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Telecommunications Uses—City Council Denies Request to Construct Wireless Communications Tower

Applicant says city council's denial was unsupported by substantial evidence, in violation of the Telecommunications Act of 1996

Citation: *T-Mobile Northeast LLC v. City Council of City of Newport News, Va., 2012 WL 990555 (4th Cir. 2012)*

Contributors

Corey E. Burnham-Howard

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

FOURTH CIRCUIT (VIRGINIA (03/26/12)—This case addressed the issue of whether the denial of an application for a conditional use permit to construct a wireless telecommunications tower was supported by substantial evidence, as required by the Telecommunications Act of 1996, 47 U.S.C.A. § 332(c)(7)(B)(iii).

The Background/Facts: T-Mobile Northeast LLC ("T-Mobile") sought to fill a gap in its wireless service coverage by constructing a new wireless communication tower at an elementary school (the "School") in Newport News, Virginia (the "City"). As required by the City's zoning ordinance, T-Mobile applied for a conditional use permit ("CUP") to construct the tower at the School.

The City's Planning Department and the City's Planning Commission both recommended that the City approve T-Mobile's application. However, the City Council voted without explanation to deny T-Mobile's application.

T-Mobile subsequently sued the City and the City Council. It alleged violations of § 704 of the federal Telecommunications Act of 1996 ("TCA"). Among other things, T-Mobile alleged that the City Council's denial of its requested CUP was "not supported by substantial evidence," in violation of 47 U.S.C.A. § 332(c)(7)(B)(iii).

The district court agreed with T-Mobile. It issued an injunction directing that T-Mobile's application be granted.

The City Council appealed.

DECISION: Affirmed.

The United States Court of Appeals, Fourth Circuit, also agreed with T-Mobile that the City Council's denial of T-Mobile's CUP application was not supported by substantial evidence, in violation of TCA § 332(c)(7)(B)(iii).

In so holding, the court explained that the TCA "limit[s] the ability of state and local governments to frustrate the [ ] national purpose of facilitating the growth of wireless telecommunications, [but] also . . . preserve[s] state and local control over the siting of towers and other facilities that provide wireless services." In order to strike this balance, further explained the court, the TCA "preserves the power of the local zoning authority 'over decisions regarding the placement, construction, and modification of personal wireless service facilities,' while placing certain limits on that authority." One of those limitations is that the TCA requires that any decision by state or local government to deny a request to place or construct personal wireless service facilities "shall be in writing and supported by substantial evidence contained in a written record." (47 U.S.C.A. § 332(c)(7)(B)(iii).) "Substantial evidence," explained the court means: more than a mere scintilla, but less than a preponderance. Also, emphasized the court, in reviewing whether a decision is supported by substantial evidence, courts look only to whether the denial—not the application itself—is supported by substantial evidence.

Here, the court found that the City Council's denial of T-Mobile's CUP application was not supported by substantial evidence in light of the following

facts: there was no widespread opposition to the proposed wireless service tower as only four residents expressed opposition to the tower; and the substance of the residents' opposition consisted only of uncorroborated concerns about the effect of the tower on property values, passing comments about the tower's aesthetic impact, and speculative concerns about the risk posed to students by workers servicing the towers.

See also: *AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach, 155 F.3d 423 (4th Cir. 1998).*

See also: *Petersburg Cellular Partnership v. Board of Sup'rs of Nottoway County, 205 F.3d 688 (4th Cir. 2000).*

Case Note:

Opponents of T-Mobile's application had also expressed concerns about the health effects of building a tower on school property. The court noted that the TCA is clear that potential health effects flowing from the grant of a CUP have no place in the decision to deny a permit. (47 U.S.C.A. § 332(c)(7)(B)(iv).)

Nonconforming Use—County Says Use of Farm as "Materials Processing Facility" Violates County Code Restricting Such Uses

Business operator claims facility is nonconforming use despite the fact facility was not fully operational when restrictive regulation was adopted

Citation: *King County v. King County Dept. of Development and Environmental Services, 2012 WL 1071395 (Wash. Ct. App. Div. 1 2012)*

WASHINGTON (04/02/12)—This case addressed the issue of whether owners of an organic materials processing business had a valid "nonconforming use" of property even though their business was not in full operation prior to adoption of a regulation restricting such uses in certain areas.

The Background/Facts: Jeff Spencer ("Spencer") owned farmland in the Green River Valley in King County, Washington (the "County"). Ron Shear ("Shear") operated an organic materials processing business on Spencer's farm. Shear's business involved other farmers and nursery owners bringing to Shear organic vegetation and organic soils that he converted into matter used in animal bedding and fuel.

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After receiving a complaint about dust created by trucks driving up and down roads to Spencer's property, the County's Department of Development and Environmental Services ("DDES") issued a notice of violation on the grounds that Shear's use of the farm was an unauthorized "materials processing facility" in a critical area, namely a wetland and flood hazard area. Pursuant to a County Code regulation adopted in September 2004, "materials processing facilities" were not permitted in critical areas.

Spencer and Shear maintained that the use of Spencer's property as a materials processing facility was a valid nonconforming use. They contended that their use of the property amounted to operation of a materials processing facility before the regulation restricting such activity in critical areas came into existence in September 2004.

A hearing examiner agreed with Shear and Spencer.

DDES appealed under the Land Use Petition Act ("LUPA"). DDES pointed to the County Code's definition of "materials processing facility": "a site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source separated organic materials that is not the final disposal site." DDES noted that Spencer and Shear had not begun crushing and grinding the earth materials, organic vegetation and organic waste until the winter of 2004 or spring of 2005—after adoption of the September 2004 regulation restricting such activity in critical areas. DDES contended that every step involved in materials processing had to be completed in order to have "established" the use. Accordingly, DDES argued that Spencer and Shear had not been using the property as a "materials processing facility" before the restriction went into effect.

The superior court agreed with DDES and reversed the hearing examiner.

Shear and Spencer appealed. On appeal, Spencer and Shear countered DDES' arguments. They pointed out that the County Code did not require crushing and grinding to be taking place for the property to be used as a materials processing facility. Indeed, the Code indicated that property could be used as a materials processing facility where the operator is "otherwise preparing" the earth materials vegetation and organic waste. Moreover, Shear and Spencer maintained that the Code's definition of the term "established," included prospective language: "The use is considered permanently established when that use will or has been in continuous operation for a period of sixty days."

DECISION: Reversed and matter remanded.

The Court of Appeal of Washington, Division 1, held that Spencer and Shear had a valid nonconforming use of property even though the materials processing facility was not in full operation prior to adoption of the restrictive regulation in September 2004.

In so holding, the appellate court agreed with Spencer and Shear's arguments: The Code did not require crushing and grinding to be taking place

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for property to be used as a materials processing facility. Also, the Code explicitly included the prospective word "will" in the definition of "established."

In analyzing whether Shear's activities on the site amounted to a nonconforming use, the court explained that a nonconforming use was: a use "which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the [current] zoning restrictions applicable to the district in which it is situated." In order to qualify as a nonconforming use with vested legal rights to continue the use, the use of the property must be established prior to the adoption of the zoning ordinance, said the court.

The court noted that the hearing examiner had found that, prior to September 2004, Shear had: rented the site; assembled and stored equipment at the site; graded the site; stockpiled materials for processing organic materials; and extended access driveways to the site. The court found these findings, in combination with the court's interpretation of the Code, supported the hearing examiner's conclusion that: (1) a materials processing facility was in existence on Spencer's property prior to the adoption of the restrictive regulation in September 2004; and (2) it was a legal nonconforming use.

The court reversed the superior court's decision and reinstated the hearing examiner's decision.

See also: *McMilian v. King County, 161 Wash. App. 581, 255 P.3d 739 (Div. 1 2011).*

Case Note:

Spencer and Shear had also argued that the materials processing facility use did not occur within a critical area. The court found that DDES had not articulated a clear, intelligible flood hazard standard in enacting the "critical areas" ordinance. Consequently, the court found the ordinance was not enforceable against Spencer's business.

Telecommunications Act—Zoning Board Denies Application to Construct Wireless Broadband Internet Access Service

Parties dispute whether zoning of such service is limited by the Telecommunications Act of 1996

Citation: *Clear Wireless LLC v. Building Dept. of Village of Lynbrook, 55 Communications Reg. (P & F) 740, 2012 WL 826749 (E.D. N.Y. 2012)*

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NEW YORK (03/08/12)—As a matter of first impression (i.e., the first time the court ever addressed the specific issue), this case addressed the issue of whether a local zoning board is limited by § 332(c)(7)(B) of the federal Telecommunications Act of 1996 (the "TCA") in reviewing an application to construct a facility providing wireless broadband Internet access services.

The Background/Facts: Clear Wireless LLC ("Clearwire") is an affiliate entity of Sprint Nextel ("Sprint"). Clearwire provides the wireless broadband component of Sprint's telecommunications network—known as "wireless broadband Internet access service" or "4G" technology.

In February 2010, Clearwire applied to the Village of Lynbrook (the "Village") to obtain a special use permit to construct and operate a telecommunications facility consisting of antennas and related equipment (the "Proposed Facility").

The Board of Trustees of the Village (the "Board") eventually denied Clearwire's application. Among the reasons for its denial was the Board's belief that because the 4G service is an "advanced Internet product," Clearwire's application was not entitled to the level of review afforded under the TCA. Thus, the Board only analyzed Clearwire's application under the criteria set forth in the Village Code.

Clearwire filed a legal action against the Board, the Village, and the Village's Building Department (hereinafter, collectively, the "Village Defendants"). Clearwire alleged that denial of its application was not supported by substantial evidence, as required by TCA § 332(c)(7)(B)(iii). Among other things, Clearwire sought declaratory and injunctive relief under federal law pursuant to the TCA.

Clearwire moved for summary judgment, asking the court to find there were no material issues of fact and decide the matter in its favor on the law alone. The Village Defendants also cross-moved for summary judgment, asking the court to find in their favor.

DECISION: Clearwire's motion for summary judgment denied; Village's motion for summary judgment granted. Clearwire's cause of action for declaratory and injunctive relief based on violations of the TCA dismissed.

The United States District Court, E.D., New York, held that "the plain language of the TCA does not limit a local government's authority over zoning issues involving applications for wireless broadband Internet access service facilities." In other words, a local zoning board is not limited by § 332(c)(7)(B) of the TCA in reviewing an application to construct a facility providing wireless broadband Internet access services.

In so holding, the court explained that, the TCA was adopted in order to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition . . . ." In furtherance of that

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purpose, § 332(c)(7) of the TCA limits the authority of state and local governments over zoning and land use issues related to the installation of wireless communications facilities.

The court further explained that, under the TCA, a service is subject to a different regulatory framework depending on whether it constitutes an "information service" or a "telecommunications service." The court noted that the FCC has concluded that wireless broadband Internet access service, such as Clearwire's 4G, is an "information service" and not a "telecommunications service." This, said the court, means that the FCC has classified wireless broadband Internet access service outside of the statutory reach of § 337(c)(7) of the TCA.

Thus, based on the FCC's definition, the court concluded that because Clearwire's Proposed Facility would be used solely to provide an "information service," it did not qualify as a "personal wireless service facility" subject to limitation on local zoning authority in § 332(c)(7)(B) of the TCA. Accordingly, the court denied Clearwire's motion for summary judgment and granted the Village Defendant's cross-motion for summary judgment, and dismissed Clearwire's cause of action for declaratory and injunctive relief based on violations of the TCA.

See also: *Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010).*

See also: *Arcadia Towers LLC v. Colerain Tp. Bd. of Zoning Appeals, 53 Communications Reg. (P & F) 410, 2011 WL 2490047 (S.D. Ohio 2011).*

Case Note:

The court noted that "the law had not kept up with the changes of technology." However, the court also found that it was "not up to the FCC to construe the TCA to say something it does not say, nor up to the Court to find broadband communication encompassed by the law."

Case Note:

Clearwire had also raised state law claims. The court found these claims raised such an important issue (i.e., whether a provider of wireless broadband Internet services is a "public utility" and therefore subject to the "public necessity" standard for the purposes of zoning applications under New York law) that they should first be addressed by the New York state courts. As such, the court declined to exercise supplemental jurisdiction over Clearwire's state law claims and granted the Village Defendants' cross-motion for summary judgment, dismissing those claims without prejudice.

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Particular Uses—State Agency Approves Wind Energy Project

Opponents dispute finding that project will have "attributable" "tangible benefits"

Citation: *Friends of Boundary Mountains v. Land Use Regulation Com'n, 2012 ME 53, 2012 WL 1134914 (Me. 2012)*

MAINE (04/05/12)—This case addressed the issue of the interpretation of "tangible benefits" required for approval of a wind energy project under Maine statutory law.

The Background/Facts: In December 2009, TransCanada filed an application with Maine's Land Use Regulation Commission ("LURC") for a permit to construct the Kibby Expansion Wind Power Project in the townships of Kibby and Chain of Ponds. As initially proposed, the project was a 45 megawatt wind energy generation facility, including 15 wind turbines, created as an expansion of an existing 44-turbine wind facility operated by TransCanada.

Following the public comment period, LURC voted to approve TransCanada's amended application. Among other things, LURC's decision found that the project would provide "significant tang[ible] benefits" as a result of the following: "the employment of several hundred workers during construction; economic benefits to local businesses during the construction period; the creation of one permanent job in operations and maintenance; a $110,000 grant from TransCanada to the Department of Labor (DOL) to support green jobs training in Franklin County; $13million in anticipated income taxes over the next twenty-five years; a $110,000 grant from TransCanada to the High Peaks Alliance (HPA) to support land conservation in Franklin County; and $10 million in property taxes over the next twenty years." LURC also noted that TransCanada planned to contribute approximately $660,000 to the local community over the next 20 years as part of a "community benefits package."

> Maine statutory law, 12 M.R.S. § 685-B(4-B)(D), requires that a developer of a wind energy project (here, TransCanada) must demonstrate that the proposed generating facility "[w]ill provide significant tangible benefits." "Tangible benefits" is defined under 35-A M.R.S. § 3451(10). Effective July 12, 2010, "tangible benefits" was defined as meaning:environmental or economic improvements or benefits to residents of [Maine] attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: property tax payments resulting from the development; other payments to a host community, including but not limited to, payments under a community benefit agreement; construction related employment; local purchase of materials; employment in operations and maintenance; reduced property taxes; reduced electrical rates; land or natural resource conservation; performance of construction, operations and maintenance activities by trained, qualified and licensed workers . . . ; or other comparable benefits, with particular attention to assurance of such benefits to the host community or communities to the extent practicable and affected neighboring communities.

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The preamendment version of this definition applied to TransCanada's project in this case. Thus, factors such as "property tax payments resulting from the development" and "other payments to a host community" were not explicitly included in the applicable version of § 3451(19), and TransCanada was not required to make "payments under a community benefit agreement" to satisfy the definition of "tangible benefits."

Friends of Boundary Mountains ("FBM") appealed from LURC's decision approving the issuance of the permit to TransCanada. Among other things, FBM argued that LURC erred in finding that TransCanada's wind energy project would provide "significant tangible benefits," as required by Maine statutory law—12 M.R.S. § 685-B(4-B)(D) and 35-A M.R.S. § 3451(10). Specifically, FBM argued that LURC erred in interpreting the term "tangible benefits" to include TransCanada's grants to DOL and HPEA, as well as the payments proposed in the "community benefits package."

DECISION: Decision of LURC affirmed.

The Supreme Judicial Court of Maine held that LURC's interpretation of "tangible benefits" to include grants to the DOL and HPA, as well as payments proposed in a "community benefits package," was reasonable.

The court found that LURC properly considered TransCanada's proposed grants and payments. Since the July 12, 2010 amendment clarified existing law, the applicable preamendment definition of "tangible benefits" would include "other payments to a host community" and "payments under a community benefit agreement," said the court. Furthermore, the court found the preamendment version of § 3451(10) could, on its face, also reasonably be interpreted to include (as LURC did) TransCanada's proposed "community benefits package" and the grants to DOL and HPA.

FBM however, had also disputed whether TransCanada's payments were "attributable" to the construction, operation and maintenance of the project, as required by § 3451(10). FBM asserted that the "community benefits package" and grants to DOL and HPA would come from TransCanada's general wealth and would not result from the "construction, operation, and maintenance" of the project. On the other hand, TransCanada and LURC argued that those payments would constitute "tangible benefits" because they would not occur but for the construction, operation, and maintenance of the project.

The court explained that to the extent the term "attributable" is ambiguous, LURC's interpretation was reasonable and should be accorded deference. Moreover, the court found that given the goals of the Wind Energy Act—to encourage the development of wind energy production in Maine in a manner that ensures significant tangible benefits to the people of Maine—LURC's broad interpretation of the term "attributable" furthers the purpose of the statute as a whole. The court found that payments to host communities, such as those at issue here, benefit those communities and the state regardless of whether they flow directly and organically from the project itself or from the applicant's own wealth. Thus, concluded the court, in either case, such payments would not occur or benefit the state but for the approval and resultant "construction, operation and maintenance" of the project.

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Case Note:

The court also found that, notwithstanding LURC's conclusion that the "community benefits package" and the payments to DOL and HPA fell within the definition of the "tangible benefits" that are "attributable to the construction, operation and maintenance" found in the preamendment version of § 3451(10), LURC made other findings that would independently support its decision to approve TransCanada's amended application. Specifically, LURC had found the project would, among other things: result in several hundred jobs; provide indirect benefits to local businesses during the construction period; create one additional permanent job in operations and maintenance; and generate an estimated $13 million in state income taxes over a 25-year period.

Zoning News from Around the Nation

MARYLAND

The state Senate recently passed legislation that would require counties to draw mapped "tiers" of development before any major subdivisions served by septic systems could be approved. The bill now moves to the House.

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

MISSOURI

The state House of Representatives has given first-round approval to a measure that would "declare that farmers have a 'right to raise livestock.' " Under the measure, livestock farmers would be exempt from "local, state or federal laws enacted after the farm goes into business or Aug. 28, 2012, whichever is later." This would exempt Missouri livestock farmers from new zoning and environmental laws, among other laws. Bill supporters say the measure "would give farm-related businesses more certainty about laws so that they can make long-term investments." Opponents of the measure argue the measure "would create confusion for state and local agencies trying to enforce laws and ordinances because the agency would have to know if the farm existed when the law was created" and "could make it more difficult for the state to enact and enforce agricultural regulations during farm-related emergencies, such as a disease outbreak, because some businesses would have to comply, while others would not." The bill must be approved once more by the House before it goes to the Senate for consideration.

Source: *Columbia Daily Tribune; www.columbiatribune.com*

NEW YORK

A substantive amendment to the New York Open Meeting Law went into effect in February 2012. The new law "requires public records that are scheduled to be the subject of discussion during an open meeting to be avail-

able upon request 'to the extent practicable' prior to or at the meeting." Thus, "[i]f the agency in question maintains a 'regularly and routinely updated website,' and has a high-speed Internet connection, 'such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting.' "

Source: *Bennington Banner; www.benningtonbanner.com*

OHIO

A bill has been introduced in the state Senate, which would require licensing of Internet cafes and "allow municipalities to regulate them within city limits."

Source: *http://www.thenews-messenger.com/*

PENNSYLVANIA

A state judge has granted a 120-day stay to provisions in the new Marcellus Shale drilling law that would override local zoning ordinances for industry activity. The order prevents land-use portions of that law from going into effect, and provides that local ordinances must remain in effect until a challenge under the new law finds them invalid. The decision gives towns an additional 120 days beyond that already included in the law to revise their drilling-related rules.

Source: *Pittsburgh Post-Gazette; http://articles.philly.com/*

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Applicability of Regulations—Conservation Commission Denies Utility Company's Request for Wetlands Permit

Commission says utility's application for zoning exemption fails to meet requirement that it apply for all local zoning approvals prior to seeking wetlands permit

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Citation: *Conservation Com'n of Brockton v. Department of Environmental Protection, 81 Mass. App. Ct. 601, 2012 WL 1320214 (2012)*

MASSACHUSETTS (04/19/12)—This case addressed the issue of whether public service corporations (e.g., utility companies) can request local zoning exemption from the Department of Public Utilities (as provided by Massachusetts statutory law) prior to filing a notice of intent required under the state's Wetlands Protection Act. In other words, does a utility company's application for exemption from local zoning under Mass. Gen. L. c. 40A, § 3 satisfy the state Wetlands Protection Act requirement that applicants seek all obtainable local permits and approvals when filing a notice of intent with the local conservation commission?

The Background/Facts: Brockton Power Company, LLC ("Brockton Power") proposed to construct a 350 megawatt power plant (the "plant"). The plant was to be located in the city of Brockton (the "City"). Part of the plant was to be within 100 feet of vegetated wetlands bordering the Salisbury Plain River.

The state Wetlands Protection Act ("WPA") prohibits certain activities that would alter wetlands in the absence of a wetlands permit. (Mass. Gen. L. c. 131, § 40.) The WPA provides that a person desiring to perform "work" within the 100-foot area surrounding wetlands (the "buffer zone") that would alter the wetlands may be required to file a notice of intent ("NOI") with the local conservation commission and obtain a permit, known as an order of conditions. (Mass. Gen. L. c. 131, § 40; 310 Code Mass. Regs. § 10.02(2)(b).)

Because part of Brockton Power's project would fall within a buffer zone, Brockton Power filed an NOI with Brockton's Conservation Commission (the "Commission").Brockton Power also applied to the state Department of Public Utilities ("DPU") for an exemption from the City's relevant zoning restrictions, pursuant to Massachusetts statutory law—Mass. Gen. L. c. 40A, § 3. That statute provides that public service corporations may seek and obtain from the DPU exemption from the zoning ordinance or by-law "reasonably necessary for the convenience or welfare of the public."

The Commission, in addressing Brockton Power's NOI, denied Brockton Power's request for approval of the project. Among other things, the Commission found that Brockton Power failed to apply for local zoning approvals as required by state regulations—310 Code Mass. Regs. § 10.05(4)(e)-(f). Those regulations provide that, prior to filing an NOI, an applicant must apply for "all permits, variances and approvals required by local bylaw with respect to the proposed activity" that are "feasible to obtain."

Brockton Power appealed the Commission's decision to the state Department of Environmental Protection's ("DEP") Bureau of Resource Protection ("BRP"). The BRP overruled the Commission's decision and issued a superseding order of conditions.

The Commission again appealed under DEP adjudicatory procedures. The DEP upheld the superseding order of conditions. Among other things, the DEP found that Brockton Power was not required to apply for or obtain site plan approval from the local boards before filing an NOI with the Commission. The DEP determined that Brockton Power's application for exemption from

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local zoning under Mass. Gen. L. c. 40A, § 3, satisfied the WPA's requirement that applicants seek all obtainable local permits and approvals when filing a NOI with the local conservation commission (Mass. Gen. L. c. 131, § 40).

The Commission appealed to superior court. The superior court judge affirmed the DEP's decision. The judge found that the exemption process under Mass. Gen. L. c. 40A, § 3, relieved Brockton Power of the WPA obligation to apply for or obtain local zoning approval.

The Commission again appealed.

DECISION: Affirmed.

The Appeals Court of Massachusetts held that public service corporations can request local zoning exemption from the DPU prior to filing a NOI under the WPA. In other words, a utility company's application for exemption from local zoning under Mass. Gen. L. c. 40A, § 3 satisfies the WPA's requirement that applicants seek all obtainable local permits and approvals when filing a notice of intent with the local conservation commission.

The Commission had argued that allowing the filing of an NOI before a utility had sought all possible local zoning approvals effectively eliminated any role for local conservation commissions in the over-all approval process. The court disagreed. The court found that DEP's decision "harmonized" and "reconcile[d]" the two statutes (Mass. Gen. L. c. 40A, § 3 and Mass. Gen. L. c. 131, § 40) and "fulfil[led] the statutory purpose of both." The court said that under that interpretation, the exemption process would go forward at the DPU, while the local conservation commission acted on the NOI. Otherwise, found the court, the purpose of the exemption for public service corporations—"to assure utilities' ability to carry out their obligations to serve the public when [that] duty conflicts with local interest"—would be frustrated if public service corporations were required to apply for site plan approval at the same time they sought an exemption from it.

See also: *New England Legal Foundation v. City of Boston, 423 Mass. 602, 670 N.E.2d 152 (1996).*

Case Note:

The Commission had also denied approval of Brockton Power's project because they found the NOI contained insufficient information in that Brockton Power did not describe the impact of the project's use of the Brockton advanced waste water reclamation facility ("Brockton Water"). The court determined that Brockton Power was not required to include in its NOI an accounting of water purchased from Brockton Water since Brockton Power's purchase of water was not "work" pursuant to the WPA. Rather, Brockton Water's sale of the water, not Brockton Power's purchase of the water, was the "work" that had the potential to affect the wetland.

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Validity of Zoning Regulations—City Informs Business Owner He is Violating Sign Restrictions

Business owner challenges sign restrictions as being unconstitutional in violation of his free speech rights

Citation: *Catsiff v. McCarty, 2012 WL 1232106 (Wash. Ct. App. Div. 3 2012)*

WASHINGTON (04/12/12)—This case addressed the issue of whether city ordinances restricting the size and height allowed on wall signs violated a store owner's free speech rights under the state and federal constitutions.

The Background/Facts: In 1991, the city of Walla Walla, Washington (the "City"), enacted a sign ordinance (the "Sign Code"). The Sign Code's stated purpose was to improve the City's visual quality by accommodating and promoting sign placement "consistent with the character and intent of the zoning district; proper sign maintenance; elimination of visual clutter; and creative and innovative sign design." The Sign Code detailed wall sign size and height requirements for the City's central business district (the "CBD"): Wall signs were limited to 25% of a wall area; no combination of sign areas could exceed 150 square feet per frontage; and signs could not extend higher than 30 feet above grade.

In 2002, the City designated a "downtown area" as a subset of its CBD. Then, in 2003, it adopted design standards for the downtown area that contained signage requirements. Those signage requirements mirrored the Sign Code's requirements.

Beginning in March 2004, Robert Catsiff ("Catsiff") leased a building in the downtown area of the CBD in which he operated the "Inland Octopus" toy store. In April 2010, Catsiff painted a wall sign depicting an octopus hiding behind a rainbow over the rear entrance of the store. In September 2010, Catsiff painted on the store front an octopus hiding behind several buildings with a rainbow above the buildings. Catsiff did not obtain a sign permit for either sign.

The City eventually issued a notice of civil violation to Catsiff and his landlord regarding both signs. The notice advised them that Catsiff's signs violated the Sign Code permitting requirements, and the sign size and height requirements, as well as the downtown design standards.

Catsiff conceded that his signs violated these requirements and standards. However, he asserted that the Sign Code and downtown design standards were unconstitutional in violation of Catsiff's free speech rights under the state and federal constitution.

After a hearing examiner ruled that Catsiff had violated the Sign Code and design standards, Catsiff appealed to the superior court. The court rejected Catsiff's constitutional claims and affirmed the hearing examiner's decisions.

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Catsiff appealed.

DECISION: Affirmed.

The Court of Appeals of Washington, Division 3, held that the Sign Code and design standards were constitutionally valid and did not violate Catsiff's free speech rights.In so holding, the court first determined that, contrary to Catsiff's claims, his signs were commercial speech; the signs were related solely to Catsiff's economic interests and proposed a commercial transaction.

Next, because the City's Sign Code and design standards restricted commercial speech, the court had to decide whether the City's sign restrictions were an unconstitutional restriction of speech. In other words, the court had to decide whether, as Catsiff contended, the City had failed to meet its burden of justifying the restrictions by showing they were narrowly tailored to protect the city's substantial interest in traffic safety and aesthetics.

The court explained that while signs are a form of expression protected by the free speech clause, "they pose distinctive problems that are subject to municipalities' police powers." For example, unlike oral speech, signs "take up space and may obstruct views, distract motorists, displace alternative uses of land, and pose other problems that legitimately call for regulation." The court explained that restrictions upon the noncommunicative aspects of signs (i.e., the physical characteristics of signs)—such as found here in the size and height restrictions found in the Sign Code and the design standards—are constitutionally valid if they are: (1) content neutral (i.e., "absent censorial purpose"); (2) reasonable (i.e, not necessarily the least restrictive, but having a reasonable fit "between the means chosen and the interests asserted"); and (3) supported by legitimate regulatory interests (such as "aesthetics" and "traffic safety").

The court concluded that the City's sign restrictions under the Sign Code and the design standards were lawfully justified and constitutional, finding they were: (1) content neutral in that they did not limit what a business owner may say or depict, and they applied to all wall signs without classification and without reference to content; (2) reasonable in light of the fact that the City used certain careful considerations when choosing the size and height restrictions; and (3) meant to protect a legitimate regulatory interest in that they were meant to eliminate "visual clutter" and applied only to signs visible to motorists or pedestrians on public rights-of-way (thus addressing aesthetics and traffic safety).

See also: *City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).*

See also: *Collier v. City of Tacoma, 121 Wash. 2d 737, 854 P.2d 1046 (1993).*

See also: *State v. Lotze, 92 Wash. 2d 52, 593 P.2d 811, 13 Env't. Rep. Cas. (BNA) 1123, 5 Media L. Rep. (BNA) 1069 (1979).*

Case Note:

Catsiff had also argued that the ordinances were unconstitutionally vague. The court disagreed, finding it clear they regulated "wall signs" and could not be mistaken as

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regulating other surfaces such as T-shirts or hats.

Variance Modification—Restaurant Seeks Modification to Hours-of-operation Condition in Original Variance

Restaurant claims increased competition and the economic downturn established a change in circumstances warranting the modification

Citation: *German v. Zoning Bd. of Adjustment, 2012 WL 1150785 (Pa. Commw. Ct. 2012)*

PENNSYLVANIA (04/09/12)—This case addressed the issue of whether there was a change in circumstances sufficient to allow for a modification of conditions attached to a grant of variance, which limited the hours-of-operation of a restaurant/bar.

The Background/Facts: In April 2001, the Philadelphia Zoning Board of Appeals (the "Board") granted a variance to Jorgi Mosquera (the "Owner") to construct a two-story addition on property he owned and to use the property for a restaurant, Mixto, Inc ("Mixto"). As a condition to granting that variance, the Board limited Mixto's hours of operation to 8:00 a.m. to 11:00 p.m. Monday through Thursday and 8:00 a.m. to 12:30 a.m. on Friday, Saturday and Sunday.

Seven years later, in April 2008, Mixto applied to the City's Department of Licenses and Inspections (the "Department") for a Zoning/Use Registration Permit. Mixto wanted permission to operate its restaurant and bar until 2:00 a.m. daily. The Department denied the application.

Mixto appealed to the Board. Before the Board, Mixto indicated that it was seeking a modification of the Board's original limitations on Mixto's operational hours.

The Board found that Mixto was entitled to a modification of the original 2001 conditions attached to its grant of variance because Mixto had "sustained [its] burden of proving a proliferation of restaurants open until 2:00 a.m. and the national and local economic contraction, [were] changed circumstances that ma[de] the previously imposed limitation of hours inappropriate." The Board also concluded that permitting Mixto the extended hours of operation "[would] not injure the public because, although some individuals may suffer inconvenience, there w[ould] be at least an equal amount of benefit to them and other members of the public."

Carl N. German ("German") objected to the Board's decision. He argued that: (1) the Board erred in concluding that increased competition and a

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downturn in the economic climate were sufficient to establish a change in circumstances necessary for modification of conditions imposed in granting an earlier variance; (2) the record did not contain sufficient evidence to support the factual findings concerning the economic downturn and increased competition that Mixto relied upon as a basis for the modification; and (3) the Board erred in concluding that the record contained sufficient evidence to support its conclusion that the grant of the requested modification would not injure the public.

The trial court affirmed the Board's decision.

German again appealed.

DECISION: Reversed.

The Commonwealth Court of Pennsylvania held that the evidence was insufficient to support the Board's finding of a change in circumstances that would demonstrate that the hours-of-operation limitation imposed in Mixto's 2001 variance conditions were no longer appropriate.

In so holding, the court explained that in order to obtain a modification of the hours-of-operation condition on the 2001 variance, Mixto had to prove that the condition no longer promoted the public interest. In other words, there must have been a change in circumstances that made the condition no longer appropriate.

Here, the court found Mixto failed to show changes in circumstances rendered the hours-of-operation condition no longer appropriate. The court found that Mixto had failed to show that the hours of operation of other restaurants changed *after* Mixto opened. Moreover, the court found that there was a lack of evidence as to the proximity of other restaurants that Mixto had claimed had later operating hours. Without such evidence, said the court, "the Board could not define the competition area at issue or determine whether the overall characteristic of the area (or areas) ha[d] changed, such that the Board could conclude that the original conditions imposed, limiting Mixto's hours of operation, [were] no longer appropriate."

The court further concluded that, even if the economic downturn was relevant to the question of whether a change in the circumstances made the conditions of the 2001 variance no longer appropriate, the evidence presented here was insufficient to demonstrate that the economic downturn has impacted Mixto. The only comments in the notes of testimony regarding the economy came from Mixto's legal counsel, who referred to a general economic downturn. The court found this was "simply insufficient in any light to support factual determinations that the alleged [economic] downturn had created a change in circumstances that could be remedied by increased hours of operation."

See also: *Ford v. Zoning Hearing Bd. of Caernarvon Tp., 151 Pa. Commw. 323, 616 A.2d 1089 (1992).*

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Validity of Zoning Regulations—City Adopts Ordinance Imposing Different Parking Requirements for Residences Owned by Absentee Owners

Property owners argue ordinance violates city law

Citation: *Tupper v. City of Syracuse, 93 A.D.3d 1277, 941 N.Y.S.2d 383 (4th Dep't 2012)*

NEW YORK (03/23/12)—This case addressed the issue of whether a city ordinance that imposed different parking requirements for residences owned by absentee owners violated city law, which required regulation of open spaces be "uniform for each class of buildings throughout any district."

The Background/Facts: In 2010, the City of Syracuse, New York (the "City"), adopted ordinances related to parking spaces for one- and two-family residences. General Ordinance 21 imposed parking requirements for one- and two-family residences that were owned by absentee owners (i.e., nonowner occupied houses). Under General Ordinance 21, one- and two-family residences that were owned by absentee owners were required to have one off-street parking space for each potential bedroom. Although existing absentee-owner properties were exempt from the new requirements, the owners of those properties would be required to meet the new parking requirements if they made any "material changes" to the properties.

Owners of nonowner occupied houses in the City, as well as an unincorporated association of owners of those properties, and the president of that association (collectively, the "Owners"), challenged the validity of General Ordinance 21. Among other things, they argued that the City had violated City law because General Ordinance 21 treated absentee-owner properties differently from owner-occupied properties.

The Supreme Court dismissed the Owners' complaint.

The Owners appealed.

DECISION: Affirmed as modified.

The Supreme Court, Appellate Division, Fourth Department, New York, agreed with the Owners that the City had violated city law (Second Class Cities Law § 20(24) and Syracuse City Charter § 5-1302) because General Ordinance 21 was not uniform for each class of buildings within the district.

The court found that the statute and charter provided in relevant part that the City had the power "[t]o . . . regulate and determine the area of yards, courts and other open spaces . . ." and that such regulations "shall be uniform for each class of buildings throughout any district . . . ."

The City had argued that the statute and charter did not apply to General Ordinance 21. The court, however, disagreed. It found that the creation of off-

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street parking regulations was included in the authority to regulate the use of land and open spaces. Thus, the statute and charter applied to General Ordinance 21 as that ordinance regulated open spaces.

As to the uniformity required by the statute and charter "for each class of buildings throughout any district," the City had contended that absentee-owners were in a different "class" from owner-occupied properties and, accordingly, did not have to be regulated uniformly. The court again disagreed. It found that contention lacked merit inasmuch as "[t]he uniformity requirement [was] intended to assure property holders that all owners in the same district [would] be treated alike and that there [would] be no improper discrimination." The court found General Ordinance 21 treated buildings within the same class differently based solely on the status of the property owner (i.e., absentee property owners as opposed to owners who occupy the property). The court said that "[e]ven though such a distinction may be constitutionally valid, it [was] invalid under the uniformity requirements of the General City Law and the City of Syracuse Charter."

The court concluded by declaring Ordinance 21 invalid.

Case Note:

The Owners had also argued that the City had violated their constitutional due process rights in adopting the ordinances. The appellate court held that the City was entitled to judgment as a matter of law on these constitutional due process rights claims. The court found that the ordinances were "reasonably related to the legitimate governmental purposes of eliminating traffic congestion due to on-street parking . . . and served to enhance traffic safety by removing cars from the [City's] streets."

Case Note:

The Owners had also argued that the City failed to comply with City law when the City's Common Council adopted General Ordinance 21 and General Ordinance 20. General Ordinance 20 established, among other things, the amount of space required for workable parking spaces and the maximum square footage allowed for open surface parking areas for one- and two-family residences. The Owners had argued that adoption of these ordinances on the same day on which they were introduced without unanimous consent violated Second Class Cities Law § 35. That law provided that no ordinance shall be passed by the common council on the same day it is introduced, except by unanimous consent. The court agreed with the Owners, finding there was not the requisite unanimous consent here in the passage of the ordinances. The court also declared General Ordinance 20 invalid.

Zoning News from Around the Nation

CALIFORNIA

The state Assembly's Public Safety Committee has passed through legisla-

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tion that would create statewide regulations for medical marijuana dispensaries. Assembly Bill 2312 would reportedly "establish a nine-member medical marijuana board within the state's Department of Consumer Affairs," which would, among other functions "judge registration applications from businesses, develop rules for running dispensaries and issue fines and penalties." The legislation would also require cities and counties to allow at least one medical marijuana dispensary per 50,000 residents. It also would "make getting or giving a doctor's medical marijuana recommendation on false pretenses a misdemeanor." The bill next goes to the Assembly's Appropriations Committee for consideration.

Source: *KTVU; www.ktvu.com*

MARYLAND

Frederick County Commissioners have voted to "remove beekeeping from a zoning law that required it to be done on properties that are 3 acres or more—the same law that governs farm animals, such as cows, pigs and sheep." Consequently, beekeepers in Frederick County can now keep honeybees on their property regardless of the size of the land.

Source: *Gazette.Net; www.gazette.net*

NEW YORK

New York State Assemblyman Fred W. Thiele Jr. has proposed a bill that would allow municipalities to ban chain stores and fast food restaurants. Reportedly, the bill is intended to allow municipalities to protect their "hometowns' historic character" and would not be mandatory. Thiele reportedly believes the bill would withstand judicial challenge because its purpose is the "preservation of historic character."

Source: *Southampton Patch; http://southampton.patch.com*

PENNSYLVANIA

Part of the Marcellus Shale law became effective April 16. Drillers are now required to pay impact fees based on the number of Marcellus shale wells they have producing and the price of natural gas. Meanwhile, the 120-day court-ordered injunction (issued on April 11) remains in effect in regards to the portion of the law that would impact local zoning laws.

Source: *Farm and Dairy; www.farmanddairy.com*

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