QUINLAN™ January 10, 2015 | Volume 9 | Issue 1

Zoning Bulletin

in this issue:

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Mat #41675397

Proceedings—Neighbor sues landowner, challenging validity of special use permit

Landowner contends such a private action cannot be brought under state law

Citation: *Nord v. Village of Saybrook, 2014 IL App (4th) 140017-U, 2014 WL 5760861 (Ill. App. Ct. 4th Dist. 2014)*

ILLINOIS (11/4/14)—This case addressed the issue of whether a

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ISSN 0514-7905

private landowner may challenge the validity of a special use permit in an action brought pursuant to Illinois Municipal Code § 11-13-15—which permits private actions to enforce zoning violations.

The Background/Facts: In July 2009, Gene Talley ("Talley") was the zoning officer for the Village of Saybrook, Illinois (the "Village"). While acting as the zoning officer, Talley issued a building permit to himself for the construction of a 42-foot by 72-foot storage structure ("shed") on property he owned in the Village's R-1 residential district. Later, the Village's attorney advised Talley to cease construction until he established a principal use on his property or he applied for a conditional-use permit.

Eventually, the Village adopted a zoning amendment, reestablishing a zoning board of appeals to consider special-use applications. In February 2010, Talley applied for a special-use permit to construct the shed on his property. Through adoption of an ordinance, the Zoning Board of Appeals (the "Board") approved Talley's application for a special use permit to allow the accessory use of the shed on Talley's property. Talley was issued a special use permit and a zoning certificate allowing the use.

In April 2010, Talley's neighbor, Renee Nord ("Nord") filed a complaint against, among others, Talley. In an amended complaint, Nord alleged, among other things, that "Talley's actions violated the zoning ordinance," as the special use permit Talley obtained was "void in that it was arbitrary, capricious, unreasonable, and bore no substantial relationship to the public health, safety, morals, comfort, or general welfare of the Village and its residents."

Talley sought summary judgment. He asked the court to find that there were no material issues of fact in dispute and to decide the matter in his favor on the law alone. Talley argued that he was entitled to summary judgment because § 11-13-15 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/11-13-15) allows a private citizen to enforce zoning violations but does not allow a private citizen to challenge the validity of a zoning regulation.

Section 11-13-15 of the Municipal Code states, in pertinent part:

> In case any building or structure . . . is constructed . . . or any building or structure . . . or land is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, . . . any owner or tenant of real property, within 1200 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding (1) to prevent the unlawful construction . . . or use, (2) to prevent the oc-

cupancy of the building, structure or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation.(65 ILCS 5/11-13-15 (West 2012).)

The trial court granted summary judgment in favor of Talley. It agreed with Talley that § 11-13-15 of the Municipal Code did not allow a plaintiff to challenge the validity of an ordinance. The court found that Nord's "sole avenue of relief was administrative review pursuant to the Administrative Review Law." (735 ILCS 5/3-101 to 3-113.) Because Nord had not sought administrative review of the ordinance, the court found in favor of Talley.

Nord appealed. Nord maintained that she could bring a private action against Nord for zoning ordinance violations because his special permit allowed the use of property in a manner that would otherwise violate the zoning ordinance. Nord argued that the validity of the special use permit had a direct bearing on whether Talley was violating the zoning ordinance.

DECISION: Judgment of circuit court affirmed.

The Appellate Court of Illinois Fourth District concluded that § 11-13-15 of the Municipal Code did not permit Nord to challenge the validity of the special use permit through an action against a Talley, "a private violator of the Village's zoning ordinance." Rather, the court held, a person challenging the validity of a special use permit must do so through an action against the municipality seeking to invalidate the grant of the permit.

The court explained that a legislative decision such as the enactment of an ordinance granting a variance application is reviewable through a declaratory judgment proceeding challenging the validity of the ordinance. To have an ordinance declared invalid, the complaint "must allege that it is 'arbitrary, capricious and unreasonable' and bears 'no substantial relation to the public health, safety or general welfare' [citation], or in some other way violates the plaintiffs' constitutional rights."

Here, Nord had filed an action against the Village seeking to invalidate Talley's special use permit but she had based that challenge on alleged Open Meetings Act violations. Nord failed to allege that the Village, in granting the special use permit, acted arbitrarily, capriciously, or unreasonably, or that the special use permit bore no rational relationship to the health, safety, welfare, and morals of the public. She had only brought those allegations against Talley.

The court concluded that because Nord failed to "appropriately

challenge" Talley's special use permit, Talley's intended use of his property was not in violation of the Village's zoning ordinance. The special use permit allowed Talley to use the property in a way that would otherwise have violated the underlying ordinance; it allowed him to establish an accessory structure that was 72 feet long, 42 feet wide, and 22 feet high as the primary structure on his property.

Accordingly, the court concluded that summary judgment was properly granted to Talley.

See also: *Young v. City of Belleville, 115 Ill. App. 3d 960, 71 Ill. Dec. 759, 451 N.E.2d 913 (5th Dist. 1983).*

Case Note:

Nord had brought other claims in her action, including claims against the Village, alleging violation of Illinois' Open Meetings Act. The appellate court concluded that those claims failed because Nord had failed to show how the alleged violation was a "step" leading to the issuance of Talley's special use permit, plus the Village had remedied any alleged prior violation of the Open Meetings Act by holding a subsequent public meeting that was in compliance of the Act.

Uses—Hospital seeks to construct helipad

City and hospital dispute whether a helipad is a permitted accessory use in zoning district

Citation: *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals, 2014-Ohio-4809, 2014 WL 5644149 (Ohio 2014)*

OHIO (11/05/14)—This case addressed the issue of whether a helipad was a permissible accessory use of a hospital under the zoning regulations of the City of Cleveland.

The Background/Facts: The Cleveland Clinic Foundation (the "Clinic") owns the Fairview Hospital (the "Hospital") in Cleveland, Ohio (the "City"). The Hospital was constructed in 1952. The Hospital's parcels of land were rezoned in 1964 to "Local Retail Business District." Pursuant to the Cleveland Code of Ordinances ("C.C.O."), such a district allows uses that are "normally required

for the daily local retail business needs of the residents of the locality only." (C.C.O. 343.01(a).)

In October 2010, the Clinic filed an application with the City's Department of Building and Housing seeking approval of three construction projects for the Hospital, including the construction of a helipad on the roof of a proposed two-story addition. The City rejected the Clinic's application for the helipad, citing C.C.O. 343.01(b)(8), which provides that "accessory uses" are allowed "only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division." Thus, the City rejected the Clinic's assertions that a helipad was a permitted use for property within a Local Retail Business District.

The Clinic appealed to the City's Board of Zoning Appeals (the "BZA"). Among other things, testimony at the hearing established that nearly 88% of hospitals in and around the City had helipads. It also made clear that a helicopter significantly reduced transportation time for critically ill patients.

Ultimately, the BZA determined that a helipad was not "an accessory use authorized as of right." Citing C.C.O. 343.01(b)(8), the court said this was because "those uses that the Zoning Code characterizes as retail businesses for local or neighborhood needs would not involve a helip[ad] as normally required for the daily local retail business needs of the residents of the locality."

The Clinic appealed the BZA's denial of the helipad. The court of common pleas reversed. The court pointed to C.C.O. 343.01(b)(1), which provides that with limited exceptions, all uses permitted in the Multi-Family District are also permitted in the Local Retail Business District. The common pleas court looked at other provisions of the C.C.O. and concluded that a helipad was "customarily incident to" a hospital and therefore qualified as an "accessory use." The court reasoned that "hospitals and their accessory uses are expressly permitted in the City's Multi-Family District, and are therefore permissible in the City's areas that are zoned 'Local Retail Business District.' '' The common pleas court concluded that because the "record before [the court]" established that a helipad qualified as an "accessory use" in a Multi-Family District, it was "therefore permissible in the instant case."

The BZA appealed. The appellate court reversed. The appellate court held that since the BZA reasonably relied on the code provision—C.C.O. 343.01(b)(8)—in its decision, its determination should hold so long as its decision was "not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the

preponderance of substantial, reliable, and probative evidence on the whole record." The court held that the BZA had "reasonably relied on C.C.O. 343.01(b)(8) and the evidence in the record" in concluding that a helipad was not an accessory use as of right, and the trial court had abused its discretion "in determining that the administrative order was not supported by reliable, probative, and substantial evidence." It further held that courts must give "due deference" to an agency that has accumulated special expertise.

The Clinic appealed.

DECISION: Judgment of district court of appeals reversed; common pleas court judgment reinstated.

The Supreme Court of Ohio first held that the appellate court had applied the incorrect standard of review when it reversed the common pleas court's decision. The appellate court had analyzed whether the BZA had reasonably interpreted the ordinance. Rather, found the Supreme Court of Ohio, under the proper standard of review, the appellate court should have analyzed whether the common pleas court's decision was properly supported by evidence (not whether the BZA's decision was properly supported by evidence). (R.C. 2506.04.)

The Supreme Court of Ohio found that the common pleas court's decision was properly supported by the evidence. The Supreme Court of Ohio reiterated the common pleas court finding that "hospitals and their accessory uses [were] expressly permitted in the City's Multi-Family District, and [were] therefore permissible in the City's areas that [were] zoned 'Local Retail Business District.' " The parties had not disputed that conclusion. Rather, they had disputed whether a helipad was an accessory use.

The BZA had asserted that because C.C.O. 343.01(b)(8) provided that accessory uses were allowed "only to the extent necessary normally accessory to the limited types of neighborhood service use permitted under this division," a helipad was forbidden because helipads were not "normally required for the daily local retail business needs of the residents of the locality only." The Supreme Court of Ohio rejected that argument, finding it "seem[ed] designed to inject ambiguity into a code that [was] not ambiguous." The court said that the BZA had to look at the Code as a whole.

Looking at the Code as a whole, the court focused on the language of the C.C.O. that defined accessory uses (C.C.O. 325.02 and 325.721) and that defined the types of buildings permissible in the Multi-Family District and the Local Retail Business District (C.C.O. 337.08 and 343.01(b)). Strictly construing the ordinance in favor of

the property owner, and looking at the entire context of the ordinance, the court found that the proposed helipad fit the C.C.O's definitions of "accessory use or building." The helipad would be built on the same lot or parcel as the principal use, and a helipad was customarily incidental to the principal use of the property, a hospital (where as 88% of hospitals in the City's metropolitan area had helipads). Accordingly, the Supreme Court of Ohio concluded that a helipad was a permitted accessory use because it was customarily incident to a hospital, which was a permitted use under the Code, and thus the Hospital was entitled to construct.

See also: *University Circle, Inc. v. City of Cleveland, 56 Ohio St. 2d 180, 10 Ohio Op. 3d 346, 383 N.E.2d 139 (1978).*

Proceedings—Landowners ask court to grant equitable relief, prohibiting town from enforcing ordinance after it already issued related building permit

Town says court action must be dismissed because landowners did not exhaust administrative remedies

Citation: *Dembiec v. Town of Holderness, 2014 WL 5859514 (N.H. 2014)*

NEW HAMPSHIRE (11/13/14)—This case addressed the issues of: (1) whether a zoning board of adjustment has the jurisdiction to decide a municipal estoppel claim; and (2) under what circumstances landowners are not required to exhaust administrative remedies before seeking judicial review.

The Background/Facts: Daryl and Marcy Dembiec (the "Dembiecs") owned property in the Town of Holderness, New Hampshire (the "Town"). Prior to October 2011, the only structure on that property was a two-story boathouse with living quarters on the second floor. The Dembiecs sought to construct a single-family home on their property. In October 2011, the Dembiecs obtained from the Town a permit for construction of a single-family home on their property.

In April 2012, when construction of the Dembiecs home was substantially complete, the Town's compliance officer advised the Dembiecs that he would not issue a certificate of compliance for their new home because the boathouse contained a dwelling unit, and the applicable zoning ordinance allowed two dwellings on a lot only when they were the same structure. The Dembiecs were advised to either obtain a variance or remove all plumbing from the boathouse.

The Dembiecs applied to the Town's zoning board of adjustment (the "ZBA") for an equitable waiver from the ordinance. After that was denied, the Dembiecs sought a variance, which was also denied. The Dembiecs then filed in court a petition for equitable relief. The Dembiecs asked the court to declare that because the Town issued a building permit, it was "estopped from enforcing the one dwelling per unit lot provision of the zoning ordinance as applied to the Property." In other words, the Dembiecs sought the equitable relief of municipal estoppel. They also requested an order requiring the Town to issue certificates of compliance and occupancy for the single family house.

The Town asked the court to dismiss the petition. The Town argued that the court lacked jurisdiction because the Dembiecs had not appealed the decision of the compliance officer to the ZBA, and, therefore, had failed to exhaust their administrative remedies.

The trial court agreed with the Town and dismissed the petition.

The Dembiecs appealed.

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

The Supreme Court of New Hampshire held that because the ZBA lacked authority to grant the relief requested by the Dembiecs in their petition, the Dembiecs were not required to exhaust their administrative remedies before bringing their judicial petition.

In its decision, the court acknowledged that, in the interest of "encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency," "[o]rdinarily, parties must exhaust their administrative remedies before appealing to the courts." However, the court also recognized that the exhaustion of administrative remedies is not required under certain circumstances. Such circumstances include, said the court: when it is "unnecessary to burden local legislative bodies and zoning boards with the responsibility for rulings on subjects that are beyond their ordinary competence," such as when "the action raises a question that is peculiarly suited to judicial rather than administrative treat-

ment and no other adequate remedy is available," including with questions of the constitutionality or validity of an ordinance. Circumstances warranting exception to the administrative exhaustion requirement also include, said the court: "when further administrative action would be useless."

Here, the court found that an appeal by the Dembiecs of the compliance officer's decision to the ZBA would fall under that second exception. The court found such an appeal would have been useless because the ZBA lacked the authority to grant the Dembiecs' request of the equitable relief of municipal estoppel. The court explained that zoning boards only have those powers expressly conferred upon them. The court found that the plain language of the pertinent New Hampshire statutes (RSA 674:33 and 674:33-a) did not confer equitable jurisdiction upon a zoning board. It noted that, under those statutes, a zoning board has the authority to grant equitable relief from a zoning ordinance only when the statutory prerequisites for an equitable waiver, a variance, or a special exception are satisfied. The court found that the statutes did not confer upon a zoning board of adjustment the power to grant relief under the equitable doctrine of municipal estoppel.

Accordingly, here, the court concluded that the ZBA would have had "no authority under a municipal estoppel theory to order the compliance officer to issue a certificate of compliance to the petitioners given that their new home indisputably failed to comply with the ordinance." In other words, the ZBA "could not have compelled the compliance officer to violate the ordinance merely because doing so, arguably, would have been 'equitable.' " Moreover, the court found that the ZBA could not have granted any relief to the Dembiecs under the applicable statutes or the Town's ordinance "because their new home violated the ordinance, and they failed to meet the requirements for either a variance or an equitable waiver from dimensional requirements." Under those circumstances, the court concluded that "further pursuit of administrative remedies would have been futile, and, therefore, exhaustion of remedies [was] not required."

Finding that the Dembiecs' municipal estoppel claim was not barred by the exhaustion of administrative remedies, the court remanded the matter to the trial court for further proceedings on the claim.

See also: *McNamara v. Hersh, 157 N.H. 72, 945 A.2d 18 (2008).*

See also: *Porter v. City of Manchester, 151 N.H. 30, 849 A.2d 103, 21 I.E.R. Cas. (BNA) 642 (2004).*

Case Note:

The court noted that its decision comported with decisions in numerous other jurisdictions. (See Fields v. Kodiak City Council, 628 P.2d 927, 931 (Alaska 1981) (zoning board's authority "is restricted to that provided by the zoning ordinance and its enabling legislation" and, under that scheme, board lacked authority to decide equitable questions of estoppel and "clean hands"); Carini v. Zoning Bd. of Appeals of Town of West Hartford, 164 Conn. 169, 319 A.2d 390, 393 (1972) (zoning board's function is not to consider matters such as estoppel or laches in determining whether a variance should be granted); Bianco v. Town of Darien, 157 Conn. 548, 254 A.2d 898, 901 (1969) (exhaustion of administrative remedies is not required for an action seeking equitable relief because such claims "are not susceptible of determination by a zoning board . . . composed of laymen but can only be resolved in a judicial proceeding"); Forest County v. Goode, 219 Wis. 2d 654, 579 N.W.2d 715, 722 (1998) (zoning board "has no equitable power"). But see Vaughn v. Zoning Hearing Bd. of Tp. of Shaler, 947 A.2d 218, 223-24 (Pa. Commw. Ct. 2008) (Pa.Commw.Ct.2008) (zoning board had jurisdiction to grant a "variance by estoppel").)

Case Note:

In its decision, the court distinguished claims of municipal estoppel that were "essentially an appeal of a planning board determination" (which would require exhaustion of administrative remedies), and a municipal estoppel claim not predicated upon a contention that the board or compliance officer erred (such as here) (which is actually a new claim for relief and which the court held would not require the exhaustion of administrative remedies).

Zoning News from Around the Nation

CALIFORNIA

The City of San Clemente has been sued by a group seeking to develop a homeless shelter. The group charges that a new city ordinance "flouts a state mandate designed to facilitate shelters."

The lawsuit says the ordinance makes shelters in the city unfeasible such as by designating sites for shelters, which are actually unavailable, and imposing costly standards. "Since 2007, Senate Bill 2 has required all cities in California to adopt zoning allowing discretion-free shelters."

Source: *OC Register; www.ocregister.com*

NEW JERSEY

Assembly Speaker Vincent Prieto recently announced that he is introducing legislation that would consolidate the New Jersey Meadowlands Commission (the zoning and planning agency for a 30.4-square-mile area in Bergen and Hudson counties) and the New Jersey Sports and Exposition Authority (which promotes athletic contests, horse racing, and other spectator events in the state). Prieto reportedly touts this as a move that would "boost property tax savings, economic growth and job creation in the Meadowlands region." Among other things, the bill would also reestablish the Hackensack Meadowlands Transportation Planning District.

Source: *NJ.com; www.nj.com*

RHODE ISLAND

Providence Mayor Angel Taveras recently signed an ordinance updating the city's zoning rules "for the first time in more than 60 years." The new rules, which go into effect on December 24, reportedly include "streamlining the development process and making changes to encourage more pedestrian friendly development in certain areas of the city."

Source: *The State; www.thestate.com*

VERMONT

The state's Department of Housing and Community Development recently announced that nearly 50 Vermont cities and towns will share $475,000 in state municipal planning grants.

Source: *The Barre Montpelier Times Argus; www.timesargus.com*

QUINLAN™ January 25, 2015 | Volume 9 | Issue 2

Zoning Bulletin

in this issue:

THOMSON REUTERS

Mat #41675493

Rezoning—Land use commission reverts land use classification to former use

Property owner argues commission's reversion is improper under state statutory law

Citation: *DW Aina Le"a Development, LLC v. Bridge Aina Le"a, LLC., 2014 WL 6674432 (Haw. 2014)*

HAWAI'I (11/25/14)—This case addressed the issue of whether the Hawai'i Land Use Commission ("LUC") properly reverted land to its for-

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ISSN 0514-7905

mer land use classification pursuant to Hawai'i statutory law, Hawai'i Revised Statutes ("HRS") § 205-4(g).

The Background/Facts: In 1989, the LUC reclassified 1,060 acres of land in Waikoloa on Hawai'i Island from agricultural to urban in order to allow the development of a residential community. The reclassification was subject to numerous conditions, including a condition that at least 60% of the residential units be affordable. Over time, the land changed hands several times, and the LUC granted requests to amend the affordable housing condition. By 2005, the condition required the landowner, Bridge Aina Le'a, LLC ("Bridge"), to construct 20% of the housing units as affordable housing units.

By December 2008, the LUC opined that Bridge and its predecessors in interest had failed to meet the affordable housing conditions of the reclassification. LUC issued an order to show cause ("OSC") pursuant to HRS § 205-4(g) as to why the land should not revert back to its former agricultural land use classification.

Soon after the OSC, Bridge assigned its interest in the land to DW Aina Le'a Development LLC ("DW"). DW then invested more than $20 million in developing the site.

Nevertheless, after OSC proceedings over the course of several years, in April 2011, the LUC issued an order reverting the land to the agricultural use district.

Bridge and DW appealed the LUC's decision and order. Their cases were consolidated in circuit court. The circuit court reversed and vacated the LUC's decision and order. Among other things, the circuit court concluded that the LUC had exceeded its statutory authority and violated HRS Chapter 205. The court found that while the statute granted the LUC authority to establish land use regulations for the major classes of uses and to establish boundaries of the districts for those uses, the responsibility of enforcing the land use classification districts adopted by the LUC was expressly delegated to the counties.

The LUC appealed. On appeal, the LUC argued that reclassification and reversion of property was different under HRS § 205-4(a) and 205-4(g). Specifically, the LUC argued that pursuant to HRS § 205-4(g), it was authorized to impose conditions on a petition seeking to amend a district boundary, to issue an OSC, and to revert property to its former land use classification. In the LUC's view, because reclassification was different than reversion, it was not required to consider other factors set forth in HRS §§ 205-16 and 205-17, or satisfy the requirements of HRS § 205-4(h), or satisfy the 365 day deadline set forth in HRS § 205-4(g).

Bridge and DW argued that, pursuant to the statute, the LUC could only revert property pursuant to an OSC if the petitioner had not substantially commenced use of the property. They pointed to the language of HRS § 205-4(g), which provides: "The [LUC] may provide by condition that absent substantial commencement of the use of land in accordance with

such representations [made to LUC by the petitioner], [the LUC] shall issue and sever upon the party bound by the condition an OSC why the property should not revert to its former land use classification or be changed to a more appropriate classification." They argued that they had substantially commenced use of the property and therefore LUC's reversion was improper.

DECISION: Judgment of circuit court affirmed in part.

The Supreme Court of Hawai'i agreed with Bridge and DW. It held that since DW and Bridge had substantially commenced use of the land in accordance with their representations, the LUC erred in reverting the property without complying with the requirements of HRS § 205-4.

The court explained that once the LUC issues an OSC, the procedures it must follow before reverting land depend upon whether the petitioner has substantially commenced use of the land. While HRS § 204(g) gives the LUC broad authority to impose conditions on boundary amendments, the court noted that enforcement of those conditions was expressly left to counties under HRS § 205-12. HRS § 205-4(g) provides the one exception to that general rule, allowing the LUC to revert property to its former land use condition when substantial commencement of the use of the land has not begun. Thus, where the petitioner has substantially commenced use of the land, the LUC is bound by the requirements of HRS § 205-4, which require the LUC to: find by a clear preponderance of the evidence that the reclassification is reasonable, not violative of HRS § 205-2, and consistent with the policies of HRS §§ 205-16 and 205-17 (HRS § 205-4(h)); obtain six votes in favor of the reclassification (HRS § 205-4(h)); and resolve the reversion or reclassification issue within 365 days (HRS § 205-4(g).) The court further clarified that the LUC may only revert property without following those procedures when the petitioner has not substantially commenced use of the property in accordance with its representations.

Here, the court found that by the time the LUC reverted the property to the agricultural land use district, Bridge and DW had substantially commenced use of the land in accordance with their representations. Specifically, the court found that they had constructed sixteen townhouses on the property, commenced construction of numerous other townhouses, and graded the site for additional townhouses and roads. At that point, more than $20 million had been spent on the project. The court further found that although Bridge and DW had substantially commenced use of the land, the LUC failed to comply with the requirements of HRS § 205-4. Although its order reverting the property to the agricultural land use district had explained how DW and Bridge had failed to comply with representations made to the LUC, the LUC failed to make specific findings as to whether the reversion was "reasonable," not violative of HRS § 205-2, and consistent with the policies and criteria established under HRS §§ 205-16 and 205-17. Moreover, the LUC had failed to resolve the OSC within 365 days as required, but rather had taken several years to resolve it.

Accordingly, because it had not complied with the requirements of HRS

§ 205-4, the court concluded that the LUC erred in reverting the property to the agricultural land use district.

See also: *Lanai Co., Inc. v. Land Use Com'n, 105 Haw. 296, 97 P.3d 372 (2004).*

Case Note:

The court also explained that in cases where the petitioner has not substantially commenced use of the property, then the LUC may revert the property without following the strictures of HRS § 205-4, so long as it otherwise complies with Hawai'i Administrative Rules § 15-15-93.

Case Note:

DW and Bridge had also alleged that their procedural and substantive due process and equal protection rights had been violated by the reversion. The circuit court had agreed. The appellate court disagreed. It noted that with respect to procedural due process, both Bridge and DW had notice of the OSC and that the LUC might revert the property. They also each had a meaningful opportunity to be heard on the proposed reversion. With regard to substantive due process, the court found that the LUC's reversion was not "clearly arbitrary and unreasonable," given the project's long history, the various representations made to the LUC, and the petitioners' failure to meet deadlines. With respect to Bridge's and DW's equal protection arguments, the court concluded that the record failed to establish that the LUC's imposition of a condition and subsequent reversion of the property constituted a violation of equal protection rights.

Standing—Residents appeal county board of commissioner's approval of a zoning application

Court weighs whether residents meet the requirements for standing to appeal

Citation: *Alesi v. Warren Cty. Bd. of Commrs., 2014-Ohio-5192, 2014 WL 6612551 (Ohio Ct. App. 12th Dist. Warren County 2014)*

OHIO (11/24/14)—This case addressed, among other things, the issue of whether third-party property owners had standing (i.e., the legal right) to appeal a county board of commissioner's approval of a zoning application.

The Background/Facts: Pilot Travel Centers LLC ("Pilot") operated

truck stops. It sought to build and operate one of its "Flying J" truck stops on a 10.5-acre lot in an unincorporated area of Turtlecreek Township in Warren County (the "Property"). The Warren County Rural Zoning Code (the "Code") permitted truck stops in the zoning district in which the Property was located, subject to "site plan review" by the Warren County Board of County Commissioners ("BOCC").

Pilot filed an application for a site plan review. The BOCC eventually approved the application, subject to 24 enumerated conditions. Pilot, as well as 78 citizens with postal addresses in the County, appealed the BOCC's decision to the Warren County Court of Common Pleas. That court affirmed the BOCC's decision, but struck and modified some of the BOCC's enumerated conditions.

Pilot, the BOCC, and 58 of the citizens (the "Residents") all appealed. The Residents challenged the approval of the site plan in general.

DECISION: Judgment of court of common pleas affirmed as modified and dismissed in part.

As an initial matter, the Court of Appeals of Ohio, Twelfth District, held that the Residents lacked standing to appeal the BOCC's decision approving the Flying J. Although none of the parties had raised the issue of standing, because standing determined whether the court had jurisdiction in the case, the court addressed the issue.

The court explained that one could not appeal an administrative order absent statutory authority. Here, the court found that Ohio statutory law (R.C. Chapter 2506) permitted appeals of a decision of a board of county commissioners only by "those directly affected by the administrative decision." More specifically, the court explained that for a third-party, private property owner—such as the Residents appealing here—to appeal under R.C. 2506.01, the property owner must at a minimum have been "directly affected" by a board's decision and must have "actively participated" in an administrative hearing.

The court further explained that the "active-participation" element "requires that the third party must have actively participated in an administrative hearing by attending the hearing personally, or through a representative, and voicing opposition to the proposed property use." Also, the "directly-affected" requirement is met "where the property owner shows some unique harm that is distinct from the harm suffered by the community at large."

Here, the court found that although a few of the Residents testified before the BOCC at the hearings, most did not. Moreover, the court also found that none of the Residents who had testified at the BOCC hearings had indicated how they would be uniquely harmed by the proposed travel center. The testimony and briefing all had dealt with harms to the community at large; nowhere did any of the Residents identify any unique harm that he or she would suffer. The court found that there was "simply nothing in the record to even suggest that any of the Residents [would]

suffer any grievance different than what other residents of the community might suffer. Rather, the record evidence demonstrate[d] that the complaints voiced by the Residents consisted of generalized fears as to the impact of the truck stop on the community as a whole."

Finding none of the Residents met the unique-harm requirement, the court concluded that the Residents lacked standing under R.C. 2506.01, and that the lower court should have dismissed their appeal.

See also: *Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals, 2013-Ohio-5610, 5 N.E.3d 694 (Ohio Ct. App. 4th Dist. Athens County 2013).*

Case Note:

The court went on to evaluate Pilot's objections to certain conditions in the BOCC's resolution. The court agreed with Pilot's assertion that the common pleas court erred in upholding a condition that required Pilot to submit an additional traffic-impact study to the Ohio Department of Transportation ("ODOT"). The court agreed with Pilot that the BOCC lacked authority to order the additional study. Although the Code allowed the BOCC to determine the impact of a proposed site plan on local roadways, the court found that the BOCC exceeded its authority by requiring Pilot to submit another traffic-impact study to ODOT—a state entity over which the BOCC had no control.

Case Note:

The court also dismissed the BOCC's appeal for lack of standing, finding that the BOCC failed to identify any interest adversely affected by the common pleas court's judgment.

Proceedings—After county rezone of their property, property owners bring Harris Act and inverse condemnation claims

County contends claims fail as untimely

Citation: *Hussey v. Collier County, 2014 WL 5900018 (Fla. 2d DCA 2014)*

FLORIDA (11/15/11)—This case addressed the issue of whether causes of action alleged in relation to a zoning challenge were timely. It also ad-

dressed whether the complaint stated causes of action under which the plaintiffs could obtain relief.

The Background/Facts: Since between 1989 and 1991, Frances and Mary Hussey (the "Husseys") owned 979 acres of land (the "Property") in a rural area of Collier County (the "County") known as North Belle Meade. At the time the Husseys purchased the Property, the property was zoned such that mining was an allowed use on the Property. In 2000, the Husseys hired a contractor and "engaged in other activities in pursuit of rock mining endeavors" on the Property.

However, in July 2002, the County amended its comprehensive plan to establish a Rural Fringe Mixed-Use District ("RFMD"). Lands within the RFMD were given one of three use classifications. The Husseys' Property was designated as "Sending Lands," on which mining was precluded and residential development was limited.

In September 2002, the Husseys challenged the Sending Lands designation by filing a petition for formal administration with the Department of Community Affairs. In early 2003, an administrative law judge ("ALJ") issued a recommended order concluding that the County's actions were in compliance with state and local law. The Department of Administrative Hearings ("DOAH") approved the ALJ's recommended order in July 2003. The Husseys then appealed to the First District Court of Appeal, which affirmed DOAH's final order on September 15, 2004.

Subsequently, in accordance with the governing statute (see Fla. Stat. § 70.001(4)(a)), in July 21, 2004, the Husseys gave the County notice that they would seek compensation under the Bert J. Harris Private Property Rights Act (the "Harris Act"). The Harris Act provides a cause of action for aggrieved property owners. Under the Act, if property owners can demonstrate that a governmental action "inordinately burdens" their property, they are entitled to some form of compensation. On July 24, 2008, they filed an amended Harris Act notice. On September 11, 2008, they then filed suit in the circuit court asserting a claim under the Harris Act, as well as a claim for inverse condemnation.

The circuit court dismissed both the Husseys' Harris Act Claim and the inverse condemnation claims. The court did not detail reasons for the dismissals, but court records indicated that they were presumably because the court had determined that both the inverse condemnation claim and the Harris Act only allowed "as applied" challenges (i.e., a challenge that seeks to invalidate a particular application of a statute), while it found that the RFMD amendments were "general" ordinances (not applied to a particular property). The County also challenged both causes of action as being untimely.

The Husseys appealed.

DECISION: Judgment of circuit court affirmed in part, reversed in part, and remanded.

The District Court of Appeal of Florida, Second District, held that the

Husseys' Harris Act claim was sufficient and timely and should not have been dismissed. The court also held that the Husseys' inverse condemnation claim was untimely and was properly dismissed.

In addressing the timeliness of the Harris Act claim, the court noted that, pursuant to the governing statute, Fla. Stat. § 70.001(11), property owners have four years—plus any tolling time—to file their complaint under the Harris Act. The court found that the limitations period commenced on September 15, 2004, which was the date that the First District affirmed the DOAH's determination, thereby ending the Husseys' administrative and judicial proceeding; "it was 'when the last element constituting the cause of action occurred." The court further found that, therefore, the Husseys' September 11, 2008, lawsuit was filed within the four-year limitations period.

The appellate court also concluded that the circuit court had erred by dismissing the Husseys' Harris Act claim under the theory that the RFMD amendments had not been applied specifically to the Husseys' Property. The court found that the RFMD amendments were applied to the Husseys' Property by their very terms. The RFMD amendments specifically identified which lands in the RFMD received which designation, including the Husseys' Property.

As to the Husseys' inverse condemnation claim, the court concluded that it was untimely. The court noted that the limitations period for the inverse condemnation claim was also four years, but, unlike with Harris Act claims, no tolling period applied to inverse condemnation actions based on a regulatory taking. The court said that the statute of limitations began running on the effective date of the RFMD amendments (i.e., "when the governmental entity has made a final decision about the permissible use of the property.") The court found that the County ordinance defined that effective date as the date a final order is issued by the Department of Community Affairs or Administration Commission finding the amendment in accordance with law. Here, that order was issued by the DOAH on July 22, 2003, and thus that was the date that four-year statute of limitations began running. Accordingly, the court concluded that the Husseys' inverse condemnation claim, filed on September 15, 2008, was barred by the statute of limitations.

See also: *M & H Profit, Inc. v. City of Panama City, 28 So. 3d 71 (Fla. 1st DCA 2009).*

Case Note:

The County had also contended that the Husseys' Harris Act notice was improper. The court disagreed. It said that the Husseys were required to notify the County of their Harris Act claim within one year after the RFMD amendments were applied to their land, subject to tolling of the notice period for the time the Husseys' "Sending Lands" designation was being appealed. The court found that the Husseys' notice was timely, and had also honored the statutory mandate that no suit could

be filed until 180 days after the governmental entity is given notice of the claims (Fla. Stat. § 70.011(4)(a)) (which here was July 21, 2004).

Variance—Property owner seeks area variance to convert house to church

City argues that variance is unwarranted because any hardship is personal

Citation: *Faith Walk Fellowship Church v. Cleveland, 2014-Ohio-5035, 2014 WL 6065658 (Ohio Ct. App. 8th Dist. Cuyahoga County 2014)*

OHIO (11/13/14)—This case addressed the issue of whether a landowner was entitled to an area variance.

The Background/Facts: Faith Walk Fellowship Church ("Faith Walk") owned a single-family residence in a single-family residential zoning district in the City of Cleveland, Ohio (the "City"). Faith Walk sought to use the house as a church. A church was a permitted use in the single-family residential zoning district as long as the church was at least 15 feet from any adjoining premises. Because the house that Faith Walk wished to use as a church was less than 15 feet from the adjoining premises, Faith Walk applied to the City for an area variance. Ultimately, the City's Board of Zoning Appeals ("BZA") denied the variance request on grounds that it would have an adverse effect on neighboring property owners, would be inconsistent with the character of the surrounding neighborhood, and would be contrary to the purpose and intent of the City's zoning code.

Faith Walk appealed. The court of common pleas affirmed the BZA's decision.

DECISION: Judgment of court of common pleas affirmed.

The Court of Appeals of Ohio, Eighth District, Cuyahoga County, held that Faith Walk was not entitled to the grant of an area variance because any hardship it suffered was personal.

In so holding, the court explained that, "[u]nlike the more stringent 'use' variance, an 'area' variance will be granted upon a showing of 'practical difficulties rather than unnecessary hardship.' " Under the City's ordinance, in order to obtain the variance, Faith Walk needed to prove three conditions. First, it needed to show that Faith Walk would have practical difficulty using the house as a church without the variance, and that the practical difficulty was peculiar to the premises because of physical size, shape, or other characteristics of the premises (which differentiate it from other premises in the same district and create a difficulty or hard-

ship caused by a strict application of the provisions of this Zoning Code not generally shared by other land or buildings in the same district). In other words, Faith Walk had to show that the 15-foot setback requirement did not refer to conditions personal to it as the owner of the land but rather referred to the conditions especially affecting its lot. Second, it needed to show that refusal of the variance would deprive it of substantial property rights. Third, it needed to show that the granting of the variance would not be contrary to the purpose and intent of the City's zoning code.

The court found that Faith Walk failed to meet the first condition. It found that Faith Walk's difficulties with the 15-foot setback requirement were personal to its preferred way to use the land, not to the property itself. The court found that there was no evidence that Faith Walk could not erect on the property a church that conformed to the setback requirements. That it chose only to use the existing structure but could not use the existing structure on the land for use as a church because of the setback requirements was a condition personal to Faith Walk, not the property. Moreover, the court found no evidence of any physical or topographical attributes of the property that imposed limitations on conforming uses.

See also: *Hulligan v. Columbia Tp. Bd. of Zoning Appeals, 59 Ohio App. 2d 105, 13 Ohio Op. 3d 162, 392 N.E.2d 1272 (9th Dist. Lorain County 1978).*

Case Note:

In its decision, the court also had to construe the words of the ordinance that required the 15-foot distance of a church from "adjoining premises." Faith Walk had argued that an "adjoining premises" should be construed as a house on an adjoining lot. However, the court found that "adjoining premises," considering the ordinary meaning of "premises," meat adjoining land and structures.

Case Note:

Faith Walk had also requested a variance to have an accessory, off-street parking lot. Given its holding in the case, the court concluded that request was arguably moot.

Zoning News from Around the Nation

MICHIGAN

The state House has approved a bill that would move important notices about government actions out of newspapers and onto government Web

sites. More specifically, if passed into law, the bill would phase out, over 10 years, current requirements that notices about new laws, public hearings, or zoning changes be published in a newspaper of general circulation. Instead, local governments would publish their own notices on their government Web sites. Proponents of the bill say it would save municipalities thousands of dollars that are spent each year in newspaper notices.

Source: *Traverse City Record-Eagle; www.record-eagle.com*

NEW YORK

Governor Andrew M. Cuomo's administration recently announced that it would ban hydraulic fracturing ("fracking") in New York State because of concerns over health risks. Governor Cuomo's decision was based on a report by the acting state health commissioner, Dr. Howard A. Zucker. That report had found "significant public health risks" associated with fracking. Such health risks were listed as including water contamination and air pollution.

"Dozens of communities across New York have passed moratoriums and bans on fracking." As well, in June 2014, "the state's highest court, the Court of Appeals, ruled that towns could use zoning ordinances to ban fracking."

Source: *New York Times; www.nytimes.com*

PENNSYLVANIA

The Pittsburgh Planning Commission recently voted to recommend an amendment to the city zoning code to study the residential impact of new development within specially planned districts in the city. This would reportedly give the city council the opportunity to vote to approve code changes by a majority, rather than the super-majority vote previously required.

Source: *Pittsburgh Business Times; www.bizjournals.com*

QUINLAN™ February 10, 2015 | Volume 9 | Issue 3

Zoning Bulletin

in this issue:

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Mat #41675494

Permits/Fees—Six years after paying impact fee, developers seek refund

Town points to ordinance that allows current owners of property only to obtain such refund

Citation: *K.L.N. Construction Company, Inc. v. Town of Pelham, 2014 WL 6967664 (N.H. 2014)*

NEW HAMPSHIRE (12/10/15)—This case addressed the issue of whether a statute requiring the refund of municipal fees in certain circum-

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

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ISSN 0514-7905

stances allowed refund of the fees to the current property owners rather than to the original payors.

The Background/Facts: Under New Hampshire statutory law, RSA 674:16 and RSA 674:21, municipal impact fee ordinances must: "establish reasonable times after which any portion of an impact fee which has not become encumbered or otherwise legally bound to be spent for the purpose for which it was collected shall be refunded . . . upon the failure of the legislative body to appropriate the municipality's share of the capital improvement costs within a reasonable time . . . [and no later than] 6 years." In 1999, in accordance with New Hampshire statutory law, the Town of Pelham (the "Town") adopted an impact fee ordinance (the "Ordinance"). That Ordinance allowed the Town to assess fees on new development in order to pay for capital improvements necessitated by the development. The Ordinance also required that if the Town failed to spend or otherwise encumber the impact fees within six years, "[t]he current owners of property on which impact fees have been paid may apply for a full or partial refund of such fees, together with any accrued interest."

K.L.N. Construction Company, Inc., Cormier & Saurman, LLC, and Brian Soucy were all residential real estate developers (the "Developers"). Subsequent to the enactment of the Ordinance, the Developers paid impact fees to the Town pursuant to the Ordinance. After paying the impact fees, the Developers sold the related properties to individual homeowners.

The fees paid by the Developers were not totally spent or otherwise encumbered by March 2012. At that time, the Developers filed an action in superior court. They sought the refund of impact fees that they had paid more than six years earlier.

The Town argued that, under the Ordinance, only a current property owner was entitled to a refund of impact fees. Since the Developers had each sold the related properties, the Town maintained that the Developers lacked standing (i.e., the legal right) to seek a refund of the impact fees.

The superior court agreed with the Town and dismissed the case. The court concluded that the governing state statute, RSV 674:21,V(e), did not prevent municipalities from choosing to direct refunds to the current property owner.

The Developers appealed.

DECISION: Judgment of superior court affirmed.

The Supreme Court of New Hampshire concluded that the Town was within its authority to enact the Ordinance, directing that any refund of impact fees be paid to the current property owner.

In so concluding, the court interpreted the governing statute, RSV 674:21,V(e). Looking at the plain language of the statute, the court found that the term "refund" was not defined. The Developers had argued that, in the absence of a stated recipient for the unencumbered or unspent fees, the term "refund" in the statute must be given its "plain meaning" of "to pay back or to reimburse." Consequently, they asserted that the unencumbered fees must be paid to the original payor or its successor in interest.

The Town maintained that the statute as a whole compelled the conclusion that legislature chose not to limit payment of refunds to the original payor. To emphasize its argument and by way of comparison, the Town pointed to mandatory refund language in the state's exaction fee statute, which directed that a "refund shall be made to the payor or payor's successor in interest."

The court found the Town's argument compelling. The court found the fact that the legislature used different language when addressing impact fees and exaction fees supported a conclusion that the legislature intended different meanings. The court concluded that, under statute, the impact fee refund was not limited only to the "payor or payor's successor in interest," as was the exaction fee refund.

See also: *State Employees Ass'n of New Hampshire, SEIU, Local 1984(SEA) v. New Hampshire Div. of Personnel, 158 N.H. 338, 345, 965 A.2d 1116 (2009).*

Case Note:

Gerald Gagnon, Sr. had also intervened in the matter. He argued that, as a successor-in-interest to Woodview Development Corporation, he was entitled to a refund of impact fees that the corporation had paid prior to selling its properties.

Case Note:

The Developers had also argued that the legislative history supported their interpretation of impact fee "refund." However, because the appellate court did not find the term "refund" ambiguous, it declined to consider the legislative history.

Case Note:

In its decision, the court noted that courts in other jurisdictions have held that a "refunded" fee can be paid to an entity other than the original payor. See, e.g., Washington Urban League v. F.E.R.C., 886 F.2d 1381, 1386 (3d Cir. 1989); Texas Eastern Transmission Corp. v. Federal Power Commission, 414 F.2d 344, 348-49, 80 Pub. Util. Rep. 3d (PUR) 342 (5th Cir. 1969); Southern County Mut. Ins. v. Surety Bank, N.A., 270 S.W.3d 684, 688-89 (Tex. App. Fort Worth 2008); Lake County Bd. of Review v. Property Tax Appeal Bd. of State of Ill., 119 Ill. 2d 419, 116 Ill. Dec. 567, 519 N.E.2d 459, 461-62 (1988).

Inverse Condemnation—Under ordinance, when adjacent lots came under common ownership, they merged

Lot owners alleged merger of lots deprived use of one lot, amounting to a compensable taking

Citation: *Murr v. State, 2014 WL 7271581 (Wis. Ct. App. 2014)*

WISCONSIN (12/23/14)—This case addressed the issue of whether an ordinance that merged two adjacent lots under common ownership deprived the owners of all or substantially all practical use of their property such as to amount to a compensatory taking.

The Background/Facts: Joseph Murr, Michael Murr, Donna Murr, and Peggy Heaver (collectively, the "Murrs") owned adjacent lots—Lot E and Lot F—near a river in St. Croix County (the "County"), Wisconsin. The Murrs' parents had purchased the lots separately in the 1960s. On Lot F, the Murrs' parents built a cabin. Lot E was allegedly purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party. Together the lots contained approximately 0.98 acres.

The Murrs' parents transferred Lot F to the Murrs in 1994. They transferred Lot E to the Murrs in 1995. Under a County ordinance, § 17.36I.4.a (the "Ordinance"), the 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots. The Ordinance prohibited the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot had at least one acre of net project area. However, if abutting, commonly owned lots did not each contain the minimum net project area, they together sufficed as a single, buildable lot.

Years later, the Murrs wanted to sell Lot E as a buildable lot. They sought a variance to separately use or sell their two contiguous lots. That variance was denied, and the denial was upheld in court. The Murrs then filed a complaint against the State of Wisconsin (the "State") and the County. The Murrs alleged that the Ordinance resulted in an uncompensated taking of their property. They maintained that the merger of their lots under the Ordinance deprived them of "all, or practically all, of the use of Lot E because the lot [could] not be sold or developed as a separate lot." They alleged that the lot was usable only for a single-family residence, and that without the ability to sell or develop it, the lot was rendered useless.

Finding no material issues of fact, and deciding the matter on the law alone, the circuit court granted summary judgment to the County and State.

The circuit court held that there was no taking here because the Murrs' property, taken as a whole, could be used for residential purposes, among other things.

DECISION: Judgment of circuit court affirmed.

Agreeing with the circuit court, the Court of Appeals of Washington held that the Murrs' takings claim failed on its merits as a matter of law.

The court explained that federal and state constitutions do not prohibit the taking of private property for public use, but they do require that the government provide just compensation for any taking. The court further explained that under Wis. Stat. § 32.10, in the absence of physical occupation, in order to amount to a compensatory taking, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property."

Here, the Murrs had alleged that the Ordinance (a government regulation) effectively was a taking of their property because it deprived them of all, or substantially all, of the beneficial use of their property. The Murrs had argued that the circuit court erred when examining the beneficial uses of Lots E and F in combination. Rather, the Murrs insisted that they were entitled to compensation for the taking of Lot E, which now could not be sold separately and therefore "ha[d] no value."

The appellate court rejected the Murrs' argument. It pointed to a "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." Focusing on the Murrs' property as a whole (Lot E and Lot F combined), the court found it clear that the Murrs' could not establish a compensable taking. The property sufficed as a single, buildable lot under the Ordinance. The Murrs could continue to use their property for residential purposes, including the ability to use Lot E for such purposes (such as by razing the cabin on Lot F and building a new residence on Lot E or a new residence straddling both lots). The court found that the "Murrs' ability to use Lot E for residential purposes, standing alone, was a significant and valuable use of the property." Accordingly, the court concluded that the Murrs had not been denied "all or substantially all practical uses[ ]" of their property and thus failed to establish a takings claim.

See also: *Zealy v. City of Waukesha, 201 Wis. 2d 365, 548 N.W.2d 528, 42 Env't. Rep. Cas. (BNA) 2179 (1996).*

See also: *Howell Plaza, Inc. v. State Highway Commission, 66 Wis. 2d 720, 226 N.W.2d 185 (1975).*

Case Note:

Although the circuit court had ruled on the merits of the Murrs' claim, it had also concluded that the Murrs' claim was time barred. Having held as it did on the merits, the appellate court did not address that issue, but assumed without deciding, that the claim was time barred.

Uses—Property owner seeks conditional use permit

Township says it has no authority to issue such a permit

Citation: *Restore House, Inc. v. Helga Tp., 2014 WL 7237354 (Minn. Ct. App. 2014)*

MINNESOTA (12/22/14)—This case addressed the issue of whether a township had the legal authority to grant a request for a conditional use permit.

The Background/Facts: Restore House, Inc. ("Restore House") operated a six-resident chemical dependency treatment facility ("facility") in Helga Township (the "Township"). The facility was located in a large house on a 14-acre lot zoned "Agricultural/Rural Residential." In that zoning district, state licensed residential facilities serving six or fewer persons was allowed as of right.

In February 2013, Restore House applied for a conditional use permit ("CUP") that would allow it to serve nine, rather than just six, residents on the property. The public objected to the CUP, expressing fear that the residents would menace the community. Ultimately, the Township's Board of Supervisors (the "Board") denied the CUP. The Board's stated reasons for the denial included findings that the planned use would: "be detrimental to the public safety . . . ;" and would be an "incompatible" use, changing the essential character of the primarily residential area.

Restore House sued the Township. It asked the district court to declare that the Board's denial of its CUP request was based on insufficient and discriminatory grounds. Among other things, Restore House argued that the explanations for the denial were factually and legally deficient, and that the denial also discriminated against the disabled.

The Township argued that the governing zoning ordinance did not authorize it to grant the CUP.

The district court entered judgment against Restore House. It agreed with the Township, finding that the governing zoning ordinance gave the Board no legal authority to approve the CUP application.

Restore House appealed.

DECISION: Judgment of district court affirmed.

The Court of Appeals of Minnesota agreed with the Township and the district court. It held that the governing zoning ordinance gave the Board no legal authority to approve the CUP application.

In so holding, the court noted that the state legislature, under Minn. Stat. § 462.357 authorizes town boards to designate land uses by zoning ordinances, and under Minn. Stat. § 462.3595, authorizes town boards "by

ordinance [to] designate . . . certain land development activities as conditional uses under zoning regulations." Notably, the court found that the statute gave a town board "no authority to permit a conditional use that the ordinance has not designated as a conditional use or to issue a permit when the standards 'stated in the ordinance' cannot be satisfied."

Here, the court found that the controlling provision of the Township's ordinance directed that "[o]nly those uses specifically listed in this Ordinance as being allowed within a particular district as a permitted, conditional, interim, or accessory use may occur within that district." (Helga Township, Minn., Land Use Ordinance art. V, § 3 (2011).) The ordinance prohibited a landowner from engaging in any conditional use in a district without a permit. (Township Ordinance, § 1(9).)

Also here, the Ordinance permitted only the following uses in the Agricultural/Rural Residential District where Restore House's property was located: 1. Farms and agricultural uses; 2. Forestry; 3. Single family residences; 4. State licensed residential facilities serving six or fewer persons; 5. Class A home occupations; and 6. Accessory uses and structures to the above principal uses. The Ordinance enumerated no conditional uses for that zoning district.

Since the Board's statutory authority to grant any conditional use was restricted to those conditional uses designated by ordinance, and the Township's Ordinance did not designate any conditional uses (including residential treatment facilities serving more than six residents), the court concluded that: therefore, Restore House could not, as a matter of law, show that the Ordinance's criteria could be satisfied, and therefore, the Board had no legal authority to grant Restore House the requested conditional use permit.

See also: *Costley v. Caromin House, Inc., 313 N.W.2d 21, 27 (Minn. 1981).*

Case Note:

Restore House had also argued that the Township had waived the argument of having no legal authority to issue the CUP because it had failed to raise that argument/issue during the CUP proceedings. The appellate court acknowledged that it generally does not allow landowners to litigate issues that are not raised in the zoning process. However, the court noted that exceptions applied—such as when reviewing an issue first raised on appeal that is "plainly decisive of the entire controversy on its merits." Moreover, here, the court found was the "rare situation" in which, in addition to the municipality's stated reasons for denying the permit, the municipality simply lacked the legal authority to grant the application. The court concluded that courts were not prevented by the doctrine of waiver from affirming a municipality's denial of a conditional use permit based on the municipality's lack of authority to grant the permit even if the municipality first identifies its lack of authority during a judicial proceeding challenging its bases for denying the permit.

Variance—After seawall is constructed in accordance valid building permit, town says it violates zoning setback requirements

Town then denies variance from setback requirements finding no "practical difficulties" would result from denial

Citation: *Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals, 2014 WL 6843364 (Ind. Ct. App. 2014)*

INDIANA (12/04/14)—This case addressed the issue of whether strict application of an ordinance would result in practical difficulties, supporting the grant of a variance.

The Background/Facts: Caddyshack Looper, LLC ("Caddyshack") owned real property on Lake Shore Drive, adjacent to the Lake Michigan beachfront, in the Town of Long Beach (the "Town"). After a severe storm sheared a five-or six-foot cliff from the property, Caddyshack sought to construct a seawall to protect its property and improvements on the property. Caddyshack, through its contractor, submitted a building permit application to the Town for construction of a seawall. The building permit was issued in January 2011. Construction of the seawall began in early February 2011 and was completed by early March 2011. During construction, the Town's building inspector visited the construction site multiple times.

On March 18, 2011, the Town's Building Commissioner (the "Commissioner") notified Caddyshack and its contractor that the seawall had been constructed in violation of the Town's View Protection Ordinance (the "Ordinance"). The Ordinance prohibited the location of a structure ("i.e., a septic system and steel seawall") further than 106.6 feet from Lake Shore Drive. The Commissioner ordered Caddyshack to remove its seawall.

In July 2011, Caddyshack applied for a variance to "extend the seawall beyond the 106.60 foot setback" and "extend the seawall for 36.6 feet on the west side and 36.4 feet on the East side beyond the 106.60 mark."

The Town's Advisory Board of Zoning Appeals ("BZA") denied Caddyshack's request for a variance. The BZA based the denial on finding

that: "it was injurious to the morals and general welfare of the citizens of the Town to allow a contractor to build a structure that it should have known violated the Ordinance, that the contractor should have known a building permit signed by the Town's Clerk-Treasurer was improperly issued, and that the contractor acted at its peril in relying on the permit." The BZA further found that the use and value of the area adjacent to the property would be affected in a substantially adverse manner. The BZA also found that the strict application of the Ordinance would not result in practical difficulties in the use of Caddyshack's property because it found the record was "devoid of any evidence whatsoever showing that a seawall could not be built within the 106.6 ft. setback as required by [the Ordinance]."

Caddyshack appealed to court. Disagreeing with the BZA, the court found that approval of Caddyshack's requested variance would not be injurious to the public. The court observed that the reasoning of the BZA was based on whether Caddyshack obtained an invalid building permit and had knowledge of the setback requirement, and the court found that this was not a proper evaluation of whether granting a variance would be injurious to the public. Moreover, the court found that Caddyshack and its contractor should not have known that the building permit was invalid. The court also found no evidence that granting of the variance and construction of the seawall would affect the view or property values of surrounding properties. However, the court did find that there was insufficient evidence of economic injury that would result from denial of the variance request, and that there was no evidence that an existing seawall could not be built within the 106.6 foot setback. Thus, the court concluded that the BZA was not arbitrary or capricious when it denied Caddyshack's variance request, finding that strict application of the Ordinance would not result in practical difficulties in the use of the property for which the variance was sought.

Caddyshack appealed.

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

The Court of Appeals of Indiana disagreed with the BZA and superior court findings. It concluded that strict application of the setback requirement would result in practical difficulties of the property, and that therefore Caddyshack's variance request should be granted.

In so holding, the court explained that under Indiana statutory law, Ind. Code § 36-7-4-918.5(a), a board of zoning appeals may approve a variance if: (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community; (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.

Here, the court found that "[t]he evidence before the BZA, as determined

by the trial court and not challenged by the BZA on appeal, did not support the BZA's findings under subsections (1) and (2) of Ind. Code § 36-7-4-918.5." Thus the court focused its analysis on whether the denial of the requested variance would not result in practical difficulties in the use of Caddyshack's property. In its analysis of that issue, the court looked at the following factors: (1) whether "significant economic injury" would result if the ordinance was enforced; (2) whether the injury was self-created; and (3) whether there were feasible alternatives.

Here, the court found the following:

(1) "The evidence . . . shows that the factor of whether significant economic injury will result if the setback requirement is enforced weighs in favor of a finding that compliance with the setback requirement will result in practical difficulties in the use of the property." Though hard to predict potential future damages to the property if a seawall were not installed, the seawall was installed to protect the property from future damage. Past storm damage to the property had included exposure of pipes and the evidence showed that the distance between the edge of the pool and the 106.6-foot setback line was relatively short.

(2) "The factor of whether any injury was self-created does not weigh heavily in favor of a finding that compliance with the setback requirement will or will not result in practical difficulties in the use of the property." Although Caddyshack should have had knowledge of the applicable setback requirements and failed to seek and obtain a variance from the BZA to the setback requirements prior to installing the seawall, a building permit was issued based on information as to location of the seawall and the building inspector visited the construction site without objecting to the seawall setback location.

(3) "The factor of whether there were feasible alternatives which would have complied with the setback requirement which achieved the same goals of the landowner weighs in favor of a finding that compliance with the setback requirement will result in practical difficulties in the use of the property." The seawall was built to protect the home from storm damage. The evidence showed that there would have been few, if any, practical alternatives to a seawall within the 106.6-foot setback requirement that would adequately protect the property and that could be installed within the setback without damaging the improvements—including the existing septic system and the edge of the pool.

(4) Substantial removal or relocation costs, in light of the fact that the Town did not object to the location of the seawall before or during its construction, "provides an additional consideration which favors the conclusion that compliance with the setback requirement will result in practical difficulties in the use of the property."

Based on those findings, the court concluded that Caddyshack demonstrated that strict application of the setback requirement would result in practical difficulties in the use of the property under Ind. Code § 36-7-4-918.5(3). The court reversed the order of the trial court that had affirmed the denial of the variance, and the court remanded the matter.

See also: *Edward Rose of Indiana, LLC v. Metropolitan Bd. of Zoning Appeals, Div. II, Indianapolis-Marion County, 907 N.E.2d 598 (Ind. Ct. App. 2009).*

Zoning News from Around the Nation

CONNECTICUT

Norwalk's Common Council's Ordinance Committee is "working to put some teeth into the enforcement of Norwalk's zoning regulations." A proposed Zoning Citation Ordinance aims to "establish a local means of addressing violation rather than relying solely upon State Superior Court." Currently, Norwalk's Department of Planning and Zoning has the ability to pursue compliance through the courts and seek fines as prescribed under state statutes. Under the proposal, Norwalk "would be able to issue citations, meaning daily fines for zoning violations versus a zoning enforcement action in court." Citations would impose an initial fine of $150 and an additional fine of $150 per day after five days had passed. The recipient of the violation would have 10 days to make an "uncontested payment" of the fine, or to request a hearing.

Source: *The Hour; www.thehour.com*

MASSACHUSETTS

A Massachusetts superior court has heard arguments in a chicken zoning case. The case addresses the issues of: whether any accessory use not listed in a bylaw must be prohibited; and whether chickens meet the town bylaw's three-pronged test for allowable accessory uses (i.e., must be subordinate to the primary use, reasonably-related to the primary use, and customary within the zone).

Source: *The Republican; www.masslive.com*

PENNSYLVANIA

Four Pulaski residents are challenging the constitutionality of the township zoning ordinance. The residents claim that the township's zoning ordinance "fails to protect residential property owners from having to live near heavy industry." More specifically, they object to the township's 2002 zoning ordinance that allows hydraulic fracturing as a "conditional use" in a residential area. The residents argue that the ordinance violates the Pennsylvania constitution "because the zoning ordinance deprives residents 'of their constitutionally guaranteed right to enjoyment of private property without due process of law.' " They maintain that oil and gas drilling via hydraulic fracturing is not compatible or safe in a residential zone.

Source: *New Castle News; www.ncnewsonline.com*

