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Proceedings—Unseated Alternate Board Member Participates in Public Hearing and Board Deliberations on Application

Applicant argues alternate's participation was illegal

Citation: *Komondy v. Zoning Bd. of Appeals of Town of Chester, 127 Conn. App. 669, 2011 WL 1161725 (2011)*

CONNECTICUT (04/05/11)—This case addressed the issues of whether, under Connecticut statutory law, an unseated alternate zoning board of appeals member can: (1) participate in the public hearing; and/or (2) participate in the zoning board of appeals' deliberations.

The Background/Facts: Marguerite Komondy ("Komondy") owned a single-family home in the town. A fire destroyed Komondy's home in March 2005. Thereafter, under § 113B.5 of the town's zoning regulations, she applied for and was granted a six-month use permit to install a temporary mobile home on her property during the reconstruction of her home. Approximately one year and four months later, the mobile home remained on Komondy's property.

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The town's Zoning Enforcement Officer (the "ZEO") issued a cease and desist order regarding the use of the mobile home. The ZEO then rejected Komondy's request for an extension of the permit.

Komondy then appealed to the town's zoning board of appeals (the "Board") from both the cease and desist order and the denial of her request for an extension. Additionally, she applied for a variance from the "[six] months' time limit" contained in § 113B.5.

The Board held a public hearing on Komondy's applications. After the hearing, the Board deliberated the merits of Komondy's applications. The Board ultimately voted to deny both the appeal from the decisions of the ZEO and the application for a variance from § 113B.5.

Komondy appealed to the superior court. Among other things, she argued that the Board acted illegally because it allowed Theresa Myers ("Myers"), an unseated alternate Board member, to participate in the public hearing and the Board's deliberations.

The superior court dismissed Komondy's appeal. In doing so, it rejected Komondy's claim that the Board acted illegally with regard to Myers' participation. In addition, the court concluded that the Board properly denied the variance application because the requisite hardship was lacking.

Komondy appealed. On appeal, she challenged only the superior court's determination regarding Myers' participation in the public hearing and the Board's deliberations. She did not challenge its determination related to the denial of the variance application.

DECISION: Affirmed.

The Appellate Court of Connecticut held that the Board did not act illegally in allowing Myers, an unseated alternate Board member, to participate in the public hearing. However, the court found that the Board did act illegally in allowing Myers to participate in the Board's deliberations.

In reaching its conclusion, the court first analyzed whether Myers' participation in the Board's proceedings ran afoul of Connecticut statutory law, General Statutes §§ 8-5(a) and 8-6(a). Myers had argued that the plain language of § 8-5(a) forbid an alternate member from participating in either the public hearing or board deliberations on an application unless that alternate had been seated pursuant to § 8-5(a).

Section 8-5(a) provided in relevant part: "In each municipality having a zoning commission there shall be a zoning board of appeals consisting of five regular members and three alternate members .... Such alternate members ... shall, when seated ... have all the powers and duties set forth in the general statutes relating to zoning boards

of appeals and their members ...." Section 8-6(a) enumerated the "powers and duties" of a zoning board of appeals. Those "powers and duties" included: "[t]o hear and decide appeals ...."

Analyzing the statute, the court found that the Legislature had been "silent" on the issue of participation by board members in the public hearing. Participation in public hearings was neither a power nor duty set forth in the statutes relating to zoning boards of appeals and their members, found the court. Accordingly, the court concluded that Myers' participation in the public hearing did not contravene the statute.

As to participation in boards of appeal's deliberations, the court found the statute was not silent. Section 8-6(a) vested boards of appeal with power to "decide" certain matters and to "determine and vary the application of the zoning ... regulations." The court interpreted this to indicate that the boards' powers included something other than simply voting on a particular matter; the intent of the legislature, found the court, was to include deliberations of a zoning board of appeals among the powers and duties set forth in § 8-6(a). Because under § 8-5(a) only "seated" alternate members possessed the powers and duties set forth in § 8-6(a), the court found that § 8-5(a) precluded the participation of an unseated alternate—like Myers—in board deliberations following the close of the public hearing.

Nevertheless, the court concluded that Myers' participation in the Board's deliberations did not result in material prejudice to Komondy; the superior court had found the requisite hardship for a variance was lacking and Komondy had not challenged this finding. Accordingly, the court concluded that Komondy's appeal had been properly dismissed.

See also: *S.I.S. Enterprises, Inc. v. Zoning Bd. of Appeals of City of Bristol, 33 Conn. App. 281, 635 A.2d 835 (1993).*

See also: *State v. Anderson, 227 Conn. 518, 631 A.2d 1149 (1993).*

See also: *Murach v. Planning and Zoning Com'n of City of New London, 196 Conn. 192, 491 A.2d 1058 (1985).*

Case Note: The court found support for its decision regarding the permissibility of unseated alternate board members to participate in public hearings in: the fact that "the burden rests with the applicant to demonstrate its entitlement to the requested relief"; § 8-6(a) delineated matters that could be acted upon by a zoning board of appeals, and this did not include public hearing par-

ticipation; the court's determination that "[c]ommon sense" made clear that "the legislature did not intend to preclude participation of unseated alternate members in public hearings" since "a public hearing affords an opportunity ... for other members of the community to 'register their approval or disapproval' ... [and] to obtain any and all information relevant to the inquiring on hand"; and "the fact that an alternate member ... may well be called on to act in the place of a regular member [and thus it would not make sense to] vest in such an alternate the statutory power to decide the substantive matter before the board yet preclude that alternate from asking pertinent questions or otherwise commenting during the public hearing."

Case Note: Komondy had argued that the term "hear," as it was used in the phrase "hear and decide," constituted active participation in public hearings. The court disagreed, finding the term "hear" merely indicated that the zoning board of appeals was the proper forum for certain appeals and matters. In other words, the court found the term "hear" simply expressed the board's power to entertain such matters.

Case Note: In its decision, the court likened the participation of an unseated alternate board member to that of an alternate juror. The court said that, similar to the participation of an alternate juror in the jury's deliberations, the participation of an unseated alternate "tarnishes the deliberations of a zoning board of appeals, as it permits one not authorized to vote on the matter before the board to nevertheless pass on the merits thereof."

Proceedings—Board Denies Developer's Applications but Fails to Provide Required Statements of Its Reasons

Developer argues this failure should result in remand of the applications to the board

Citation: *Nexum Development Corp. v. Planning Bd. of Framingham, 79 Mass. App. Ct. 117, 943 N.E.2d 965 (2011)*

MASSACHUSETTS (04/18/11)—This case addresses the issue of whether a board's denial must be remanded, under Massachusetts

law, for failure to identify reasons for the denial, even where the board is legally obligated to deny the application(s).

The Background/Facts: Nexum Develop Corp. ("Nexum") proposed development on a 32-acre tract of land in the town. Nexum planned to construct 24 detached single family residences in a condominium cluster development. Nexum planned to construct a common well and a common septic system for use by the condominium residences. In furtherance of its plans, Nexum applied for two separate but necessarily parallel applications: (1) a special permit for cluster development pursuant to the town's open space residential development provisions in its zoning by-law; and (2) approval of the resulting definitive subdivision plan.

The town's planning board (the "Board") denied Nexum's applications.

Nexum appealed to the superior court.

The superior court affirmed the denials. The judge concluded that the bylaw and applicable regulations required the denial of the applications because: (1) Nexum failed to comply with bylaw requirements to establish the permissible density of the project; and (2) Nexum could not comply with conditions imposed by the town's board of health related to on-site water supply.

Nexum again appealed. It argued that: (1) the Board made no statement of its reasons for its decisions; (2) Nexum's density calculation was valid without soils tests on each lot shown on the preliminary subdivision plan; and (3) the judge erroneously upheld the Board's denials on the basis of inadequate water supply.

DECISION: Affirmed.

The Appeals Court of Massachusetts agreed that the Board had failed to identify reasons for its denials of Nexum's applications, as required under Massachusetts statutory law, G.L. c. 41 § 81U and c. 40A, § 15. Still, although such a failure typically required a remand of the applications to the Board, the court found remand not appropriate here. Rather, the court concluded that the Board was legally obligated to deny the applications because: (1) Nexum failed to comply with by-law requirements in that it failed to perform soil tests on all proposed lots; and (2) Nexum could not comply with on-site water supply regulations.

As to the latter, the court noted that "[a] planning board may not approve a subdivision plan which does not comply with the recommendation of the board of health; the planning board's options in such a case are limited to those of disapproving the plan or modifying it in such fashion as to bring it into conformity with the rec-

ommendation of the board of health." Here, the town's board of health had condition approval of Nexum's special permit on future satisfaction of water supply issues. The record established, found the court, that Nexum could not achieve compliance with the conditions. Since no amendment to the applications could, as a practical matter, satisfy the board of health conditions, the Board had no choice but to deny the applications, said the court.

See also: *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 909 N.E.2d 1161 (2009).*

See also: *Loring Hills Developers Trust v. Planning Bd. of Salem, 374 Mass. 343, 372 N.E.2d 775 (1978).*

Nonconforming Use—Court Finds Marina on Separate Lot is an Illegal Expansion of a Legally Nonconforming Clubhouse

Owner of marina and clubhouse says court erred and marina is legally operating

Citation: *Campbell v. Tiverton Zoning Bd., 2011 WL 1168315 (R.I. 2011)*

RHODE ISLAND (03/25/11)—This case addressed the issue of whether development on a separate lot across the street from a legally nonconforming use, with the same ownership and serving the same clientele, is an illegal expansion of a legally nonconforming use.

The Background/Facts: The Tiverton Yacht Club ("TYC") was incorporated in 1945. It opened a clubhouse at its current location in 1956. When the Town of Tiverton (the "Town") adopted zoning in 1964, the TYC clubhouse became a legal nonconforming use located in a residential zoning district.

Across the road from TYC's clubhouse, on a separate lot owned by TYC (the "Marina Lot") located in a waterfront zoning district, TYC operated a marina.

In June 2003, TYC's clubhouse was destroyed in a fire. TYC endeavored to rebuild the clubhouse. In December 2006, the Town's building official approved a building permit for proposed building plans for a new clubhouse.

Owners of land abutting the site of the former and proposed location of the TYC clubhouse (the "Neighbors") promptly appealed to the Town's zoning board (the "Board"). Among other things, the

Neighbors argued that the building plans and permit "indicate[d] the expansion and intensification of a non-conforming use in a residential zone."

Eventually, a superior court judge agreed with the Neighbors. Among other things, the judge concluded that: "the evidence clearly demonstrate[d] that the marina activities [were] intended to coalesce with operation of the clubhouse"; and "a tandem marina/clubhouse operation [was] contrary to the applicable law regarding non-conforming uses and must be disallowed." The judge declared that the marina "was an unlawful expansion of a nonconforming use" and "must be prohibited" because such operations did not exist when the TYC clubhouse became a nonconforming use in 1964.

TYC appealed. Among other things, TYC argued that the trial judge erred when she prohibited it from operating the marina because the marina was located "on waterfront property zoned to permit such use as a matter of right."

DECISION: Vacated in part.

The Supreme Court of Rhode Island held, among other holdings, that TYC's marina was not an expansion of TYC's nonconforming use of the clubhouse lot property. From the establishment of the marina, the TYC's Marina Lot had been zoned to permit the operation of a marina. The court acknowledged that the clubhouse lot and the Marina Lot shared ownership and that the marina was for the exclusive use of TYC members. However, the court found it error that the trial judge had "reached across [the road] to prohibit the legal operation of the marina." The marina was "physically separate and exist[ed] independently from the TYC [clubhouse] and vice versa," found the court. As a private—property owner, TYC had the right to sell the Marina Lot, and the new owner could legally operate the marina. Accordingly, under those circumstances, the court found the trial judge erred in finding that the marina and the clubhouse were "tandem" entities and that the marina was an "impermissible expansion of a nonconforming use on a wholly distinct lot as a result of the TYC's use of th[e] waterfront lot as a marina for its members." Rather, the court found that the judge had "incorrectly treated the marina and clubhouse lots as essentially one lot, despite the presence of [the road] between them ...."

See also: *Sanfilippo v. Board of Review of Town of Middletown, 96 R.I. 17, 188 A.2d 464 (1963).*

Case Note: TYC had also appealed the judge's finding that the proposed rebuilding of the clubhouse represented an "unlawful expansion of a nonconforming use." The court found that part of the appeal was rendered moot by the Town's amendment of the zoning ordinance and map—which rezoned the lot on which existed the former and proposed clubhouse to "water-front-related." That zoning ordinance amendment extinguished the TYC clubhouse's status as a legal, nonconforming use in a residential district.

Fees—Agreement Between Developer and County Requires Payment of Impact Fees Without Regard to Issuance Of Building Permit

Developers says agreement violates statute, but county says parties could agree to such terms

Citation: *Effingham County Bd. of Com'rs v. Park West Effingham, L.P., 2011 WL 1023144 (Ga. Ct. App. 2011)*

GEORGIA (03/23/11)—This case addressed the issue of whether a county and developer could agree to a contract regarding impact fees, the terms of which violated state law.

The Background/Facts: Park West Effingham, L.P. ("Park West") was a real estate developer building a subdivision of new homes in the County.

In April 2006, Park West's predecessor in title, DJ Development Company, Inc. ("DJ") signed an agreement with the County titled "Water, Sewer, and Re-Use Water Service Agreement (Impact Form)" (the "Agreement"). Section 5 of the Agreement, "Impact Fees; Re-Use Fees," provided: "To assist in the payment of the cost of constructing the County's water supply and distribution and sewage collection and treatment systems, [DJ] shall pay to the County impact fees as established by ordinance ...." Section 6 of the Agreement, "Guaranty and Security," set forth the developer's guaranteed impact fee payment to the County. Based upon DJ's anticipated 10-year build-out period, DJ agreed to pay "water and sewer impact fees and re-use capacity fees (if applicable) of not less than $297,152.00 per year for the 10-year Project build-out period."

On March 18, 2009, the County served upon Park West a "Notice of Shortfall" seeking payment of approximately $700,000 for impact fee payments. The notice sought payment of impact fees on the basis of the percentage provided for in the Agreement. It did not consider whether building permits had been issued. In fact, no building permits had been issued corresponding with the amount sought in the Notice of Shortfall.

Park West filed an action in court, challenging the County's Notice of Shortfall. Park West asked the court to declare that Park West did not owe any prepayment of impact fees pursuant to the Agreement. In support of its position, Park West contended that the Agreement violated the provision of the Georgia Development Impact Fee Act, OCGA § 36-71-4(d) ("DIFA"). Section 36-71-4(d) prohibits the collection of impact fees before the issuance of a building permit.

The trial court agreed with Park West. Finding there was no material issue of fact in dispute and deciding the matter on the law alone, the court granted summary judgment in favor of Park West. The court found the Agreement was void because it violated § 36-71-4(d).

The County appealed.

DECISION: Affirmed.

The Court of Appeals of Georgia held that the fact that the County and DJ had agreed to the Agreement and impact fee schedule did not render the Agreement valid and enforceable. The court found that the Agreement violated OCGA § 36-71-d(4) and therefore was void.

On appeal, the County had argued that, absent a limiting statute or controlling public policy, it could contract with a developer "on any terms agreeable to both." The court said that was true, but noted that the County was "overlook[ing] the controlling issue here: a limiting statue [was] present. OCGA § 36-71-4(d) forbid[] the prepayment of impact fees." "An agreement to violate [a statute] [was] unlawful and against the public policy ... [and] unenforceable," said the court. "Parties to a contract [could] not agree to alter state law."

The court found that the Agreement was in violation of § 36-71-4(d) "in its basic purpose: the collection of impact fees to repay the [C]ounty's loan from [the Georgia Environmental Facilities Authority ("GEFA")]." The Agreement calculated the payment of impact fees not in reference to the issuance of building permits, as required by the statute, but as sum certain. The Agreement further provided for a guarantee of payment of a minimum stated amount on a year-

ly basis for a 10-year period, and an irrevocable letter of credit to be provided immediately for one-half the total amount owed. The court found the letter of credit and the minimum payment constituted "pre-payment of impact fees for the purpose of retiring the [C]ounty's debt with GEFA." Since the Agreement constituted the entire method of calculating, collecting and enforcing payment, the court concluded that it violated § 36-71-4(d) by requiring prepayment of impact fees.

See also: *Moore v. Dixon, 264 Ga. 797, 452 S.E.2d 484 (1994).*

See also: *Shannondoah, Inc. v. Smith, 140 Ga. App. 200, 230 S.E.2d 351 (1976).*

Zoning News from Around the Nation

CALIFORNIA

San Francisco's Board of Supervisors is considering "urban agriculture" legislation that would "update zoning regulations to explicitly permit gardens in all areas of the City and allow for the sale of produce from those gardens." The legislation would allow for "gardens of less than one acre, while gardens one acre or larger would require a special Planning Commission exemption."

Source: *The Examiner; www.sfexaminer.com*

HAWAII

The United States Senate is considering two bills related to native Hawaiian sovereignty. The Native Hawaiian Reorganization Act (S. 675) would "create a native Hawaiian sovereign government within the state." S. 676 would reaffirm the authority of the Secretary of Interior to take Hawaii lands into trust for an Akaka tribe and exempt tribal businesses from state and county regulations (such as labor laws and zoning) and from state taxes such as income tax, property tax and excise tax.

Source: *Hawaii Reporter; www.hawaiireporter.com*

NEW MEXICO

Farmington Councilors are considering an ordinance that would "limit where medical marijuana could be grown to areas zoned for industrial use." The proposed ordinance would also prohibit the production of medical cannabis within 300 feet of any school,

church or youth facility, and "adds a further zoning restriction by making illegal production for distribution purposes outside of industrial zones and planned industrial parks."

Source: *The Daily Times; www.daily-times.com*

OREGON

A proposal to regulate "nudity" is being considered in the state legislature. "Senate Joint Resolution 28 would ask voters to amend the Oregon Constitution to allow governments to restrict live entertainment involving nudity."

Source: *Northwest Cable News; www.nwcm.com*

The state house of representatives is considering a bill, House Bill 3047, which would "expand the definition of 'farm use' to include facilities for training dogs in canine skills on land zoned for exclusive farm use."

Source: *Statesman Journal; www.statesmanjournal.com*

TENNESSEE

The Metro Council is considering legislation that would allow "business owners to register historic signs with the Metro Planning Commission, which would then provide protections for landmark signs around Davidson County." To qualify, a sign would have to be at least 25 years old and have "cultural value" to the community.

Source: *The Tennessean; www.tennessean.com*

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First Amendment—Amendments to City Ordinance Restrict the Location of Adult Businesses

Adult business operator says ordinance violates the First Amendment

Citation: *Big Dipper Entertainment, L.L.C. v. City of Warren, 2011 WL 1378417 (6th Cir. 2011)*

The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

SIXTH CIRCUIT (MICHIGAN) (04/13/11)—This case addressed the issue of whether a zoning ordinance restricting the location of adult businesses violated the First Amendment to the United States Constitution.

The Background/Facts: In October 2005, the city of Warren (the "City") adopted a zoning ordinance—§ 14.01 of the City's zoning code—that restricted the location of adult businesses in the City. The ordinance provided that sexually oriented businesses had to be

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located more than 750 feet from the nearest lot line of specific listed zoning districts.

On February 1, 2006, the City published notice of its intent to amend § 14.01. To maintain the status quo during consideration of the proposed amendment, the city council temporarily barred the issuance of new licenses for adult businesses in the downtown area of the City. In March 2006, the City amended § 14.01 to also prohibit sexually oriented businesses from locating within the City's Downtown Development District.

On February 14, 2006, Big Dipper Entertainment and Aquarius Investments (collectively, "Big Dipper") applied for permission to operate a topless bar on a parcel of land (the "Property") in the City. The March 2006 amendment to § 14.01 encompassed the Property. Thus, the § 14.01 amendment effectively prohibited Big Dipper from using the Property for an adult business. The City rejected Big Dipper's application.

Big Dipper eventually filed a legal action in federal district court, challenging the constitutionality of the October 2005 and March 2006 amendments to § 14.01. Big Dipper claimed that the amendments violated the First Amendment. In other words, Big Dipper argued that § 14.01 was an unconstitutional restriction upon speech.

The City moved for summary judgment—it asked the court to find there were no material issues of fact in dispute and to decide the matter on the law alone. The district court granted summary judgment in favor of the City.

Big Dipper appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Sixth Circuit, held that § 14.01 did not violate the First Amendment.

In so holding, the court first explained that "[n]ormally, a content-based restriction on speech is subject to strict scrutiny." However, "zoning ordinances that regulate adult businesses—which typically on their face are content-based—are treated differently. So long as they aim to limit the secondary effects of adult businesses, [the courts] treat the ordinances as content-neutral, which means they get less scrutiny."

Thus, here, if § 14.01 was limited to the secondary effects of adult businesses, the ordinance would be constitutionally valid if it was "designed to serve a substantial government interest and allow[ed] for reasonable alternative avenues of communication."

The court found that the City's predominate concerns in adopting the amendments to § 14.01 were with the secondary effects of adult businesses. The City had reviewed at least 49 studies and reports concerning the secondary effects of adult businesses before enacting the October 2005 amendments. Those reports were also valid for the March 2006 amendments. As well, the City council's minutes contained discussions about limiting secondary effects. The court thus concluded that the amendments to § 14.01 were content-neutral for purposes of the court's analysis.

The court also found that the ordinance was constitutionally valid in that it was designed to serve a substantial government interest and allowed for reasonable alternative avenues of communication. Big Dipper had argued that § 14.01 was too broad in geographic scope—leaving too few sites available for adult businesses in the city. The court said the available sites would be adequate so long as the ordinance gave Big Dipper a "reasonable opportunity to open and operate an adult [business] within the [City]." Whether that was the case, said the court, depended on the facts of the case, not necessarily on set percentages or formulas.

Here, the court found that the amendments left reasonable alternative avenues of communication for Big Dipper since 27 sites in the City remained available for an adult business and only two applications for adult businesses had been filed in the City during the preceding five years. The court concluded: "A supply of sites more than 13 times greater than the five-year demand [was] more than ample for constitutional purposes." The ordinance allowed for reasonable alternative avenues of communication.

See also: *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986).*

Case Note: Big Dipper had argued that city council members were hostile to adult businesses and that hostility was a motivating factor in enacting the ordinance. The court noted that such motivation was "not sufficient to trigger heightened scrutiny of this type of ordinance."

Case Note: Big Dipper had also argued that the City violated the First Amendment—by imposing a prior restraint on Big Dipper's speech—when the City took 24 days, rather than 20 as prescribed by the City's rules, to reject Big Dipper's application. The court disagreed. It found that the City taking 24 days rather than 20 to act on Big Dipper's application was "immaterial for consti-

tutional purposes." Constitutional safeguards required only that the City make its decision whether to issue the license "within a specified and reasonable time period during which the status quo is maintained." The court found that was the case here.

Standing—Residents Challenge Grant Of Subdivision Application To Developer

Developer asserts residents' proximity to development alone is insufficient to establish standing to challenge grant

Citation: *Golf Course Investors of NH, LLC v. Town of Jaffrey, 2011 WL 1399563 (N.H. 2011)*

NEW HAMPSHIRE (04/12/11)—This case addressed the issue of whether town residents who lived in close proximity to a proposed development project had standing to challenge a planning board decision to grant the developer's subdivision application.

The Background/Facts: Golf Course Investors of NH, LLC ("GCI") submitted a major subdivision application to the Town of Jaffrey (the "Town"). It sought to subdivide its single 9.13-acre parcel into two lots, one consisting of 7.39 acres, and the other of 1.75 acres containing a building. GCI also sought to convert the existing building into a four-unit condominium.

The Town's planning board voted that a special exception was not required to allow the proposed four-unit condominium. The planning board ultimately approved the major subdivision application.

Seven Town residents (the "Residents") appealed the planning board's decision to the Town's zoning board of appeals (the "ZBA"). Each of the Residents lived within 450 to 2,400 feet of GCI's lot. The Residents argued that the planning board erred in allowing the four dwelling units in the Mountain Zone on a plot of only 1.75 acres without a special exception. The Residents asserted that the standard zoning in the Mountain Zone required at least six acres for four units with town water, or at least 4.8 acres for Open Space Development Plan for four units with town water. They asked the ZBA to overturn the planning board's decision. They maintained that they welcomed the building redevelopment by GCI as long as GCI's proposed four-unit development was on at least 4.8 acres, as required by the Town's zoning regulations.

GCI argued that the Residents lacked standing (i.e., the legal right) to appeal the planning board's decision. GCI contended that

the Residents were not "persons aggrieved." It argued that living close to the project or having a general interest in the proper enforcement of town ordinances was not enough to be "aggrieved."

The ZBA voted that the Residents were "aggrieved." It also voted to grant the Residents' appeal, finding that a special exception to allow a multifamily use was required.

GCI appealed to court. The trial court ruled that the Residents lacked standing to bring their appeal. The court vacated the ZBA's decision granting the appeal, reversing the planning board's decision.

The Town appealed.

DECISION: Judgment of superior court affirmed.

The Supreme Court of New Hampshire held that the Residents were not "persons aggrieved," and therefore lacked standing to appeal the planning board's decision.

The court said that to have standing to appeal to the ZBA, the Residents had to be "aggrieved" by the planning board's decision approving the major subdivision application without requiring a special exception. Citing the relevant state statute (RSA 677:2 and RSA 677:4), the court explained that "persons aggrieved" included any person "directly affected" by the challenged administrative action or proceeding. The appealing party had to show some "direct, definite interest in the outcome of the action or proceeding."

In determining whether the Residents—all nonabutters—had a sufficient, definite interest to confer standing, the court said it must consider factors such as: proximity of the challenging party's property to the site for which approval is sought; the type of change proposed; the immediacy of the injury claimed; and the challenging party's participation in the administrative hearings. The court further noted that sufficiency of the challenging person's interest is a factual determination to be undertaken on a case-by-case basis.

Here, the court found that all of the Residents lived within approximately 2,400 feet of GCI's lot. However, the court noted that there was no "bright line rule identifying whether and to what extent physical proximity establishes direct interest sufficient to confer standing." The court concluded that while close proximity is relevant to determining standing, it does not alone establish a direct, definite interest sufficient to confer standing.

Looking to the other factors it must consider, the court found that here: the type of change proposed was minimal; none of the Residents asserted or presented evidence supporting a particularized harm to them that would result from GCI's proposed project; and only one of seven Residents participated in the planning board proceedings. The

Residents had failed to meet all of the other factors that would indicate they had a sufficient, definite interest to confer standing. Accordingly, the court concluded that the Town failed to demonstrate that the trial court's decision—finding the Residents lacked standing to challenge the planning board's grant of the subdivision application to GCI—was unsupported by evidence or legally erroneous.

See also: *Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 404 A.2d 294 (1979).*

See also: *Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 945 A.2d 13 (2008).*

Decisions Reviewable—Residents Challenge City's Approval Of Developer's Plat

City and developer argue residents can not challenge plat because it is not a "development order"

Citation: *Graves v. City of Pompano Beach ex rel. City Com'n, 2011 WL 1376617 (Fla. Dist. Ct. App. 4th Dist. 2011)*

FLORIDA (04/13/11)—This case addressed the issue of whether, under Florida law, municipal approval of a plat can be challenged as inconsistent with a city's comprehensive plan.

The Background/Facts: PPI, Inc. ("PPI") sought to expand an existing racetrack and casino in the City of Pompano Beach (the "City"). As required by the City's Land Development Code, PPI first filed an application for a plat approval for the "Pompano Park Racino" (the "Park"). The City approved the plat.

Thereafter, City residents (the "Residents") who lived around or near the Park brought a legal action in court against the City and PPI. The Residents challenged the approval of PPI's plat as inconsistent with the City's comprehensive plan.

The trial court dismissed the Residents complaint. It found that a plat approval was not a "development order" under the state statute that allowed challenges to consistency of a development order with a comprehensive plan (Fla. Stat. § 163.3215(3)).

DECISION: Judgment of circuit court approved.

The District Court of Appeal of Florida agreed with the trial court's conclusion. It upheld the dismissal of the Residents' complaint. It held that approval of PPI's plat was not a development order that, under state statute, could be challenged by the Residents.

The court noted that Fla. Stat. § 163.3215(3) allowed aggrieved persons to challenge decisions of local governments granting or denying an application for a development order.

The court explained that a "development order," as defined by statute (Fla. Stat. § 163.3164(7)), is: "any order granting, denying, or granting with conditions an application for a development permit." A "development permit" includes: "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." (Fla. Stat. § 163.3164(8).) Further, "development" means: "the carrying out of any building activity ... [or] the making of any material change in the use or appearance of any structure or land." (Fla. Sta. § 380.04(1).) On the other hand, noted the court, a "plat" is simply: "a map or delineated representation of the subdivision of lands, being a complete exact representation of the subdivision." (Fla. Stat. § 177.031(14).)

The court found that the City, in approving PPI's plat, "only approved a map of the Park, but did not permit PPI to begin building on the land or make any alternations to structures existing on the land." The City's land development code required additional steps before development could begin.

The court concluded that because PPI's plat was not a "development order," under the relevant Florida statutory law, its approval could not be challenged by the Residents.

Variance—Property Owner Seeks Variance To Permit Him To Not Have a Garage On His Property

City rejects variance request and orders construction of garage

Citation: *Cimino v. Cleveland Hts. Bd. of Zoning appeals, 2011-Ohio-1803, 2011 WL 1419646 (Ohio Ct. App. 8th Dist. Cuyahoga County 2011)*

OHIO (04/14/11)—This case details the factors that must be considered and weighed in determining whether a property owner has encountered a "practical difficulty" in the use of his property sufficient to allow the issuance of a variance.

The Background/Facts: In June 2006, William Cimino ("Cimino") purchased a home in the city of Cleveland Heights (the "City"). Prior to his purchase, Cimino was aware that the detached two-car garage on the property was in disrepair and had six code violations. Upon purchase, Cimino had 90 days to correct the code violations. The City subsequently gave Cimino a series of extensions to replace the garage. During that time, it became apparent that the garage could not be repaired, but needed to be rebuilt.

In March 2009, Cimino applied to the City for a zoning variance. Section 1121.09(b) of the City's Codified Ordinances required: "Two (2) off-street enclosed parking spaces ... for each dwelling unit"—either as an attached garage or a detached garage. Cimino had demolished the existing garage and planted a garden in its place. He now sought a variance to permit him to not have a garage on the property.

The City denied Cimino's variance request.

Cimino appealed.

The common pleas court affirmed the City's decision.

Cimino again appealed.

DECISION: Judgment of common pleas court affirmed.

The Court of Appeals of Ohio held that the City's decision to deny Cimino's variance request was supported by the preponderance of the evidence.

The court explained that the City's ordinances required that a "practical difficulty" must exist before a variance would issue. A "practical difficulty" exists if the area zoning requirement, as applied to the property owner, is unreasonable, said the court. The court further explained that in making the determination as to whether a property owner seeking an area variance has encountered practical difficulties in the use of his property, certain factors must be considered and weighed, including but not limited to:

> (1) whether the property in questions will yield a reasonable return or whether there can be any beneficial use of the property without the variance; (2) whether the variance is substantial; (3) whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variances; (4) whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage); (5) whether the property owner

> purchased the property with knowledge of the zoning restriction; (6) whether the property owner's predicament feasibly can be obviated through some method other than a variance; (7) whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.

Here, the court found that Cimino failed to demonstrate practical difficulty. The court noted that he was aware of the zoning provisions related to the garage before he purchased the property. In addition, he did not demonstrate a special condition or circumstance that existed on his property. Also, there was no evidence to support his contention that building a garage would not yield a reasonable return on his investment in the property. Furthermore, the variance he sought was "substantial" in that it would eliminate the entire garage structure (as opposed to requesting a variance for a single-car garage). Finally, the variance he sought was "inconsistent with the spirit and intent of the zoning code, which is intended to protect property values in residential areas."

Considering and weighing the specific factors, the court concluded that Cimino had not encountered a practical difficulty and was not entitled to the grant of a variance.

See also: *Duncan v. Village of Middlefield, Ohio, 479 U.S. 986, 107 S. Ct. 576, 93 L. Ed. 2d 579 (1986).*

Case Note: Cimino also made two other arguments related to the court of common plea's review of evidence, which the appellate court rejected.

Zoning News from Around the Nation

CALIFORNIA

The state assembly recently approved a bill that would dissolve the city of Vernon. Reportedly, this is the first known attempt by legislature to disincorporate a charter city. The city of fewer than 100 residents is alleged to have had a "pattern of unprecedented corruption." Expected amendments to the bill include those that would "preserve the city's utility rates and zoning."

Source: *Los Angeles Times*; http://latimesblogs.latimes.com

San Francisco Mayor Ed Lee recently signed legislation that allows "urban agriculture" throughout the city. Previously, old zoning laws prohibited the selling of homegrown produce without a permit and a Planning Commission hearing. The new ordinance now "allows for the sale, pick-up and donation of fresh food and horticultural products grown on-site throughout the city. It also allows for the sale of 'value-added products' like jams, pickles or pies where the primary ingredients are grown and produced on-site in all areas except those zoned exclusively for residential uses."

Source: *San Francisco Chronicle*; www.sfgate.com

FLORIDA

The state house is considering a bill, HB 7195, that would, among other things, prohibit cities and counties from imposing zoning and building restrictions only on charter schools.

Source: *Miami Herald*; www.miamiherald.com

The state house recently passed a bill that "gives teeth to an existing law that prohibits local governments to pass firearm regulations." The bill allows "those 'harmed' by local gun regulations [to] sue local governments and receive up to $100,000." "The bill has implications for dozens of firearms discharge ordinances in communities across the state." The bill still awaits consideration by the state senate.

Source: *Pensacola News Journal*; www.pnj.com

HAWAII

Pending in the state legislature is a bill, HB 44, which aims to suppress prostitution by instituting a penalty of a year in jail for solicitations within 750 feet of a school or park.

Source: *Honolulu Civil Beat*; www.civilbeat.com

MINNESOTA

The state legislature is considering bills (Senate File 270 and House File 389) that would provide that: "counties, cities, and towns may only adopt interim zoning maps or ordinances, commonly called moratoria, after public notice and a hearing and a two-thirds vote of the governing body." The bills would also prevent interim ordinances from delaying, impeding, or interfering with uses, developments, or subdivisions for which a complete application is pending before the governing body. It also would set pa-

rameters on the conditions that a municipality may put into a development contract.

Sources: www.senate.leg.state.mn.us; *Winona Daily News*; www.winonadailynews.com

NEW JERSEY

The state senate recently passed legislation that would permit municipalities to "restrict the ability of known sex offenders to live near places where children congregate." "The bill (S-837) responds to a 2009 state Supreme Court decision which invalidated 118 local ordinances that sought to create such 'pedophile-free zones' within communities." The ordinances were invalidated because the then-primary source of "state law dealing with sexual offenders was silent on the subject of restricting where registered sex offenders may live." The bill "would permit a municipality to enact an ordinance that would prevent most sex offenders convicted of committing a crime against a minor from residing within 500 feet of a school, playground or child care center." Towns would not be able to "create a zoning scenario that would essentially block an offender from living anywhere within the municipality." The state assembly will now consider the bill.

Source: *Gloucester County Times; www.nj.com*

PENNSYLVANIA

Collier is considering a proposed ordinance that would "limit gas and oil well use to nonresidential areas, establish zoning regulations for applicable mineral removal and define and permit natural gas processing plants, natural gas compressor stations and refinery uses." Among other things, the "proposed ordinance would prohibit drilling in residentially zoned areas, but allow it in other zones, including special conservation."

Source: *Pittsburgh Post-Gazette*; www.post-gazette.com