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Zoning Bulletin

in this issue:

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Proceedings/Ripeness—After its special permit request is denied, landowner chooses not to appeal and instead challenges denial in court, claiming discrimination

Landowner argues requirement of a final decision from a zoning agency before bringing land use claims to court should not apply when landowner alleges intentional discrimination

Contributors

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Citation: *Sunrise Detox V, LLC v. City of White Plains, 2014 WL 4922130 (2d Cir. 2014)*

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

SECOND CIRCUIT (NEW YORK) (10/02/14)—This case addressed the issue of whether cases in which a landowner alleges intentional discrimination should be excepted from the final decision-ripeness requirement for a court to have jurisdiction over the land use dispute.

The Background/Facts: Sunrise Detox V, LLC ("Sunrise") was a provider of medically supervised care for individuals recovering from alcohol and drug abuse. Sunrise sought to operate a treatment facility in an R2-2.5 zoning district in White Plains, New York (the "City"). In order to satisfy the City zoning requirements for the R2-2.5 zoning district, Sunrise sought to have its residential facility designated as a permissible "community residence" use, and to obtain a special permit for that use. The City's zoning ordinance defined a "community residence" as: "[a] residential facility for the mentally disabled operated pursuant to the New York State Mental Hygiene Law and regulations promulgated thereunder, including an alcoholism facility, a hostel, a halfway house and any other such facility as defined in such regulations, and any similar facilities operated under the supervision of federal departments and agencies."

During the hearing process on Sunrise's application, the Commissioner of the City's Department of Building first determined that Sunrise's proposed facility met the special permit requirements as a "community residence." However, before the hearing process was complete and as opposition to the proposed facility mounted, the Commissioner revised his determination. He concluded that Sunrise's proposed facility was more properly classified as a "Crises Services," akin to Hospitals or Sanitaria, which were not permitted uses in the R2-2.5 zone. The Commissioner informed Sunrise that it would have to either seek a variance or appeal the Department's determination to the Zoning Board of Appeals in order to proceed with its application.

Sunrise did not seek relief from the Zoning Board of Appeals. Instead, it filed a lawsuit alleging that the City violated the federal Americans with Disabilities Act (the "ADA") by intentionally discriminating against it and its prospective clients, and by failing to offer a "reasonable accommodation" (required by the ADA) by allowing Sunrise's proposed use of the property.

The district court dismissed the case for lack of subject-matter jurisdiction. It concluded that Sunrise's claims were unripe for adjudication because they presented a "zoning dispute" which first required a final determination before it could be heard by a court.

Sunrise appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Second Circuit, held that Sunrise's claims were not ripe for adjudication; the claims could not be heard by a court until Sunrise had exhausted its administrative avenues and obtained a final de-

cision from the City's zoning authority in the form of a variance or Zoning Board of Appeals decision.

The court explained that with regard to land use decisions, claims were not ripe until the government entity charged with implementing the regulations had reached a final decision regarding the application of the regulations to the property at issue. The court said the purpose of the ripeness requirement is to ensure that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III of the U.S. Constitution. (Article III authorizes the federal courts to hear actual cases and controversies only.) To be ripe for adjudication, the injury must be "concrete and particularized," "actual or imminent," not "merely speculative," said the court.

Sunrise had argued that the final-decision requirement did not apply to zoning challenges under the ADA based on allegations of intentional discrimination because those "cause[d] a uniquely immediate injury" rendering such claims "ripe from the act of discrimination." The court acknowledged that argument had some appeal since, generally, when a public official violates constitutional rights, related claims may proceed to federal court without state remedies first being exhausted. However, in the case of land use disputes, the court "declin[ed] to adopt a categorical rule excepting from the final-decision requirement any case in which a landowner alleges intentional discrimination." The court noted that whether or not the rejection of Sunrise's special permit request was the product of discriminatory motivation, the remedy was not necessarily the issuance of a permit to Sunrise. The court further noted that if Sunrise proceeded with its application, "the rejection may be reversed, and the project may be permitted to proceed—or the application may be rejected on other, non-discriminatory grounds." Only after a final decision was rendered would it be known whether the allegedly discriminatory decision of the official had any effect at all on Sunrise's application, said the court.

The court concluded: "[T]herefore . . . a plaintiff alleging discrimination in the context of a land-use dispute is subject to the final-decision requirement unless he can show that he suffered some injury independent of the challenged land-use decision."

Here, the court found that the Commissioner's determination that Sunrise's facility did not qualify as a "community residence" did not give rise to an injury independent of the City's ultimate land-use decision. As to Sunrise's claim that the City failed to reasonably accommodate it and its clients as required by the ADA, the court held that Sunrise's failure to pursue a variance or to appeal the Commissioner's determination deprived the City of the opportunity to accommodate Sunrise and its clients through the City's established procedures. Accordingly, the court concluded that Sunrise's claims were not yet ripe for adjudication.

See also: *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).*

See also: *Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1541 (11th Cir. 1994).*

See also: *Groome Resources Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 199-200 (5th Cir. 2000)*

Case Note:

In its decision, the court gave examples of when a plaintiff need not await a final decision to challenge a land-use decision: (1) when a zoning policy is discriminatory on its face; or (2) when there is manipulation of a zoning process out of discriminatory animus to avoid a final decision. In those cases, said the court, "pursuit of a further administrative decision would do nothing to further define [the] injury," and the "claim should not be subject to the application of the [final-decision] ripeness test."

First Amendment—Zoning bylaws restrict size, height, and operating hours of adult-entertainment establishments

Landowner challenges zoning bylaws as unconstitutional, in violation of free speech rights under the First Amendment

Citation: *Showtime Entertainment, LLC v. Town of Mendon, 2014 WL 5028046 (1st Cir. 2014)*

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

FIRST CIRCUIT (MASSACHUSETTS) (10/08/14)—This case addressed the issue of whether a town's zoning bylaws relating to size, height, and operating hours of adult-entertainment establishments, as well as a ban on sale and consumption alcohol at such establishments, constituted impermissible prior restraint on freedom of expression.

The Background/Facts: In May 2008, the Town of Mendon (the "Town") amended its zoning bylaws. Among other things, the amendments created an Adult-Entertainment Overlay District, which limited the location of any adult-entertainment business to four specific parcels of land within the town limits. Upon citizens' petition, Town residents also later voted to approve additional bylaws, enacting additional zoning restrictions, restricting the following at all adult entertainment businesses: (1) the maximum size and height allowances of buildings; and (2) the operating hours. The stated purposes of the zoning bylaws were to: protect the Town's "historically rural atmosphere"; and support traffic safety.

Showtime Entertainment, LLC ("Showtime") owned one of the few parcels of land within the town limits zoned for adult entertainment. In June 2008, Showtime applied to the Town for a license to operate an adult entertainment business (presenting live nude dancing) on a parcel of land within the Adult-Entertainment Overlay District.

Showtime received its requested adult-entertainment license, subject to the applicable governing bylaws and regulations.

Displeased with the limitations placed on its adult-entertainment license, Showtime filed suit. It claimed that the zoning bylaws restricting its operating hours and the size and height of its building were unconstitutional restrictions of expressive activity protected by the First Amendment to the United States Constitution (U.S. Const. amend. I.). "Pursuant to the First Amendment, the government cannot inhibit, suppress, or impose differential content-based burdens on speech or other 'expressive conduct,' including those expressive activities associated with adult entertainment."

Showtime and the Town filed cross-motions for summary judgment. Each party asked the court to find there were no material issues of fact in dispute and to decide the matter in their favor on the law alone.

The district court granted summary judgment in favor of the Town on all claims, finding the challenged zoning bylaws were constitutional.

Showtime appealed.

DECISION: Judgment of district court reversed, and matter remanded.

The United States Court of Appeals, First Circuit, held that the Town zoning bylaws regulating size, height, and hours of operation of adult-entertainment were unconstitutional in violation of the First Amendment to the United States Constitution.

In so holding, the court first determined that Showtime's challenge was a facial challenge to the bylaw; it was not an as-applied challenge since the relief sought was to be the invalidation of the zoning bylaws, not merely a change in their application. Finding that the zoning bylaws were content-neutral in that they attempted to combat the "undesirable secondary effects" of adult-entertainment businesses, the court applied an intermediate level of scrutiny (as opposed to strict scrutiny). The court explained that the intermediate level of scrutiny allows regulations justified by neutral purposes to survive as long as they support a significant government interest, do not burden substantially more speech than necessary, and leave available alternative channels of communication.

Here, the court found that the stated purposes of the zoning bylaws regulating the size, height, and hours of operation of adult-entertainment businesses—namely, to maintain the town's rural aesthetics and to avoid traffic congestion—were "patently under[-]inclusive." Thus the court found the zoning bylaws' purposes were insufficient to support the Town's claim that it regulated adult-entertainment businesses only out of a substantial interest in curbing secondary effects.

More specifically, the court found that the Town failed to clarify what particular negative effect the size and height of an adult-entertainment business would have on rural aesthetics that was not shared by all other large, commercial structures. Since, under the zoning bylaws, size did not matter to all enterprises, but mattered only in the context of the type of business that a building housed, the court found that the Town differentiated between speakers for reasons "unrelated to the legitimate interests that prompted the

regulation." The court concluded that "the under-inclusive nature of this size and height restriction defeat[ed] [the Town's] assertion that the bylaws truly served a substantial interest in maintaining rural aesthetics."

The court also found the zoning bylaws were equally under-inclusive as related to traffic concerns. The court found that the Town failed to clarify how the traffic effects of adult-entertainment businesses were in any way distinct from the traffic effects that would be caused by any other large, commercial business that might choose to locate in the same area. The court concluded that the Town's reliance on traffic concerns was "tellingly under[-]inclusive," revealing that the Town's alleged substantial interest was not actually furthered by its bylaws.

See also: *National Amusements, Inc. v. Town of Dedham, 43 F.3d 731 (1st Cir. 1995).*

See also:*The Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443, 16 Media L. Rep. (BNA) 1801 (1989).*

See also: *Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).*

Case Note:

In 2008, the Town's general bylaws were also amended so as to forbid the granting of alcohol sales licenses to any adult-entertainment business and to ban the consumption of alcohol by patrons within any such business. Showtime also challenged the ban on the sale and consumption of alcohol on the premises, alleging that it violated Article 16 of the Massachusetts Declaration of Rights (Mass. Const. art. XVI) (the free speech provision of the Massachusetts Constitution). The court concluded that circumstances warranted certification to the Massachusetts Supreme Judicial Court of the question as to whether the bylaw banning the sale and consumption of alcohol at adult-entertainment businesses violated the free speech provision of the Massachusetts Constitution.

Nonconforming Use/Due Process—At hearing on zoning violation citation, landowner, pursuant to city ordinance, is unable to raise defense of legal nonconforming use

Landowner says this violates his due process rights

Citation: *Johnson v. City of Seattle, 2014 WL 5144611 (Wash. Ct. App. Div. 1 2014)*

WASHINGTON (10/13/14)—This case addressed the issue of whether a city violated a resident's right to procedural due process when, pursuant to a city ordinance, only the Department of Planning and Development could establish whether the resident had a legal nonconforming use, and therefore the resident could not assert a nonconforming use defense to a hearing examiner at a hearing for a zoning violation citation.

The Background/Facts: Tyko Johnson ("Johnson") owned a single-family home in Seattle, Washington (the "City"). Johnson owned the home since 1959. He was a "car guy" and kept multiple cars on his property.

In September 2010, the City issued Johnson a zoning violation citation with a $150 penalty. The citation stated that Johnson had "more than the allowed 3 vehicles parked on a single family lot" in violation of the City's zoning code, SMC 23.44.016.

At a hearing on the citation, Johnson argued that he had a legal nonconforming use and was therefore not in violation of SMC 23.44.016. The hearing examiner determined that, under the zoning code, only the City's Department of Planning and Development (the "Department") could determine whether a property use was legal nonconforming. The hearing examiner did not stay the citation hearing pending an application by Johnson to establish his use. Rather, because Johnson had not established a legal nonconforming use with the Department at the time of the hearing, the examiner concluded that the citation was proper.

In December 2010, and again in February 2011, the City issued Johnson a second and third citation for parking more vehicles than allowed under the City zoning ordinance. Each citation included a $500 fine. The hearing examiner affirmed the citations.

In May 2011, Johnson applied to the Department, and on August 31, 2011, the Department determined that Johnson had established his use as legal nonconforming.

Johnson then filed three Land Use Petition Act ("LUPA") (RCW 36.70C)

petitions, contesting each of his citations. He also brought claims for damages under federal law, 42 U.S.C. § 1983 (which allows a civil action for deprivation of rights), alleging a violation of his procedural due process rights in violation of the 14th Amendment to the United States Constitution.

The superior court affirmed the citations and dismissed the due process violation claims.

Johnson appealed.

DECISION: Judgment of superior court reversed, and matter remanded with instructions.

The Court of Appeals of Washington, Division 1, held that Johnson's inability, under the City's ordinance scheme, to present evidence of his nonconforming use as a defense to his citations, violated his constitutional right to procedural due process. The court also held that since Johnson was never in violation of the City zoning ordinance (SMC 23.44.016)—since his use was a legal nonconforming use, he was not subject to citation.

In so holding, the court explained that a legal nonconforming use is one that "does not conform to a zoning law but which lawfully existed at the time the law went into effect and has continued to exist without legal abandonment since that time." Here, the Department had determined that Johnson had a legal nonconforming use and thus a vested right to keep more than three cars on his single-family lot.

The court agreed with Johnson that the City had violated his procedural due process rights—of notice and a hearing—by preventing him from asserting his legal nonconforming use as a defense and thus denying him of a meaningful opportunity to be heard. The court explained that to demonstrate a valid § 1983 claim, Johnson had to show that "a person acting under color of state law deprived [Johnson] of a federal constitutional or statutory right." Since the court had found that the City had violated Johnson's right to procedural due process, the court concluded that Johnson had demonstrated valid claims under § 1983.

The court vacated the citations, and thus found they did not constitute damages under § 1983. The court remanded the issue to the trial court to determine whether Johnson had additional damages on which to base an award.

See also: *Post v. City of Tacoma, 167 Wash. 2d 300, 217 P.3d 1179 (2009).*

Special Exception/Preemption/ Natural Gas—Township denies special exception request for natural gas compressor station

Applicant says proposed station is of the same general character as other permitted essential uses and should be permitted

Citation: *MarkWest Liberty Midstream & Resources, LLC v. Cecil Tp. Zoning Hearing Bd., 2014 WL 4783426 (Pa. Commw. Ct. 2014)*

PENNSYLVANIA (09/26/14)—This case addressed the issues of whether: (1) a zoning board erred or abused its discretion in denying a special exception application; and (2) whether a zoning board erred or abused its discretion by finding that the township's unified development ordinance was not preempted by state law to the extent that the ordinance precluded operations ancillary to oil and natural gas well development.

The Background/Facts: MarkWest Liberty Midstream & Resources, LLC ("MarkWest") was a limited liability corporation that owned and operated midstream facilities which transport, compress and process oil, gas, and other substances extracted from oil and gas wells. In September 2010, MarkWest purchased a 71.5-acre undeveloped parcel of land (the "Property") in Cecil Township's I-1 Light Industrial District. MarkWest sought to construct and operate a natural gas compressor station roughly in the center 15 acres of the Property (the "Proposed Facility").

In November 2010, MarkWest applied to Cecil Township's Zoning Hearing Board (the "Board") for a special exception under § 911.D.1 of the Township's Unified Development Ordinance ("UDO") (Comparable Uses Which Are Not Specifically Listed). Pursuant to § 404.B.1 of the UDO, the Board could approve a special exception for the Proposed Facility in the Township's I-1 Light Industrial District, if the Proposed Facility: "(1) would have an equal or lesser impact than, and [was] of the same general character as any of the Township's permitted conditional uses (Section 911.C) or uses by right (Section 911.B) [which included 'essential services']; (2) [met] the Township's area and bulk requirements; (3) complie[d] with the express standards and criteria specified for the most nearly comparable I-1 Light Industrial District use; and, (4) [was] consistent with the intent set forth in UDO Section 910 for industrial districts."

Among other things, MarkWest maintained that it should receive the special exception because although MarkWest was not a governmental entity and was not a public utility, its gas distribution facilities were of the "same general character" as other uses falling within the definition of "essential services," which were permitted uses. MarkWest claimed that its operations were critical to the downstream supply of gas to consumers; and the Compressor Station was necessary for the health, safety, and general welfare of the community.

In March 2011, the Board denied MarkWest's special exception application on the basis that MarkWest failed to satisfy the UDO's requirements that the Proposed Facility would be of the "same general character" as other uses permitted in an I-1 Light Industrial District, and that its impact would be equal to or less than other permitted uses.

MarkWest appealed to the trial court. Range Resources-Appalachia, LLC ("Range Resources") intervened as an owner or tenant of the Property on which the Proposed Facility would be constructed. The Township also intervened.

In January 2013, the trial court affirmed the Board's decision.

MarkWest and Range Resources appealed, and the appellate court consolidated the appeals. The arguments on appeal were that: (1) the Board erred or abused its discretion by denying MarkWest's special exception; and (2) state law, Act 13, preempted the UDO to the extent that the UDO precluded operations ancillary to oil and natural gas well development.

DECISION: Judgment of trial court reversed in part, and matter remanded.

The Commonwealth Court of Pennsylvania first held that the Board acted arbitrarily and abused its discretion in denying MarkWest's application for special exception. The court explained that "[a] special exception is a use that is expressly permitted by the zoning ordinance, absent a showing of a detrimental effect on the community." Again, here, the UDO permitted a proposed facility that would have an equal or lesser impact than, and is of the same general character as permitted essential uses. The Board had found that MarkWest's Proposed Facility was not of the "same character" as an essential service, but was more comparable to a cellular communications facility which was expressly excluded from uses permitted by special exception under the UDO.

The appellate court found the Board's findings were errors of law that mandated requirements not set forth in the UDO. The court found that the two distinct operations (natural gas compressor facilities and cellular communications facilities) were in no way "comparable." Further, the court found that although MarkWest's Proposed Facility was a commercial business and not a public utility, it was of the "same *general* character" as an essential service—all that was required by the UDO for a special exception. The court concluded that "every factor that the UDO require[d] the Board to consider when reviewing special exception applications in the Township's I-1 Light Industrial District [had] been satisfied." Accordingly the court remanded the matter with direction that the special exception be granted.

The court also addressed MarkWest and Range Resources' contention that state law, Act 13, clearly preempted local zoning ordinances, including the Township's UDO as applied in this case. Among other things, Act 13 preempted local zoning control over oil and gas in favor of statewide standards. However, Act 13's preemption language had been ruled by the Pennsylvania Supreme Court to be unconstitutional. Thus, because the UDO did not exclude natural gas compressor stations, and Act 13's preemption language was unconstitutional, the appellate court concluded that the UDO was not preempted by state law.

See also: *Polay v. Board of Sup'rs of West Vincent Tp., 752 A.2d 434 (Pa. Commw. Ct. 2000).*

See also: *Robinson Tp., Washington County v. Com., 83 A.3d 901 (Pa. 2013).*

Zoning News from Around the Nation

NEW YORK

According to a recently released report from the New York Attorney General, "[n]early three-quarters of the New York City listings offered by the short-term rental service Airbnb violate city or state laws." Among other things, the attorney general charged that many listings violate city zoning laws because the legal resident of the unit are not present during the room rental period.

Source: *Crain's New York Business; www.crainsnewyork.com*

New York's highest court has denied a request to rehear its June decision, which upheld local bans on shale gas drilling. Accordingly, currently, state oil and gas mining laws do not trump town zoning laws enacted to prohibit fracking.

Source: *Law 360; www.law360.com*

PENNSYLVANIA

Reportedly, Penn Township is "considering a change to its zoning laws that would further restrict Marcellus Shale gas drilling in residential and commercial areas." As part of the township's comprehensive revision of zoning laws, the proposed changes "would create a special zoning district with setback requirements between drilling operations and homes, schools and businesses on properties encompassing less than a prescribed acreage." "The overlay district, which superimposes additional regulations onto existing zoning laws, would not apply to rural areas and those zoned for agricultural and industrial use." According to the township manager, the goal of the zoning changes is to "minimize any disturbance caused by drilling without impeding landowners' oil and gas rights."

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

TEXAS

On November 4, residents of the City of Denton were expected to vote on whether to ban hydraulic fracturing within city limits.

Source: *The Dallas Morning News; www.dallasnews.com*

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Standing—Landowner's contractor applies for permit to modify sign of landowner

After permit is denied, contractor appeals, but city says contractor lacks standing to appeal

Citation: *Bass Custom Signs, LLC v. Lafayette City-Parish Consolidated Government, 2014-131 La. App. 3 Cir. 10/8/14, 2014 WL*

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5011141 (La. Ct. App. 3d Cir. 2014)

LOUISIANA (10/08/14)—This case addressed the issue of whether a contractor prevented from performing a contract because of the decision of the board of zoning adjustment has standing to bring a suit challenging the zoning decision.

The Background/Facts: Bass Custom Signs, LLC ("Bass") contracted with Lafayette Shooters, Wilderness & Western Wear, Inc. ("Shooters") to modify a sign. Changes to zoning laws in the city of Lafayette rendered Shooters' sign legally nonconforming (i.e., nonconforming with current zoning regulations, but allowed to remain because it existed prior to the zoning law changes). The contract between Bass and Shooters required Bass to apply for and secure the necessary permits for the modifications. Bass applied for the permits for sign modification. The Board of Zoning Adjustment (the "Board") did not approve the permit request. Bass then appealed the decision to the district court.

Lafayette City-Parish Consolidated Government (the "City") then filed an Exception of No Right of Action. It maintained that Bass did not have standing to appeal the zoning decision, pursuant to Louisiana statutory law, La. R. S. 33:4727(E)(1). That statute defines who may challenge board of zoning adjustment decisions as including: "any person or persons jointly or severally aggrieved" by the decision. The City argued that the proper party to bring the appeal was the owner of the business or the landowner—here, Shooters. Bass claimed it was "a person aggrieved" because the Board's refusal to approve the modifications for the sign caused Bass to lose the contract to modify the sign.

The district court agreed with the City, granted the City's requested exception, and dismissed the case.

Bass appealed.

DECISION: Judgment of district court affirmed.

As a matter of first impression (i.e., the first time the court ruled on the issue), the Court of Appeal of Louisiana, Third Circuit, held that a contractor that is prevented from performing a contract because of a decision of a board of zoning adjustment does not have standing to challenge the decision in a district court. Thus, here, the Court concluded that Bass did not have standing to challenge the appeal of the Board's decision to deny the requested sign modification permit.

In so holding, the court looked to interpret La. R. S. 33:4727(E)(1) and the meaning of "a person aggrieved." The court found that "a person aggrieved" had been defined by state common law as: a person that (1) has some interest in land affected by the zoning and (2) alleges specific pecuniary damage. The court interpreted the term "a person aggrieved" to require, in order to challenge a decision of the Board of Zoning Adjustment in district court, that "the person have a proprietary interest

in immovable property subject to the zoning ordinance or variance at issue, or in immovable property affected by the ordinance or variance."

Although Bass may have been impacted by the Board's decision, it was not, concluded the court, "a person aggrieved."

See also: *Hood v. Cotter, 5 So. 3d 819 (La. 2008).*

Variances—After applicants for proposed restaurant are granted off-street parking variance, neighbor appeals

Neighbor argues variance request should have been considered as use variance, not an area variance

Citation: *Colin Realty Co., LLC v. Town of North Hempstead, 2014 WL 5285474 (N.Y. 2014)*

NEW YORK (10/16/14)—This case addressed the issue of whether requests for off-street parking variances should be evaluated by applying the standards for an area variance or by applying the standards for a use variance.

The Background/Facts: Manhasset Pizza LLC ("Manhasset Pizza") and Fradler Realty Corporation ("Fradler") (collectively, the "Applicants") sought to open a 45-seat, full-service, dine-in restaurant in a storefront in the unincorporated community of Manhasset in the Town of North Hempstead, New York (the "Town"). Restaurants were permitted in the zoning district in which the Applicants' building was located, subject to the issuance of a conditional use permit. The storefront had previously been used as a gift shop, which was also a permitted use in the zoning district.

The Applicants applied to the Town's Board of Zoning Appeals (the "Board") for the conditional use permit. They also sought variances from the Town's off-street parking requirements.

The Board granted the conditional use permit, subject to certain conditions. Treating the application for requested variances as a request for area variances, the Board concluded that the benefit to the applicants of granting variances from the Town Code's parking and loading/unloading restrictions outweighed the detriment imposed on the community. The Board granted the parking variances.

Thereafter, Colin Realty, LLC ("Colin"), the owner of a multitenant

retail building next to the proposed restaurant property, commenced a legal action against the Town, the Board, certain members of the Board, and the Applicants. Colin sought to annul the Board's decision granting the permit and variances to the Applicants. Colin argued the proposed restaurant required a use variance rather than an area variance from the Town's parking and loading/unloading restrictions. Colin alleged that existing public parking was "overwhelmed" and inadequate to accommodate the applicants' proposed "high volume use."

The state Supreme Court rejected Colin's argument that use variances, as opposed to area variances, were required here. The court also concluded that Board had applied the proper balancing test.

Colin appealed. The Appellate Division also held that the Board had properly determined that the variances from parking sought by the Applicants were to be treated as applications for area variances. The Appellate Division further held that the Board's balancing test was rational and not arbitrary and capricious.

Colin again appealed.

DECISION: Judgment of appellate division affirmed.

The Court of Appeals of New York held that requests for off-street parking variances should be evaluated by applying the standards for an area variance so long as the property is intended to be used for a purpose permitted in the zoning district. The court concluded that the Board properly considered the application for off-street parking variance as a request for an area variance.

In so holding, the court noted that the distinction between area variances and use variances is important because the standard for a use variance is "clearly harder to satisfy than the test for an area variance." Here, to obtain a use variance, an applicant had to demonstrate to the zoning board of appeals that "applicable zoning regulations and restrictions have caused unnecessary hardship" (Town Law § 267-b [2][b]). To obtain an area variance, an applicant had to show that "the benefit to the applicant if the variance is granted" outweighs "the detriment to the health, safety and welfare of the neighborhood or community by such grant" (Town Law § 267-b [3] [b]).

Colin had argued that when determining which type of variance to apply, the determinative factor is "whether the local code imposes the off-street parking requirement based on area/square footage [calling for an area variance] or based on the intensity of the use [calling for a use variance]." Colin contended that, here, the Town Law imposed off-street parking requirements based on the intensity of the use, and therefore the Applicants were required to seek a use variance, not an area variance as had been granted.

The court pointed to New York statutory law defining use and area variances: General City Law § 81-b (1) defines a "use variance" as an

authorization for the use of land for a purpose "otherwise not allowed or . . . prohibited" in the zoning district; it defines an "area variance" as an authorization to use land "in a manner which is not allowed by the dimensional or physical requirements" of the zoning regulations. The court found that "off-street parking requirements, while differing depending on use, regulate how the property's area may be developed, akin to minimum lot size or set-back restrictions." Accordingly, the court concluded that "area variance rules apply to requests to relax off-street parking requirements so long as the underlying use is permitted in the zoning district." "Use variance rules," said the court, "prevail only if the variance is sought in connection with a use prohibited or otherwise not allowed in the district."

In this case, the Applicants had applied for an off-street parking variance in connection with a change in the storefront's use from a retail gift shop to a restaurant. Because both uses were permitted in the zoning district, the court concluded that the Board had properly considered the application as a request for an area variance.

See also: *Overhill Bldg. Co. v. Delany, 28 N.Y.2d 449, 322 N.Y.S.2d 696, 271 N.E.2d 537 (1971).*

See also: *Off Shore Rest. Corp. v. Linden, 30 N.Y.2d 160, 331 N.Y.S.2d 397, 282 N.E.2d 299 (1972)* (overruled by this decision).

Case Note:

The court's decision here overruled its previous decision in Off Shore Rest. Corp. v. Linden, 30 N.Y.2d 160, 331 N.Y.S.2d 397, 282 N.E.2d 299 (1972).

Freedom of Speech/Signs—Township ordinance bans electronic multimessaging billboards

Commercial property owner argues ordinance violates constitutional free speech rights

Citation: *E & J Equities, LLC v. Board of Adjustment of Tp. of Franklin, 437 N.J. Super. 490, 100 A.3d 539 (App. Div. 2014)*

NEW JERSEY (10/17/14)—This case addressed the issue of whether a township ordinance prohibiting electronic multimessaging billboards

was unconstitutional in violation of free speech rights under the First Amendment to the United States Constitution.

The Background/Facts: E & J Equities ("E & J") sought to erect an electronic multimessaging billboard for off-site advertising on its property in the Township of Franklin (the "Township"). Township Ordinance No. 3875-10 (the "Ordinance") prohibited such billboards. Specifically, the Ordinance provided:

> No billboard or billboard display area or portion thereof shall rotate, move, produce noise or smoke, give the illusion of movement, display video or other changing imagery, automatically change, or be animated or blinking, nor shall any billboard or portion thereof have any electronic, digital, tri-vision or other animated characteristics resulting in an automatically changing depiction.

E & J applied for a variance to erect the electronic billboard. The Township denied the variance application. E & J then brought a legal action, challenging the constitutionality of the Ordinance and the denial of its application for a variance. Among other things, E & J argued that the Ordinance's ban on electronic billboards violated the First Amendment to the United States Constitution, which protects freedom of speech.

The trial court found that the Ordinance's ban on electronic billboards violated the First Amendment.

The Township appealed.

DECISION: Judgment of superior court reversed.

The Superior Court of New Jersey held that the Ordinance's ban on electronic billboards did not violate the First Amendment.

The court explained that, unlike oral speech, billboards are the subject of federal, state, and local regulation because they "pose distinctive problems that are subject to municipalities' police powers"—such as taking up space, obstructing views, and distracting drivers. Restrictions on billboards are constitutional if they meet scrutiny standards. The level of scrutiny applied depends on whether the restriction is a content-neutral regulation of the time, place, or manner of the speech or whether it is a restriction on the content of the speech.

In its appeal, the Township had argued that the trial court erred in applying an intermediate scrutiny standard to the Ordinance. Among other things, it maintained that because the Ordinance was content-neutral, it should have been reviewed pursuant to a time, place, and manner analysis.

E & J had agreed that a time, place, and manner analysis applied here. However, E & J had also contended that the Ordinance's ban on digital billboards "constitute[d] a non-content neutral restriction on [E & J's] planned and non-commercial speech," and thus was subject to a stricter scrutiny standard. E & J argued that content such as emergency

public service announcements could not be communicated through other medium such as a static billboard.

The appellate court agreed with the Township. The court noted that the Ordinance did not ban all billboards but only one feature of billboards that was unrelated to the content of any message. To be precise, noted the court, "the practical effect of the ban was to prohibit electronic multi-messaging on a single billboard in the Township." In sum, the court found it was "essentially undisputed that a 'time, place or manner' analysis [was] appropriate."

The court further explained that, under the applicable standard, time, place, or manner restrictions are valid, provided they satisfy three criteria: (1) they "are justified without reference to the content of the regulated speech"; (2) "they are narrowly tailored to serve a significant governmental interest"; and (3) "they leave open ample alternative channels for communication of the information."

Here, the court had found that the first prong of the test was met: the Ordinance was a content-neutral restriction on speech because it did not ban all billboards, but rather, only one feature of billboards that was unrelated to the content of any message.

The court also found that the second prong of the test was met: the Ordinance was "narrowly tailored to serve a significant governmental interest." The court found that the governmental interests served were aesthetics and traffic safety. As for being "narrowly tailored," the court noted that a regulation need not be "the least restrictive means" to satisfy the requirement that a content-neutral restriction on time, place, and manner by "narrowly tailored"; rather, the means chosen must not "burden substantially more speech than is necessary to further" the content-neutral interest. The court said that the fact that the Ordinance banned all digital billboards did not preclude a finding that the Ordinance was "narrowly tailored." The Ordinance was "narrowly tailored," found the court, in that it "did no more than eliminate the exact source of the evil it sought to remedy": aesthetics and traffic safety. The court concluded that the Ordinance's ban on digital billboards "represent[ed] a reasoned compromise between serving the [Township's] asserted goals and allowing some [billboards in the Township]."

Finally, the court also found the third prong of the test was met. The court found that the restrictions imposed by the Ordinance left open ample alternative channels for communication of the information. The "lion's share of commercial speech" did not require an electronic multimessage billboard in order to have its message changed in short order. As E & J had pointed out, the only type of message identified as being adversely affected by the loss of that "advantage" was emergency public service announcements. There were other means available to satisfy the need for projecting emergency public service announce-

ments, found the court, including signs posted by the New Jersey Department of Transportation on nearby highways, as well as the Township's "reverse 9-1-1" calling system and "email blast" system.

See also: *Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).*

Due Process—After County grants conditional use permit, neighbors contend their due process rights were violated

Neighbors point to inadequate zoning ordinance and commissioner's ex parte communications

Citation: *In re Conditional Use Permit No. 13-08, 2014 SD 75, 2014 WL 5474691 (S.D. 2014)*

SOUTH DAKOTA (10/29/14)—This case addressed the issue of whether a county zoning ordinance provided adequate criteria upon which to base a decision to grant a conditional use permit, or did not and thus violated neighboring property owner's rights to due process. The case also addressed the issue of whether a zoning commissioner's prehearing investigation and ex parte communication with a conditional use permit applicant tainted the entire proceedings such as to have violated neighboring property owner's rights to due process and requiring a new hearing on the permit.

The Background/Facts: Eastern Farmers Cooperative ("EFC") sought to build and operate an agronomy facility on approximately 60 acres of land located a few miles north of Colton, South Dakota in Minnehaha County. The land was zoned A-1 Agricultural. The proposed facility would store, distribute, and sell a variety of farm products, including anhydrous ammonia.

EFC applied to the Minnehaha County Planning Commission (the "MPC") for a conditional use permit ("CUP") to build and operate the agronomy facility. At the hearing on EFC's application, Dough and Louise Hanson (the "Hansons") and other area residents appeared in order to oppose the CUP. They voiced concerns about the dangers of chemical storage in close proximity to their residences. At the conclusion of the hearing, the MPC voted unanimously to approve the permit, subject to 10 stated conditions.

The Hansons appealed the decision of the MPC to the Minnehaha County Commission (the "Commission"). Prior to the appeal hearing, County Commissioner Dick Kelly ("Kelly") toured another agronomy facility near Worthing, South Dakota. Kelly viewed the interior and exterior of the facility and received information on some of its safety features. At some time, Kelly was informed that EFC owned the Worthing facility.

At the Commission hearing on the Hansons' appeal, Kelly disclosed that he had toured the Worthing facility and that he was "impressed" by the safety measures in place. At the conclusion of the hearing, the commissioners present voted unanimously in favor of upholding the MPC's decision to grant the permit to EFC.

The Hansons appealed to circuit court. The Hansons argued that the MPC and Commission violated their right to due process of law in two ways: First, the Hansons alleged that the Minnehaha County Zoning Ordinances ("MCZO") did not provide adequate criteria upon which to base a decision to grant a conditional use permit in this case. Therefore, they argued that the MPC's decision to grant EFC a conditional use permit was arbitrary and capricious and constituted a violation of the Hansons' constitutional right to due process of law. Second, the Hansons alleged that in light of Kelly's ex parte communications with EFC, Kelly's subsequent participation in their appeal to the Commission denied them a fair and impartial hearing, violating the Hansons' right to due process.

The circuit court found that the MCZO satisfied the state statutory requirements for criteria evaluation of conditional uses. (SDCL 11-2-17.3.) The circuit court also found that Kelly's tour of the Worthing Facility constituted ex parte communication that disqualified his vote. However, the circuit court found no evidence of influence in the other three votes and, therefore, left the Commission's decision intact.

The Hansons appealed, raising the same arguments.

DECISION: Judgment of circuit court affirmed.

The Supreme Court of South Dakota held that the Hansons' constitutional due process arguments failed. The court upheld the grant of EFC's conditional use permit.

The court first concluded that the Hansons' failed to support their contention that the MCZO was inherently arbitrary and lacked statutorily required criteria for evaluating conditional uses. State statutory law, SDCL 11-2-17.3, only required counties to establish "criteria for evaluating each conditional use." Here, the court found that the MCZO provided nine criteria applicable to EFC's proposed conditional use. Moreover, the court noted that zoning law is afforded a presumption of constitutionality, and will only be found arbitrary and unconstitutional when it has "no substantial relations to the public health, safety, morals,

or general welfare." Here, the MCZO required the Commission to protect the health, safety, and general welfare of the public.

Next, addressing the Hansons' due process claims related to Kelly's ex parte communications, the court explained that a "fair trial is a basic requirement of due process which is applicable to administrative agencies." The court said that the test in determining whether an applicant received a fair and impartial hearing is "whether there was actual bias or an unacceptable risk of actual bias." The court further explained that if it was to find that Kelly's disqualifying interest resulted in a due process violation to the Hansons, the remedy would be to place the Hansons in the same position had the lack of due process not occurred.

The court concluded that the Hansons' failed to meet the burden necessary to show that Kelly's ex parte communications violated the Hansons' due process rights. The Hansons had not asserted or shown that Kelly had a conflict of interest (i.e., a personal interest in the outcome) that would have required the court to automatically order a new hearing in the case. Further, the Hansons had failed to meet their burden of showing that "Kelly's actions were sufficient to taint the entire proceeding or that one of the remaining commissioners should also be disqualified individually." There was no evidence that the other commissioners relied on, or even considered, Kelly's statements when casting their votes, found the court. The Hansons also failed to point to any specific "opinions" that Kelly shared before the Commission that were not otherwise also directly addressed by witness testimony at the hearing. Having found that Kelly's statements were otherwise supported by evidence in the record or testimony by witnesses, and that other commissioners were not influenced by Kelly's actions, and that the other county commissioners were of equal station to Kelly, the court concluded that there was "no unacceptable risk that his opinion carried disproportionate weight." Therefore, the court concluded that: (1) Kelly's opinions did not affect the outcome of the proceeding; and (2) invalidating Kelly's voted was sufficient to preserve the Hansons' due process rights by putting them in the same position they would have been in had Kelly not participated in the hearing.

See also: *Armstrong v. Turner County Bd. of Adjustment, 2009 SD 81, 772 N.W.2d 643 (S.D. 2009).*

See also: *Northwestern Bell Telephone Co., Inc. v. Stofferahn, 461 N.W.2d 129, 118 Pub. Util. Rep. 4th (PUR) 77 (S.D. 1990).*

Zoning News from Around the Nation

MICHIGAN

Legislation proposed in the state Senate—Senate Bills 1123 and 1124—aims to restrict "nuisance" lawsuits filed over wind turbines. The bills would exempt from lawsuits those who operate or own wind turbines that are in compliance with state and local rules. The bills would prohibit lawsuits such as those filed by 17 Mason County residents against Consumers Energy over negative health impacts, including dizziness, sleeplessness, headaches and other physical symptoms they allege are being caused by wind turbines. Bill proponents think the proposed legislation will "put more of an onus on our local zoning officials to really dig in and make sure their ordinances protect health and safety."

Source: *Michigan Capital Confidential; www.michigancapitolconfidential.com*

MINNESOTA

In early November, the Minnesota Supreme Court heard objections to a city of Winona law that limits the number of rental homes on each city block to 30% of all homes. Opponents argue that the city "does not have the authority to limit the number of homeowners who can rent their properties," and that the law is unconstitutional.

Source: *MPRNews; www.mprnews.org*

OREGON

The Albany City Council has adopted locational restrictions for sellers of recreational marijuana and marijuana-infused products. They reportedly mirror restrictions on medical marijuana dispensaries. The restrictions are effective immediately. Measure 91, which voters approved in the November ballot, legalizing recreational marijuana and directing the Oregon Liquor Control Commission to regulate it, does not take effect until July 1, 2016.

Source: *Democrat Herald; http://democratherald.com*