April 10, 2011 | Volume 5 | No. 7

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059030

Pre-emption—County Seeks to Prohibit Operation of Medical Marijuana Dispensary For Its Failure to Comply With County Ordinances

Dispensary argues ordinances are pre-empted by state law and unconstitutional

Citation: *County of Los Angeles v. Hill, 192 Cal. App. 4th 861, 2011 WL 454524 (2d Dist. 2011)*

CALIFORNIA (02/10/11)—This case addressed the issue of whether county ordinances regulating medical marijuana dispensaries ("MMDs") were pre-empted by state laws governing MMDs and/or in violation of the equal protection clause of the state constitution.

The Background/Facts: In California, the "Compassionate Use Act" allows for the "safe and affordable distribution of marijuana to all patients in medical need of marijuana." The state's Medical Marijuana Program Act ("MMPA") includes guidelines for implementation of the Compassionate Use Act.

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

In June 2006, Los Angeles County adopted ordinances regulating the operation of medical marijuana dispensaries in unincorporated areas of the county (the "Ordinances"). Among other things, the Ordinances required MMDs: to obtain a conditional use permit ("CUP"); obtain a business license before operating; and "not be located within a 1,000 foot radius of schools, playgrounds, parks, libraries, places of religious worship, child care facilities, youth facilities ...."

Martin Hill and the Alternative Medicinal Collective of Covina (collectively, "Hill") operated a MMD in an unincorporated area of the County. Hill's MMD was operating without having obtained a business license, a conditional use permit or a zoning variance to allow it to operate within a 1,000-foot radius of a public library.

The county brought a nuisance action in court against Hill. The county asked the court to grant a temporary restraining order and preliminary injunction prohibiting Hill from "possessing, offering, selling, or giving away marijuana" anywhere in the unincorporated area of the county without the necessary permits and licenses required by law.

The court granted the county's request.

Hill appealed. On appeal, Hill argued that the county's Ordinances regulating MMDs were: (1) pre-empted by the Compassionate Use Act and MMPA; (2) inconsistent with those state laws; and (3) unconstitutionally discriminatory against MMDs.

DECISION: Affirmed.

The Court of Appeal, Second District, Division 1, California, held that the county's MMD Ordinances were not: (1) pre-empted by Compassionate Use Act and MMPA; (2) inconsistent with those state laws; or (3) unconstitutionally discriminatory against MMDs.

Hill had argued that the Compassionate Use Act and MMPA "fully occupied the field of MMD regulation and thereby preclude[d] the County from enforcing any additional requirements." The court disagreed. It found Hill's argument failed. Section 11362.83 of the MMPA provides that it does not "prevent a city or other local governing body from adopting and enforcing laws consistent with [the MMPA]." Thus, found the court, state law allowed counties to regulate the establishment of MMDs and their locations so long as those regulations were consistent with the provisions of the MMPA.

Hill had also argued that even if the MMPA did not pre-empt the county's authority to regulate MMDs, the county's regulations were invalid because they were inconsistent with the state law. Again, the court disagreed. Section 11362.83's allowance of local laws "consistent" with the MMPA did not mean that the county could only enact the same limitations as provided in the MMPA, said the court. Rather, the legislature clearly "expected and intended that local governments [would] adopt additional ordinances." Section 11362.768 made this clear, providing

that nothing in the MMPA "shall prohibit a [county] from adopting ordinances or policies that further restrict the location or establishment of a [MMD]."

Hill had further argued that even if the county's MMD Ordinances were consistent with state law, they were inconsistent as applied. Hill said this was because the Ordinances so restricted the establishment and location of MMDs as to "make it practically impossible for such dispensaries to exist anywhere in the unincorporated areas of the County." Again, the court rejected this argument. Hill had specifically pointed to the county's $11,500 application fee for a CUP for an MMD. The court found no evidence that the fee was inconsistent with the Compassionate Use Act or MMPA: Hill had failed to show that the county charged a higher fee to MMDs than to other businesses or that the fee applicable to MMDs was unreasonable. Hill had also argued that there was no location where a MMD could exist "without being in violation of the ordinance and/or forced out of existence due to the remote and unreasonably inconvenient location." The court found the county code permitted MMDs to operate in certain commercial zones.

Finally, Hill had maintained that the county's Ordinances violated the equal protection clause of the California Constitution (Article I, § 7). Hill said this was because the Ordinances did not allow the dispensaries to operate in the same zones as pharmacies. Once again, the court found Hill's argument unpersuasive. Equal protection laws require entities "similarly situated with respect to the legitimate purpose of the law receive like treatment." Dispensaries and pharmacies, noted the court, "are not 'similarly situated' for public health and safety purposes." Therefore, said the court, they "need not be treated equally." Moreover, because similar risks are not associated with the location of pharmacies as with MMDs, the court concluded that the county had a "rational basis for zoning MMDs differently than pharmacies."

See also: *City of Corona v. Naulls, 166 Cal. App. 4th 418, 83 Cal. Rptr. 3d 1 (4th Dist. 2008).*

See also: *City of Claremont v. Kruse, 177 Cal. App. 4th 1153, 100 Cal. Rptr. 3d 1 (2d Dist. 2009), review denied, (Dec. 2, 2009).*

Case Note: Hill had also argued that the MMPA precluded the county from applying its nuisance laws to MMDs. Hill said this was because § 11362.775 of the MMPA provided a limited statutory immunity from prosecution under the "drug den" abatement law. While the statute exempted qualified patients and their primary caregivers from nuisance laws, it did not confer on them the "unfettered right to cultivate or dispense marijuana anywhere they [chose]," said the court. Section 11362.775 did not affect the county's constitutional authority to regulate the particular manner and

location in which a business may operate. In other words, the court found that § 11362.775 did not prohibit the county from applying its nuisance laws to MMDs that did not comply with the county's valid ordinances.

Case Note: On December 7, 2010, the county banned MMDs in all zones in the county. The validity of that ban was not before the court in the case summarized here.

Standing—Commission Adopts Amendment Creating an Overlay Zone in an Industrial Zone

Property owner in industrial zone maintains he is statutorily aggrieved and has standing to challenge amendment

Citation: *Douglas v. Planning and Zoning Com'n of Town of Watertown, 127 Conn. App. 87, 2011 WL 722526 (2011)*

CONNECTICUT (03/08/11)—This case addressed the issue of whether a property owner had standing to challenge an amendment to a zoning ordinance, which created an overlay district.

The Background/Facts: The town planning and zoning commission (the "PZC") adopted a text amendment to the town zoning regulations (the "Amendment"). The Amendment created a B-PCD262 zone, which permitted retail and office development in an existing industrial zone. Essentially, the Amendment created an "overlay zone," which under specific circumstances and subject to specific preconditions affected 150 acres of land bound by five different roads in town.

Jonathan Andrew ("Andrew") owned land that was located within the newly created zoning district. He brought a court action, challenging the town's adoption of the Amendment. Among other things, he argued that the "approval of the [A]mendment was illegal, arbitrary, capricious, in abuse of the [PZC]'s discretion and in violation of its own regulations and applicable statutes."

Andrew had maintained that he had standing to bring the challenge because he was statutorily aggrieved under Conn. Gen. Stat. § 8-8(a)(1). Section 8-8(a)(1), which governs planning and zoning commission appeals, allows an appeal to be brought by an "'aggrieved person' ... [and] includes any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

The PZC argued that Andrew was not aggrieved and thus lacked standing. The PZC said that the zone created by the Amendment was a

"floating zone." Therefore, the PZC argued, since the zone did not apply to any specific parcel of land, Andrew was not aggrieved.

The trial court agreed with the PZC. It held that Andrew was not aggrieved by the Amendment's creation of the "floating zone" because "no particular area was affected by the text amendment." Finding he lacked standing to challenge the PZC's adoption of the Amendment establishing the new zoning district, the court dismissed Andrew's action.

Andrew appealed.

DECISION: Reversed in relevant part.

The Appellate Court of Connecticut found that Andrew was a "statutorily 'aggrieved person'" with standing to challenge the Amendment.

In so holding, the court first rejected the PZC's argument that the zone created by the Amendment was a "floating zone." "Floating zones," explained the court, were zones that did not apply to a specifically described parcel of land. Those challenging the enactment of floating zone regulations ordinarily would not be aggrieved and have standing because they could not show that they would likely be affected by the particular regulation. Here, however, found the court, the parcel of land subject to the new "overlay zone" did not float over the entire community. Rather, it had "distinct geographical boundaries". The B-PCD262 zone was specifically described as approximately 150 acres being bound by five specified roads. Thus, the court concluded that because the Amendment "sufficiently defined the specific, limited geographic area to which the [Amendment] related ... the new zoning district [could] not be considered a floating zone."

Having found that the Amendment created a defined, bounded zoning district, the court next concluded that Andrew was "statutorily aggrieved under [Conn. Gen. Stat.] § 8-8(a) because his property f[ell] within the particular zone to which the text amendment pertained." Again, § 8-8(a)(1) allowed an appeal to be brought by an "aggrieved person," which included "any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

The PZC had also argued that Andrew was not aggrieved because there had not been any change to the zoning map; and Andrew could "opt out of the amendment to the zoning map." The court rejected these arguments. It said whether the zoning map had been changed or further steps in the application process would be taken was immaterial to its determination that Andrew was statutorily aggrieved: The area (affected by the new overlay zone) was "no less bounded than if it were delineated on the zoning map." Additionally, even if Andrew could somehow opt out of the amendment to the zoning map, his land still would abut or be within a radius of 100 feet of any portion of the land involved.

See also: *Schwartz v. Town Plan and Zoning Commission for Town of Hamden, 168 Conn. 20, 357 A.2d 495 (1975).*

See also: *Cole v. Planning and Zoning Com'n of Town of Cornwall, 30 Conn. App. 511, 620 A.2d 1324 (1993).*

Case Note: In its decision, the court had explained that Andrews could have shown standing to challenge the adoption of the Amendment if he could establish classical aggrievement or statutory aggrievement. To establish he was classically aggrieved, Andrews would have to show: (1) a specific personal and legal interest in the decision, as distinguished from the general interest of the community as a whole; and (2) that the specific personal and legal interest had been specially and injuriously affected by the decision. However, Andrews did not have to prove either of those prongs because he was statutorily aggrieved under § 8-8(a)(1), which only required that he show that he owned land abutting or within a radius of 100 feet of the newly zoned area.

Case Note: The court's decision also addressed the standing of intervening plaintiffs—owners of property from other parts of town who also challenged the PZC's adoption of the Amendment. The court found those plaintiffs did not have standing under an environmental protection statute to challenge the Amendment.

Grounds For Denial—Commission Denies Developer's Plat on Ground That It Does Not Meet "Purposes" of Zoning Code

Developer argues plat must be approved since use is permitted and plat complies with zoning standards

Citation: *Pomeranc-Burke, LLC v. Wicomico Environmental Trust, Ltd., 2011 WL 711995 (Md. Ct. Spec. App. 2011)*

MARYLAND (03/02/11)—This case addressed the issue of whether, when a proposed use is a permitted use in a zoning district, and the plat complies with specific statutory (i.e., zoning code) standards, a zoning board can deny approval of the plat on the ground that it does not meet the purposes of the code or the Comprehensive Plan.

The Background/Facts: Pomeranc-Burke, LLC ("PB") sought approval from the county planning and zoning commission (the "Commission") of a preliminary plat for a "cluster subdivision" (the "subdivision"). The

proposed subdivision was to be developed on a site in the A-1 "Agriculture-Rural" zoning district. It would contain 147 lots on the 519.2-acre tract. Lots would average 1.04 acres in size and 352.30 acres would remain undeveloped as forested set-aside and open space area.

Ultimately, the Commission denied PB's preliminary plat for the subdivision. The Commission did so upon concluding that the subdivision did not meet the "purpose" of a cluster development, as outlined in the county zoning code (the "Code"). In relevant part, the Code provided that the purpose of the "cluster development" regulations was: "[t]o encourage innovative and creative cluster design of residential developments"; "[t]o encourage more efficient use of land ..."; and "[t]o preserve agriculture lands and enhance the rural atmosphere and visual character in the county." The Commission determined that PB's plat did not represent any of those purposes.

PB appealed the Commission's denial to the county Board of Appeals (the "Board"). The Board adopted the Commission's findings and upheld the denial.

PB appealed to court. The circuit court affirmed the Board's decision.

PB again appealed. On appeal, PB contended, among other things, that: "because an A-1 'cluster subdivision' [was] a permitted use pursuant to 'unambiguous criteria' set forth in [the Code], the Commission did not have the authority to deny an application for such use, especially by relying on the 'purpose provisions' of [the relevant sections of the Code]."

The county countered that "the Commission had the authority to consider the 'purpose provisions,' because they [were] not preambles, but rather [were] part of the 'statutes themselves.'"

DECISION: Affirmed.

The Court of Special Appeals of Maryland held that the Commission could rely on the "purpose" sections of the Code in denying approval of PB's plat.

The court observed that the Board's findings, as adopted from the Commission's findings, went "beyond just the purpose provisions of the Code and of the Comprehensive Plan." In any event, said the court, the Board (and Commission) was entitled to consider the purposes of the Code and the Comprehensive Plan as part of its analysis. As the county had asserted, "the purpose sections [were] part of the ordinances themselves, not a preamble to an ordinance," found the court.

PB had argued that the Board had "exceeded its authority as an administrative body and acted legislatively when it relied on purposes and plans." The court disagreed, finding the Code gave the Board "considerable latitude in determining the design of a cluster development consistent with the maximum density permitted": "The language of the Code ... [was] permissive, not mandatory .... While residential use [was] a permitted use, and a cluster form of development [was] permitted under

certain circumstances, the design of a specific subdivision, including its location and density, [was] subject to approval. The Board did not deny the plat on the ground that cluster developments were not a permitted use, [or that they were inconsistent with the applicable ordinance], but rather on the ground that this particular subdivision, as designed was inconsistent with the purposes." The court concluded that the Board could deny approval of PB's plat, even though it met zoning requirements, because it did not comply with the purposes set forth in the Code when the Code required compliance with the purposes.

See also: *Maryland-Nat. Capital Park and Planning Com'n v. Washington Business Park Associates, 294 Md. 302, 449 A.2d 414 (1982).*

See also: *Coffey v. Maryland-National Capital Park and Planning Commission, 293 Md. 24, 441 A.2d 1041 (1982).*

Constitutionality of Zoning Decision—Zoning Commission Grants Conditional Use Permit For Less Units Than Landowner Claims Entitlement

Landowner argues commission's action amounted to an unconstitutional regulatory taking

Citation: *Henry v. Jefferson County Com'n, 2011 WL 724666 (4th Cir. 2011)*

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (WEST VIRGINIA) (03/03/11)—This case addressed the issue of whether a planning and zoning commission's decision to grant a conditional use permit ("CUP") for less units than the landowner claimed entitlement to amounted to an unconstitutional regulatory taking or the landowner's property.

The Background/Facts: Aubrey Henry ("Henry") owned or had an interest in four adjoining parcels of land totaling 13.69 acres in the county. Henry sought to develop the land. In 2001, Henry applied to the county planning and zoning commission (the "PZC") for a CUP to build a 76-unit townhouse development. The PZC granted Henry's request. However, it limited the number of units to 51.

Neighboring landowners appealed the grant of the CUP. Ultimately, the circuit court reversed because it found that the PZC had failed to enter sufficient factual findings.

After reconsideration, eventually, in 2005, the PZC again granted Henry's CUP, but this time allowing only 14 units.

Henry appealed. The county board of zoning appeals (the "BZA") affirmed the CUP.

Henry later sold the land. However, he still sued the county. He alleged that the county "took his property without just compensation by... denying him a meaningful CUP." More specifically, he claimed that the PZC "took his property by granting him a 14-unit CUP rather than the 51-unit CUP to which he claims he was entitled."

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment against Henry on all claims.

Henry appealed.

DECISION: Affirmed.

The United States Court of Appeals, Fourth Circuit, held that the PZC's decision to grant Henry a 14-unit CUP rather than a 51-unit CUP did not amount to a regulatory taking.

Henry had argued that his CUP proposal fell under certain heightened density provisions that entitled him to a CUP of over 100 units. Thus, he contended that he was "entitled as a matter of right to a permit for his [earlier] high-density townhouse project." He argued that once he agreed in principle to resolve all issues, the PZC was obligated to issue the CUP. The court disagreed. It acknowledged that "when a developer's uncontradicted expert evidence resolves outstanding issues, the [PZC] lacks discretion to deny the CUP." However, emphasized the court, in the absence of such circumstances, the PZC could "properly consider density in using its discretion to resolve murkier requests." Here, Henry presented no expert testimony on density, and the PZC explicitly cited density in granting only a 14-unit CUP. It had discretion to do so, and as a result Henry was not entitled to a 51-unit CUP, concluded the court. Thus, Henry could not claim that the PZC took his property simply by granting a smaller CUP.

Henry had also alleged that the grant of the smaller CUP took his property under "ordinary regulatory takings doctrine." The court disagreed. It acknowledged that property regulations that go too far take a landowner's property. However, the court found it "obvious that the grant of the smaller CUP did not unacceptably interfere with Henry's existing property interests under the regulatory takings framework." The PZC's action on Henry's CUP request "never subjected his property to physical invasion, nor did it eliminate the property's value," found the court. Otherwise, explained the court, a regulatory taking would be found to have occurred only if there was "economic harm approaching constitutional magnitude"; there was interference with Henry's "investment-backed expectations"; or the character of the PZC's action was "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

Here, the court found, even if it assumed the 14-unit CUP was not economically feasible, Henry's various parcels "retained permitted uses

that obviously possessed economic value." The court also found that Henry did not suffer economic harm "approaching constitutional magnitude": he ultimately sold the parcels for a total of over $100,000. Moreover, all of Henry's investment-backed expectation claims were based on his having an entitlement to those claims, which he did not. In any case, he received "significant return" on his investments when he sold the land. Finally, found the court, the character of the PZC's action—which was based on density and other traditional zoning concerns—"did nothing like" directly appropriating private property or ousting Henry from his domain.

See also: *Jefferson Orchards, Inc. v. Jefferson County Zoning Bd. of Appeals, 225 W. Va. 416, 693 S.E.2d 781 (2010).*

See also: *Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005).*

See also: *Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).*

Case Note: Henry had also claimed that the CUP process violated his substantive and procedural due process rights. The court disagreed.

Zoning News from Around the Nation

ILLINOIS

The state senate is considering Senate Bill 167, which would allow communities without a zoning ordinance to restrict wind turbine development within 1.5 miles of the town. Currently, the law allows communities to ban such development surrounding its "zoning jurisdiction."

Source: *Quincy Herald-Whig*; www.whig.com

The state house recently passed a measure "to expedite township razing of nuisance properties." The bill would allow townships "to deal with nuisance properties if a county has not acted within 60 days." The bill still must pass in the senate.

Source: *Peoria Journal Star*; www.pjstar.com

MARYLAND

The Maryland General Assembly is considering House Bill 948, which would "empower local jurisdictions and the state to plan for and

permit increased density and more diverse uses within designated areas around rail stations throughout Maryland." More specifically, the bill would enable "State Rail Station Overlay Districts." Goals of the bill include: "to foster vibrant, pedestrian-oriented, energy-efficient communities centered on transit"; and "to improve public services and the aesthetic quality of the public realm—streetscapes, open space, civic amenities, architecture—within overlay districts."

Source: *The Washington Post*; www.washingtonpost.com

KANSAS

The state house recently approved the "Community Defense Act," a bill that would "restrict strip clubs, adult video stores and other sexually oriented businesses." The bill "would limit the hours and location of such businesses, ban total nudity inside them and impose a 'no touch' rule for employees and customers." Reportedly, critics of the bill say that the "regulation of sexually oriented businesses is best left to cities and counties." Proponents of the bill reportedly say "small, rural communities often lack the resources to resist such businesses, if they're willing to challenge restrictions or adverse zoning decisions in court." The bill still awaits senate consideration.

Source: *Bloomberg Business Week*; www.businessweek.com

TENNESSEE

Pending before the state General Assembly is HB 1345, which would "prohibit[] the rezoning of private property by local governments without written consent of property owner[s]." Proponents of the bill reportedly feel it will help ease the economic burden of multiparcel zoning. Opponents fear "state government stripping away the power of communities to determine their futures."

Source: *Nashville Scene*; www.nashvillescene.com

UTAH

State Senate Bill 231, which would have created a "so-called film enterprise zone," failed to pass before the Utah legislative session that recently ended. The bill could have overridden local zoning rules to benefit the development of a movie studio.

Source: *Park Record*; www.parkrecord.com

April 25, 2011 | Volume 5 | No. 8

QUINLAN™

Zoning Bulletin

in this issue:

WEST®

41059271

Proceeding—Board Approves Variance But Fails to Timely File Decision With Town Clerk

Opponent argues failure to timely file should annul approval

Citation: *Frank v. Zoning Bd. of Town of Yorktown, 917 N.Y.S.2d 697 (App. Div. 2d Dep't 2011)*

NEW YORK (03/01/11)—This case addressed the issue of whether the failure of a zoning board to file its written decision within the time specified in the town zoning law mandated annulment of its determination.

The Background/Facts: Tom Knoesel and Joan Knoesel (the "Knoesels") applied to the town's zoning board (the "Board") for an area variance to legalize an existing fence that was taller than permitted. The Board granted the application. The Board concluded that legalizing the fence would not have an adverse impact on the neighborhood.

Thereafter, neighbors of the Knoesels (the "Neighbors") appealed the Board's approval of the variance. Among other things,

Contributors
Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to, Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526 St. Paul, MN 55164-0526.

WEST®

610 Opperman Drive • P.O. Box 64526 • St. Paul, MN 55164-0526
1-800-229-2084 • email: west.customerservice@thomsonreuters.com • west.thomson.com/quinlan
ISSN 0514-7905 • © 2011 Thomson Reuters. All Rights Reserved.
Quinlan™ is a Thomson Reuters brand.

the Neighbors argued that the Board's approval had to be annulled because the Board had failed to file its written decision in the office of the town clerk within five business days, as required by the town zoning law.

The Supreme Court dismissed the Neighbors' action.

DECISION: Affirmed.

The Supreme Court, Appellate Division, Second Department, New York, held that the failure of the Board to file its written decision in the office of the town clerk within the time specified in the town zoning laws "did not mandate annulment of its determination" to grant the variance. The court so concluded upon finding that: the zoning law did not specify a sanction for failure to comply with the five-day filing requirement; and, "[i]n any event, the Board offered a reasonable explanation for its delay in filing its written decision, and the delay was not extensive."

See also: *Nyack Hosp. v. Village of Nyack Planning Bd., 231 A.D.2d 617, 647 N.Y.S.2d 799 (2d Dep't 1996).*

See also: *Platzman v. Munno, 184 Misc. 2d 201, 706 N.Y.S.2d 846 (Sup 2000), judgment aff'd, 282 A.D.2d 539, 722 N.Y.S.2d 886 (2d Dep't 2001).*

Pre-emption—Town Says Transloading Facility at Rail Yard is an Impermissible Use Under Ordinance

Railway company and facility operator argue ordinance is pre-empted by federal law

Citation: *New York & Atlantic Ry. Co. v. Surface Transp. Bd., 2011 WL 873030 (2d Cir. 2011)*

The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

SECOND CIRCUIT (03/15/11)—This case "delineates the power of the Surface Transportation Board ("STB") to decide ... the extent to which the construction and operation of transloading facilities fall within the STB's exclusive jurisdiction, freeing the operations from local regulation by way of federal preemption."

The Background/Facts: New York & Atlantic Railway Company ("NYAR") was a short-line railroad that ran the freight operation of the Long Island Rail Road ("LIRR"). In 2002, Coastal Distribution, LLC ("Coastal") and NYAR entered into an agreement to refurbish a rail yard in the Town of Babylon (the "Town") to handle the transloading of construction materials, mainly building materials and construction and demolition debris (the "Facility").

The Town's zoning ordinance (the "Ordinance") forbids the operation of a waste transfer facility anywhere in the Town except for an area remote from the Facility and inaccessible by rail.

As work on the new Facility neared completion, a Town building inspector served Coastal with a stop work order. The inspector had determined that the Facility violated the Ordinance. Coastal appealed to the Town's Zoning Appeals Board (the "ZBA"). The ZBA upheld the stop work order, finding the Facility constituted an impermissible use.

NYAR and Coastal then sued in federal district court. They asked the court to enjoin the stop work order. They argued that: the Town's zoning Ordinance was pre-empted under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"); and that the Facility fell within the exclusive jurisdiction of the STB. The court issued a preliminary injunction barring the Town from enforcing the stop work order. The United States Court of Appeals, Second Circuit, upheld the injunction but allowed the parties to bring the matter to the STB for a determination as to whether the Facility did, in fact, fall within its exclusive jurisdiction.

The Town and the lessor of the rail yard, Pinelawn Cemetery Corporation, (hereinafter, collectively, the "Town") asked the STB to declare that: the Town's zoning Ordinance was not pre-empted; and that STB did not have jurisdiction over the Facility. The STB did so declare. The STB found that its exclusive jurisdiction "extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party's operation." Here, the STB determined that NYAR was not involved with Facility and that Coastal "exercised almost total control over the [F]acility."

Thereafter, the Town asked the district court to vacate the preliminary injunction. NYAR and Coastal objected. Among other things, they argued that the "newly passed Clean Railroads Act of 2008 (the "CRA"), 49 U.S.C. § 10909, preempted [the Town's Ordinance]." The CRA "requires that solid waste rail transfer facilities follow the same state and federal laws and regulations that apply to

non-railroads, except that land use regulations may not be applied to existing facilities."

The Town again petitioned the STB, asking it to declare that the CRA did not apply to the Facility. The STB did so declare. It found that the CRA did not apply to the Facility because the Facility was not "owned or operated by or on behalf of a rail carrier." Again, the STB had found that NYAR "lacked control over the operation of the Facility."

NYAR and Coastal appealed to the United States Court of Appeals for the District of Columbia. That court transferred the case to the United States Court of Appeals, Second Circuit.

DEICISION: Petition denied.

The United States Court of Appeals, Second Circuit, held that the Town's Ordinance was not pre-empted by the ICCTA or the CRA.

The court noted that the ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers," which includes "wide authority over transloading facilities." However, after analyzing the statutory language (see 49 U.S.C.A. § 10501(2)), the court determined that the STB does not exercise exclusive jurisdiction over Facilities when they are not operated by, or under the control of, a "rail carrier." The STB could exercise exclusive jurisdiction only if: the activity constituted "transportation"; and was performed by, or under the auspices of, a "rail carrier." Here, the court found there was "no question that the activity at issue ... constitutes 'transportation.'" However, the court found the activity was not performed by NYAR, the rail carrier. NYAR's involvement was essentially limited to transporting cars to and from the Facility, found the court. Thus, the STB did not have jurisdiction over Coastal's activities, and Federal pre-emption under the ICCTA did not apply.

Similarly, the court found that the CRA did not pre-empt the application of the Town's Ordinance. Under the CRA, the STB only had jurisdiction over "solid waste transfer facilities" under certain exceptions. (See 49 U.S.C.A. § 10908(b)) Those exceptions applied only to facilities that fell under STB's jurisdiction. Again, because the Facility was not part of "transportation by rail carrier," it was not within the STB's jurisdiction, and therefore the Facility was not covered by the CRA.

See also: *Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004).*

See also: *Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005).*

Standing—Property Owners Challenge Issuance of Special Permit Allowing Neighbors to Increase the Height of Their Home

They claim standing based on obstruction of their ocean view and related diminution in their property value

Citation: *Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 2011 WL 817428 (2011)*

MASSCHUSETTS (03/11/11)—This case addressed the issue of whether abutting property owners had standing to challenge the issuance of a special permit to their neighbors based on the allegations of obstruction of ocean view and diminution in property value based on obstruction of ocean view.

The Background/Facts: Louis and Ellen Hieb (the "Hiebs") owned property (the "Hieb Property") abutting the Atlantic Ocean in the Town of Chatham (the "Town"). In June 2006, the Town's Zoning Board of Appeals (the "ZBA") granted a special permit to the Hiebs. The special permit allowed the Hiebs to raze their existing house and construct in the same footprint a new house that would be seven feet taller than their existing one.

Brian and Carol Kenner lived across the street from the Hiebs, such that the Hieb Property was between the Kenners' property and the Atlantic Ocean. The Kenners challenged to court the issuance of the special permit to the Hiebs.

The Hiebs asked the court to dismiss the Kenners' action. The Hiebs argued that the Kenners were not "aggrieved" parties within the meaning of Mass. Gen. L. c. 40A, § 17, and therefore did not have standing to bring their action. Massachusetts General Laws c. 40A, § 17 provides that: "[a]ny person aggrieved by a decision of the [zoning] board of appeals ... may appeal to the land court department ...."

The land court judge agreed with the Hiebs, and concluded that the Kenners were not "persons aggrieved" and therefore did not have standing to challenge the issuance of the permit to the Hiebs.

The Kenners appealed. They maintained that they had standing because they were "aggrieved" given that, among other things: the Hiebs' new house would obstruct the Kenners' view of the ocean; and the obstructed ocean view would diminish the value of the Kenners' property.

The Appeals Court agreed with the Kenners and reversed.

The Hiebs and the ZBA appealed.

DECISION: Vacated, and matter remanded.

The Supreme Judicial Court of Massachusetts held that the obstruction of the Kenners' ocean view based on the seven-foot increase in height of the Hiebs' house was insufficient to qualify the Kenners as "aggrieved persons," so as to confer standing. The court also held that any diminution in the value of the Kenners' property based on obstruction of their ocean view due to the increased height of the Hiebs' house did not provide the Kenners with a basis for standing to bring an action to challenge the permit issued to the Hiebs.

The court explained that a "person aggrieved," within the meaning of Mass. Gen. L. c. 40A, § 17, is one who "suffers some infringement of his legal right." Generally, abutting landowners, like the Kenners, enjoy a rebuttable presumption that they are "persons aggrieved." However, said the court, if their standing is challenged and evidence is offered supporting that challenge, there is no benefit of presumption of aggrievement.

Here, the Hiebs had challenged the standing of the Kenners, and the Hiebs had successfully (according to the land court judge) offered evidence to rebut the Kenners' presumption of aggrievement based on their claim that the Hiebs' new house would block the Kenners' view of the ocean. Therefore, the burden then shifted to the Kenners to prove, "by direct facts and not speculative evidence, that they would suffer a particularized injury as a consequence of the increased height of the Hiebs' house." The Kenners had to not just show they were "impacted," but had to show that they would be "injured or harmed." The Supreme Judicial Court found that the Kenners failed to meet that burden.

The court explained that, "[g]enerally speaking, concerns about the visual impact of a proposed structure on an abutting property are insufficient to confer standing." "However, where a municipality's bylaw specifically provides that the zoning board of appeals should take into consideration the visual impact of a proposed structure, '[that] defined protected interest may impart standing to a person whose impaired interest falls within that definition.'" Here, the Town's bylaw did address the visual impact of a proposed structure "on the visual character of the neighborhood as a whole." So, in order for the Kenners to establish standing based on the visual impact of the Hiebs' new house, the court said the Ken-

ners had to show: (1) a particularized harm to the Kenners' own property; and (2) a detrimental impact on the neighborhoods' visual character. The court found that the Kenners failed to put forth "credible facts to support their allegation that the increased height of the Hiebs' new house [would] block their view of the ocean." Moreover, the court found there was no evidence that the increased height of the Hiebs' new house would have a detrimental impact on the visual character of their neighborhood. Instead, evidence showed that the increased height of the Hiebs' house would have only a de minimis impact on the Kenners' view of the ocean.

The Kenners had also claimed that the obstruction of their ocean view by the increased height of the Hiebs' new house would diminish the value of the Kenners' property. The court said that diminution in the value of real estate is a sufficient basis for standing "only where it is 'derivative of or related to cognizable interests protected by the applicable zoning scheme.'" Given that the Kenners' view of the ocean was not an interest protected by the Town's zoning bylaw, and that the land court judge had concluded, in any event, that any impact on the Kenners' ocean view would be de minimis, the alleged diminution in value of the Kenner property was not a basis for standing, concluded the court.

See also: *Martin v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 747 N.E.2d 131 (2001).*

See also: *Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 849 N.E.2d 197 (2006).*

Modification—Landowners Seek a Building Permit to Construct a Deck That Complies With All Zoning Regulations

Zoning Board of Appeals denies the permit, saying landowners need to obtain modification of prior variances

Citation: *Anatra v. Zoning Bd. of Appeals of Town of Madison, 127 Conn. App. 125, 2011 WL 722532 (2011)*

CONNECTICUT (03/08/11)—This case addressed the issue of whether property owners were required to obtain modification of prior variances before building a deck.

The Background/Facts: Victor and Heather Anatra (the "Anatras") owned a home in the Town of Madison (the "Town"). In 2001, the Anatras applied to the Town's zoning board of appeals (the "ZBA") for a variance to replace the then-existing house on the footprint of that prior structure. The ZBA granted the variance.

In September 2003, the Anatras were issued another variance to enable them to install new stairs and an air conditioning unit on the outside of their home.

Several years later, the Anatras submitted an application for a building permit to construct an uncovered deck on their property. The zoning officer denied the application. The zoning officer determined that the Anatras needed to obtain modification of the prior variances before they could build the deck.

The Anatras appealed the zoning officer's decision to the ZBA. The ZBA upheld the zoning officer's decision. The Anatras were denied a certificate of zoning compliance to enable them to secure a building permit to construct the proposed uncovered deck. They were told that they needed to obtain modification of their prior variances.

The Anatras appealed to court. The court dismissed their appeal, concluding that the ZBA had acted properly.

The Anatras again appealed. On appeal, they argued that the proposed uncovered deck fully complied with the town's zoning regulations. They also argued that the ZBA did not have the authority to "monitor and approve modifications to the structure [that] did not affect aspects of the structure for which variances had been granted." In other words, they argued that they should not be required to obtain variance modifications because: their proposed deck complied with all zoning regulations; and their prior variance did not contain conditions related to the proposed deck.

The ZBA did not contest that the proposed deck complied fully with zoning regulations. However, the ZBA argued that the Anatras were bound by their prior variances and needed a new or modified variance to construct the deck.

DECISION: Reversed, and matter remanded with direction.

The Appellate Court of Connecticut held that the Anatras did not need a new or modified variance to build their proposed deck, which fully complied with the zoning regulations and was not prohibited by any condition attached to the certificates of variances previously granted.

The court explained that a variance runs with the land and is not personal to the parties applying for it. For that reason, any conditions attached to a variance "must be stated explicitly on the certificate of variance recorded in the land records." Here, the first variance contained conditions that: all construction had to be in conformity with standards put forth by the Federal Emergency Management Agency ("FEMA"); and replanting of beach grass be scheduled for early spring. The second variance contained a condition that the air conditioning unit meet specified efficiency standards. The court found: "There was no condition placed on the certificates that would give anyone knowledge that the [Anatras] or the future owners of [the] property forever would be precluded from modifying the property in any manner that was inconsistent with the plans submitted at that time that the [Anatras]'s variances were granted, even if such modifications fully complied with the zoning regulations." Because "[t]he conditions [of the prior variances] did not restrict the [Anatras] from seeking to construct an uncovered deck within the scope of the regulation," the Anatras did not now need to obtain modifications to those variances in order to construct the deck, concluded the court.

See also: *Dodson Boatyard, LLC v. Planning and Zoning Com'n of Town of Stonington, 77 Conn. App. 334, 823 A.2d 371 (2003).*

See also: *Reid v. Zoning Bd. of Appeals of Town of Lebanon, 235 Conn. 850, 670 A.2d 1271 (1996).*

Zoning News from Around the Nation

ARIZONA

Governor Jan Brewer recently signed a law that "gives rescue ranches a chance to seek agricultural status and win exemption from county zoning and building codes."

Source: *The Arizona Republic*; *www.azcentral.com*

CONNECTICUT

Westport's Planning and Zoning Commission is considering a proposal to amend Westport's zoning regulations to exempt from the definition of "structure" all swing and play sets that are not buildings, as defined in the regulations. The proposal also seeks to exempt swing and play sets from the town's setback requirements.

Source: *Westport News*; *www.westport-news.com*

ILLINOIS

Bills pending in the state senate (SB 402) and the state house of representatives (HB 45) would limit local governments from enforcing gun laws stricter than the state's. Reportedly, the bills would "void ... zoning ordinances designed to restrict or prohibit the sale or manufacture of firearms or ammunition ... [and] would also eliminate provisions authorizing counties to adopt an ordinance requiring a waiting period between the purchase and delivery of a handgun."

Source: *Highlands Today*; http://www2.highlandstoday.com

MARYLAND

"A bill that would have authorized Garrett County commissioners to control the development of wind farms in the county" recently "died" in the Maryland General Assembly. The House Economic Matters Committee reported the bill unfavorably, effectively killing it. A companion senate bill remains in committee. Garrett County "does not have zoning, and without passage of the bill, has limited ability to regulate wind-powered electricity generation."

Source: *Cumberland Times-News*; http://times-news.com

MICHIGAN

The Muskegon City Commission recently gave final approval to a zoning ordinance change that allows for medical marijuana businesses and regulates those businesses. Medical marijuana businesses are now limited to the city's heavy industrial zones.

Source: *Muskegon Chronicle*; www.mlive.com/news/muskegon

OHIO

Legislation recently introduced into the state house of representatives seeks to allow local communities to "prohibit sweepstakes gaming operations at Internet cafes." The legislation was reportedly proposed to address concerns "about the potential for consumers to be defrauded by the machines and the potential for competition with legally licensed charitable gaming activities." Proponents say "the proposed legislation will help define what is or is not legal gambling in Ohio." Among other things, the legislation "would limit the number of machines to five per establishment. Each would require two licenses and be subject to inspection to determine if

customers have a fair chance at winning. Both the operator and the machine would require a license for each machine .... Oversight would be provided by the Ohio Casino Control Commission."

Source: *Sun News*; www.cleveland.com

PENNSYLVANIA

State Representative Phyllis Mundy (Democrat-Kingston) has introduced a bill that would "ban zoning hearing board members from voting when they have conflicts of interest." Under the proposed bill, "the governing authority responsible for appointing members to the zoning board would select a temporary replacement who would only serve for the specific issue."

Source: *Citizens' Voice*; http://citizensvoice.com

SOUTH CAROLINA

Legislation introduced in both the state senate and House of Rpresentatives "could soon make it easier for coastal towns to have more control over piers." The proposed legislation "would give individual towns the power to make additions to piers, as long as they follow individual town zoning laws and ordinances."

Source: *WMBF News*; www.wmbfnews.com