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Estoppel—City Employee Provides Applicant with Wrong Survey on Which Building Permit is then Based

Applicant says this error equitably estops the city from enforcing related zoning regulations against him

Citation: *City of North Oaks v. Sarpal, 2011 WL 1775532 (Minn. 2011)*

MINNESOTA (05/11/11)—This case addressed the issue of whether a municipality can be estopped from enforcing zoning laws when a mistake by the city contributes to the zoning violation.

The Background/Facts: Dr. Rajbir S. Sarpal ("Dr. Sarpal") and his wife, Dr. Carol L. Sarpal, (the "Sarpals") sought to build a shed on property (the "Property") they owned in North Oaks, Minnesota. The Sarpals' use of their property was subject to relevant restrictions: (1) the North Oaks Company reserved an easement over the northernmost 15 feet and the westernmost 15 feet of the Property for use as a future trail; and (2) city ordinances provided that structures could not be built within 30 feet of property lines.

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In obtaining a building permit for the shed, the Sarpals needed an "as-built survey" showing the "location of [the] proposed shed." Dr. Sarpal asked a city employee for an "as-built survey" for his Property. The employee gave Dr. Sarpal a document, which the employee said was what Dr. Sarpal needed. The survey was dated before the Sarpals' house was constructed and showed a "proposed house" and the 30-foot setback.

Dr. Sarpal drew the location of the proposed shed on the survey. As drawn by Dr. Sarpal, the shed did not encroach on the 30-foot setback or the trail easement.

The city granted the Sarpals a building permit to construct the shed. When Mr. Sarpal constructed the shed, he located it by measuring from the house as it was actually built on his property; he did not measure the location from the lot lines on his property. After the shed was constructed, the city issued a certification of completion.

Sometime thereafter, the Sarpals received notice from the City that the Sarpals' shed encroached upon the trail easement and the 30-foot setback. The Sarpals applied for a variance, which the city denied. The city told the Sarpals that the shed would have to be moved. The Sarpals never moved the shed.

In 2008, the City brought a legal action against the Sarpals. The action alleged a violation of the city code, trespass, and nuisance. It asked the court to order the Sarpals to remove the shed from the easement area.

The Sarpals argued that the city was equitably estopped from enforcing its zoning ordinance against them because the city provided the survey on which Dr. Sarpal relied in applying for his building permit.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary judgment in favor of the Sarpals. The court dismissed all of the city's claims against the Sarpals.

The city appealed, and the court of appeals affirmed.

The city again appealed.

DECISION: Reversed; matter remanded.

The Supreme Court of Minnesota held that: "A simple mistake by a government official does not constitute the wrongful conduct necessary to establish [a defense] of equitable estoppel." In other words, the city could not be estopped from enforcing zoning laws because of the mistake by the city employee, which contributed to the Sarpals' zoning violation.

The court explained that the Sarpals, in seeking equitable estoppel against the city, had to establish four elements: (1) "wrongful

conduct" on the part of an authorized city agent; (2) that the Sarpals reasonably relied on the wrongful conduct; (3) that the Sarpals incurred a unique expenditure in reliance on the wrongful conduct; and (4) that the balance of equities weighed in favor of estoppel.

The city had argued that the Sarpals could not establish the first of those necessary elements: wrongful conduct by the city employee. The Supreme Court of Minnesota agreed. It said that "wrongful conduct" required "some degree of malfeasance." Wrongful conduct could not be established by "simple inadvertence, mistake, or imperfect conduct." It found that, here, "the City's actions did not constitute anything other than a simple mistake." The city employee made a mistake in giving the Sarpals a survey that was not, in fact, an as-built survey. The court also found that the city's building inspector did not act wrongfully when reviewing the plans submitted by the Sarpals, as "there was no reason why the City should have noticed or corrected the Sarpals' error, or declined to issue a permit on the basis of the Sarpals' error."

Having found the Sarpals failed to satisfy the first element of equitable estoppel, the court concluded that the city was not estopped from enforcing its zoning ordinance against the Sarpals. The court remanded the matter to the district court for further proceedings.

See also: *Mesaba Aviation Division of Halvorson of Duluth, Inc. v. Itasca County, 258 N.W.2d 877 (Minn. 1977).*

See also: *Brown v. Minnesota Dept. of Public Welfare, 368 N.W.2d 906 (Minn. 1985).*

See also: *Ridgewood Development Co. v. State, 294 N.W.2d 288 (Minn. 1980).*

See also: *Bond v. Commissioner of Revenue, 691 N.W.2d 831 (Minn. 2005).*

Conditions—Board Requires, as a Condition of Subdivision Approval, Transfer of Open Space to Town

Applicant argues condition violates state statutory law

Citation: *Collings v. Planning Bd. of Stow, 79 Mass. App. Ct. 447, 2011 WL 1744264 (2011)*

MASSACHSUETTS (05/10/11)—This case addressed the issue of "whether, as a condition of granting approval, [a municipal planning

board in Massachusetts] may require dedication of open space for public use and actual conveyance of that open space to the town in exchange for certain waivers without violating [state statutory law]."

The Background/Facts: Robert and Caroline Collings and Linda S. Cornell (collectively, the "Collings") owned over 55 acres of land in the town of Stow, Massachusetts (the "town"). The Collings submitted to the town's planning board (the "Board") a definitive subdivision plan seeking approval for five residential lots.

As a condition of approval of the subdivision plan, the Board required the Collings to modify the plan to show a minimum of 10% (5½ acres) of the land to be dedicated for open space with public access acceptable to the Board. Additionally, the Board required that the Collings offer the open space parcels: first to the town's conservation commission for open space and "passive recreation with public access in perpetuity"; or should the commission decline, "to a land trust or similar nonprofit organization subject to a Conservation Restriction with the [t]own named as a benefitted party."

The Collings appealed to Land Court. They argued that the Board exceeded its authority in imposing the condition that the Collings transfer open space to the conservation commission or a land trust. They pointed to Massachusetts statutory law, Mass. Gen. L. c. 41, § 81Q. Section 81Q prohibits, as a condition of approval of a subdivision, dedication of subdivision land to the public use or conveyance to the town for any public purpose without just compensation.

The Board maintained that the condition was permissible pursuant to Mass. Gen. L. c. 41, § 81R. Section 81R provides that: "[a] planning board may ... where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations, and ... approve a plan on conditions limiting the lots upon which buildings may be erected ...." The Board maintained that § 81R gave it the authority to require open space for passive recreation with public access in exchange for strict compliance—waivers—from the requirements of the town's subdivision rules and regulations. Here, the Board had waived a street length regulation—allowing a 1300-foot cul-de-sac instead of limiting the Collings to a 500-foot cul-de-sac.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the Land Court issued summary judgment in favor of the Board. The judge reasoned that the Board's condition did not violate § 81Q because it was in exchange "for proper and rational consideration"—the waiver of the street length rule.

The Collings appealed.

DECISION: Vacated, and matter remanded.

The Appeals Court of Massachusetts held that the Board exceeded its authority under § 81Q when it required, as a condition of subdivision plan approval, that the Collings reserve open space for public use and transfer the property to the town or a land trust.

In reaching its decision, the Appeals Court looked to the language of §§ 81Q and 81R. The court agreed that, in general: "a condition requiring the dedication of open space which in effect reasonably limits the number of buildable lots, imposed out of safety concerns arising from the length of the street, would not run afoul of § 81Q." However, it found that, here, the Board "did not limit itself to a reasonable open space requirement"; instead, it "went much farther and required dedication of open space for public use, including the actual transfer of that open space to the town or a land trust."

Moreover, disagreeing with the Land Court, the Appeals Court found the condition was "imposed without compensation and [did] not serve the purposes of the subdivision control law." The court found "no authority for the proposition that the grant of a waiver may constitute 'just compensation' as that term is used in § 81Q." "That waivers from some of the subdivision rules and regulations [were] required [did] not authorize [the Board] to exact conditions expressly prohibited by § 81Q, and unrelated to the regulation sought to be waived or the purposes of the subdivision control law."

Furthermore, the court said, the prohibition of § 81Q applied "where a planning board requires a subdivision applicant to grant land for a public purpose unrelated to adequate access and safety of the subdivision." The court found that was exactly what happened here: the Board failed to identify concerns within the scope of the subdivision control law that justified the transfer of the property to the public without compensation which were not already addressed by simply requiring a dedication of open space (without a transfer of the property to the public). The court concluded that, while an open space requirement may be acceptable, the dedication of the open space for public use and the transfer to the town had no relation to the waiver of the dead-end street length rule or safety issues.

See also: *Sullivan v. Planning Bd. of Acton, 38 Mass. App. Ct. 918, 645 N.E.2d 703 (1995).*

Case Note: In its decision, the court noted that it thought that "if the Legislature intended to eliminate the prohibition of § 81Q where waivers are required in the context of subdivision control, it would have expressly so provided."

Case Note: The court also "[could] not resist concluding" that, however worthy the objectives, the conditions imposed by the Board attempted "to achieve a result which properly should be the subject of eminent domain."

Standing—City Residents Appeal Subdivision Plat Approval

City argues residents lack standing because their alleged injuries are too general

Citation: *Heffernan v. Missoula City Council, 2011 MT 91, 2011 WL 1652154 (Mont. 2011)*

MONTANA (05/3/11)—This case addressed the issue of whether city residents had standing (i.e., the legal right) to challenge a city's decision to approve zoning a preliminary plat for a subdivision.

The Background/Facts: In December 2007, the Missoula City Council (the "City") approved zoning and preliminary plat for a 37-lot subdivision known as Sonata Park in an area of the city known as Rattlesnake Valley. Several city residents (the "Residents") opposed the subdivision. The Residents included an adjacent landowner, neighbors who lived within 600 feet of the proposed subdivision, and a neighborhood association. The Residents appealed to court the City's decisions. Among other things, they alleged that the City: had violated subdivision and zoning laws; and that the City's approval of Sonata Park was arbitrary, capricious, and unlawful because the subdivision was not in substantial compliance with the Rattlesnake Valley neighborhood growth plan (the "Rattlesnake Plan").

The City asked the court to dismiss the Residents' action. It argued that the Residents did not have standing (i.e., the legal right to bring the action). Specifically, the City argued that none of the Residents had alleged or shown: "material injury to their property or its value, a specific personal and legal interest, and a special and injurious effect flowing from subdivision approval."

The district court disagreed. It reasoned that the adverse impacts cited by the Residents (such as increased traffic, noise, and pollution, and disruption of wildlife in the area) could materially injure the Residents' properties or the value of the Residents' properties. Eventually, finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the court issued summary

judgment in favor of the Residents. It found that the City's approval of the Sonata Park subdivision was a "significant deviation from the Rattlesnake Plan and therefore arbitrary and capricious."

The City appealed. Among other things, the City, on appeal, argued that the Residents did not have standing because their alleged injuries "could apply to any new residence" and "[were] ambiguous and too general to meet the standard set out in [Montana Statutory law—] § 76-3-625, MCA."

DECISION: Affirmed.

The Supreme Court of Montana held that the Residents all had standing to bring the action.

The court explained that to have standing, the Residents had to "clearly allege a past, present, or threatened injury to a property or civil right—i.e., an invasion of a legally protected interest." The court noted that "there is no right to appeal a governing board's approval of a preliminary subdivision plat, except as provided by statute." The court acknowledged that Montana had such a statute that provided a right to such an appeal.

Section 76-3-625 provides that certain parties who are "aggrieved" by a decision of the governing body to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat may appeal to the district court. Pursuant to the statute, those parties who may appeal include: "landowner[s] with a property boundary contiguous to the proposed subdivision"; or "private landowner[s] with property within the county or municipality where the subdivision is proposed if th[e] landowner[s] can show a likelihood of material injury to the landowner's property or its value." Also pursuant to the statute, an "aggrieved" party is: "a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, who has been or is likely to be specifically and injuriously affected by the decision."

Again, the City had argued that the Residents did not have standing here because they were not "aggrieved" since their alleged injuries "could apply to any new residence" and "[were] ambiguous and too general" to meet the standard set out in the statute. The Supreme Court of Montana disagreed.

The court noted that the Montana Subdivision and Platting Act was enacted to "promote the public health, safety, and general welfare by regulating the subdivision of land." As such, the court found § 76-3-625 was "entitled to liberal construction with a view towards the accomplishment of its highly beneficial objectives." The court found that the adjacent landowner had standing to challenge the City's decisions because: she shared a boundary with the subdivision; and was

aggrieved in that she alleged that development and traffic would affect wildlife and the rural quality of her neighborhood. The court found that the neighbors who lived within 600 feet of the subdivision had standing because: they were adjacent to its sole access road such that they would be directly affected by increased traffic; and they had averred that the development would have an adverse impact on wildlife, noise, and traffic, and would create light pollution. The court found that the neighborhood association had standing because: some of its members had standing to sue; the interests the association sought to protect were germane to its purpose of dealing with the land use issues in the neighborhood and protection of the area plan; and the declaratory and injunctive relief sought by the action did not require individual participation of association members.

See also: *Aspen Trails Ranch, LLC v. Simmons, 2010 MT 79, 356 Mont. 41, 230 P.3d 808 (2010).*

See also: *Little v. Board of County Com'rs of Flathead County, 193 Mont. 334, 631 P.2d 1282 (1981).*

See also: *Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).*

Nonconforming Use—Property Owner Claims Use is a Valid Nonconforming Use

He says nonconforming use was established when prior owners of adjacent property used portions of his property for such use

Citation: *McMilian v. King County, 2011 WL 1631853 (Wash. Ct. App. Div. 1 2011)*

WASHINGTON (05/02/11)—This case addressed the issue of whether a nonconforming use can be lawfully established even where the individual engaging in the use of property is a trespasser.

The Background/Facts: Leo McMilian ("McMilian") owned two adjacent parcels in an unincorporated area in the county. He purchased the parcels—a northern parcel and a southern parcel—in 2002. The northern parcel had been used as a wrecking yard business since prior to 1958. The southern parcel was used by prior owners for logging. However, prior owners of the northern parcel had also used part of the southern parcel for the wrecking yard business. Thus, the wrecking yard "bulged" past the northern parcel's property lines.

In 2007, McMilian was using both parcels for an automobile wrecking yard. At that time, both parcels were zoned for residential development. In 1958, the county's zoning ordinances were amended such that a wrecking yard was prohibited in the area.

Also in 2007, the county's Department of Development and Environmental Services (DDES) investigated numerous complaints about McMilian's use of the southern parcel. The DDES notified McMilian that, among other things, his use of the southern parcel for the wrecking business violated the county code because it was not a residential use in the residential zone.

McMilian appealed. He argued that the operation of the wrecking yard on the southern parcel was a valid nonconforming use. He said this was because the wrecking yard business on the northern parcel, which was in effect before the zoning amendments of 1958, had spilled over onto the southern parcel for years.

The hearing examiner concluded that the owners of the northern parcel, as trespassers on the southern parcel, could not establish a valid nonconforming use.

McMilian appealed. The superior court reversed in favor of McMilian.

The County appealed.

DECISION: Affirmed in part and remanded.

The Court of Appeals of Washington, Division 1, held that a trespasser cannot establish a valid nonconforming use.

The court explained that in order to establish that a valid nonconforming use exists, a landowner must prove that: (1) the use existed before the county enacted the contrary zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year prior to the relevant change in the zoning code. Thus, said the court, generally speaking, a valid nonconforming use is one which lawfully existed prior to the adoption of the contrary zoning legislation. "The requirement that the use be lawfully established is not limited to compliance with zoning legislation but, rather, also demands compliance with general statutory requirements," said the court. This is because "[n]onconforming use ordinances 'are not intended to protect uses which were not legally commenced or continued.'" Thus, "an illegality, even one arising from a violation of legislation other than land use laws, would render a use unlawful such that it could not be established as a valid nonconforming use."

This rule—requiring compliance with both land use legislation and with general legislation, explained the court, is consistent with the purpose underlying the continuance of nonconforming uses: to avoid constitutional due process concerns arising from interference with a landowner's property rights. It is the property owner whose property rights are affected by changes in zoning legislation, and, thus, it is the property owner who is afforded constitutional due process protection. Since such constitutional concerns do not arise where a trespasser establishes the use, a trespasser onto land cannot lawfully establish a nonconforming use, concluded the court.

See also: *State ex rel. Miller v. Cain, 40 Wash. 2d 216, 242 P.2d 505 (1952).*

See also: *First Pioneer Trading Co., Inc. v. Pierce County, 146 Wash. App. 606, 191 P.3d 928 (Div. 2 2008), review denied, 165 Wash. 2d 1053, 208 P.3d 554 (2009).*

Case Note: The court also found that the hearing examiner improperly presumed that the owner of the northern parcel who used part of the southern parcel as a wrecking yard was trespassing. The court said that where the southern parcel was "vacant, open, unenclosed, and unimproved," use by the owner of the northern parcel was presumed to be permissive. Therefore, said the court, if McMilian could establish that the southern parcel was being used by the owners of the northern parcel for a wrecking yard prior to 1958, then McMilian would be entitled to the presumption that the operators of the wrecking yard were using the southern parcel "with the true owner's permission"—and thus were not trespassers.

Zoning News from Around the Nation

GEORGIA

Governor Nathan Deal recently signed legislation authorizing the incorporation of Peachtree Corners, a community near Norcross in Gwinnett County. Area residents will vote in November on whether to incorporate.

Source: *The Atlanta Journal Constitution; www.ajc.com*

MINNESOTA

The state senate's Local Government and Election Committee recently voted to advance proposed legislation—Senate File 270, which would prevent local units of government from halting the construction of any project through the use of an interim ordinance once the developer has applied for permits. Reportedly, local officials oppose the measure, saying they often do not get information about a project until after permit application.

Source: *Timberjay*; www.timberjay.com

NEW YORK

The state senate recently approved legislation, which reinstates a former law—"Article 10." The legislation would "speed the development of new power plants by establishing state oversight of the siting and permitting process, trumping local zoning boards." Essentially, the legislation would allow power plant developers to avoid the process of completing separate reviews before various municipal and county governments and agencies. The bill does not yet have a sponsor in the assembly.

Source: *The Business Review*; www.bizjournals.com

OREGON

The state senate is considering proposed legislation—Senate Bill 766, which would "streamline the permit process for up to 10 industrial plants and designate up to 15 more regionally significant industrial areas ...." The bill reportedly: "shortens the time line for permits and narrows the grounds for appeal but still allows public comment and local government control."

Source: *The Oregonian*; www.oregonlive.com

WASHINGTON

The Tacoma City Council is considering an ordinance that would place a six-month moratorium on any new conventional or digital billboards in the city. Reportedly, "[i]t's meant as a way to more thoughtfully contemplate the complicated issues surrounding proposed billboard regulation changes ...." If the ordinance is approved, it "would enact a moratorium for 180 days and refer the issue to the Planning Commission. The commission would then take up the issue and hold a public hearing on July 12 to determine how long the moratorium is needed."

Source: *The News Tribune*; http://blog.thenewstribune.com/politic

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Standing—After Being Sued For Denying Variance, Town Settles With Project Proponent

Abutting landowners, who intervened in the matter, appeal, seeking to defend denial of variance

Citation: *Industrial Communications And Electronics, Inc. v. Town of Alton, N.H., 2011 WL 1887334 (1st Cir. 2011)*

The First Circuit has jurisdiction over Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.

FIRST CIRCUIT (NEW HAMPSHIRE) (05/19/11)—This case addressed the issue of whether property owners who had intervened in a case had standing to defend denial of a zoning variance even after the town had sought to enter into a consent decree with the party seeking the variance.

The Background/Facts: Industrial Communications and Electronics, Inc. ("Industrial Communications") sought to construct for two wireless companies a cell phone tower in the Town of Alton, New Hampshire (the "Town"). Industrial Communications

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claimed that only one site was suitable for the tower and that the tower needed to be 120 feet above ground level to be effective. The Town's zoning ordinance limited cell phone towers to 10 feet above the average tree canopy. In this case, the ordinance would have limited Industrial Communications tower to 71 feet above ground level. Industrial Communications applied for a variance to construct the tower.

The Town's Zoning Board of Adjustment (the "Board") denied the variance. The Board found that Industrial Communications "failed to meet the criteria for a variance under New Hampshire law."

Industrial Communications and the two wireless providers then filed a lawsuit in federal district court against the Town under § 704(a) of the federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C.A. § 332(c)(7). Section 704(a) allows—in defined circumstances—an aggrieved person or entity to bring a suit to override state or local law in order to construct cell phone towers. Section 704(a) allows a court to override a local restriction if the court finds that the local action or refusal to act violates one or more of the Act's grounds for relief. Here, Industrial Communications claimed that the Town's denial of the variance would effectively "prohibit[] the provision of personal wireless services in violation of the Act."

The Town initially defended the case. David and Marilyn Slade (the "Slades"), who owned property within 200 feet of the proposed tower, intervened in the case. The Slades "stood silent as the Town handled the defense."

Eventually, the Town and Industrial Communications negotiated a settlement. They agreed to vacate the Board's variance denial and to permit a 100-foot tower—without further meetings, hearings, or decisions of the Board.

The federal court entered, as a judgment in the case, the consent decree proposed by Industrial Communications.

The Slades then appealed. On appeal, Industrial Communications argued that the Slades were not entitled to make claims on their own behalf under the Act and therefore did not have standing (i.e., the legal right) to pursue the case.

DECISION: Vacated, and matter remanded.

The United States Court of Appeals, First Circuit, first agreed with Industrial Communications that the Slades were not entitled to

make claims on their own behalf under the Act. The Act empowers only those "adversely affected" by denials of requests to construct wireless facilities, found the court. Therefore, the Slades, who were offended by the grant of the variance under the settlement, had no claim of their own under the Act.

However, the court held that the Slades did have standing to defend the denial of the zoning variance even after the town sought to enter into the consent decree. The court found that the Slades had standing under Article III of the United States Constitution.

The court explained that to have Article III standing to act as independent litigants, the Slades had to have "suffered an 'injury in fact' that [was] causally connected to the complained-of conduct and that [would] likely be redressed by a favorable federal court decision." The court found that the Slades had claimed protectable economic and other interests that would be directly impaired by the construction of a tower. (They had claimed that the tower would "stand[ ] prominently in the line of sight of the panoramic view ... of Lake Winnipesaukee and the surrounding mountains" that they currently enjoyed from their property, and that the construction of the tower would cause them economic as well as aesthetic harm by diminishing the property's value.) More importantly, found the court, the Slades had a legal interest under state law in the protection that the zoning laws afforded to their property (i.e., they could sue in state court to overturn the variance if it were granted unlawfully). In other words, the consent decree would effectively serve as a "legally operative judgment that overrides state law and the Slades' rights under state law that would prevail unless overridden by the decree." The court found this injury fulfilled the Article III requisites. The court therefore concluded that, unless a violation of the Act was proven, the Slades were entitled to resist the entry of the consent decree between the Town and Industrial Communications because the consent decree would terminate the Slades' protectable state rights.

Industrial Communications maintained that denial of the variance did violate the Act. The court found the Slades could defend that denial of the variance, as parties to the case, with independent interests to protect that were threatened by the decree. The court concluded that the Town was not obliged to defend the suit but that the Slades were free to carry on the suit and protect their interests directly.

The court remanded the matter for further proceedings to determine whether Industrial Communications was entitled to relief—from the denial of the variance—under the Act.

See also: *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 34 Env't. Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913 (1992).*

See also: *Daniels v. Town of Londonderry, 157 N.H. 519, 953 A.2d 406 (2008).*

Case Note: The court acknowledged that "[t]he situation could be quite different if the Slades' legal rights under state law were unaffected by the decree." However, since the consent decree would eliminate those rights, the court determined that the "most appropriate time and place" to raise the issue of the validity of the decree was in the court considering the decree.

Case Note: The Slades had also challenged, under state law, the authority of the town to settle the case on behalf of the Board. The court found that that state law issue need not be resolved in this case because the Slades were free to carry on the suit and protect their interests directly.

Nonconforming Use—City Refuses to "Grandfather In" Property Owners' Short-Term Rental Use

Owners argue use is legally nonconforming because they complied with unchallenged interpretation of old ordinance

Citation: *Allen v. City of Key West, 2011 WL 1485992 (Fla. Dist. Ct. App. 3d Dist. 2011)*

FLORIDA (04/20/11)—This case addressed the issue of whether owners' use of their properties for short-term rentals was a lawful nonconforming use in light of the fact that their use complied with their unchallenged interpretation of the old ordinance.

The Background/Facts: Russell and Linda Allen and several others (collectively, the "Owners") owned property in the City of Key West

(the "City"). The Owners purchased their properties in the City "with the intent to use them as short-term rentals for a portion of each year in order to offset their purchase costs." At the time the Owners purchased their properties, the City's 1986 Growth Management Ordinance ("GMO") was in effect, as part of the City's Land Development Regulations ("LDRs"). The GMO defined "transient housing" as: "commercially operated housing, principally available to short-term visitors ..." (the "Former Transient Definition").

The City eventually revised its ordinances, modifying the definition of "transient housing" to remove the "principally available" language.

The Owners then asked the City to have their short-term rental use deemed a "grandfathered in," lawful nonconforming use. The City denied that request. The Owners then filed the instant suit for declaratory and injunctive relief. The trial court issued judgment denying the Owners' claims against the City.

The Owners appealed.

DECISION: Reversed, and matter remanded.

The District Court of Appeal of Florida, Third District, held that the Owners' use of their respective properties for short-term rental was a lawful nonconforming use that was "grandfathered."

In so holding, the court found that some property owners and developers had interpreted the Former Transient Definition (which contained the "principally available" language) to mean that an owner could rent his or her residential dwelling for less than half the year without the dwelling losing its residential status (the "50% rule"), and therefore without the need for a City-issued transient license. Under that interpretation, the Owners involved in this case believed that their properties were nontransient because they were used for short-term rentals for less than half of any given year. Under that belief, the Owners had secured necessary nontransient occupational licenses. Because that interpretation of the ordinance went "unchallenged by the City," the court found that the Owners' use of their properties for short-term rentals complied with the Former Transient Definition—and thus was now a lawful nonconforming use given that: (1) the Owners had engaged in short-term rental of their units prior to the change in the definition of "transient housing"; (2) the Owners complied with the 50% rule; and (3) the Owners had obtained nontransient occupational licenses.

See also: *Rollison v. City Of Key West, 875 So. 2d 659 (Fla. Dist. Ct. App. 3d Dist. 2004).*

Limitation of Actions—Individuals Challenge City's Action in Rejecting a Project Proposal, Saying It Violated State Laws

City contends challenge is untimely because it was not brought within statutory limitations period

Citation: *Haro v. City of Solana Beach, 2011 WL 1797292 (Cal. App. 4th Dist. 2011)*

CALIFORNIA (05/12/11)—This case addressed the issue of when a cause of action challenging a city's denial of a project accrued, and thus, whether the action was brought timely.

The Background/Facts: In April 2008, the City of Solana Beach (the "City") determined that a mixed-use development proposal—the Cedros Crossing proposal—was inconsistent with certain local zoning and specific plan requirements. The city directed the project's proponents to redesign the project.

About two months later, on July 3, 2008, Rosa Haro and Carlos Ibarra (collectively, the "Plaintiffs") gave the City written notice that the City's failure to approve the project constituted a failure to implement the City's Housing Element. The City's Housing Element was a required part of the City's general plan. It contained policies to provide for the City's regional housing needs.

The Plaintiffs indicated that they intended to take formal legal action if the City did not amend and/or implement the Housing Element.

The City responded by adopting Resolution 2008-152, retaining outside defense counsel to represent the City in the challenge to the Housing Element.

More than one year later, on September 2, 2009, the Plaintiffs filed a legal action against the City. Among other things, the Plaintiffs action alleged that the City "failed to implement" its Housing Element by rejecting the Cedros Crossing proposal.

The City demurred to all causes of action. The City argued that the Plaintiffs' claims were untimely. The City pointed to California Government Code § 66499.37, which establishes a 90-day limitations period for claims challenging a public entity's actions "concerning a subdivision," including "the approval of a tentative map or final map."

The Plaintiffs argued that the suit was governed by the one-year limitations period of § 65009(d) because it pertained to affordable housing and alleged violations of housing element law.

The trial court agreed with the City that § 66499.37 applied. It held that the Plaintiffs' claims were untimely because they were filed more than 90 days after the City took action on the Cedros Crossing project.

The Plaintiffs appealed. On appeal, they again argued that the one-year limitations period of § 65009(d) applied.

DECISION: Affirmed.

The Court of Appeal, Forth District, Division 1, California, concluded that, even assuming the Plaintiffs were correct that § 65009(d) applied, their action was untimely because they filed it more than one year after the limitations period commenced.

Section 65009(d)(2) states in relevant part: "A cause of action brought pursuant to [§ 65009(d)] shall not be maintained until 60 days have expired following notice to the city ... by the party bringing the cause of action .... A cause of action brought pursuant to [§ 65009(d)] shall accrue 60 days after notice is filed ***or*** the legislative body takes a final action in response to the notice, whichever comes first."

The court found that the City's "final action" on the Plaintiffs' notice occurred before "60 days after notice [was] filed"; the City's "final action" in response to the Plaintiffs' notice was its August 27, 2008 resolution. Thus, here, the City's final action came first (occurring prior to 60 days postnotice). It was therefore from August 27, 2008, that the one-year limitations period ran. Thus, under § 65009(d), the limitations in the case ended on August 28, 2009, concluded the court. Since the Plaintiffs did not file their complaint until September 2, 2009, it was untimely.

Case Note: The Plaintiffs had contended that under § 65009(d), the statute did not begin to accrue until 60 days after the City took "final action" on the notice. This argument was based on a grammatical construction of § 65009(d)(2). The court rejected that interpretation, finding it would violate the fundamental statutory interpretation principles because the statutory phrase "whichever occurs first" would become meaningless.

Standing—Abutting Property Owners Challenge Grant of Variance to Neighbor

Neighbor maintains abutters' alleged injury to view is insufficient for abutters to establish standing

Citation: *Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 2011 WL 1796528 (2011)*

MASSACHUSETTS (05/13/11)—This case addressed the issue of whether abutting property owners' alleged injury to their view from their neighbors proposed project was sufficient to give them standing (i.e., the legal right) to challenge the grant of a variance for the project to their neighbors.

The Background/Facts: Rosanne LaBarre and Jon Scott (collectively, the "Scotts") owned a home in the Town of Sutton (the "Town"). Their property had frontage on a pond and was within an R-1 zoning district. The Town's bylaw provided certain dimensional and density provisions for lots in the R-1 zoning district.

The Scotts sought to build a two-car garage, with attic space above, on a building footprint 24 feet by 24 feet. The Scott's existing use, while historically consistent with the cottage-campsite character of several surrounding properties, was nonconforming as to density and dimensions under the bylaw. The addition of the garage would increase the existing density and dimensional nonconformity. It would also partially obscure the view of the pond from the home of the abutting property owners—Robert and Linda Marhefka (the "Marhefkas").

In furtherance of their proposed garage, the Scotts applied to the Town's Zoning Board of Appeals (the "Board") for a necessary variance from the density and dimensional requirements of the bylaw.

The Board granted the Scotts' requested variance.

The Marhefkas appealed the grant of the variance to Land Court.

The Scotts argued that the Marhefkas' action failed because the Marhefkas lacked standing (i.e., legal right) to bring the action. The Scotts argued that the Marhefkas had not alleged violation of an interest protected by the Town's bylaw, which was required for standing.

The Land Court judge agreed with the Scotts. Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the judge issued summary judgment in favor of the Scotts. The judge determined that the Marhefkas' claims of loss of view and resulting diminution of property value were not protected

interests under the bylaw, as required for standing under Massachusetts statutory law (Mass. G.L. c. 40A, § 17).

The Marhefkas appealed.

DECISION: Reversed, and matter remanded.

The Appeals Court of Massachusetts concluded that the Marhefkas "did assert a competent basis for standing."

The court explained that under the Zoning Act, Mass. G.L. c. 40A, § 17, only a "person aggrieved" may appeal a decision of a zoning board. In order to qualify as a "person aggrieved," said the court, one must assert "a plausible claim of a definite violation of a private right, property interest, or legal interest." Moreover, "[t]he right or interest asserted must be one that the [bylaw] under which a plaintiff claims aggrievement intends to protect." Such a protected interest, further explained the court, can arise from: the bylaw's express language, or implicitly from the intent of the bylaw's provisions.

Here, the court noted that the applicable bylaw "extensively regulate[d] the dimensions of the lots and density of use. The front, rear, and side yard criteria [were] extensive." The bylaw defined "open space" as "[t]he portion of the lot area not covered by any structure and not used for drives, parking, or storage ...." The bylaw also described "yard" as: "[a]n undeveloped, naturally vegetated and/or landscaped strip ... unobstructed from the ground upward and unoccupied except by specific structures and/or uses allowed by the provisions of [the bylaw]." The bylaw specifically noted: "Said yard is intended to provide aesthetic value as well as serve as a spatial and visual buffer between lots."

Disagreeing with the Land Court judge, the appellate court found that the bylaw clearly "identifie[d] open space and describe[d] 'yard' in such a manner as to make protection of view an implicit interest protected by the density and dimensional provisions of the by-law." The court found that "[a]s a matter of common sense, the yard and setback requirements ha[d] a purpose to preserve open space, implying the ability to see through the open space." As such, the court found that the Marhefkas' claims of diminished water view did allege a violation of an interest protected by the bylaw; this alleged view injury related to protected density and dimensional interests. Finding the Marhefkas had, in alleging the injury to their water view, alleged an injury of the density and dimensional interests protected by the bylaw, the court concluded that the Marhefkas "did assert a competent basis for standing."

See also: *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 540 N.E.2d 182 (1989).*

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

See also: *Dwyer v. Gallo, 73 Mass. App. Ct. 292, 897 N.E.2d 612 (2008), review denied, 453 Mass. 1103, 901 N.E.2d 138 (2009).*

Case Note: In its decision, the court also acknowledged that "of course, [a] claim of an impairment of water view, without more, does not confer standing. But where, as here, a neighbor asserts diminished water view as a result of further violation of by-law density and dimensional provisions, including those calling for a 'visual buffer' between lots, on an already non-conforming lot, then such an intrusion can confer standing."

Case Note: Because there was a "disputed degree of the injury," the court found the case was inappropriate for summary judgment. It therefore remanded the matter to the Land Court for further proceedings consistent with the appellate court's opinion.

Zoning News from Around the Nation

CALIFORNIA

Whittier city officials are considering a zoning ordinance that would allow and set standards for outdoor displays for businesses.

Source: *Whittier Daily News*; www.whittierdailynews.com

CONNECTICUT

Bridgeport City Council members have reportedly "submitted a proposal that would create a new law to further regulate adult entertainment establishments." The proposed resolution "would create a sexually-oriented business ordinance."

Source: *Connecticut Post*; www.ctpost.com

INDIANA

Dowagiac officials "are proposing an amendment to the zoning ordinance that would essentially ban the use of marijuana at all locations

other than a cardholder's residence." Essentially, the ordinance would "treat medical marijuana as a home occupation," requiring a business license. The proposed ordinance would also ban medical marijuana dispensaries from the city, and prohibit the sale of marijuana from storefronts or other businesses.

Source: *South Bend Tribune*; www.southbendtribune.com

MASSACHUSETTS

The state senate is considering Senate Bill 1019, the Comprehensive Land Use Reform and Partnership Act ("CLURPA"). The bill reportedly would "overhaul Chapter 40-A, the zoning enabling statute, which is essentially the set of rules that dictate how and what gets built on land in the Commonwealth."

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

NEW YORK

Recently proposed state legislation, S. 3472, seeks to "empower local governments and allow them to regulate natural gas drilling through local planning and zoning." Reportedly, "[u]nder the legislation, local governments would be given clear authority to enact and enforce local zoning ordinances or laws governing oil, gas, and other solution mining development."

Source: *WKTV*; www.wktv.com

PENNSYLVANIA

The state House Local Government Committee has "shelved" proposed legislation that "would have dispensed of existing law requiring government entities to advertise public notices in [newspapers]" and instead required online notification.

Source: *Williamsport Sun-Gazette*; www.sungazette.com

The state senate is considering a bill, Senate Bill 898, that would reportedly "grant preemption to quarries from all local ordinances." Reportedly, although the bill would "not exempt applications from quarry operators from complying with zoning," it provides that "all local ordinances and enactments purporting to regulate surface mining are hereby superceded" and proposes that it "shall apply to any subdivision and land development plan pending on or after the effective date of this section."

Source: *The Mercury*; http://pottsmerc.com