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Variance—Homeowners Ask For Variance From Roof Height Limit, Claiming Hardship Was Fault of Their Contractor

Neighbors say variance cannot be issued because hardship was self-created

Citation: *Morikawa v. Zoning Bd. of Appeals of Town of Weston, 126 Conn. App. 400, 2011 WL 341683 (2011)*

CONNECTICUT (02/08/11)—This case addressed the issue of "whether a hardship created by the error of the [homeowners'] contractor and/or architect is self-created" and, as such, insufficient to justify a variance.

The Background/Facts: Joseph Ryan and Lois Ryan (the "Ryans") constructed a single-family home in the town. The home was located in a district that only permitted single-family homes with a maximum height of 35 feet.

Approximately four months after its completion, the town's code enforcement officer determined that the roof was 37 feet, seven inches

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high. A cease and desist order was issued to the Ryans. The order required them to "remove the height violation and bring the structure into compliance." On appeal by the Ryans, the town's zoning board of appeals ("the "ZBA") upheld the cease and desist order.

The Ryans then applied for a variance. They asked the Board to grant them a variance from the 35-foot building height limit. They maintained that they were entitled to a variance because enforcement of the height limit was a hardship for them. They said that the fact that their roof was nearly three feet above the height limit was the fault of their independent contractor and/or architect. Thus, they said their hardship resulted from "a voluntary act by one other than the one whom the variance would benefit." In other words, they argued that since the roof height error was not their fault, they should get the variance.

The Board granted the variance.

The Ryans' abutting neighbors, Curtis Morikawa and Diane Lynch (the "Neighbors"), appealed. They argued that the Ryans' hardship was self-created, and that, as such, it was insufficient to justify the grant of a variance. The court agreed.

The Ryans appealed. On appeal, they maintained that the court improperly concluded that their hardship was self-created.

DECISION: Affirmed.

The Appellate Court of Connecticut held the alleged errors of the Ryans' architect and/or general contractor were attributable to the Ryans, and thus, the Ryans' claimed hardship was self-created, precluding the granting of a zoning ordinance.

The court explained that a variance gives permission "to act in a manner that is otherwise prohibited under the zoning law of the town ...." "An applicant for a variance must show that, because of some peculiar characteristic of his property, the strict application of the zoning regulation produces an unusual hardship, as opposed to the general impact which the regulation has on other properties in the zone." The court further explained that a zoning board of appeals may grant a variance only when two basic requirements are satisfied: "(1) the variance must be shown not to affect substantially the comprehensive zoning plan"; and "(2) adherence to the strict letter of the zoning ordinance must be shown to cause unusual hardship unnecessary to the carrying out of the general purpose of the zoning plan." Without hardship, a variance may not issue, emphasized the court. Moreover, a "mere economic hardship or a hardship that was self-created ... is insufficient to justify a variance."

Here, the Neighbors had argued that a variance should not issue because the Ryans' hardship was self-created. The Ryans had countered that their hardship was not self-created, but was created by the error of the contractor and/or the architect. The appellate court agreed with the Neighbors. The court acknowledged that variances may be issued when

the hardship is created by "a voluntary act by one other than the one whom the variance will benefit." That, however, was not the case here. Rather, the court found that here, the errors of the architect and/or general contractor that resulted in the roof exceeding the 35-foot height requirement were "attributable to the [Ryans] because the voluntary acts of those persons were on behalf of the ones whom the variance would benefit [(i.e., the Ryans)]." Thus, concluded the court, the Ryans' hardship was self-created. As such, the Board could not grant the variance sought by the Ryans.

See also: *Highland Park, Inc. v. Zoning Bd. of Appeals of Town of North Haven, 155 Conn. 40, 229 A.2d 356 (1967).*

See also: *Pollard v. Zoning Bd. of Appeals of City of Norwalk, 186 Conn. 32, 438 A.2d 1186 (1982).*

Case Note: The Ryans had also asked the court "to recognize a 'de minimis' deviation exception that would obviate the need for the homeowners to prove hardship." The appellate court refused to do so. The court noted that the authority to grant a variance is controlled by statute. The governing statute—Conn. Gen. Stat. § 8-6(a)(3)—did "not allow a variance unless the applicant proves there is an 'exceptional difficulty or unusual hardship ....'"

Hearings—Court Remands Subdivision Permit Application To Board For Further Consideration

Board asks whether applicant is entitled to a contested case hearing or merely a public hearing

Citation: *Sheridan County Com'n v. V.O. Gold Properties, LLC, 2011 WY 16, 2011 WL 338723 (Wyo. 2011)*

WYOMING (02/04/11)—This case addressed the issue of whether, under Wyoming law, a subdivision applicant is entitled to a contested case hearing.

The Background/Facts: V.O. Gold Properties, LLC ("Gold") owned property in the county. In 2009, Gold submitted a subdivision and final plat application to the county Public Works Department. The county Planning and Zoning Commission (the "PZC") recommended denial of the application. The Board of County Commissioners (the "Board") ultimately denied the application. The record basis for the Board's decision was limited to the minutes of the meeting at which the denial was made. This was because the Board's recording equipment failed. Addi-

tionally, no separate findings of fact, conclusions of law, or final order were entered.

Gold filed in court a Petition for Review. He challenged the Board's denial of his subdivision and final plat application. Among other things, he argued that the Board's decision was: "arbitrary, capricious, an abuse of discretion, and not in conformity with law."

The Board conceded that the agency record was inadequate and that remand was necessary to make a complete record.

The district court reversed the Board's decision to deny Gold's subdivision permit. The court remanded the matter to the Board for an "appropriate hearing."

The Board appealed, asking the appellate court to determine whether the hearing it must provide on remand had to be: a contested case hearing (i.e., trial-type hearing) or a public hearing.

DECISION: Affirmed in part, reversed in part, and remanded.

The Supreme Court of Wyoming held that the Board needed only to hold a public hearing on whether to grant Gold's subdivision permit; Gold was not entitled to a contested case hearing before the Board.

The court explained that, in determining whether or not a subdivision applicant (such as Gold) is entitled to a contested case hearing, the court first needs to determine whether there is any law that requires a trial-type hearing. The court found that no law required such a hearing. Wyoming statutory law governing real estate subdivisions (Wyo. Stat. Ann. §§ 18-5-301 et seq.) did not require a board of county commissioners or a county planning commission to provide a contested case hearing to an applicant for a subdivision permit. The rules and regulations adopted by the PZC in this case also did not require contested case hearings for subdivision and plat applications. They required only that the PZC receive "public comment" on the preliminary plat and the final plat.

Having found that "neither the statutes nor the administrative rules provide[d] for a contested case hearing," the court further explained that a contested case hearing to deny or approve a subdivision permit would be required "only if the applicant has a property right in that subdivision plan that is protected by constitutional due process." In other words, since the statutes and rules did not require a contested case hearing, Gold would only get such a hearing if it had a vested property right in its subdivision plan. A vested property right, said the court, required "more than an abstract need or desire for it ... [and] more than a unilateral expectation of it"; it required a "legitimate claim of entitlement to it." The court found "no authority that suggests a property owner has a vested right in a contemplated development or subdivision."

Thus, concluded the court, Gold, "under the existing statutes and county regulations, was not entitled to a contested case hearing, and the prospect of developing a subdivision is not a vested property right pro-

tected by the constitutional right to due process." Therefore, no law required a contested case hearing for a subdivision permit application.

The court remanded Gold's subdivision permit application back to the Board for further consideration under a public hearing.

See also: *Foster's Inc. v. City of Laramie, 718 P.2d 868 (Wyo. 1986).*

Case Note: The court also noted that a "subdivision permit application is more nearly akin to legislative action[—which produces a general rule or policy—]than it is to adjudicative action[—which applies to identifiable persons and specific situations]" because a subdivision "implicates many policy and public welfare considerations." The court said that while the determination of "adjudicative facts" requires a contested case hearing, the determination of "legislative facts" does not.

Referendum—After County Rejects Citizens' Proposed Zoning Amendment, Citizens Demand Referendum Vote

County says proposed amendment is not a legislative decision and thus not referable to a referendum vote

Citation: *Grant County Concerned Citizens v. Grant County Bd. of Com'rs, 2011 SD 5, 2011 WL 325630 (S.D. 2011)*

SOUTH DAKOTA (02/02/11)—This case addressed the following issue: "whether a proposed amendment to a zoning ordinance that is rejected by a county commission is referable to the qualified voters of the county."

The Background/Facts: Grant County Concerned Citizens ("Citizens") submitted a proposed amendment to a zoning ordinance to the Grant County Board of Commissioners (the "Board"). Citizens proposed to increase the setbacks for concentrated animal feeding operations. After public hearing and consideration, the Board rejected Citizens' proposed amendment.

Citizens then petitioned the Board to refer the proposed amendment to a public vote. The Board rejected this referendum petition. It said that the matter was not referable.

Citizens then filed in court a request for the court to order (i.e., a writ of mandamus) the Board to refer the proposed amendment to a public vote. The circuit court agreed with the Board. It held that Citizens' pro-

posed amendment was not a legislative decision and was therefore not referable to a referendum vote.

Citizens appealed.

DECISION: Affirmed.

The Supreme Court of South Dakota held that a proposed amendment to a zoning ordinance is not a legislative decision, and, thus, is not referable to a referendum vote.

The court explained that the procedure for submitting an amendment of an ordinance was governed by South Dakota statutory law. SDLC § 11-2-30 provided: "After the hearing, the board shall by resolution or ordinance, as appropriate, either adopt or reject the amendment ...." That section also provided that § 11-2-22 was applicable. Section 11-2-22 provided: "The comprehensive plan, zoning ordinance, and subdivision ordinance may be referred to a vote of the qualified voters of the county pursuant to §§ 7-18A-15 to 7-18A-24 ...."

The court found that the language of § 11-2-22 referred "only to a 'comprehensive plan, zoning ordinance, and subdivision ordinance.'" Here, noted the court, Citizens was "not seeking any of th[ose] but rather a rejected amendment to a zoning ordinance." The court determined that SDCL § 11-2-22 was not applicable.

Even if § 11-2-22 was applicable, noted the court, § 7-18A-15 (cited in § 11-2-22) allowed that only ordinances or resolutions "adopted by a board" could be referred to a referendum vote. Here, there was no "adoption" of an ordinance; here, the Board "rejected the proposed amendment." Moreover, § 7-18A-15.1 provided only that a "legislative decision of a board of county commissioners is subject to the referendum process." Here, found the court, the Board's rejection of the proposed amendment did not constitute a legislative act. Only affirmative actions effecting some change in an existing ordinance or the passing of a new ordinance may be referred to a referendum vote, said the court.

The court concluded that because the Board's rejection of Citizens' proposed amendment was not a legislative decision (i.e., it "was not an act"), it was not referable to the referendum process.

See also: *Bechen v. Moody County Bd. of Com'rs, 2005 SD 93, 703 N.W.2d 662 (S.D. 2005).*

See also: *Wang v. Patterson, 469 N.W.2d 577 (S.D. 1991).*

Case Note: In emphasizing the difference between legislative decisions—which were subject to referendum vote—and administrative decisions—which were not—the court noted that "all municipal action cannot be subject to local review by the electorate. If govern-

ment is to function there must be some area in which representative action will be final."

Findings—In Denying Variance Requests, Board Summarizes Evidence In a Section Separate From Its Findings

Applicant says denial should be overturned because separation of findings from evidence prevented meaningful judicial review

Citation: *Critical Area Com'n for Chesapeake and Atlantic Coastal Bays v. Moreland, LLC, 2011 WL 265852 (Md. 2011)*

MARYLAND (02/28/11)—This case addressed the issue of "what level of detail a Board of Appeals must employ in supporting its findings with evidentiary references, in order to enable meaningful judicial review."

The Background/Facts: Moreland, LLC ("Moreland") owned two parcels on the north shore of Warehouse Creek in the county. The parcels were within the 100-foot buffer of a "critical area" of the Chesapeake Bay. Under the county's critical area protection program, certain activities, including "new structure" construction and a specified maximum percentage of vegetation clearing, were prohibited within the 100-foot buffer of tributaries to the Chesapeake Bay. The county code did allow for variances in the critical area under certain conditions and circumstances.

Moreland sought to construct a single-family home on each of its two parcels. Moreland requested variances from the county's Office of Planning and Zoning. Moreland claimed that "without variance relief from the prohibition on development within the buffer area and from tree clearing limitations, [it] [could] not build any reasonably sized home on these residentially zoned lots."

An administrative hearing officer denied Moreland's variance requests.

Moreland appealed, and the county Board of Appeals (the "Board") also denied the variance requests. In reaching its conclusion, the Board provided a 14-page memorandum opinion after conducting three nights of evidentiary hearings over a course of several months. Among other things, the Board found that "the proposed construction, because of the large area of impervious surface and the removal of significant amounts of vegetation, would adversely affect the water quality of Warehouse Creek."

Moreland appealed. It contended that the Board's opinion denying the variance failed to provide sufficient detail and reasoning to enable meaningful judicial review. Moreland contended that "the central issue '[was] not whether there [was] substantial evidence in the record,' but rather, whether the [Board]'s opinion denying the variance requests [was] amenable to meaningful judicial review." Moreland said it was not because each of the Board's findings was not immediately followed by supportive and specific evidentiary references.

The circuit court agreed with Moreland. It found that the separation of findings from the evidence in the Board's opinion prevented meaningful judicial review. It concluded that the Board failed to adequately support in its written decision any of its adverse findings with references to specific evidence. The court remanded the matter back to the Board.

The Critical Area Commission for the Chesapeake and Atlantic Coastal Bays and the South River Federation (collectively, the "Bays Commission") appealed. The Bays Commission countered that the Board's opinion adequately reflected that substantial evidence existed in support of its findings.

The court of special appeals agreed with the circuit court.

The Bays Commission again appealed.

DECISION: Reversed, and matter remanded.

The Court of Appeals of Maryland found that the Board's decision did permit meaningful judicial review and therefore should be upheld. The court held that the Board provided sufficient reasoning for its conclusion that Moreland had failed to establish that its proposed development in the critical area would not adversely affect water quality.

In so concluding, the court found that the Board's opinion "contained clear adverse findings, as well as summaries of substantial evidence supporting those findings." The court said that the Board did not, as Moreland had argued, need to describe the evidentiary foundation for each of its findings immediately following each findings. All that was needed was "articulated evidence in support of conclusory finding[s]."

The court explained that when a board of appeals "merely states conclusions, without pointing to the evidentiary bases for those conclusions, such findings are not amenable to meaningful judicial review and a remand is warranted." However, "[i]n contrast, ... when the [b]oard of [a]ppeals refers to evidence in the record in support of its findings, meaningful judicial review is possible."

The court determined that the present case fell within the latter category. This was because the Board, in its determination that the Moreland variances should be denied, "explicitly summarized evidence presented by several witnesses supporting its conclusions, albeit in a separate section, enabling meaningful judicial review." Because the board of appeals summarized substantial evidence in support of its conclusory findings,

meaningful judicial review was possible, concluded the court. Accordingly, the court held that the board's decision should be affirmed.

See also: *Bucktail, LLC v. County Council of Talbot County, 352 Md. 530, 723 A.2d 440 (1999).*

See also: *Annapolis Market Place, L.L.C. v. Parker, 369 Md. 689, 802 A.2d 1029 (2002).*

See also: *Mastandrea v. North, 361 Md. 107, 760 A.2d 677 (2000) Chesley v. City of Annapolis, 176 Md. App. 413, 933 A.2d 475 (2007).*

See also: *Alviani v. Dixon, 365 Md. 95, 775 A.2d 1234 (2001).*

Case Note: In its decision, the court emphasized that a board of appeals could, in a section separate from its findings, summarize the evidence. Doing so would not "deprive[] the [b]oard's conclusory findings of adequate evidentiary support."

Zoning News from Around the Nation

CONNECTICUT

State Representative Jonathan Steinberg (D-136th District) has proposed legislation to amend the state's affordable housing laws. Under Steinberg's proposal, "municipalities would be able to consider whether affordable housing development proposals follow 'principles of smart growth.'" Currently, municipalities cannot deny or request changes to proposed affordable housing developments unless they violate established health and safety standards. Steinberg's bill is now before the Housing Committee.

Source: *The Daily Easton*; www.thedailyeaston.com

MARYLAND

The Howard County Council has voted "to change the county zoning law to allow beehives at reduced setbacks under certain conditions." Prior to the recent change, "apiaries (a cluster of beehives) fell under the zoning regulations for farming, which require animal shelters to be set back at least 200 feet from neighboring properties." Apiaries are now allowed with 25-foot setbacks from neighboring properties (or 10 feet in cases where a six-foot-tall fence or barrier surrounds the apiary).

Source: *Columbia Flyer*; www.explorehoward.com

MASSACHUSETTS

Pending before the state legislature is a bill—the Land Use Reform and Protection Act—that would "reform the state's zoning laws to make it easier to preserve open space, build affordable housing and mixed-use developments in community centers and ensure that cities and towns are 'more livable and walkable' with sidewalks and accommodations for bicycles."

Source: *Boston Herald*; *http://news.bostonherald.com*

OHIO

Madeira is reportedly considering "dark-sky" zoning legislation. The legislation would require "outdoor lights to be shielded and to be directed downward instead of upward." One councilman reported that the legislation "probably would affect only public property initially." Proponents of the legislation sight benefits to the environment and cost-savings.

Source: *Cincinnati.com*; *http://news.cincinnati.com*

VIRGINIA

The state senate recently passed a "controversial aquaculture bill"—Senate Bill 1190. The bill, which now heads to the House of Delegates for consideration, would "roll commercial aquaculture activities under the protections of the Virginia Right to Farm Act." Opponents of the bill have claimed the bill "would strip local authority over zoning issues." The bill essentially "introduces aquaculture into farming regulations that prevent localities from adopting ordinances requiring special exceptions or use permits for agriculture-related activities in areas where zoning allows agriculture."

Source: *Daily Press*; *http://articles.dailypress.com*

WEST VIRGINIA

House Bill 2871, which recently passed the House of Delegates, provides that a "brownfield economic development district may not be approved unless the district conforms to a county's or municipality's planning and zoning laws." The bill will now be considered by the state senate.

Source: *The Journal*; *www.journal-news.net*

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Rezoning—City Denies Churches Applications For Rezoning and Conditional Use Permit to Allow "Assembly Use"

Church argues denials substantially burden the church's religious exercise in violation of RLUIPA

Citation: *International Church of the Foursquare Gospel v. City of San Leandro, 2011 WL 505028 (9th Cir. 2011)*

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

NINTH CIRCUIT (CALIFORNIA) (02/15/11)—This case addressed the issue of whether a city's denial of a church's rezoning and conditional use permit applications substantially burdened the church's religious exercise in violation of the Federal Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") (42 U.S.C.A. § 2000cc(a)(1)).

The Background/Facts: International Church of the Foursquare Gospel ("ICFG") had a dramatically increasing membership. ICFG determined that its present location in the city was too small to support its

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large congregation. It sought to build a new church facility on certain industrial land that it purchased in the city (the "Property").

ICFG's Property was located in the city's Industrial Park ("IP") zoning district. It was also situated in an area set aside in the city's General Plan "to preserve an environment for industrial and technological activity."

The city's zoning code (the "Zoning Code") did not allow in the IP district or other industrial or commercial district of the city: "assembly uses," which included churches and private non-profit clubs, lodges, and organizations. "Assembly uses" were only allowed in: Residential districts, provided the assembly use obtained a conditional use permit ("CUP") or "IP (AU) with Assembly Use Overlay" districts.

ICFG applied to the city for: (1) a rezoning of the Property from IP to "IP (AU) with Assembly Use Overlay"; and (2) a CUP for a proposed assembly use at the Property under the existing IP zoning.

The city's Planning Commission denied ICFG's rezoning application. It did so because it found that ICFG's Property did not meet two criteria of eight that it used in determining suitability of properties for AU Overlay designation. The Planning Commission also denied ICFG's CUP application because of "inconsistency with the zoning and additional factors such as inadequate parking."

ICFG appealed both denials. The City Council also denied both applications.

ICFG appealed to district court. ICFG argued that the city's denial of ICFG's rezoning and CUP applications violated the substantial burden provision of the federal RLUIPA. RLUIPA provides that a government land-use regulation "that imposes a substantial burden on the religious exercise of a ... religious assembly or institution" is unlawful "unless the government demonstrates that imposition of the burden ... is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling interest."

Finding there were no material issues of fact in dispute and deciding the matter on the law alone, the district court granted summary judgment in favor of the city. The court concluded that the city's denial of ICFG's rezoning and CUP applications did not violate the substantial burden provision of RLUIPA.

ICFG again appealed.

DECISION: Reversed, and matter remanded.

The United States Court of Appeals, Ninth Circuit, held that the district court erred in holding that: (1) as a matter of law, the city's actions did not impose a substantial burden on ICFG's exercise of religion within the meaning of RLUIPA; and (2) the city's claimed need to preserve properties for industrial use qualified as a compelling governmental interest as a matter of law.

The court explained that RLUIPA applies if "[the] burden is imposed in the implementation of a land use regulation ..., under which a government makes ... individualized assessments of the proposed uses for the property involved." The court noted that, in this case, the zoning scheme itself "may be facially neutral and generally applicable." However, it found that the individualized assessment that the city made to determine that ICFG's rezoning and CUP request should be denied was not.

Here, further explained the court, ICFG bore the burden of proving that the city's Zoning Code or denial of the CUP imposed a substantial burden on ICFG's religious exercise, in violation of RLIUPA. To meet that burden, it had to show "more than inconvenience on religious exercise;" it had to show that city placed "substantial pressure" on ICFG "to modify [its] behavior and to violate [its] beliefs." If ICFG could demonstrate a substantial burden, the city would bear the burden of establishing that its action: "(A) [was] in furtherance of a compelling governmental interest; and (B) [was] the least restrictive means of furthering that compelling government interest."

The court found that ICFG had presented evidence that "no other suitable sites exist[ed] in the [c]ity to house [ICFG]'s expanded operations." ICFG had also asserted that its core religious beliefs required it to be able to meet in one place in communal worship with the entire congregation. As such, the court found that ICFG had presented enough evidence to raise a fact issue for trial (thus precluding summary judgment) as to whether the denial of space adequate to house all of ICFG's operations could be a substantial burden imposed by the city on ICFG. The court remanded the matter back to the district court for further proceedings on the issue.

Also, assuming, for the sake of argument, that ICFG proved a substantial burden, the court noted that the burden would then shift to the city. The city maintained that it had a "compelling interest in preserving [ICFG's] [P]roperty for industrial use" because it "was located in [a focus area] that [was] specifically targeted in the [c]ity's General Plan for preservation of industrial and certain commercial development needed to maintain the [c]ity's job base and economic welfare."

The court held that "preservation of industrial lands for industrial uses [did] not by itself constitute a 'compelling interest' for purposes of RLUIPA." Nor was "revenue generation" a compelling state interest "sufficient to justify denying a religious institution a CUP when such denial imposes a substantial burden." Even assuming the city's interest here was compelling, the court found that there was "a genuine issue of material fact as to whether the [c]ity used the least restrictive means to achieve its interest." The court noted that the city had not presented "evidence that it could not achieve the same goals by using other property within its jurisdiction for that purpose" (i.e., the purpose of preservation of industrial lands for industrial uses).

For these reasons, the court reversed the district court's order granting summary judgment for the city, and remanded the matter for further proceedings.

See also: *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).*

See also: *Grace Church of North County v. City of San Diego, 555 F. Supp. 2d 1126 (S.D. Cal. 2008).*

Vested Property Rights—Landowners Spent Millions on Capital Development in Reliance on Zoning Under Preliminary Development Plan

After county rezones land, landowners claim a vested property right

Citation: *Jordan-Arapahoe, LLP v. Board of Com'rs of the County of Arapahoe, Colo., 2011 WL 420439 (10th Cir. 2011)*

The Tenth Circuit has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

TENTH CIRCUIT (COLORADO) (02/08/11)—This case addressed the issue of whether a county's approval of a preliminary development plan ("PDP") created a vested property right.

The Background/Facts: Jordan-Arapahoe, LLP and Jacob Mazin Company, Inc. (together, "Jordan-Arapahoe") owned land in the county (the "Property"). A 1998 PDP, amended in 1999, (the "1998/1999 PDP" or the "PDP") rezoned Jordan-Arapahoe's land from agricultural to Mixed Use-Planned Unit Development ("MU-PUD"). The 1998/1999 PDP noted that "Automotive Sales and Repair" was an allowable use under the MU-PUD zoning.

Relying on the 1998/1999 PDP provision of "Automotive Sales and Repair" as an allowed use, Jordan-Arapaho paid approximately $2.6 million in capital development costs on the Property. The capital development was done in preparation for selling the Property to a buyer interested in using it for an automotive dealership.

In April 2006, Jordan-Arapahoe agreed to sell the Property to CarMax. The sale was contingent upon confirmation that CarMax's intended use of an automotive dealership was permitted under the zoning regulations.

After learning of the planned development, the county Board of Commissioner's (the "County") rezoned the Property. The rezone effectively: made it impossible to build a car dealership on the Property and negated Jordan-Arapahoe's contract with CarMax.

Jordan-Arapahoe sued. It claimed that the County's rezone deprived it of a protected property interest without due process in violation of the 14th Amendment of the United States Constitution. More specifically, Jordan-Arapahoe argued that it had a vested property interest to use its land for "automotive sales and repair" under: (1) Colorado's Vested Property Rights Act ("VPRA"); and (2) Colorado common law. Jordan-Arapahoe alleged that the VPRA prevented the County from changing the zoning once it had already approved a PDP. It also alleged that it had a vested right under Colorado common law by virtue of its detrimental reliance on the original zoning classification.

The district court disagreed with Jordan-Arapahoe. It held that Jordan-Arapahoe had failed to show a protected property interest under Colorado law since its development proposal had not yet become sufficiently final, or vested.

Jordan-Arapahoe appealed.

DECISION: Affirmed.

The United States Court of Appeals, Tenth Circuit, held that, under Colorado law, a property owner does not obtain a vested property right unless: (1) there was approval of a site specific development plan; or (2) the landowner substantially and detrimentally relied on representations and affirmative actions by local government. The court found neither condition was met here.

The court explained that, generally, "a landowner's protected interest in a particular zoning decision depends on 'whether there is discretion in the [local zoning authority] to deny a zoning or other application.'" If discretion is limited so that properly followed procedures require a particular outcome, then a property interest exists. On the other hand, "where the governing body retains discretion and the outcome of the proceeding is not determined by the particular procedure at issue, no property interest is implicated."

Here, then, to succeed, Jordan-Arapahoe had to show that the county had limited discretion to change the zoning and to disapprove Jordan-Arapahoe's final development plan. The court concluded that Jordan-Arapahoe failed to make that showing and thus had not demonstrated a protected vested property interest.

In so concluding, the court rejected Jordan-Arapahoe's allegation that the VPRA prevented the County from changing the zoning once it had already approved a PDP. The VPRA provided that: "A vested property right shall be deemed established with respect to any property upon the approval, or conditional approval, of a site specific development plan ...." Under County law, an applicant could seek approval of a "vested property right" either: (1) by approval of a site specific development plan; or (2) by approval of a development agreement relating to the proposed development. Here, Jordan-Arapahoe did not receive approval of

a final development plan. Still, Jordan-Arapahoe argued that the County did not have discretion to reject a final development plan if the plan was consistent with the already-approved PDP. The court disagreed, finding the County zoning code gave the County discretion to reject or modify proposed developments until it approved a final development plan.

The court also rejected Jordan-Arapahoe's allegation that it had a vested right under Colorado common law by virtue of its detrimental reliance on the original zoning classification. The court explained: "Colorado law recognizes a protected property interest in a zoning classification when a specifically permitted use becomes securely vested by the landowner's substantial actions taken in reliance, to his or her detriment, on representations and affirmative actions by the government." While Jordan-Arapahoe showed detrimental reliance, it did not show representation or affirmative action by the County, found the court. The PDP alone could not qualify as an affirmative action or representation because Jordan-Arapahoe "could not have reasonably relied on the PDP approval as creating a vested right absent [a second-step final development plan approval required by the county's zoning code]."

See also: *Eason v. Board of County Com'rs of County of Boulder, 70 P.3d 600 (Colo. App. 2003).*

Procedures—Seven-Member Board Votes Three to Two to Adopt Rezone Application

Town says application fails because adoption requires favorable vote of majority of entire board

Citation: *Depot Property, LLC v. Town of Arlington, Tennessee, 2011 WL 334472 (Tenn. Ct. App. 2011)*

TENNESSEE (01/31/11)—This case addressed the issue of whether adoption of a rezoning application requires: the favorable vote of the majority of the membership of the legislative body who participates in the consideration of the rezoning application; or the favorable vote of the entire membership of the legislative body.

The Background/Facts: Terry Cox purchased a home in the town (the "Property"). He later transferred the Property to Depot Property, LLC ("Depot Property"). (Hereinafter, "Cox" is inclusive of both Terry Cox and Depot Property.) The Property was zoned single family residential. Cox wanted to use the Property as a law office instead of a residence. Cox filed an application with the town to have the property rezoned for office use. This rezoning would require an amendment to the town's zoning ordinance.

The town's Planning Commission recommended denial of Cox's application. The Board of mayor and aldermen (the "Board") then considered the application.

The Board had a total of seven members, which included the mayor and six aldermen. Prior to the Board's consideration of his rezoning application, Cox requested that the mayor and one alderman recuse themselves from consideration of the application. He made this request on the grounds of either a conflict of interest or a predetermined position on the question of rezoning of the Property. The mayor and alderman agreed to recuse themselves. The remaining five Board members ultimately voted three (in favor) to two (opposed) to approve Cox's rezone application.

Thereafter, the town attorney advised that the rezoning application had failed. He noted that under Tennessee statutes—T.C.A. § 13-7-204—if a proposed amendment to a zoning ordinance is not approved by the municipal planning commission, then in order to be adopted, it must receive a favorable vote by a majority of the entire membership of the municipality's legislative body. Thus, to be adopted, the town attorney advised that Cox's rezoning application needed a favorable vote by four members of the seven-member Board. This, he said, was regardless of how many members recused themselves or were otherwise absent.

The Board then referred the matter back to the Planning Commission. The Planning Commission again voted to deny Cox's rezone application. The Board again considered Cox's application. The mayor and five of the six aldermen attended the Board meeting. The mayor and one alderman recused themselves. The four remaining Aldermen considered the application. The motion to approve the rezone failed for lack of a second.

Cox later filed in court a petition for common law certiorari against the town. Cox claimed that he had received a "majority" vote of the Board in favor of the zoning amendment (i.e., the rezone application). Cox asked the court to void the denial of his application.

The court found that the Board's decision to treat its three-to-two vote favoring Cox's rezoning application as insufficient to amend the town's zoning ordinance was contrary to the provisions in T.C.A. § 12-4-101(c)(3)(B). That statute states that a member of a municipal zoning body who "abstains from voting" on an issue "shall not be counted for the purpose of determining the majority vote."

The town appealed. The town argued that the trial court erred in finding that the general statute—§ 12-4-101(c)(3)(B)—controlled over the mandatory provisions of § 13-7-204.

DECISION: Reversed.

The Court of Appeals of Tennessee agreed with the town that § 13-7-204 applied to the Board's vote on Cox's rezoning application. The court

agreed that the more specific statutory provision—§ 13-7-204, which alluded to the function of a municipality's planning commission and the municipality's legislative body with respect to the amendment of the municipal zoning ordinance—controlled over the more general statutory provision—§ 12-4-101(c)(3)(B), which contained general provisions on the actions of public official with respect to the contracts of a municipality or other political subdivision.

The court found that § 13-7-204 was "clearly intended to address precisely the situation presented here[]." Interpreting the statutory language, the court found it clear and unambiguous: "Under [§] 13-7-204, a favorable vote from the majority of the entire seven-member Board was required to enact Cox's proposed amendment to the [t]own zoning ordinance." Since Cox's application received only three votes, the Board correctly determined that the proposed amendment had failed, concluded the court.

See also: *Arnwine v. Union County Bd. of Educ., 120 S.W.3d 804, 183 Ed. Law Rep. 603 (Tenn. 2003).*

See also: *Carson Creek Vacation Resorts, Inc. v. State, Dept. of Revenue, 865 S.W.2d 1 (Tenn. 1993).*

Case Note: The trial court had also found that the Board's decision was arbitrary and capricious. The appellate court disagreed.

Conditions—Town Says Applicant Violated Ordinance Because He Failed to Comply With State Permit

Applicant argues town lacks authority to enforce conditions of state permit

Citation: *Town of Vassalboro v. Barnett, 2011 ME 21, 2011 WL 505227 (Me. 2011)*

MAINE (02/15/11)—This case addressed the issue of whether a town had the authority to enforce conditions of a landowner's Maine Department of Transportation ("MDOT") permit.

The Background/Facts: Leo Barnett applied to the town's planning board (the "Board") for a subdivision permit. The town's Subdivision Ordinance (the "Ordinance") performance standards required that "[a]ny and all required permits from the [MDOT] shall be submitted" to the Board before it approves a subdivision application. Barnett submitted his

MDOT permit. The Board eventually approved Barnett's subdivision application. However, the Board later found that Barnett violated the Ordinance because he failed to fully comply with two of the MDOT permit's special conditions.

The town filed a land use complaint in the district court. It alleged, among other things, that Barnett violated the Ordinance by not fully complying with the special requirements of his MDOT highway entrance permit.

The court entered judgment against Barnett.

Barnett appealed. He did not challenge the Ordinance's requirement that he obtain an MDOT permit. Rather, he contended that the town did not have authority to enforce the conditions of the MDOT permit once it was issued. He said this was because the enforcement function had been preempted by state law and reserved to MDOT. Accordingly, Barnett argued that he fully complied with the Ordinance when he submitted the permit with his subdivision application.

DECISION: Affirmed.

The Supreme Judicial Court of Maine disagreed with Barnett. It held that the town had the authority to enforce the conditions of Barnett's MDOT permit.

The court acknowledged that MDOT had the sole authority to issue the required permit initially. However, it found nothing in the governing statute—23 M.R.S. § 704—reserved to MDOT the exclusive authority to enforce the permit once it had been issued. Rather, the court found § 704 contemplated "shared responsibility for the enforcement of highway entrance standards between MDOT and the municipality involved."

Furthermore, the court said that under the town's home rule authority, the Ordinance was presumed to be valid unless: it purported to "exercise a power or function expressly denied to the [t]own by statute"; or "if enforcement of the Ordinance 'would frustrate the purpose of any state law.'" In this instance, found the court: "the [t]own's enforcement of Barnett's MDOT permit requirements further[ed], rather than frustrate[d], the purpose of 23 M.R.S. § 704." As such, the court concluded that the town's enforcement of the permit was a "valid exercise of the [t]own's home rule authority."

See also: *Damon v. S.D. Warren Co., 2010 ME 24, 990 A.2d 1028 (Me. 2010).*

Case Note: The court noted that MDOT could have taken enforcement action against Barnett if it chose. However, in enacting § 704, the court found that "the Legislature did not intend to render the

[t]own powerless to enforce MDOT-mandated highway safety standards affecting its residents."

Case Note: The town also alleged other violations of town ordinances made by Barnett. The trial court found all of the alleged violations were committed by Barnett. The appellate court affirmed.

Zoning News from Around the Nation

COLORADO

Recently, the Denver City Council preliminarily approved new licensing procedures and requirements for medical-marijuana centers and grow facilities. Under the new rules, grow facilities that had "set up in areas where zoning laws later changed ... will face a public hearing within two years to determine whether they can stay." The new rules would also restrict new dispensaries from operating within 1,000 feet of drug and alcohol treatment centers.

Source: *Denver Post;* 2011 WLNR 2989953

ILLINOIS

Reportedly, DuPage County is "expected to drop a controversial proposal to ban new places of assembly in unincorporated residential areas." Alternatively, the county board may propose zoning law amendments "that would address parking, traffic and density issues caused by 'massive religious facilities'" and would possibly reduce the county's allowable floor area ratio.

Source: *Daily Herald;* 2011 WLNR 3703834

MASSACHUSETTS

Regis College has reportedly asked the state appeals court to reverse a land court judge's decision regarding the college's proposed construction of a 362-unit luxury retirement community on its Weston campus. Residents of the retirement community would "have an individualized learning plan and be required to take at least two courses a semester." The land court judge ruled that the development was "primarily a housing program, and therefore not exempt from local zoning laws." The college is attempting to "bypass local zoning under a state law known as the Dover Amendment, which grants zoning exemptions for educational facilities."

Source: *Boston Globe;* www.boston.com

The Newton Board of Aldermen recently approved a set of new residential zoning rules. Effective October 15, 2011, the zoning changes will "impact the city's floor-area ratio (FAR) regulations and the parts of a home that are factored into a property's FAR, which is the relationship between a home's floor space to its lot size.... Residents who want to add more floor space to their homes, but would exceed FAR limits in doing so, must seek a special permit from the city." The zoning changes are reportedly aimed at preventing "construction of oversized homes." Now included in home's floor space are: garages, certain enclosed porches, and some accessory buildings.

Source: *NewtonPatch; http://newton.patch.com*

MONTANA

Great Falls is considering a new zoning ordinance that would allow chickens in residential zones. Current "city law prohibits livestock, including poultry, except in one suburban zoning district ...." The proposed ordinance would allow chickens in an additional five residential zones in the city, with restrictions. Another ordinance would: restrict the number and sex of chickens allowed; require covered, predator-proof coops; and set distance restrictions from property lines and neighboring homes.

Source: *KRTV; www.krtv.com*

NEW YORK

Buffalo is considering adoption of new zoning laws "based on an environmentally friendly code to encourage smarter development and walkable neighborhoods." "The Green Code project entails the first new citywide land-use plan since 1977 and marks the first time since 1951 that the city will adopt a broad new set of zoning laws."

Source: *Buffalo News;* 2011 WLNR 3204420

