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Review/Use—Town finds proposed community therapeutic residence is a "health care facility" permitted as a conditional use

Neighbors challenge grant of conditional use permit, contending that proposed facility is a "residential facility," prohibited in the zoning

Contributors

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district

Citation: *In re Confluence Behavioral Health, LLC, 2017 VT 112, 2017 WL 6102805 (Vt. 2017)*

VERMONT (12/08/17)—This case addressed the issue of whether a community therapeutic residence qualified as a "health care facility" under a town's zoning bylaws and thus was a permitted use in the applicable zoning district. The case also addressed the issue of whether the Supreme Court of Vermont, when reviewing the Superior Court, Environmental Division's interpretation of permit conditions and local zoning ordinances, reviews with or without deference to the Environmental Division.

The Background/Facts: Confluence Behavioral Health, LLC ("CBH") proposed to operate a therapeutic community residence ("Project") on property zoned "Rural Residential" in the Town of Thetford (the "Town"). CBH's Project was licensed by the Vermont Department of Disabilities, Aging and Independent Living ("DAIL"). The Project was to be "a short-term wilderness therapy program designed to treat young male adults," through the combination of "clinical therapeutic services with adventure-based wilderness therapy and agrarian living to help clients address mental-health diagnoses, as well as emotional, behavioral, and relational challenges." The Project was to house 48 patients and 37 staff at any one time.

The Town's Development Review Board ("DRB") issued a conditional-use and site-plan approval for CBH's Project. The DRB based its approval on its finding that the Project was a "health care facility," permitted as a conditional use under the Town's Zoning Bylaws (the "Bylaws").

Under the Bylaws, the Rural Residential zoning district was intended to "maintain an area of low average density that is compatible with clusters of high-density, remaining primarily a district of open space, farms, residences, and woodlands, with scattered commercial uses that are either home-based or dependent on natural resources." Under the Bylaws, health care facilities were allowed as conditional uses in the Town's Rural Residential areas.

A group of Project neighbors (the "Neighbors") appealed the DRB's decision to the Superior Court, Environmental Division. The Neighbors argued that the Project was not a "health care facility" for purposes of the Bylaws. Rather, they argued, the Project was a "residential facility," "community residence," or "group living facility," which was prohibited in the Town's Rural Residential district. Alternatively, the Neighbors argued that even if the Project was a "health care facility," its additional use as a residential facility was precluded under the Bylaws.

The Environmental Division concluded that the Project was a "health care facility."

The Neighbors appealed.

DECISION: Judgment of Superior Court affirmed.

The Supreme Court of Vermont concluded that CBH's Project was a "health care facility" under the Town's Bylaws and, thus, CBH was entitled to a conditional use permit.

In so concluding, the court first addressed the parties' disagreement about the level of deference the Supreme Court of Vermont should give to the Environmental Division's interpretation of municipal zoning ordinances. The Neighbors contended that the interpretation of a zoning ordinance presents a legal issue that the court should review de novo (i.e., starting from the beginning; anew) without deference to the Environmental Division. In contrast, CBH asserted that the deference the court had historically given to the Environmental Division with respect to findings of fact extended to the court's interpretation of zoning ordinances.

The court admitted that, in prior case law, it had made "arguably inconsistent statements on the subject [of deference to the Environmental Division]." Overruling some of its prior holdings in several cases, here, the court determined that it would "[h]enceforth . . . review the Environmental Division's interpretation of permit conditions and local zoning ordinances without deference." The court explained the basis for that determination:

> [W]here the outcome of the matter turns not on findings of fact, but on interpretation of a statutory term, and where we are not reviewing a decision by an agency charged with promulgating and interpreting its own rules, we employ the familiar de novo standard of review for matters of law.

In sum, the court stated that it reviews zoning ordinances and municipal permit conditions according to the principles of statutory construction, approaching the interpretation of such ordinances and permits "as a legal question that we resolve without deference to the trial court." Thus, here, the court concluded that it must review the Environmental Division's determinations regarding CBH's Project de novo.

In concluding that the Project was a "health care facility," the court looked at the language and intent of the Bylaws. Because the Bylaws did not define the term "health care facility," the court looked to: the common definitions of "health care facility"; a Vermont statute defining "health care facility"; and prior caselaw that addressed whether therapeutic community residences were facilities used for "health purposes." The court found that CBH's Project "comport[ed]" with and "align[ed]" with those definitions. The court also noted that under DAIL's licensing authority, CBH's Project would be recognized as a subcategory of "health care facility."

Notably, the Neighbors had argued that the Project was a "therapeutic *community residence*," and, consequently, could not be a "health care facility." The court responded to that argument noting that "simply because a particular use, or an aspect of a use, is not expressly listed as permitted in the Bylaws does not mean that use is prohibited." "Moreover," the court explained that there was "no reason to conclude that the Project's use as a 'therapeutic community residence' and its use as a 'health care facility' [were] mutually exclusive." A "therapeutic community residence" can be a subcategory of "health care facility," said the court. Here, the Project was to provide professional mental-health counseling and treatment through on-site, inpatient programs—services commonly associated with "health care facilities." Therefore, the court concluded that the purpose and plain language of the Town Bylaws provided support for the contention that CBH's Project was a "health care facility" and allowed as a conditional use.

In a related argument, the Neighbors had further asserted that each of the proposed facility's uses—as a therapeutic community residence, recreation, and health care facility—must be allowed within the project's zoning district in order for the facility to be permitted. The court agreed that each of CBH's potential uses—therapeutic community residence, recreation, and health care facility—must be allowed under the Bylaws, but noted that the Project did not require conditional-use and site-plan approval for every use. "Where one use is a component of another allowed use, additional permitting via conditional-use and site-plan review is not necessary," said the court. Therefore, the court explained, here, the residential use component of the Project did not require separate permitting above and beyond the Project's conditional-use and site-plan approval as a "health care facility."

See also: *Fletcher Farm, Inc. v. Town of Cavendish, 137 Vt. 582, 409 A.2d 569 (1979)* (determining that a licensed therapeutic community residence, which included "group therapy, work, recreation, family-style meals and other related programs," was being used for "health purposes," and was therefore not exempt from real property tax under Vermont law).

Case Note:

The Neighbors had also argued that the Project "impermissibly reestablishe[d] the 'therapeutic retreats, conferences, and events' previously hosted [on the same property by a church]," which, the Neighbors asserted were nonconforming uses. Finding the Project was a conditionally approved "health care facility" in its own right, the court determined that it need not consider that argument.

Case Note:

With regard to the holding on deference to the Environmental Division, the court's decision here overruled the following cases: overruling In re Willowell Foundation Conditional Use Certificate of Occupancy, 201 Vt. 242, 2016 VT 12, 140 A.3d 179 (2016); In re Wagner & Guay Permit, 2016 VT 96, 153 A.3d 539 (Vt. 2016); In re Group Five Investments CU Permit, 195 Vt. 625, 2014 VT 14, 93 A.3d 111 (2014); and In re Champlain College Maple Street Dormitory, 186 Vt. 313, 2009 VT 55, 980 A.2d 273, 249 Ed. Law Rep. 284 (2009).

Nonconforming Use— ZBA determines that hosting live concerts is consistent with property's prior, legal nonconforming use as a campsite

Group of individuals challenge that determination, contending that the use of the property as a campsite did not equate to hosting commercial concerts

Citation: *Cleere v. Frost Ridge Campground, LLC, 155 A.D.3d 1645, 65 N.Y.S.3d 405 (4th Dep't 2017)*

NEW YORK (11/17/17)—This case addressed the issue of whether the use of property owned by campsite operators to host live concerts was a preexisting nonconforming use.

The Background/Facts: Since the 1950s, Frost Ridge Campground, LLC, individually and doing business as The Ridge N.Y. Recreation & Camping ("Frost Ridge") owned a parcel of land (the "Property") in the Town of Leroy (the "Town"), which functioned as a campsite and provider of recreational activities since the 1950s. In 2010, Frost Ridge began selling tickets for admission to concerts hosted on the Property as part of its summer concert series. In 2015, Frost Ridge sought from the Town an interpretation of certain provisions of the Code of the Town of LeRoy (the "Code") pertaining to the Property. In particular, Frost Ridge asked whether camping and attendant recreational activities, including live and recorded amplified music and limited food ser-

vice, constituted a preexisting nonconforming use under section 165-13 of the Code—thus allowing its music concerts to continue without Town permit. After a hearing, the Town's Zoning Board of Appeals (the "ZBA") issued a determination that camping and attendant recreational activities on Frost Ridge's Property, including live and recorded amplified music and limited food service, constituted a preexisting nonconforming use under the Code.

Thereafter, David Cleere, Marny Cleere, W. Scott Collins, and Betsy Collins (the "Petitioners") commenced a legal action to annul the ZBA's determination. The Petitioners argued that the ZBA's decision was "arbitrary and capricious, made in violation of the law, and not based on substantial evidence in as much as the use of the Property to host commercial concerts was not a preexisting nonconforming use."

The Supreme Court, Genesee County, agreed with the ZBA's determinations, and dismissed the Petitioners' petition.

The Petitioners appealed.

DECISION: Judgment of Supreme Court, Genesee County, affirmed.

The Supreme Court, Appellate Division, Fourth Department, New York, held that the use of the property to host live concerts was a preexisting nonconforming use.

In so holding, the court explained that a ZBA's determination "must be sustained if it has a rational basis and is supported by substantial evidence." The court also explained that "a use of property that existed before the enactment of a zoning restriction is a legal nonconforming use."

The court explained that "[w]here, as here, a zoning ordinance permits the ZBA to interpret its requirements . . . 'specific application of a term of the ordinance to a particular property is . . . governed by the [ZBA's] interpretation, unless unreasonable or irrational'." The court concluded that the ZBA's interpretation and determination that hosting live concerts was consistent with the prior use of the property as a campsite was not, as the Petitioners had argued, arbitrary and capricious. Rather, the court concluded that the ZBA "rationally interpreted the term 'campsite' as used in the Code as encompassing recreational activities including live music in determining that the use of the Property was a preexisting nonconforming use." The court explained that, here, the Code did not define "campsite," but did require any large campsite to "provide a common open area suitable for recreation and play purposes." Thus, the court concluded that the Code "expressly contemplate[d] that a campsite is a place for recreation." Acknowledging that the kind of recreation contemplated was "open to interpretation," the court found it rational to conclude that live music was one "kind of recreation to be enjoyed at a campsite." Moreover,

the court found that such an interpretation of the term "campsite," including attendant recreational activities such as live music, was "consistent with the record evidence." Here, the court determined that there was "substantial evidence that the Property was used for recreational activities and as a campsite prior to the adoption of the zoning ordinance." Such evidence included: an affidavit of a former Frost Ridge employee as to recreational activities on the Property in the 1960s, including live music; the testimony of several neighbors that there was a "history of live music on the Property," including "live, amplified bands played every summer weekend during the 1970s and 1980s."

See also: *Toys R Us v. Silva, 89 N.Y.2d 411, 654 N.Y.S.2d 100, 676 N.E.2d 862 (1996).*

Variance—Church challenges District of Columbia's grant of an area variance to synagogue

Church contends three-prong test for area variance is not met by synagogue

Citation: *St. Mary's Episcopal Church v. District of Columbia Zoning Commission, 2017 WL 6044242 (D.C. 2017)*

DISTRICT OF COLUMBIA (12/7/17)—This case addressed the issue of whether sufficient evidence supported a zoning commission's findings that a synagogue was affected by "exceptional condition" and "practical difficulties" such that an area variance was warranted.

The Background/Facts: Hillel at the George Washington University ("Hillel") is a synagogue that has the mission of providing for the needs of Jewish students at George Washington University ("GW") in the District of Columbia. In 2014, Hillel sought to demolish its existing campus religious structure and to construct a new four-story building. Hillel asserted that it needed such a new facility to meet institutional and religious needs. Hillel's proposed new facility would contain: a basement with a sanctuary, dining hall, and two kosher kitchens—separating meat and dairy; a second floor dedicated to staff offices, a student lounge, gathering space, a study area, and a library; and a third and fourth floor to be leased to GW.

Hillel's existing campus structure (to be demolished and replaced) was located on a narrow, rectangular corner lot with a total area of 4,575 square feet. The lot was located in a "high height and medium

high density residential zone." In order to pursue its proposed facility, Hillel needed, among other things, an area variance and special exception relief from the Zoning Commission of the District of Columbia (the "Zoning Commission"). The Zoning Commission ultimately approved Hillel's application for zoning relief.

Thereafter, St. Mary's Episcopal Church ("St. Mary's") and the West End Civic Association ("WECA") (collectively, the "Opponents") challenged that zoning approval in a petition to the court for review. The Opponents contended that Hillel failed to meet the District of Columbia Court of Appeal's "three-prong test for an area variance."

Under that test, District of Columbia zoning authorities (such as the Zoning Commission here) are authorized to grant an area variance (such as that sought by Hillel here) if they find that: "(1) there is an extraordinary or exceptional condition affecting the property; (2) practical difficulties will occur if the zoning regulations are strictly enforced; and (3) the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan."

Here, with respect to the first prong of the test, the Zoning Commission had concluded that Hillel was "affected by an exceptional condition arising from a confluence of factors," including: "(1) the size, shape, and configuration of its lot; and (2) its demonstrated need to improve and expand its facility and maintain its location near the [GW] campus where it [could] best serve its primary constituency—students." The Zoning Commission had further found that Hillel was "an organization with unique institutional and religious needs that are not related to general conditions in the neighborhood" but "uniquely tied to" GW and its 4,500 Jewish students; and the existing facility could not "accommodate existing demand for certain events" and anticipated future growth. With respect to the second prong of the test, the Zoning Commission had concluded that Hillel would face "practical difficulties" if the zoning regulations were strictly enforced. And, with regard the third prong of the test, the Zoning Commission concluded that the Opponents had failed to "convincingly show that [Hillel's new facility] [would] be detrimental to the public good."

The Opponents strongly disagreed with the Zoning Commission's findings and conclusions. They argued that Hillel merely preferred a new facility as "more cost-effective and beneficial." They maintained that the Zoning Commission incorrectly concluded that Hillel met the court's three-prong test for an area variance.

DECISION: Zoning Commission decision affirmed.

The District of Columbia Court of Appeals affirmed the order of the Zoning Commission, concluding that Hillel did meet the three-prong test for an area variance.

Addressing the first prong of the test—that there must be an exceptional condition affecting the property—the court explained that such an exceptional condition or "hardship" must be due to "unique circumstances peculiar to [Hillel's] property and not to the general conditions in the neighborhood." The court concluded that the Zoning Commission's findings that there were exceptional conditions here was based on "substantial" and "sufficient" evidence, including: the feasibility of renovating the existing building; testimony from GW students "emphasizing the uninviting and fortress-like condition of the existing building"; "increasing numbers of students and others seeking to participate in Hillel's activities and services"; "the exceptional configuration of the lot"; and "Hillel's institutional mission and needs."

Regarding the second prong of the test—that practical difficulties would occur if the zoning regulations were strictly enforced, the court explained that Hillel had to show: "(1) that the specific design it wants to build constitutes an institutional necessity, not merely the most desired of various options, and (2) precisely how the needed design features require the specific variance sought." Again, the court found that there was "sufficient" and "substantial" evidence that Hillel would face practical difficulties if zoning regulations (namely, the lot occupancy and rear yard requirements) were strictly enforced. Given Hillel's "institutional need for a single contiguous worship space and dining space of a certain size," the court found that strict enforcement of the zoning regulations "would result in an inefficient and uneconomical building" that "would not yield enough useable space for the worship, dining, and program space required by Hillel."

The court also found that the third prong of the variance test was met; the requested relief of the area variance could be granted "without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan." The Opponents' argument had focused on allegations that the construction of the proposed new facility would damage St. Mary's church building. But the court explained that the proper standard in addressing the third prong should not be on "whether harm will result from the construction of the facility, but whether harm will] result from the structure as built with the variance." Focusing on the latter, the court found no reason to disturb the Commission's findings that: "(1) the new facility's impact on light and air was less significant than what Hillel was entitled to as a matter of right[;] and (2) Hillel's revised facility design further reduced the impact on light and air [on St. Mary's]. . ."; and that "provision of an easement memorializing [St. Mary's] right of access across [another GW] property" adequately addressed St. Mary's concern of loss of access across Hillel's rear yard.

See also: *Ait-Ghezala v. District of Columbia Board of Zoning Adjustment, 148 A.3d 1211 (D.C. 2016).*

See also: *Washington Canoe Club v. District of Columbia Zoning Com'n, 889 A.2d 995 (D.C. 2005).*

Zoning News from Around the Nation

MASSACHUSETTS

Governor Charlie Baker recently announced "$10 million in incentives to encourage cities and towns to promote development within their borders." He also proposed legislation—"An Act to Promote Housing Choices"—that would make it easier for municipalities to change their zoning to promote multifamily developments, reduce their parking requirements, and make other changes to smooth the way for more housing. These initiatives are reportedly modeled on Massachusetts' Green Communities program, which rewards cities and towns for taking climate-friendly steps. Specifically, the Governor's bill would allow municipalities to "adopt certain zoning changes by a simple majority vote rather than the existing requirement of a two-thirds vote." The administration also announced "$1.3 million in grant funding for 37 projects through the Planning Assistance Grant Program, which encourages land conservation, reduced energy consumption and the housing production."

Source: *Lowell Sun; www.lowellsun.com*

PENNSYLVANIA

Pending in the state Legislature is House Bill 1620, which "would allow wireless carriers to forego local zoning review or approval in placing or modifying most facilities in public rights of way." The bill would also prohibit municipalities "requiring wireless carriers to justify installing or modifying wireless facilities, and from charging fees beyond $1,000 for regular facilities or $100 for 'small cell' antennas." Reportedly, several municipalities have passed resolutions opposing the bill, including Doylestown Borough, Plumstead, Upper Southampton, and Warrington. Proponents of the bill maintain that it is "intended as a check against municipalities that might pursue fees from wireless carriers as a moneymaking venture during the zoning process." The bill is currently awaiting review in the House Consumer Affairs Committee.

Source: *The Intelligencer; www.theintell.com*

WISCONSIN

Governor Scott Walker has signed into the law the "Mining for

America" bill. The bill is aimed at bringing the mining industry back to Wisconsin. Among other things, the bill includes "a six-month provision to allow local governments to be able to adjust their zoning laws" in response to the bill's passage.

Source: *The Lakeland Times; www.lakelandtimes.com*