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Zoning Bulletin

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Validity of Zoning Regulation/ Signs—Property owner sues city after receiving sign code violation notice

Property owner contends sign code exemptions for certain displays only renders the sign code unconstitutional in violation of the First Amendment

Contributors

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Citation: *Central Radio Co. Inc. v. City of Norfolk, Virginia, 2015 WL 151611 (4th Cir. 2015)*

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

FOURTH CIRCUIT (VIRGINIA) (01/13/15)—This case addressed the issue of whether a sign ordinance unconstitutionally exempted certain displays from regulation (namely, works of art and flags and emblems).

The Background/Facts: The City of Norfolk (the "City") has a zoning ordinance that governs signs (the "sign code"). The sign code was enacted for the purposes of aesthetics and traffic safety. The sign code applies to all signs within the City, but exempts: (1) any "flag or emblem of any nation, organization of nations, state, city, or any religious organization"; and (2) "works of art which in no way identify or specifically relate to a product or service." Under the ordinance, those wishing to display a sign are required to obtain a "sign certificate," verifying compliance with the sign code. Also under the ordinance, the City is required to issue a "sign certificate" if the proposed sign complies with the provisions that apply in the zoning district where the sign will be located.

Central Radio Company Inc. ("Central Radio") owned property in the City. That property was involved in an eminent domain dispute. Central Radio placed a 375-square-foot banner on the side of its building, protesting eminent domain. Following citizen complaints, the City issued Central Radio citations for displaying an oversized sign and for failing to obtain a sign certificate before installing the sign.

Subsequently, Central Radio sued the City. It asked the court to enjoin the City from enforcing its sign code. It alleged, among other things, that the sign code was unconstitutional in violation of the First Amendment to the United States Constitution. The First Amendment prohibits, among other things, the making of any law abridging the freedom of speech. Central Radio argued that the sign code was unconstitutional because it exempted certain "flag[s] or emblem[s]" and "works of art" from regulations placed on all other types of signs. Essentially, Central Radio contended that in light of those exemptions, the sign code constituted a content-based restriction on speech, both facially (i.e., on its face as written) and as applied (to Central Radio), which was subject to strict scrutiny as to its constitutionality. (In comparison, content-neutral restrictions are subject to a lesser intermediate scrutiny.)

The district court concluded that the provisions in the sign code exempting flags, emblems, and works of art were content-neutral. Applying intermediate scrutiny, the district court held that the sign code was a constitutional exercise of the City's regulatory authority.

Central Radio appealed.

DECISION: Judgment of United States District Court affirmed.

The United States Court of Appeals, Fourth Circuit, held that the sign code was a content-neutral restriction on speech that satisfied intermediate scrutiny.

In evaluating the content neutrality of the sign code, the court explained that a regulation is not a content-based regulation of speech if: (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech. As to the sign code's distinction between the types of speech requiring a sign certificate (i.e., most signs requiring a certificate, but exemptions for flags, emblems, and works of art), the court said that "a distinction is only content-based if it distinguishes content 'with a censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.' " The court explained that it would find censorial intent if it could find a relationship between the sign code's purpose and the content distinctions in the sign code.

Central Radio argued that a censorial intent existed here because the sign code exemptions were unrelated to the legislative interests behind the sign code, namely aesthetics and traffic safety. The court rejected that argument. It found that under the sign code, the City generally allowed signs regardless of the message displayed, and simply restricted the time, place, or manner of their location. Exemptions to those restrictions (i.e., for flags, emblems and works of art) may have had an "incidental effect on some speakers or messages," found the court, but the exemptions "did not convert the sign code into a content-based restriction on speech when the exemptions [bore] a 'reasonable relationship' to the City's asserted interests" of aesthetics and traffic safety. The court found that works of art "enhance rather than harm aesthetic appeal," and flags and emblems have "a less significant impact on traffic safety than other, more distracting displays."

Having found that the sign code was content-neutral (not content-based), the court then evaluated its constitutionality under intermediate scrutiny. Under such scrutiny, a content-neutral regulation is constitutional and valid if it: (1) furthers a substantial government interest; (2) is narrowly tailored to further that interest; and (3) leaves open ample alternative channels of communication. Here, the court found that all three elements were met: (1) Concerns for aesthetics and traffic safety were substantial government interests, which the sign code protected. (2) The sign code was narrowly tailored because it did not "burden substantially more speech than is necessary to further the [interests of aesthetics and traffic safety]," but regulated only the size and location of signs. (3) The sign code left open "ample alternative channels of communication" by "generally permitting the display of signs 'subject only to size and location restrictions.' "

See also: *Wag More Dogs, Ltd. Liability Corp. v. Cozart, 680 F.3d 359 (4th Cir. 2012).*

See also: *Brown v. Town of Cary, 706 F.3d 294 (4th Cir. 2013).*

Case Note:

Central Radio had also brought claims of selective enforcement of the sign code restrictions in violation of equal protection rights under 14th Amendment to the United States Constitution. The court found dismissal of those claims was appropriate because "there was insufficient evidence that the City was motivated by a discriminatory intent."

Standing—City passes ordinance that limits location of adult entertainment establishments, business owner challenges ordinance

City argues owner lacks standing to make challenge because it failed to file a complete business license application

Citation: *Hotboxxx, LLC v. City of Gulfport, 2015 WL 110614 (Miss. 2015)*

MISSISSIPPI (01/08/15)—This case addressed the issue of whether a lessor of a commercial building had standing to challenge the validity of a zoning ordinance.

The Background/Facts: On September 17, 2009, Barry Artz ("Artz"), co-owner of The Hotboxxx, LLC (the "Hotboxxx"), filed a business privilege license application with the City of Gulfport (the "City"). The Hotboxxx sought to operate an adult entertainment retail establishment. At the time of submission of the business privilege license application, Artz had signed a lease for related commercial office space in the City.

Not long after Artz submitted his application, a six-month moratorium was placed on privilege licenses due to expected new zoning regulations regarding adult businesses. In June 2010, the City passed an ordinance (the "Ordinance"), which contained zoning regulations restricting the areas of town in which adult businesses could be located. Under the new zoning regulations, Hotboxxx could not open an adult business at the location that Artz had leased.

Hotboxxx soon filed a lawsuit, challenging the constitutionality of the Ordinance. The City moved the case to federal district court, and asked the court to dismiss the case. The City argued that because Hotboxxx had failed to sign the application in front of a notary, the application was incomplete,

and therefore Hotboxxx lacked standing (i.e., the legal right to sue). The district court agreed with the City and dismissed the case.

Hotboxxx then filed a new complaint in the county court, and the City again moved to dismiss the action on the grounds of standing. Hotboxxx, however, argued that standing requirements are different under Mississippi state law than under federal law. It maintained that whether or not its business license application was complete on submission, its lease of the commercial building constituted the necessary "colorable interest" to give it standing to challenge the zoning ordinance restriction in state court.

The chancellor of the county chancery court disagreed. He held that the business license application was incomplete as submitted and therefore Hotboxxx had no standing to sue.

Hotboxxx appealed.

DECISION: Judgment of county chancery court affirmed.

The Supreme Court of Mississippi held that Hotboxxx did not have standing to challenge the constitutionality of the City zoning ordinance.

The court found that since Hotboxxx's business license application was not properly signed or notarized, the application was invalid.

The court addressed Hotboxxx's argument that its lease gave it the sufficient "colorable interest in the subject matter of the litigation" to merit standing to challenge the Ordinance, the court agreed that standing requirements in Mississippi courts differs from those in federal courts. The court noted that while federal courts require an "injury in fact," Mississippi courts require the plaintiff to assert a "colorable interest in the subject-matter of the litigation or experience an adverse effect from the conduct of the defendant . . . ." A "colorable interest," explained the court, is one in which the plaintiff has a right to judicial enforcement of a legal duty of the defendant, or one where the plaintiff can "show in himself a present, existent actionable title or interest, and demonstrate that . . . right was complete at the time of the institution of the action."

Here, the court found that Hotboxxx lacked a colorable interest. It did not have a valid license application. Moreover, a provision in Hotboxxx's lease provided that in the event Hotboxxx could not obtain a business license, the lease would be void. Thus, concluded the court, although Hotboxxx had an interest in land affected by the Ordinance, when Hotboxxx failed to submit a valid license application and failed to obtain a license, its lease became void, and Hotboxxx then no longer had an interest in the land—and therefore had no standing.

See also: *Fordice v. Bryan, 651 So. 2d 998 (Miss. 1995).*

See also: *City of Picayune v. Southern Regional Corp., 916 So. 2d 510 (Miss. 2005).*

Case Note:

The City had also argued that Hotboxxx's new complaint was barred under the

principle of res judicata (i.e., claim preclusion because the matter was already judged). The Supreme Court of Mississippi disagreed, holding that dismissal without prejudice by the federal district court did not preclude the case from being brought in the chancery court.

Zoning Amendment/ Comprehensive Plan—City fails to adopt zoning changes recommended by city planning board upon master plan reexamination

Property owner sues, arguing city must adopt zoning changes or hold a hearing to affirm zoning ordinance is to remain inconsistent with the master plan

Citation: *Myers v. Ocean City Zoning Bd. of Adjustment, 2014 WL 7565888 (N.J. Super. Ct. App. Div. 2015)*

NEW JERSEY (01/16/15)—This case addressed the issue of whether a state statute (N.J.S.A. 40:55D-62(a)) addressing a governing body's authority to adopt a zoning ordinance and the ordinance's conformity with the municipality's master plan required a governing body to affirmatively act in response to a master plan reexamination report.

The Background/Facts: John and Diane Myers (the "Myers") owned two residences located in a Beach and Dune ("B & D") Zone in Ocean City (the "City"). The B & D Zone prohibited residential and commercial uses. However, the Myers residences were constructed before the B & D Zone went into effect and were therefore nonconforming uses.

In 2011, the Myers sought a variance from the City's Zoning Board of Adjustment ("ZBA") to enable them to expand one of their residences. The ZBA denied the variance. The Myers sued.

Then, while the suit was pending, in 2012, the City's Planning Board (the "Board") completed a master plan reexamination. As part of that effort, the Board recommended a proposed zoning change in the B & D Zone. The Board noted that, as owners of nonconforming uses and structures, residential property owners in the B & D Zone were unable to expand or rebuild storm-destroyed homes without a variance. The Board proposed to deem the residences in the B & D Zone as conditional uses, designed to as-

sure that the residences did not interfere with the flood preventative functions of the zone.

The City never took action on the Board's proposed B & D Zone change. However, after the Board's 2012 report, the Myers appealed their 2011 complaint. They requested an order compelling the City to adopt the B & D zone change, or to endorse, affirmatively, maintenance of the zoning ordinance notwithstanding the proposed change.

The court granted the Myers' request, and issued an order requiring the City to "[a]mend the zoning ordinance to conform with [the Board's Master Plan reexamination report proposed zoning change" or "[h]old a hearing as required under N.J.S.A. 40:55D-62(a) to permit the zoning ordinance to remain inconsistent with the master plan."

The City appealed. It argued that the governing statutory law, N.J.S.A. 40:55D-62(a), did not require it to affirmatively act in response to the Master Plan recommendation.

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

The Superior Court of New Jersey, Appellate Division, agreed with the City. It held that N.J.S.A. 40:55D-62(a) does not require a governing body to affirmatively act in response to a master plan recommendation, so long as the existing ordinance is substantially consistent with the master plan's land use and housing plan elements.

In so holding, the court analyzed N.J.S.A. 40:55D-62(a), interpreting its plain language. In relevant part, the statute provides that a governing body:

> "may adopt or amend a zoning ordinance . . . after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance . . . shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which . . . is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full [membership of the] governing body . . . ." (N.J.S.A. 40:55D-62(a).)

The court found that nothing in the plain language of the statute required a governing body to affirmatively act in response to a reexamination report. Rather, the court found that the statute imposes conditions upon a governing body only when it decides to act after adoption of a master plan. The court also found that even if a preexisting zoning ordinance becomes inconsistent with one aspect of a reexamination report, the statute does not require action. The statute requires a majority vote and statement of reasons only if the governing body thereafter adopts an inconsistent ordinance or amendment, concluded the court.

The appellate court reversed the trial court's order.

See also: *Victor Recchia Residential Const., Inc. v. Zoning Bd. of Adjustment of Tp. of Cedar Grove, 338 N.J. Super. 242, 768 A.2d 803 (App. Div. 2001).*

Case Note:

In its decision, the appellate court noted that a governing body's inaction following a master plan recommendation may render its zoning ordinance susceptible to a general challenge that the ordinance is substantially inconsistent with the master plan, and therefore invalid. Here, the court reversed and remanded the matter, specifically noting that it was doing so without prejudice to any claim by the Myers that the City's zoning ordinance was invalid because it was not substantially consistent with the Master Plan.

Rezoning/Validity of Zoning Regulations—City rezoning rezones property as "Environmental Conservation district," limiting development on property

Property owners challenge validity of rezone, noting the property has no environmentally distinct features or endangered species

Citation: *Griepenburg v. Township of Ocean, 2015 WL 263913 (N.J. 2015)*

NEW JERSEY (02/15/11)—This case addressed the issue of whether specific ordinances that rezoned property in a township, restricting development, were valid.

The Background/Facts: Thomas and Carol Griepenburg owned approximately 34 acres of land in the Township of Ocean (the "Township"). Their landholdings consisted of five lots. On one of those lots, they lived in a single-family residence. The remainder of their property was undeveloped. When they acquired the property, it was subject to "mixed zoning" and included portions that were zoned as R-2 residential and C-3 commercial.

In the early 2000s, the Township reexamined and updated its Master Plan for development in accordance with smart growth principles. In 2005, the State Planning Commission endorsed the Township's updated Master Plan. As a condition of that endorsement, in early 2006, the Township passed a series of downzoning ordinances. The Griepenburgs' property was affected by these actions: All but one of their lots was converted from a "PA-2 Suburban Planning Area" to a "PA-5 Environmentally Sensitive Area" for the purposes of the State plan. The series of Township ordinances

that were adopted converted most of the Griepenburgs' property from residential and commercial use to an Environmental Conservation district ("EC district"), thereby restricting future development of their property.

The Griepenburgs filed a legal action. Among other things, they challenged the validity of the Township ordinances, which had rezoned their property. They argued that since their property did not contain any environmentally distinct features or threatened or endangered species, the ordinances rezoning their property were "arbitrary, unreasonable, capricious, and illegal."

The Township maintained that the Griepenburgs' property was reasonably included in the rezone because the property served as a "key connection point" linking other forested areas.

The trial court dismissed the Griepenburgs' challenge. In doing so, the court applied criteria for assessing the validity of a zoning ordinance and determined that the challenged zoning ordinances here were a valid exercise of municipal zoning power and were not arbitrary, capricious, or unreasonable.

The Griepenburgs appealed. The Appellate Division reversed. Agreeing with the Griepenburgs, the court held that the ordinances were invalid as applied to the Griepenburgs because the "downzoning [was] not required to serve the stated purposes of the ordinances and [did] not reflect reasonable consideration of existing development in the areas where the [Griepenburgs'] property [was] located."

The Township appealed.

DECISION: Judgment of Superior Court, Appellate Division reversed.

The Supreme Court of New Jersey held that the ordinances were valid in that they represented a legitimate exercise of the Township's power to zone property consistent with its Master Plan and the state's Municipal Land Use Law ("MLUL") goals.

In so holding, the court evaluated the validity of the challenged ordinances under a four-part, objective test. That test assessed whether: (1) the ordinances advanced one of the purposes of the [MLUL] as set forth in N.J.S.A. 40:55D-2; (2) the ordinances were substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements, unless the requirements of that statute were otherwise satisfied; (3) the ordinances comported with constitutional constraints on the zoning power, including those pertaining to due process, equal protection, and the prohibition against confiscation; and (4) the ordinance were adopted in accordance with statutory and municipal procedural requirements.

As to each of these elements, the Supreme Court of New Jersey gave deference to the trial court's determinations that all of them were satisfied. Among other things, the trial court had concluded that: the ordinances "advanced several purposes of the MLUL" including promotion of smart

growth, prevention of sprawl and provision for light, air, and open space; the ordinances "represented the culmination of a comprehensive land-use planning process that included a makeover of the Township's Master Plan"; and the ordinances complied with the MLUL requirement of consistency between zoning ordinances and a town's master plan.

Despite the fact that the Griepenburgs' property contained neither endangered species nor environmentally distinct features, the court found that the inclusion of the property in the EC district was not "arbitrary, unreasonable, capricious, and illegal." Rather, the court concluded that the inclusion of the Griepenburgs' property in the EC district rationally related to the Township's objectives in enacting the ordinances, which were: "to create a contiguous tract, or corridor, of environmentally related, sensitive coastal uplands in order to preserve and protect coastal habitat and ecosystems and to provide a buffer for its corresponding intention to promote smart growth in a sustainable, concentrated town center." The court concluded that the inclusion of the Griepenburgs' property in the EC district rationally related to the Township's comprehensive smart growth development plan, which "had the additional benefit of protecting a sensitive coastal ecosystem through the preservation of undisturbed, contiguous, forested uplands, of which [the Griepenburgs'] property [was] an integral and connected part." The court added that it would "decline to invalidate ordinances that fulfill MLUL goals and other legitimate land-use planning objectives . . . ."

See also: *Riggs v. Long Beach Tp., 109 N.J. 601, 538 A.2d 808 (1988).*

Case Note:

The Griepenburgs had also brought an inverse condemnation claim. The court found that claim better addressed their claim for redress for the downzoning of their property. However, the court found that the Griepenburgs could only bring that claim if they first exhausted their administrative remedies by applying for a variance, and then bringing the inverse condemnation claim if that variance was denied.

Zoning News from Around the Nation

MASSACHUSETTS

State Representative Denise Garlick has reportedly "refiled previously vetoed legislation to create an environmental buffer zone along Route 128 near the proposed Greendale Mews affordable housing project." Garlick argues the buffer is necessary to shield residents from highway air pollution and to assist with stormwater drainage. Opponents, including former

governor Deval Patrick, say the bill would "prevent the construction of a much needed affordable housing project."

Source: *http://needham.wickedlocal.com*

NEW YORK

In his recent State of the City address, Mayor de Blasio stated that the City is "creating a mandatory inclusionary zoning requirement that will apply to all major residential rezonings." " In every major rezoning development, [the City] will require developers to include affordable housing—not as an option; as a precondition," he said. Reportedly, this policy is being considered for East New York, East Harlem, Long Island City, Flushing West, the Bronx's Jerome Avenue corridor, the Staten Island's Bay Street corridor, and nine soon-to-be-named neighborhoods.

Source: *New York Magazine; http://nymag.com*

TEXAS

A district judge has dismissed a lawsuit that sought to bar an Orthodox Jewish community from worshiping at a private home. The plaintiff had charged that the single-family home was not being used as such and as required by the property owner's association, and cited problems with traffic and parking. The judge pointed to state and federal laws— the Texas Religious Freedom Restoration Act and the federal Religious Land Use and Institutionalized Persons Act—that protect religious practice "from government overreach."

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

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Mat #41675499

Nonconforming Use/Variance—Town denies variance for redevelopment of nonconforming structure

Owner maintains variance not needed, arguing lot is grandfathered under the existing structures exemption from the Massachusetts subdivision control law

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Citation: *Palitz v. Zoning Bd. of Appeals of Tisbury, 26 N.E.3d 175 (Mass. 2015)*

MASSACHUSETTS (03/03/15)—This case addressed the issue of whether a division of land pursuant to the Massachusetts subdivision control law's existing structures exemption, G.L. c. 41, § 81L, entitles the structures on the resulting lots to "grandfather" protection against new zoning nonconformities created by the division.

The Background/Facts: From 1923 until 1994, the parcels of land now known and numbered as 83, 87, and 89 Main Street in the town of Tisbury, Massachusetts, (the "Town") were held in common ownership (the "original tract"). Three single-family residential buildings stood closely clustered on the original tract. The town adopted a local zoning bylaw in 1959, and the state's subdivision control law went into effect in 1974.

Under the state's subdivision control law, a person may not subdivide a tract of land unless he or she has first submitted a plan of the proposed subdivision for approval by the town's planning board. (G.L. c. 41, § 81O.) However, planning board approval is not required for certain divisions of land that are specifically exempted from the definition of "subdivision" in § 81L of the law. (See G.L. c. 41, § 81L.) A plan falling within such an exemption is entitled to an "approval not required" ("ANR") endorsement pursuant to § 81P. (See G.L. c. 41, § 81P.)

In 1994, the owner of the original tract, Michael Putziger ("Putziger"), sought to divide the land into three lots, such that a single dwelling would stand on each lot, in conformance with the existing structures exemption from the definition of "subdivision" in § 81L. Putziger submitted a plan to the Town's planning board and received an ANR endorsement pursuant to § 81P. The ANR endorsement stated that it did "not stay enforcement of zoning violations." The plan depicting the endorsement and the three newly created lots was duly recorded.

The new lot at 87 Main Street, as created by the § 81L plan, did not conform to the town's zoning bylaw regarding minimum lot size and frontage requirements. The creation of the new lot also rendered the dwelling located thereon nonconforming with respect to its front and southern side yard setbacks. Putziger sought variances from the Town's zoning board of appeals (the "ZBA") to make the lot and dwelling lawful and, therefore, saleable as such. In 1995, the ZBA granted the variances.

In 2007, the 87 Main Street Nominee Trust, Suzanne Palitz, trustee, ("Palitz") acquired the lot at 87 Main Street. Palitz sought a building permit to tear down the existing dwelling and construct a new dwelling. The proposed new dwelling would maintain the same footprint as the old dwelling, but add a third floor and be approximately 10 feet taller.

The Town's zoning enforcement officer refused to issue the building permit without ZBA amendment of the 1995 variance.

Palitz applied for an amended or new variance. The ZBA denied Palitz's variance request, in part because the increased height of the proposed dwelling would have eliminated the view of an abutter.

Palitz appealed the ZBA's decision to court. Among other things, Palitz argued that 87 Main Street was entitled to grandfather protection under the Zoning Act, G.L. c. 40A, § 6. Under that grandfathering provision, "a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, . . . but shall apply to any change or substantial extension of such use, . . . [and] to any reconstruction, extension or structural change of such structure . . . except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure."

Palitz argued that because the dwelling at 87 Main Street predated the town's zoning bylaw and the lot was created pursuant to the existing structures exemption from the subdivision control law, neither the 1995 variance nor an amended variance was necessary to her project.

The land court judge disagreed with Palitz. The judge held that the ANR endorsement did not establish zoning compliance and, as a result, 87 Main Street was not rendered lawful for zoning purposes by the grandfather protection afforded by § 6. Rather, the judge concluded that 87 Main Street was rendered lawful by the 1995 variance, and consequently, an amendment to that variance was required for Palitz to enlarge her dwelling.

Palitz appealed.

DECISION: Judgment of land court affirmed.

The Supreme Judicial Court of Massachusetts agreed with the land court judge. It held that a division of land pursuant to the state's subdivision control law's existing structures exemption, G.L. c. 41, § 81L, does not entitle structures on the resulting lots to "grandfather" protection against new zoning nonconformities created by the division. Here, the court found that Palitz was not entitled to a grandfather status for zoning nonconformities on her lot.

In so holding, the court acknowledged that because the original structure on Palitz's lot predated the effective date of the Town's bylaw, it constituted a preexisting nonconforming structure entitled to grandfather status under the Zoning Act, G.L. c. 40A, § 6. The court noted, however, that although preexisting nonconforming status runs with the land, the introduction of a new nonconformity to a pre-existing nonconforming residential structure requires a variance. Here, noted the court, the § 81L division under the state's subdivision control law had created new zoning nonconformities as to lot size, frontage, and front yard setbacks, among others. The court reiterated that the Zoning Act's grandfathering provision (G.L. c. 40A, § 6) did not render those

new nonconformities lawful; thus, the 1995 variance was necessary to render the new nonconformities lawful. Since Palitz's proposed reconstructed dwelling would have expanded the nonconformities created by the § 81L division, which were made lawful by the 1995 variance, Palitz was required to obtain a new or amended variance to proceed with her proposed project, concluded the court. "It would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use," said the court.

Palitz argued that even if new nonconformities created by a division of land could deprive a structure of grandfather protection under the Zoning Act, new nonconformities created pursuant to the subdivision control law's existing structures exemption "should be ignored for zoning purposes." Looking at the history and purposes of the subdivision control law, the court disagreed. The court found the "notion . . . that a division of land would bestow immunity from zoning compliance simply because it was exempted from planning board oversight" was "abrasive to the independent character of [the distinct and separate regulatory regimes of zoning approval and subdivision rules and regulations]." The court noted that the Zoning Act's grandfather provision failed to incorporate § 81L or § 81P of the subdivision control law. The court thus concluded that "the consequences of an § 81L division should be confined to the regulatory regime of the subdivision control law"—qualifying a plan for ANR endorsement but not attesting to compliance with zoning regulations.

See also: *Howland v. Acting Superintendent of Bldgs. and Inspector of Bldgs. of Cambridge, 328 Mass. 155, 102 N.E.2d 423 (1951).*

See also: *Rockwood v. Snow Inn Corp., 409 Mass. 361, 566 N.E.2d 608 (1991).*

See also: *Gifford v. Planning Bd. of Nantucket, 376 Mass. 801, 383 N.E.2d 1123 (1978).*

Validity of Zoning Regulation—Zoning ordinance provides that absence of nonconforming mobile homes for period of time constitutes discontinuance of nonconforming use

Mobile home park owners challenge ordinance as unconstitutional

Citation: *State ex rel. Sunset Estate Properties, L.L.C. v. Lodi, 2015-Ohio-790, 2015 WL 1035632 (Ohio 2015)*

OHIO (03/10/15)—This case addressed the issue of whether a provision of a municipal zoning ordinance, which provided that the absence or removal of nonconforming mobile homes from property for a period of six months or more constituted discontinuance or abandonment of the nonconforming use from the time of absence or removal, was unconstitutional.

The Background/Facts: Sunset Properties, L.L.C. and Meadowview Village, Inc. (collectively, the "Park Owners") each owned property in the village of Lodi, Ohio (the "Village"). On their property, the Park Owners operated licensed manufactured-home parks ("mobile home parks"). Both properties were in areas zoned as R-2 Districts. R-2 Districts did not permit mobile home parks. Because the Park Owners' mobile home parks existed prior to the passage of the ordinance creating the R-2 Districts, the mobile home parks were legal nonconforming uses under state law, R.C. 713.15.

In 1987, the Village passed an ordinance enacting Lodi Zoning Code 1280.05(a) (the "Ordinance"). The Ordinance addressed discontinuation or abandonment of nonconforming uses. In general, the Ordinance provided that when a nonconforming use had been discontinued for six months, that discontinuance was conclusive evidence of the intention to legally abandon the nonconforming use. The final sentence of the Ordinance was specific to mobile homes. That sentence provided that the absence or removal of a mobile home from its lot constituted discontinuance from the time of removal. In reliance on that sentence, when a tenant left one of the Park Owners' mobile home park lots and the lot was vacant for longer than six months, the Village refused to

reconnect water and electrical service when a new tenant wanted to rent the lot. As a result, the Park Owners were not able to rent those lots "and essentially lost a property right as to that portion of their property."

The Park Owners sued the Village. They asked the court to declare that the Ordinance was unconstitutional and constituted a taking of their properties.

Finding no material issues of fact in dispute, and deciding the matter on the law alone, the trial court granted summary judgment in favor of the Village. The court concluded that the Ordinance was not unconstitutional on its face or as applied, and that it did not constitute an unreasonable interference with the Park Owners' property rights or a taking of their property.

The Park Owners appealed. The appeals court entered judgment for the Park Owners, finding the Ordinance unconstitutional on its face.

The Village appealed. On appeal, the Village asserted the following proposition of law:

> "A municipal zoning ordinance which precludes a property owner from re-establishing a nonconforming use after a specified period of nonuse does not facially violate the due process clauses of the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution."

DECISION: Judgment of court of appeals affirmed; matter remanded.

The Supreme Court of Ohio held that the last sentence of the Ordinance, which provided that the absence or removal of nonconforming mobile homes from property for a period of six months or more constituted discontinuance or abandonment of the nonconforming use from the time of absence or removal, was unconstitutional.

In so holding, the court noted that in making a facial challenge to the validity of the Ordinance, the Park Owners had to show that the Ordinance, on its face, had no rational relationship to a legitimate government purpose and could not constitutionally be applied under any circumstances. The Village had asserted that the Ordinance was rationally related to the legitimate government purposes of: protecting property values; and encouraging the development of surrounding properties. The court indicated that such purposes would be rationally related to prohibiting or regulating the new development of property, but the court differentiated that, here, the Park Owners were seeking to maintain a legal nonconforming use.

The court pointed to the 14th Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution, which provide that no person shall be deprived of life, liberty, or property without due process of law. With those constitutional references, the court found

that "[t]he plain language of the last sentence of the [O]rdinance imputes a tenant's abandonment of a lot within a mobile-home park on the park's owner[, and, in doing so] . . . impermissibly deprives the owner of the park of the right to continue the use of its entire property in a manner that was lawful prior to the establishment of the zoning ordinance." Thus, the court concluded that, pursuant to the due-process clauses of the United States and Ohio Constitutions, that impermissible deprivation of the vested private-property rights of mobile home park owners defeated the Village's argument that the provision was rationally related to its legitimate goals of protecting property values and encouraging development. In short, the court concluded that the last sentence of the Ordinance was an unconstitutional deprivation of a property right and could not be applied.

See also: *Cent. Motors Corp. v. Pepper Pike, 73 Ohio St. 3d 581, 1995-Ohio-289, 653 N.E.2d 639 (1995).*

Case Note:

The court found that the last sentence of the Ordinance could be severed from the rest of the Ordinance. The court remanded the case to the trial court "to determine what remedy [was] appropriate.".

Public and Low-Income Housing—State agency fails to adopt legislatively-mandated rules governing municipal fair housing obligations

Organization seeks court remedy for agency's failure

Citation: *In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Housing, 2015 WL 1015065 (N.J. 2015)*

NEW JERSEY (03/10/15)—This case addressed the issue of the proper relief for the failure of the New Jersey Council on Affordable Housing to adopt third-round substantive rules for calculation of affordable housing needs and criteria for satisfaction of needs.

The Background/Facts: In 1985, the New Jersey Legislature

enacted the Fair Housing Act of 1985 ("FHA") (N.J.S.A. 52:27D-301 to -329). The FHA was enacted in order to assist municipalities with their constitutional obligation to regulate zoning "in a manner that creates a realistic opportunity for producing a fair share of the regional present and prospective need for housing low- and moderate-income families." The FHA created the Council on Affordable Housing ("COAH"). COAH was "designed to provide an optional administrative alternative to litigating constitutional compliance through civil exclusionary zoning actions." Under the FHA, municipalities may resolve disputes over their constitutional affordable housing obligations in the judicial forum or through a FHA-preferred administrative forum. In support of the preference of addressing such disputes in the administrative forum, the FHA requires exhaustion of administrative remedies before pursuing judicial remedies. The FHA also compels COAH to "establish and periodically update presumptive constitutional housing obligations for each [New Jersey] municipality and to identify the permissible means by which a [municipality]'s proposed affordable housing plan, housing element, and implementing ordinances can satisfy its obligations." COAH is required to update municipal housing obligations and corresponding substantive procedural rules.

COAH's rules governing the last round of municipal housing obligations expired in 1999 (the "Second Round Rules"). Since then, COAH has failed to adopt updated regulations —the "Third Round Rules." By order of the Supreme Court of New Jersey, COAH was required to adopt Third Round Rules by November 17, 2014. COAH failed to do so. As a result, Fair Share Housing Center ("FSHC") brought a motion in aid of litigants' rights, seeking a remedy from COAH's failure to adopt the Third Round Rules.

DECISION: Ordered accordingly.

Finding itself in "the exceptional situation in which the administrative process has become nonfunctioning, rendering futile the FHA's administrative remedy," the Supreme Court of New Jersey, as relief for the failure of COAH to adopt Third Round Rules for the calculation of affordable housing needs and criteria for satisfaction of those needs, issued an order effectively dissolving (until further order) the FHA's exhaustion-of-administrative-remedies requirement.

In so holding, the court looked at Court Rules 1:103 and 4:59-2(a), finding they provided support for "assisting a litigant in securing relief... ." The court found that although punitive or coercive relief under Rule 1:10-3 (governing the motion in aid of litigants' rights) could not be used against one who was not a willful violator of a judgment (such as, arguably here, COAH), that did "not foreclose the vindication of litigants' rights through other forms of non-punitive and non-coercive orders entered pursuant to Rule 1:10-3's authority en-

abling the enforcement of rights." The court concluded that under the authority of Rule 1:10-3, courts may "resume their role as the forum of first instance for evaluating municipal compliance with [constitutional affordable housing obligations]."

The court's order here established a "transitional process" under which municipalities can transition from "COAH's jurisdiction to judicial actions to demonstrate that [their] housing plan satisfies constitutional affordable housing obligations" before allowing exclusionary zoning actions against municipalities.

In brief summary, the court's order provides as follows: Following a 90-day delay in the effective date of the implementation of the order, for the first 30 days following the effective date, "the only actions that will be entertained by the courts will be declaratory judgment actions filed by any town that either (1) had achieved substantive certification from COAH under prior iterations of Third Round Rules before they were invalidated, or (2) had 'participating' status before COAH." If a town waits and does not file a declaratory judgment action during that 30-day period, thereafter an action may be brought by a party against that town, "provided the action's sole focus is on whether the town's housing plan meets its [constitutional affordable housing obligations]." "The court's evaluation of a town's plan that had received substantive certification, or that will be submitted to the court as proof of constitutional compliance, may result in the town's receipt of the judicial equivalent of substantive certification and accompanying protection as provided under the FHA."

See also: *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 456 A.2d 390 (1983)*; *Southern Burlington County N.A.A.C.P. v. Mount Laurel Tp., 67 N.J. 151, 336 A.2d 713 (1975).*

Case Note:

The relief authorized by this order "present[s] an avenue for low- and moderate-income New Jersey citizens, and entities acting on their behalf, to challenge any municipality that is believed not to have developed a housing element and ordinances that bring the town into compliance with its fair share of regional present and prospective need for affordable housing." It also provides "a municipality that had sought to use the FHA's mechanisms the opportunity to demonstrate constitutional compliance to a court's satisfaction before being declared noncompliant and then being subjected to the remedies available through exclusionary zoning litigation, including a builder's remedy."

Case Note:

In its decision, the court emphasized that nothing in the decision should be understood to prevent COAH from fulfilling its statutory mission to adopt constitutional rules to govern municipalities' Third Round obligations in compliance with the FHA. The court further emphasized that nothing in the decision should be regarded as impeding the Legislature from considering alternative statutory remedies to the present FHA.

Zoning News from Around the Nation

CONNECTICUT

Under a proposed bill, Governor Malloy proposes the creation of "a new quasi[-]public agency called the Connecticut Transit Corridor Development Authority." The bill would give the Authority the power to seize property within a half mile of transit stations, and opponents reportedly fear it will give the Authority the power "to build whatever it wants within a half-mile of any train or CTfastrak station with no local participation or control." Meanwhile, Malloy spokesman Mark Bergman has reportedly said that all projects on nonstate-owned land would still remain subject to local zoning under the bill.

Source: *CTNow; www.ctnow.com*

FLORIDA

A state Senate committee has cleared a "broad package of school-choice measures," which would "upend[] district zoning policies that steer children toward their neighborhood schools . . . . ." The legislation would take away local control over how the school choice process works, and would prohibit districts from denying a school choice request for any reason other than school capacity.

Source: *Sarasota Herald-Tribune; http://politics.heraldtribune.com*

NEBRASKA

A bill has been introduced in the state legislature that "would allow the [state] agriculture department to create a matrix of statewide permitting standards to be used by a new seven-member, governor-appointed board in reviewing county decisions to grant or deny special-use permits for livestock expansion."

Source: *Kearney Hub; www.kearneyhub.com*

NORTH CAROLINA

A state House committee has approved a bill that would "drop the

requirement that at least three-quarters of the members of a city or town's governing body approve rezoning if enough landowners complain about the change." The bill will next be considered by the full House.

Source: *Statesville Record & Landmark; www.statesville.com*

OKLAHOMA

Proposed House Bill 1607 would forbid any "adult cabaret" in an unincorporated area not subject to county-wide zoning, if the establishment is to be located within 2,000 feet of: any building "primarily and regularly used for worship services and religious activities"; land "used for residential purposes"; or any public highway. The bill defines "adult cabaret" to mean a nightclub, bar, restaurant, or similar establishment in which "persons appear in a state of nudity in the performance of their duties."

Source: *Pryor Daily Times; www.pryordailytimes.com*

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Zoning Bulletin

in this issue:

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Proceedings—Planning and zoning commission goes into executive session to discuss how to respond to court order on permit extension and how to address noncompliance with permit

Permit holder alleges executive session violated the state Freedom of Information Act

Contributors

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Citation: *Planning and Zoning Com'n of Town of Monroe v. Freedom of Information Com'n, 316 Conn. 1, 2015 WL 1186306 (2015)*

CONNECTICUT (03/24/15)—This case addressed the issue of whether a planning and zoning commission improperly went into executive session in violation of a state Freedom of Information Act.

The Background/Facts: In 2003, the Planning and Zoning Commission of the Town of Monroe (the "PZC") issued a special exception permit to Handsome, Inc. ("Handsome"). In 2008, prior to the expiration of that permit, Handsome applied for a five year extension. The PZC denied that extension on the ground that Handsome had failed to comply with the conditions of the original permit. Handsome appealed and the Superior Court determined that the PZC had improperly denied the extension. Subsequently, Handsome requested by letter that the PZC extend the permit. In response, the PZC put the request on the agenda for its May 5, 2011 regular meeting.

At the start of the May 5, 2011 meeting, the PZC immediately went into executive session. The PZC later reconvened and extended Handsome's permit to 2013.

Handsome and its principal officers, Todd Cascella and Mona Cascella (the "Cascellas") later filed a complaint with Connecticut's Freedom of Information Commission (the "FOIC"). They claimed that the PZC's executive session at the May 5, 2011 meeting violated Connecticut's Freedom of Information Act ("FOIA").

FOIA requires that the meetings of all public agencies be open to the public, with exception. That exception, set forth in Conn. Gen. Stat. § 1-200(6)(B), allows public agencies to convene in executive session for the purpose of "strategy and negotiations with respect to pending claims or pending litigation to which the public agency . . . is a party until such litigation or claim has been finally adjudicated or otherwise settled . . . ."

The FOIC found that, during the PZC's executive session, the members of the PZC had discussed two topics that potentially warranted convening an executive session: (1) how to respond to the prior decision of the Superior Court overruling the zoning commission's denial of Handsome's application to extend its permit; and (2) how to address Handsome's noncompliance with the conditions of the original permit. With respect to the second topic, the FOIC further found that, although the zoning commission members had discussed potential options for addressing Handsome's alleged permit violations, they had not discussed initiating a zoning enforcement action against Handsome or filing an action against it in court or another forum for those alleged permit violations.

The FOIC concluded that neither of the two topics the PZC had discussed warranted convening an executive session under the pending claims or pending litigation exception in § 1-200(6)(B) of the FOIA. The FOIC determined that the pending claims or pending litigation exception did not

apply to the first topic because that prior case had been "finally adjudicated" before the executive session and, thus, was no longer pending. With respect to the second topic, the alleged permit violations, the FOIC ruled that the exception in § 1-200(6)(B) did not apply because, at the time of the executive session, there was no pending claim or litigation relating to those alleged permit violations, and the PZC had not considered during the executive session filing an action against Handsome for those violations. Consequently, the FOIC ruled that the PZC had violated the act's open meetings requirement, as provided in General Statutes § 1-225(a), by convening the executive session.

The PZC appealed.

The trial court reversed the FOIC's decision. The trial court agreed with the FOIC on topic one—that the permit extension issue had been finally adjudicated and thus did not justify convening the executive session. However, the trial court disagreed with the FOIC on issue two, and held that the PZC properly convened its executive session to discuss the alleged permit violations because that constituted "consideration of action to enforce or implement legal relief or a legal right," which fell within the purview of the pending claims or pending litigation exception.

The FOIC, Handsome, and the Cascellas appealed. The Supreme Court of Connecticut transferred their appeals to the Supreme Court.

DECISION: Judgment of superior court reversed and matter remanded.

Agreeing with the FOIC, the Supreme Court of Connecticut held that the PZC was not justified in convening an executive session under the pending claims or pending litigation exception to FOIA's opens meetings requirement.

On appeal, the PZC had argued that, under the FOIA exception, a public agency could convene an executive session to generally "[consider] action to enforce or implement legal relief or a legal right" regardless of whether there was a certain pending or prospective legal proceeding to which the agency was or would be a party. The PZC thus asserted that, because its members' discussion of their zoning enforcement options against Handsome constituted "consideration of action to enforce or implement legal relief or a legal right" (General Statutes § 1-200(9)(C)), its executive session fell within the scope of the pending claims or pending litigation exception of § 1-200(6)(B).

The court rejected the PZC's interpretation of § 1-200(6)(B) and (9)(C) and instead agreed with the FOIC that a public agency may convene an executive session under the pending claims or pending litigation exception only to discuss matters that are in connection with a prospective or pending lawsuit or legal proceeding. More specifically, the court reviewed the language of § 1-200(6)(B) and (9)(C) and found it to be "plain and unambiguous." Reading the statute as a whole, the court concluded that, in order for § 1200(6)(B) to apply, the public agency either must be bringing or defending a prospective or pending lawsuit in court or some other legal

action in an adjudicatory forum. Here, the court found there was no pending or prospective litigation regarding Handsome's alleged permit violations. Moreover, the court explained that "[e]ven if the [PZC] members had considered initiating a zoning enforcement action, § 1-200(6)(B) still would not have applied because the [PZC] [could not] be a party to its own regulatory proceeding." Although public agencies may consider taking nonjudicial action in executive session pursuant to § 1-200(6)(B) and (9)(C), public agencies are not allowed to consider taking such action in executive session when the action would not be taken in connection with a pending or prospective proceeding in court or another forum, said the court.

The Supreme Court of Connecticut also agreed with FOIC with regard to topic one discussed in the PZC's executive session: how to respond to the Superior Court's order regarding the permit extension. The court held that topic was inappropriate for executive session because the issue had been finally adjudicated before the executive session and thus did not justify convening the executive session. The court found that at the time of the PZC's executive session—approximately eight months after the superior court's order on the permit extension—the case had been finally adjudicated in that the decision could not be altered or modified on appeal since the appeal period had passed. The court rejected the PZC's claim that because the superior court continued to have jurisdiction over the matter, the matter was not yet finally adjudicated when the PZC convened its executive session.

See also: *Furhman v. Freedom of Information Com'n, 243 Conn. 427, 703 A.2d 624 (1997).*

Case Note:

Because the case presented an issue of statutory construction that had never been subject to judicial scrutiny and "lack[ed] an agency's time-tested interpretation," the court determined that the FOIC's determination was not entitled to any special deference.

Conditions—City Planning Board grants permit with condition that city planner may approve minor project changes

Permit opponent argues condition is improper delegation of legislative authority and violates city zoning ordinance

Citation: *Fitanides v. City of Saco, 2015 ME 32, 2015 WL 1198605 (Me. 2015)*

MAINE (03/17/15)—This case addressed the issue of whether a city planning board's issuance of a conditional use permit with a condition that allowed the city planner to approve minor changes to the project plans was a violation of the city zoning ordinance and/or an improper delegation of legislative authority.

The Background/Facts: In March 2013, Wayne and Michelle McClellan (the "McClellans") applied for conditional use permits to build a disc-golf course on two parcels of land in the City of Saco, Maine (the "City"). The proposed disc-golf course was situated in several different zoning districts, which each required conditional use permits for the proposed use.

Ultimately, the City's Planning Board voted to grant conditional approval for the project and issued conditional use permits for construction in the various zoning districts. One of the conditions of approval was that "[n]o deviations from the approved plans [were] permitted without prior approval from the Planning Board for major changes, and from the City Planner for minor changes."

Fred Fitanides ("Fitanides") owned a campground that abutted the proposed disc-golf course. Fitanides opposed the proposed disc-golf course. Fitanides appealed the conditional use approval to the City's Zoning Board of Appeals ("ZBA"). Among other things, Fitanides argued that the Planning Board improperly delegated legislative authority of review of minor changes to the City Planner.

The ZBA affirmed all aspects of the Planning Board's decision except for the delegation of authority to the City. The ZBA remanded the matter to the Planning Board. Ultimately, the Planning Board voted to reaffirm its earlier decision without change.

Fitanides appealed. The ZBA voted to deny Fitanides' appeals. Fitanides again appealed, and the superior court affirmed the ZBA's decisions.

Fitanides again appealed. Again, Fitanides contended that the Planning Board erred in issuing a conditional use permit with a condition that allowed the City Planner to approve minor changes to the project plans.

DECISION: Judgment of superior court affirmed.

The Supreme Judicial Court of Maine held that the condition delegating authority for approval of minor changes to the City Planner was consistent with the City's Zoning Ordinance, and that therefore the Planning Board did not err in including it in the permit issued to the McClellans.

In so holding, the court found that the state statute giving municipalities zoning authority (Title 30-A M.R.S. § 4352) did "not directly control delegation of zoning decisions among municipal boards, departments, or officers, leaving those matters to individual town ordinances." Thus, the court said that the Planning Board's condition that allowed the City Planner to approve minor changes to project plans would only be an improper delegation of legislative authority and in error if it violated the City's Zoning Ordinance.

The court concluded that the condition did not violate the City's Zoning Ordinance. The court found that the City's Zoning Ordinance did not contain any provision that prohibited the Planning Board from delegating some tasks to the City Planner. Rather, the court found that the plain language of the City's Zoning Ordinance allowed "[t]he Planning Board [to] attach such conditions, in addition to those required elsewhere in this Ordinance, that it finds necessary to further the purposes of this Ordinance." Also, the court found that "[t]he condition delegating decision-making to the City Planner further[ed] the purposes of the Ordinance by ensuring that even minor deviations from the approved plans [would] be subject to municipal review for compliance with zoning and building laws, without unduly burdening the Planning Board." The court found further support for its interpretation in that other provisions of the Zoning Ordinance delegated similar tasks to the City Planner, including: responsibility for approving "minor conditional uses," as well as "minor site plan[s]," and minor changes to site plans during construction.

Case Note:

Fitanides had also argued that he was denied due process when the City Planner sent an e-mail to the ZBA, which noted that Fitanides had demonstrated that litigation was a "hobby of his" and which urged the ZBA to affirm the Planning Board's Decision. The court found that, although the e-mail was "wholly inappropriate," it did not influence or affect the ZBA's decision and it was not sent by a member of the ZBA and therefore was not sufficient to impute bias to the ZBA.

Defenses to Enforcement—One year after certificate of occupancy is issued, opponents argues that it allows illegally expanded nonconforming use

Certificate holder says equitable estoppel should bar challenge to the certificate of occupancy

Citation: *West End Citizens Ass'n v. District of Columbia Bd. of Zoning Adjustment, 2015 WL 1486512 (D.C. 2015)*

DISTRICT OF COLUMBIA (04/02/15)—This case addressed the issue of whether an applicant's reliance on a granted certificate of occupancy supported the application of equitable estoppel to bar a challenge to the certificate of occupancy.

The Background/Facts: In 2008, Foggy Bottom Grocery, LLC ("FoBoGro") became interested in acquiring and modernizing a grocery business on a site in Washington, D.C. That site involved a three-story row house, which had a grocery operating on the first floor as a lawful nonconforming use in the residentially zoned area since at least May 1958. Before FoBoGro purchased the business, it applied for a new Certificate of Occupancy ("C of O") to allow the entire building to be used as a grocery store plus a sandwich shop (also referred to as a "prepared foods shop"). The Zoning Administrator approved the application and issued the requested C of O on August 21, 2008. Subsequently, FoBoGro purchased the business, leased the building, and eventually began renovating the property.

Approximately a year after the C of O was issued, the West End Citizens Association ("WECA") learned of the C of O and complained to the Zoning Administrator. WECA argued that the C of O improperly expanded a nonconforming use by allowing the grocery to expend to all three floors and by permitting the operation of a sandwich shop in addition to the grocery. The Zoning Administrator then initially revoked the 2008 C of O, but eventually issued a replacement C of O in November 2009. The Zoning Administrator concluded that there was no expansion of the nonconforming use (despite the expansion of the operation to three floors) and that the sandwich shop was a component of the grocery business.

WECA appealed the November 2009 C of O. The District of Columbia's Board of Zoning Adjustment ("BZA") ruled that the C of O "did not authorize an impermissible expansion of the nonconforming grocery use, because that use had not been limited in the past to only one floor of the building, and because the incidental sale of prepared food for off-site consumption was part of the grocery business."

WECA appealed. The Court of Appeals affirmed the BZA's determination that the sale of prepared food was encompassed in the grocery use. However, the court held that it was improper for the C of O to permit the expansion of the nonconforming grocery to the rest of the building. The court remanded the matter to the BZA.

On remand, FoBoGro argued that WECA's challenge of FoBoGro's C of O should be denied because FoBoGro had made large expenditures in reliance on the C of O. The BZA dismissed WECA's appeal, finding that FoBoGro had a meritorious equitable estoppel defense.

DECISION: Judgment of court of appeals affirmed.

The District of Columbia Court of Appeals held that the BZA had properly dismissed WECA's challenge to FoBoGro's C of O because FoBoGro had a meritorious equitable estoppel defense.

In so holding, the court explained that in order for FoBoGro to make out a case of estoppel, it had to show: (1) that it acted in good faith; (2) on affirmative acts of the Zoning Administrator (i.e., the issuance of the C of O); and (3) made expensive and permanent improvements in reliance thereon. Additionally, the court said FoBoGro would have to show that the equities strongly favored it in any injury to the public that would flow from the nonenforcement of the zoning law (i.e., no revocation of the C of O) must be minimal and outweighed by the injury estoppel would avoid (i.e., revocation of the C of O).

Here, the BZA had found that the requirements of the equitable estoppel were satisfied, and the court agreed: (1) the Zoning Administrator's 2008 C of O permitted the entire building to be used for the operation of a grocery; (2) FoBoGro proceeded reasonably and in good faith, having no reason to believe the 2008 C of O impermissibly expanded the nonconforming grocery use; (3) FoBoGro relied on the 2008 C of O by spending "considerable sums" to purchase the grocery business, lease the building, enter into various contracts, renovate the building, and incur other business expenses; and (4) the equities favored FoBoGro because of its good faith and objectively reasonable reliance on the 2008 C of O, and because the BZA found "no evidence" that the neighborhood would be harmed by the continued operation of "a grocery store that has been a neighborhood institution for over 60 years."

WECA had argued that FoBoGro "could not have relied justifiably or reasonably" on the 2008 C of O when it incurred the bulk of its renovation expenses, because it did so after WECA commenced its attack on the C of O in August 2009. The court rejected that argument, finding that FoBoGro relied on the 2008 C of O to its considerable financial detriment in ways other than renovation expenses, well before it learned of WECA's challenge to the legality of its C of O. For example, FoBoGro purchased the grocery business and entered into a lease of the building. Although these were not "expensive and permanent improvements" made in reliance on the erroneously issued C of O, the court found those expenditures and reliance could "equally support an estoppel."

See also: *Sisson v. District of Columbia Bd. of Zoning Adjustment, 805 A.2d 964 (D.C. 2002).*

Case Note:

WECA had also argued that expansion of the grocery to three floors would harm the surrounding neighborhood, but the court found no evidence of such harm had been presented.

Permits—City denies conditional use permit

Applicant argues denial was arbitrary and capricious

Citation: *RDNT, LLC v. City of Bloomington, 2015 WL 1215573 (Minn. 2015)*

MINNESOTA (03/18/15)—This case addressed the issue of whether a city acted within its discretion in denying an application for a conditional use permit.

The Background/Facts: RDNT, LLC ("RDNT") owned Martin Luther Care Campus (the "Campus") in Bloomington, Minnesota (the "City"). The Campus consisted of two buildings that provided a variety of services including assisted living, memory care, skilled nursing, adult day care, and transitional care. In September 2011, RDNT submitted an application to the City for a conditional use permit. RDNT sought to expand its assisted living services by adding a third building to the Campus. The proposed addition would: increase the facility units by 26%; increase staff by 8%; and increase the building square footage by 62%.

After a public hearing, the City's Planning Commission recommended denial of the conditional use permit application. The City Council ultimately denied RDNT's application for the conditional use permit. One of the reasons for the denial was that the City Council found that the proposed use would violate the City's conditional use permit ordinance, which required that proposed uses "not be injurious to the surrounding neighborhood or otherwise harm the public health, safety, and welfare." The City Council found that the increase in square footage and traffic would be injurious to the surrounding neighborhood.

RDNT appealed. The district court reversed the denial of RDNT's application. It held that the record was insufficient to support a finding that the proposed use would injure the neighborhood or harm the community.

The City appealed. The court of appeals reversed the district court and held that the City appropriately exercised its discretion.

RDNT again appealed. It argued that the City's conditional use permit ordinance standard was legally insufficient and that the City's denial of its conditional use permit application was arbitrary and capricious.

DECISION: Judgment of court of appeals affirmed.

The Supreme Court of Minnesota concluded that the City acted within its discretion in denying RDNT's conditional use permit application.

In so concluding, the court first held that the City's conditional use permit ordinance standard—which required that a proposed use not be injurious to the surrounding neighborhood or otherwise harm the public health, safety, and welfare—was legally sufficient. However, the court did note that the factual basis for the City's findings based on that subjective standard would be more closely examined than would the City findings based on a less subjective standard.

Examining the City's findings, the court held that the City had a reasonable factual basis to determine that the proposed use would injure the surrounding neighborhood or otherwise harm the public health, safety, and welfare. The court found that there was evidence that the proposed use would increase traffic on already busy streets. Importantly, the court noted that even though the City streets would not be at capacity, the City could still conclude that the proposed use would nonetheless injure or otherwise harm the neighborhood. Street capacity alone was not dispositive as to whether traffic would injure the neighborhood or otherwise harm the public health, safety, and welfare. It was not a capacity issue, but was a livability issue, said the court.

RDNT had also argued that the City unreasonably, arbitrarily, and capriciously determined that RDNT's proposed mitigation efforts would be insufficient to alleviate the traffic issues. The court disagreed. The court found that the city adequately considered the proposed mitigating conditions and had reasonably determined that they would not alleviate traffic concerns.

See also: *C. R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320 (Minn. 1981).*

See also: *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee, 303 Minn. 79, 226 N.W.2d 306 (1975).*

Zoning News from Around the Nation

MISSOURI

The state Legislature is considering a measure that would give preference for state grants to Missouri counties that meet an ''agri-ready'' designation standard. Counties would receive "agri-ready" designations if they meet various requirements—including not having any health or zon-

ing standards that could discourage agricultural operations or have standards for agricultural operations more stringent than state ones. Opponents of the legislation argue that it hurts those counties "that protect their air and water."

Source: *The Rolla Daily News; www.therolladailynews.com*

NEBRASKA

Pending in the state legislature is LB 106, the Livestock Operation and Siting Expansion Act. Among other things, the bill seeks to "create an environment friendly for livestock expansion and still maintain local control for county zoning boards."

Source: *Radio 570, WNAZ; http://wnax.com*

NORTH CAROLINA

The state House recently gave "tentative approval" to a bill that would "make it easier for developers or property owners to get land rezoned." Under current law, if owners of 5% of the land within 100 feet of a property file a legal petition objecting to a request to rezone it, the rezoning cannot take place without approval from three-fourths of a city council. The bill would remove the three-fourths majority requirement.

Source: *Citizen Times; www.citizen-times.com*

OHIO

Pending in both chambers of the state Legislature are bills that would clarify agritourism uses in local zoning. Among other things, House Bill 80 and Senate Bill 75 would clarify that agritourism land receive the same zoning protections as agricultural land.

Source: *The News-Herald; www.news-herald.com*

VIRGINIA

A new state law (House Bill 1849), which goes into effect on July 1, 2015, "will make it easier for people to get variances from zoning rules to make improvements to their properties." The new law changes the standard for granting variances from when rules "result in unnecessary or unreasonable hardship to the property owner" to when rules "unreasonably restrict the utilization of the property." It also provides that a property owner is entitled to a variance if the "strict application of the . . . ordinance would unreasonably restrict" the owner's use of the property or if the variance will "alleviate a hardship due to the physical condition related to the property or improvements."

Source: *Martinsville Bulletin; www.martinsvillebulletin.com*

