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Zoning Bulletin

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Preemption—Town ordinance prohibits solid waste processing, except subject to conditional use permit

Agricultural composting operator contends state laws preempt municipal ordinance regulation of its facility

Citation: *Dubois Livestock, Inc. v. Town of Arundel, 2014 ME 122, 2014 WL 5573301 (Me. 2014)*

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MAINE (11/04/14)—This case addressed the issue of whether Maine's Agricultural Protection Act and/or Solid Waste Act preempted a municipal land use ordinance that prohibited solid waste processing, except subject to a conditional use permit.

The Background/Facts: Since 1981, Dubois Livestock, Inc. ("Dubois") operated an agricultural composting operation in an "R-4" zone in the Town of Arundel (the "Town"). Dubois composted horse and cow manure, horse and cow bedding, and fish waste—none of which were generated on site. In 2000, the Town amended its land use ordinance (the "Ordinance") to prohibit solid waste processing in an R-4 zone, except subject to a conditional use permit.

Pursuant to the Ordinance, Dubois applied for a conditional use permit from the Town Planning Board (the "Board"). The Board issued a conditional use permit to Dubois in February 2000, and reissued a conditional use permit to Dubois in February 2011.

Under the 2011 conditional use permit, Dubois was required to, among other things, provide certain information documenting materials processed at its facility and allow the Town's code enforcement officer and the Town planner to inspect certain parts of the facility annually. In 2012, when Town representatives attempted to gather information from Dubois and inspect the facility, Dubois refused. The Town's code enforcement officer then issued to Dubois a notice of violation of its 2011 conditional use permit.

Dubois appealed to the Town's Zoning Board of Appeals (the "ZBA"). On appeal, Dubois admitted that it refused to comply with conditions imposed by the 2011 permit. However, Dubois argued that it was not subject to regulation by the Town pursuant to the Ordinance or the permit because state laws, specifically the Agricultural Protection Act and the Solid Waste Act, preempted the Ordinance.

The Agricultural Protection Act prohibits a municipality from determining that a farm's method of operations violates a local ordinance if the farm has used "best management practices." The Solid Waste Act prohibits municipal ordinances that are stricter with respect to solid waste facilities than those contained in the Solid Waste Act and the rules adopted under that Act.

The ZBA denied Dubois's appeal. It concluded that neither the Agricultural Protection Act nor the Solid Waste Act preempted the Ordinance.

Dubois again appealed, and the superior court affirmed the ZBA's decision.

Dubois once again appealed.

DECISION: Judgment of district superior court affirmed.

The Supreme Judicial Court of Maine held that neither the Agricultural Protection Act nor the Solid Waste Act preempted the Town's Ordinance prohibiting solid waste processing except subject to a conditional use permit.

In so holding, the court explained that a state statute would preempt a local ordinance if: (1) the legislature expressly prohibited local regulation; or (2) the legislature intended to occupy the field and the municipal legislation would frustrate the purpose of the state law. Accordingly, the Ordinance would be preempted only if the state laws were "interpreted to create a comprehensive and exclusive regulatory scheme inconsistent with the local action."

Here, the court concluded that the Agriculture Protection Act did not

preempt the Ordinance because: (1) the Legislature had expressly allowed local regulation of farms and thus had not expressed a clear intent to occupy the field; and (2) the Town's Ordinance did not frustrate the purpose of the Act.

Again, the Agricultural Protection Act prohibits a municipality from determining that a farm's method of operations violates a local ordinance if the farm has used "best management practices." Here, the court found that Dubois' operation was not a "farm" for the purpose of the Agriculture Protection Act, and Dubois had made no showing that it was following best practices when it violated the Ordinance by failing to share certain information and allow Town representative inspections.

The court also concluded that the Solid Waste Act did not preempt the Ordinance. Again, the Solid Waste Act prohibits municipal ordinances that are stricter with respect to solid waste facilities than those contained in the Solid Waste Act and the rules adopted under that Act. Here the court found that standards in the Ordinance were not stricter than those in the Act. The Ordinance required solid waste facilities to obtain conditional use permits, "just as solid waste facilities [were] required to obtain licenses under the Act." The court also found that the Ordinance's definitions were not inconsistent with those in the Act, as the Ordinance and the Act defined "solid waste facility" and solid waste "processing facility" almost identically. The court further found that, with similar standards and definitions, the Ordinance's provisions did not frustrate the purpose of the Act.

Case Note:

In concluding that Dubois' operation was not a "farm" for the purpose of the Agriculture Protection Act, the court noted that the Ordinance defined a farm as producing "agricultural products." The court found that Dubois did not produce "agricultural products" on site, but instead imported tons of waste materials. Moreover, the court opined that "[c]reating a product like compost, which may be used by landscapers, home gardeners, and perhaps farmers, [did] not make Dubois a 'farm' for the purposes [of the Act's] protection."

Nonconforming Use—Billboard company seeks to change nonconforming signs from vinyl to digital

Company and City dispute which zoning provision applies and whether zoning code allows alternations sought

Citation: *Key Ads, Inc. v. Dayton Bd. of Zoning Appeals, 2014-Ohio-4961, 2014 WL 5794546 (Ohio Ct. App. 2d Dist. Montgomery County 2014)*

OHIO (11/07/14)—This case addressed the issue of whether a zoning code allowed a billboard company to alter its nonconforming off-premises signs by converting the face of the signs from vinyl to electronic changeable copy panels.

The Background/Facts: Key Ads, Inc. ("Key Ads") owned three billboards in the City of Dayton (the "City"). All three signs had been built before 2006. In 2006, the City had adopted zoning restrictions that rendered the signs noncompliant with the City's Zoning Code. Accordingly, the signs were legally "non-conforming off-premises signs" under the Zoning Code.

In 2011, Key Ads filed zoning applications with the City. Under those applications, Key Ads requested to alter the three signs by changing the face of each sign from static vinyl panels to electronic changeable copy panels (i.e., digital panels). The City Zoning Administrator rejected Key Ads' applications to convert the signs. In rejecting the applications, the Administrator determined that the requested alterations were not in compliance with the Zoning Code. The Zoning Administrator pointed to § 150.140.4 of the Zoning Code prohibited nonconforming signs from being "improved or reconstructed" if the "alteration, reconstruction, or improvement" cost exceeded 50% of the replacement value of the sign.

Key Ads appealed. Key Ads contended that another provision of the Zoning Code instead governed the alteration of nonconforming signs. Key Ads said that § 150.900.18(B)(2)(b) and (B)(3) allowed for nonconforming signs to be "repaired and renovated so long as the cost of such work [did] not exceed . . . [50] percent of the value of such sign."

Here, expert witnesses had testified that the cost to convert each sign would be about $200,000. Expert witnesses had testified that the fair market value of the signs at their "highest and best use" as electronic changeable copy was $1 million to $2 million. The Zoning Administrator had testified that the value of a vinyl sign in the City was no more than $60,000.

The City's Board of Zoning Appeals (the "Board") affirmed the Zoning Administrator's rejection of Key Ads' applications.

Key Ads again appealed and the county court of common pleas reversed the Board's decision. The court found that § 150.900.18(B)(2)(b) of the Zoning Code permitted the alteration of the signs from vinyl to electronic changeable copy. The court also found that the alteration complied with § 150.900.18(B)(3) because the cost to alter the signs would not exceed 50% of the signs' value (as electronic signs).

The Board appealed. On appeal, the Board argued that § 150.140.4 of the Zoning Code governed the sign alteration request here and that the alteration cost of $200,000 would exceed 50% of the replacement value of the sign based on the vinyl sign value of $60,000.

DECISION: Judgment of court of common pleas reversed.

The Court of Appeals of Ohio, Second District, Montgomery County, agreed with the Board. The appellate court held that § 150.900.18(B) governed the requested sign alterations here. More specifically, the court found that conversion from vinyl to electronic changeable copy panels qualified as an "improvement" under § 150.140.4(B)(1).

In so holding, the court noted that "[w]hen confronted with such comparable

provisions as 150.140.4(B)(1) and 150.900.18(B), the Zoning Code require[d] the most restrictive provision to govern." Specifically, section 150.100.5(B) of the Zoning Code stated that "[w]here the conditions imposed by any provision of this Zoning Code upon the use of land, buildings, or structures are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this Zoning Code; or of any other law, ordinance, resolution, rule or regulations of any kind, the regulations that are more restrictive shall govern." In addition, § 150.100.5(C) of the Zoning Code provided that "[i]f the provisions of the Zoning Code are inconsistent with one another, the more restrictive provision shall control."

The court found that § 150.140.4(B)(1) was the more restrictive provision, which had to be applied to the case at hand. The court noted that § 150.140.4(B)(1) permitted Key Ads to improve or alter nonconforming signs only if the use was changed to a use that was permitted in the district in which it was located, or if the Board otherwise approved of the improvement or alteration and its cumulative cost did not exceed 50% of the "replacement value" for the sign. In comparison, the less restrictive § 150.900.18(B)(2)(b) and (B)(3) permitted nonconforming signs to be altered by replacing a sign panel if the sign's structure was not changed and the cost of the work did not exceed 50% of the "value" of the sign.

Applying § 150.140.4(B)(1) here, the court found that any improvements and alternations to Key Ads' signs could not exceed 50% of the cost to replace the vinyl signs in their current condition (i.e., based on their current value as vinyl signs, not based on their predicted value as electronic changeable copy). Given that the conversion from vinyl to electronic changeable copy panels would cost $200,000, the court found that it was "apparent that the project would exceed 50 percent of the signs' $60,000 to $100,000 replacement value." Therefore, under § 150.140.4(B)(1), the conversion was not permitted.

The court concluded that the Board's decision affirming the rejection of Key Ads' application to change the face of its signs from static vinyl panels to electronic changeable copy panels was lawful under the Zoning Code.

See also: *WCI, Inc. v. Ohio Liquor Control Comm., 116 Ohio St. 3d 547, 2008-Ohio-88, 880 N.E.2d 901 (2008).*

Proceedings—After two intervenors file appeal in case, third intervenor files cross-appeal

Parties dispute whether the cross-appeal was timely filed under Hawai'i law

Citation: *Friends of Makakilo v. D.R. Horton-Schuler Homes, LLC, 2014 WL 5483460 (Haw. 2014)*

Hawai'i (10/30/14)—This case addressed a question of first impression: "when must a party that seeks judicial review of an administrative decision in the form of a cross-appeal file a notice of its cross-appeal in circuit court?"

The Background/Facts: In 2007, D.R. Horton-Schuler Homes, LLC ("HSH") petitioned the Hawai'i's Land Use Commission (the "LUC"), asking to reclassify certain lands in 'Ewa District, O'ahu (the "Lands") from agricultural to urban use. HSH later amended its petition in September 2008. In February 2009, the LUC permitted Friends of Makakilo ("Friends") to intervene. In September 2009, the LUC granted Friends' motion to declare the petition deficient, with leave to HSH to amend. HSH filed subsequent amendments to its petition in May and July 2011. In September 2011, the Sierra Club and Senator Clayton Hee were granted intervenor status. On June 21, 2012, the LUC issued its decision (the "Decision"), granting HSH's petition to reclassify the Lands subject to certain conditions. A copy of the LUC's Decision was delivered to Friends on June 23, 2012.

On July 20, 2012, Senator Hee and the Sierra Club filed a notice of appeal with the Circuit Court of the First Circuit, requesting judicial review of the Decision ("Sierra Club appeal"). On August 2, 2012, Friends filed a "Notice of Cross Appeal to Circuit Court." On August 23 and 24, 2012, the LUC and HSH respectively filed motions to dismiss Friend's "cross-appeal."

Among other things, the circuit court held, pursuant to HRS § 91-14, that: (1) Friend's "cross-appeal" was not allowed by law because aggrieved parties, as defined in Hawai'i Revised Statutes ("HRS") § 91-14, have a right to appeal an agency decision, but not a right to cross-appeal; and (2) Friend's "cross-appeal," when viewed simply as a request for judicial review, was untimely.

Friends appealed. Friends argued that as an aggrieved party, pursuant to HRS § 91-15, it had a right to cross-appeal. Friends also argued that "the timely appeal by the Sierra Club/Hee divested the LUC of jurisdiction and cross-appeals were appropriate and allowed by Rule 4.1, Hawai'i Rules of Appellate Procedure ("H.R.A.P.") thereby extending the deadline for a cross appeal to 14 days after the original appeal deadline of 30 days."

DECISION: Judgment of circuit court affirmed.

The Supreme Court of Hawai'i first held that HRS § 91-14 specifically permits the filing of cross-appeals in circumstances where multiple parties request judicial review of an agency decision with the 30-day window provided in HRS § 91-14(b). As a matter of first impression (i.e., the first time the court addressed the issue), the Supreme Court of Hawai'i also held that a party seeking judicial review through cross-appeal was not entitled to a 14-day extension beyond the 30-day window in which to file a petition for judicial review.

In so holding, the court interpreted the plain language of the statute. HRS § 91-14 provides in part:

> "(a) Any person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law . . .
>
> (b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court . . . within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court . . . . The court in its discretion may permit other interested persons to intervene."

(HRS § 91- 14.)

Looking at the dictionary meaning of "cross-appeal," the court found that

where multiple requests for judicial review are initiated, "the appeal of each is called a 'cross-appeal' as regards that of the other[s]." In other words, said the court, "cross-appeals exist whenever more than one party requests judicial review of the same decision."

The court further found that the plain language of HRS § 91-14(a) showed the Hawai'i Legislature contemplated that multiple requests for review of a single decision and order may be initiated. See HRS § 91-14 (" Any person aggrieved . . . is entitled to judicial review . . . ." (emphasis added)). Thus; HRS § 91-14 specifically permits the filing of cross-appeals in circumstances where multiple parties request judicial review of an agency decision within the 30-day window provided in HRS § 91-14(b).

Again, Friends had contended that the 30-day deadline set forth in HRS § 91-14(b) did not apply to its cross-appeal. Instead, Friends had argued that court rules—specifically, Rule 4.1 of the H.R.A.P.—applied. Friends argued that Rule 4.1 conferred a "right" to cross-appeal in certain circumstances.

The court found there was "no need to comment on whether a 'right' to cross-appeal [was] bestowed by [H.R.A.P.] Rule 4.1, as the [H.R.A.P] [did] not apply to a circuit court's review of administrative decisions and orders." The court explained that although a circuit court might assume an appellate role when reviewing administrative decisions, it is not an "appellate court" as that term is used in the H.R.A.P., and therefore the H.R.A.P.—including Rule 4.1—did not apply to it.

In its holding, the court also noted that the state of Nebraska had concluded that in the absence of a specific statutory provision, "cross-appeals" of administrative decisions—such as Friend's here—were subject to the same filing deadlines as the initial appeal. The court found that the Hawai'i statute—HRS § 91-14(b)—was similar to the Nebraska statute evaluated in that case, with a similar omission of extended or different deadlines to file a cross-appeal.

Thus, the court concluded that, unless the Hawai'i legislature enacts a provision specifying the times for cross-appeals, an "aggrieved person" seeking judicial review of an administrative decision under the Hawai'i Administrative Procedures Act must institute review proceedings within 30-days after service of the final decision and order, as provided in HRS § 91-14.

The court affirmed the circuit court's determination that Friends untimely filed its "cross-appeal."

See also: *Lingle v. Hawaii Government Employees Ass'n, AFSCME, Local 152, AFL-CIO, 107 Haw. 178, 111 P.3d 587, 177 L.R.R.M. (BNA) 2103 (2005).*

Nonconforming Use—Legally nonconforming recreational gun range use grows to include commercial training use

County contends change in use is an impermissible expansion of the nonconforming use

Citation: *Kitsap County v. Kitsap Rifle and Revolver Club, 337 P.3d 328 (Wash. Ct. App. Div. 2 2014)*

WASHINGTON (10/28/14)—This case addressed the issue of whether a gun club's increased activity was permissible under the county zoning code provisions that regulated nonconforming uses. More specifically, it addressed the difference between permitted "intensification" of nonconforming uses (permitted under the county zoning code) and impermissible "expansion" of nonconforming uses.

The Background/Facts: The Kitsap Rifle and Revolver Club (the "Club") has operated a shooting range in Bremerton, Kitsap County, Washington, since 1926. In 1993, Kitsap County (the "County") adopted a new ordinance that limited the location of shooting ranges. That ordinance rendered the Club's use of the property as a shooting range to be a lawful nonconforming use.

As of 1993, the Club operated a rifle and pistol range, with members participating in shooting activities during daylight hours on weekends and during the fall "sign-in" season for hunting. Subsequently, the Club's property use changed. The Club allowed shooting between 7:00 a.m. and 10:00 p.m. The Club allowed the regular use of fully automatic "rapid-fire" weapons, as well as exploding targets and cannons. Commercial use of the Club also increased, including use by private for-profit companies, as well as military personnel training.

In 2011, the County filed a complaint for an injunction, declaratory judgment, and nuisance abatement against the Club. Among other things, the County alleged that the Club had impermissibly expanded its nonconforming use as a shooting range. The County also alleged that the Club's activities constituted noise and public safety nuisances. The County requested termination of the Club's nonconforming use status and abatement of the nuisances.

The trial court concluded that the Club's shooting range operation was no longer a legal nonconforming use because, among other things, the Club's activities constituted impermissible expansion rather than allowed intensification of the existing nonconforming use. The trial court issued a permanent injunction prohibiting use of the Club's property as a shooting range until issuance of a conditional use permit, which the County could condition upon application for all after-the-fact permits required under the Kitsap County Code ("KCC"). The trial court also issued a permanent injunction prohibiting the use of certain weapons and targets and the property's use as an outdoor shooting range before 9:00 a.m. or after 7:00 p.m.

The Club appealed.

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

The Court of Appeals, Division 2, held that the Club's increased hours of operation at the shooting range represented a permitted intensification of the legally nonconforming use. However, the court held that the commercial and military use of the shooting range, and the dramatically increased noise levels constituted an impermissible expansion of the Club's nonconforming use.

In so holding, the court explained that a legal nonconforming use is a use that "lawfully existed" before a change in regulation and is allowed to continue although it does not comply with the current regulations. Nonconforming uses, said the court, "are allowed to continue because it would be unfair, and perhaps a violation of due process, to require an immediate cessation of such a use." The court said that the law recognizes that nonconforming uses may grow in volume or intensity over time. Under the common law (i.e., court dictated, not statutory), an "intensification" of a nonconforming use generally is permissible, while the "expansion" of nonconforming use is prohibited. The court stated the standard for distinguishing between intensification and expansion:

> "When an increase in volume or intensity of use is of such magnitude as to effect a fundamental change in a nonconforming use, courts may find the change to be proscribed by the ordinance. Intensification is permissible, however, where the nature and character of the use is unchanged and substantially the same facilities are used. The test is whether the intensified use is different in kind from the nonconforming use in existence when the zoning ordinance was adopted."

The court further recognized that the County Code adopted those common law standards.

Applying the standard here, the court held that the increased hours of shooting range activities here did not affect a "fundamental change" in the use and did not involve a use "different in kind" than the nonconforming use. Rather, the court found that the nature and character of the use remained unchanged despite the expanded hours. The court found that, by definition, represented an intensification of use rather than an expansion. Accordingly, the court concluded that the increased hours of shooting did not constitute an impermissible expansion of the Club's nonconforming use.

The court also held that the Club's use of the property to operate a commercial business primarily serving military personnel represented "a fundamental change in use" and was "completely different in kind than using the property as a shooting range for Club members and the general public." Accordingly, the court held that the Club's commercial and military use of the shooting range constituted an impermissible expansion of the Club's nonconforming use.

Further, although it found the types of weapons and shooting patterns used currently did not necessarily involve a different character of use than in 1993, when similar weapons and shooting patterns were used infrequently, the court did hold that "the frequent and drastically increased noise levels found to exist at the Club constituted a fundamental change in the use of the property" and that change represented a use different in kind than the Club's 1993 property use. Accordingly, the court concluded that the dramatically increased noise levels constituted impermissible expansions of the Club's nonconforming use.

The court also ultimately concluded that—under both the KCC and the common law—the termination of the Club's nonconforming use status was not the proper remedy even though the Club did expand its use. Here, the court found that the use of the Club's property as a shooting range remained lawful, and therefore any unlawful expansion of use, permitting violations, or nuisance activities could not trigger termination of the otherwise lawful nonconforming use. Under common law, the court found no Washington case holding that an unlawful expansion of a nonconforming use, permitting violations, or nuisance activities terminates a nonconforming use. Moreover, it found no Washington case had even suggested such a remedy.

The court determined that the appropriate remedy for the Club's expansion of its nonconforming use had to "reflect the fact that some change in use—'intensification'—is allowed and only 'expansion' is unlawful." The court remanded to the trial court to determine the appropriate remedies for the Club's expansion of its nonconforming use.

See also: *Keller v. City of Bellingham, 92 Wash. 2d 726, 600 P.2d 1276 (1979).*

Case Note:

The County had also alleged that the Club had engaged in unlawful development activities because the Club lacked the required permits. It was undisputed that the Club's unpermitted development work on the property constituted unlawful uses.

Case Note:

The appellate court also held that the Club's activities—including increased noise levels and operation without property safety measures—constituted public nuisances. The court said a nuisance was a "substantial and unreasonable interference with the use and enjoyment of another person's property." Under statutory law, "an actionable nuisance" is "whatever is injurious to health . . . or offensive to the senses, . . . so as to essentially interfere with the comfortable enjoyment of the life and property." (RCW 7.48.010.). It is also defined as an "act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property." (RCW 7.48.120.)

The Club had argued that noise from its activities could not constitute a nuisance because noise regulations exempted shooting ranges (See, e.g., KCC 10.28.040 and KCC 10.28.145.) The court disagreed, noting that a nuisance can be found even if there is no violation of noise ordinances, and thus the exemption from such ordinances is immaterial.

The court affirmed the trial court's injunction limiting certain activities at the Club in order to abate the Club's nuisance activities.

Case Note:

Notably KCC 17.455.060, which specifically prohibited alteration or enlargement of a nonconforming use, was repealed after the trial court rendered its opinion. Neither

party discussed the effect of former KCC 17.455.060 being repealed. Because the court interpreted that ordinance as being consistent with the common law, the court found it did not need to address that issue.

Zoning News from Around the Nation

OHIO

In a court case challenging Broadview Height's ban on oil and gas drilling within city limits, the Ohio Department of Natural Resources (ODNR) has recently filed a motion, siding with two oil and gas companies. ODNR and the gas companies claim local governments have no authority to limit any activities relating to oil and gas. Broadview (and other cities) say the statute on which their opponents rely conflicts with the Ohio Constitution. A ruling by the Ohio Supreme Court was soon expected in the case.

Source: *Midwest Energy News; www.midwestenergynews.com*

TENNESSEE

The Cleveland Municipal Planning Commission has adopted new zoning regulations that will give developers "up to three years after receiving final approval of a plan to start a project and not be required to comply with new ordinances." The vote reportedly brings the city zoning regulations in line with a new state law that changes how and when development projects are vested. Prior to the new legislation, projects were not vested until a substantial financial investment had been made in the project. If new regulations were passed between the time the plan was approved and construction, then the project would have had to change to comply with the new requirements.

Source: *Cleveland Daily Banner; www.clevelandbanner.com*

WASHINGTON

In Seattle, the mayor's office recently proposed new zoning, packaging and testing legislation for medical marijuana dispensaries. Reportedly, under the mayor's proposal, dispensaries would be prohibited within 500 feet of child care centers, schools, parks, and similar facilities, and dispensaries with storefronts would be prohibited within 1,000 feet from each other to avoid clustering. The ordinance would also require criminal background checks for operators and testing marijuana for THC levels, molds, pesticides, and other impurities.

Source: *Puget Sound Business Journal; www.bizjournals.com*