

# Zoning Bulletin

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## Proceedings—Court issues order to remove garage that violates town's zoning ordinance

Garage owner argues order must be vacated because it was sought by the town under improper processes

Citation: *McLaughlin v. Zoning Board of Review of Town of Tiverton*, 186 A.3d 597 (R.I. 2018)

RHODE ISLAND (06/20/18)—This case addressed the issue of whether a zoning board's "motion for an order to comply" was a "due proceeding," as

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required by the state statute that vested the trial court with power to assist towns in the enforcement of zoning ordinances, and, if not, whether that presented a “manifest injustice” justifying relief from a court order to remove a garage that violated zoning setback requirements.

**The Background/Facts:** In 2007, William C. McLaughlin (“McLaughlin”) applied for and received a permit from the Building Inspector for the Town of Tiverton (the “Town”). The permit was for the construction of a 40-by-60-foot garage. Later it came to light that the permit was based on an erroneous site plan that inaccurately described the property boundaries. Ultimately, McLaughlin constructed a garage that was built 27 feet short of the side yard setback required by the Town Zoning Ordinance.

In 2010, after receiving a notice of zoning violation related to the garage setback, McLaughlin applied for a zoning variance from the Town’s Zoning Board of Review (the “Board”). The Board denied the variance request.

McLaughlin then appealed his variance denial to the superior court. The superior court affirmed the Board’s denial of the variance request. The court concluded that the only hardship McLaughlin faced was a self-created financial hardship, which was not a sufficient ground justifying a variance.

McLaughlin then appealed that judgment to the Supreme Court of Rhode Island. That appeal was dismissed as procedurally improper. Subsequently, however, the Board filed a motion with the superior court, under the original zoning appeal case. That motion was entitled “Motion for Order to Comply.” Under that motion, the Board asked the superior court to order McLaughlin to “either move or remove the [garage] to comply with local zoning in accordance with the decision of the [Board], affirmed by the [superior court].” The Board suggested a penalty of a daily fine for each day, after 90 days, that McLaughlin failed to remove the garage. In its request, the Board specifically asked the superior court to invoke its equitable powers under state statutory law, G.L., 1956, § 8-2-13, and order McLaughlin to comply with the Town Zoning Ordinance by moving or removing his garage. That statute vests the superior court with “exclusive original jurisdiction of suits and proceedings of an equitable character and of statutory proceedings following the course of equity.”

In April 2014, the superior court granted the Board’s motion and entered the requested order (the “April 2014 Order”).

When, nearly three years later, McLaughlin had still not removed the non-compliant garage, the Board filed a motion to enforce with the superior court. The Board asked the court to allow the Town to remove the garage. Unlike with the Board’s early “Motion for Order to Comply [,]” which pointed to the Superior Court’s equity jurisdiction under § 8-2-13, this motion to enforce invoked G.L. 1956 §§ 45-24-62(3) and (4). That statute vests the superior court with jurisdiction to aid towns and cities in their enforcement of their zoning ordinances, “upon due proceedings in the name of the city or town, instituted by its city or town solicitor . . .” That statute also authorizes the superior court to, among other things, “order the removal by the property owner of any building, structure . . . in violation of any zoning ordinance . . . and to authorize some official of the city or town, in the default of the removal by the owner, to remove it at the expense of the owner . . .”

In November 2015, the trial justice entered an order granting the Board's motion to enforce. When, by March 2016, McLaughlin still had not removed the garage, the Town removed it. The Town also placed a lien on McLaughlin's property for the \$69,300 in fines imposed by an August 2015 contempt order related to McLaughlin's failure to remove the garage as court ordered in the April 2014 Order.

In May 2016, McLaughlin filed a motion to vacate the April 2014 Order. Among other things, McLaughlin argued that because the Superior Court lacked the subject matter jurisdiction to order him to remove the garage, the April 2014 Order was void under Superior Court Rules of Civil Procedure Rule 60(b)(4). That rule allows relief from judgment or order when the judgment is void. McLaughlin rested his argument on the fact that, pursuant to § 45-24-62, the Town had not filed a separate action to obtain a removal order and thus the Superior Court did not have jurisdiction when it acted. McLaughlin also argued in the alternative that the April 2014 Order should be vacated under Superior Court Rules of Civil Procedure Rule 60(b)(6), because the lack of a separate action brought by the Town and the interests of justice justified relief from the operation of the order. Rule 60(b)(6) allows for relief from final judgment or order for "[a]ny other reason justifying relief from the operation of the judgment." In summary, McLaughlin contended that: (1) the Superior Court lacked the authority to entertain the zoning board's request that he be ordered to remove his garage; and (2) in order for the Town to have properly obtained an order requiring him to remove the garage, the Town should have filed a separate action in the Superior Court, not a motion for an order to comply filed by the Board in a zoning appeal.

The superior court rejected McLaughlin's arguments.

McLaughlin appealed.

**THE COURT'S DECISION: Order denying motion to vacate reversed.**

The Supreme Court of Rhode Island agreed with McLaughlin that the April 2014 Order should be vacated under Rule 60(b)(6) of the Superior Court Rules of Civil Procedure, in the interests of justice "given the unique circumstances of this case."

In so holding, the court first disagreed with McLaughlin that the Board lacked subject matter jurisdiction to order the removal of McLaughlin's garage and was thus void under Rule 60(b)(4). The court instead found that, pursuant to § 45-24-62(3), the superior court possessed the jurisdiction to order the removal of McLaughlin's garage.

Again, § 45-24-62 vests the superior court with jurisdiction to aid towns and cities in their enforcement of their zoning ordinances, "upon due proceedings in the name of the city or town, instituted by its city or town solicitor . . ." That statute also authorizes the superior court to, among other things, "order the removal by the property owner of any building, structure . . . in violation of any zoning ordinance . . . and to authorize some official of the city or town, in the default of the removal by the owner, to remove it at the expense of the owner . . ."

Looking at the language of the statute, the court concluded that it was "constrained to conclude that the Superior Court was vested with the subject

matter jurisdiction to order McLaughlin to remove the garage.” The court concluded that “[b]ecause the Superior Court possessed the subject matter jurisdiction to order McLaughlin to remove his garage, and because the granting of the April 7, 2014 [O]rder did not mark a ‘plain usurpation of power constituting a violation of due process[,]’ the [April 2014 Order] was and is not void.”

The court, however, did agree with McLaughlin that, given “[t]he unique and narrow facts of this case,” enforcing the April 2014 Order “would constitute a manifest injustice,” thus warranting the April 2014 Order be vacated under Rule 60(b)(6). The court emphasized that “[p]rocess is important.” The court found that, contrary to the requirements of § 45-24-62(3)—which gave the superior court jurisdiction to issue the April 2014 Order, this was not a case brought by the Town solicitor via a separate complaint on behalf of the Town setting forth McLaughlin’s alleged noncompliance with the Town Zoning Ordinance. Rather, the court found that this was a case that involved an appeal of a denied variance, where the Town was the defendant. As such, the court concluded that it was not the required “due proceeding[ ] in the name of [the Town of Tiverton], instituted by its . . . town solicitor . . .,” as required by the clear language of § 45-24-62. Furthermore, the court noted that, at the time the Board filed its “Motion for Order to Comply” (which resulted in the April 2014 Order), final judgment had entered. “In other words, the controversy before the Superior Court—revolving around whether there were grounds justifying reversal of the zoning board’s denial of McLaughlin’s variance request under § 45-24-69(d)—had been resolved to a finality.” Thus, the court concluded that the Board’s filing of the “Motion for Order to Comply” was “an effort to transform the case from a closed-out zoning appeal to a request for permanent injunctive relief”—relief to which the Board was not entitled, found the court. Accordingly, the court opined that, given the facts of the case, the April 2014 Order should have been vacated under Rule 60(b)(6).

See also: *Zeilstra v. Barrington Zoning Bd. of Review*, 417 A.2d 303 (R.I. 1980).

## **Use/Nonconforming Use—Property owners operate a commercial kennel and pet store in a residential zoning district that prohibits such uses**

Property owners argue their use is a “permitted agricultural use” exempt from regulation under Massachusetts statutory law

Citation: *Fink v. LeDuc*, 2018 WL 3340766 (Mass. Land Ct. 2018)

MASSACHUSETTS (07/06/18)—This case addressed the issue of whether a commercial kennel and pet store, operating in a residential zoning district that prohibited such uses, qualified as an “agricultural use,” exempt from zoning regulation under state statutory law. It also addressed whether such uses were, under the facts of the case, protected preexisting, nonconforming uses.

**The Background/Facts:** Robert and Bridgette Fink (the “Finks”) operated a commercial kennel and pet store out of their residentially-zoned property in the Town of Oxford (the “Town”). The Finks did not live at the property, but used the house as an office and pet store for the sale of puppies, open to the public every day. The Finks’ employees, puppy delivery trucks, and potential customers for the puppies regularly came and went from the property. At any given time, there were over 150 dogs and puppies on the premises. Nearly all of the puppies sold by the Finks were purchased by the Finks from out-of-state breeders. In 2018, the Finks were “on track to sell more than 1,000 puppies from this location, and perhaps as many as 1600.”

After neighbors complained to the Town about activities on the Finks’ property, the Town’s zoning enforcement officer (the “ZEO”) ordered the Finks to cease and desist their kennel and pet store operations as such activities were prohibited in the Finks’ residential zone under the Town’s zoning by-law. The Finks appealed that order to the Town’s Zoning Board of Appeals (the “ZBA”). The ZBA upheld the cease and desist order.

The Finks then appealed the ZBA’s decision to the Massachusetts Land Court. The Finks maintained that the ZBA improperly upheld the cease and desist order. The Finks first argued that their business was a “permitted agricultural use” allowed as of right in their zoning district and exempt from regulation under Massachusetts statutory law—G.L. c. 40A, § 3. General Law c. 40A, § 3 provides, in part: “No zoning ordinance or by-law shall . . . prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture.” The Finks also argued that, in any case, their commercial kennel and pet store was a grandfathered use (i.e., a permitted, preexisting nonconforming use) because there had been a kennel on the property since the 1950s before the Town had zoning by-laws.

**DECISION: Decision of ZBA affirmed, with exceptions.**

Addressing the Finks’ arguments, the Massachusetts Land Court first held that the Finks’ commercial kennel and pet store was not, as the Finks had claimed, an agricultural use that was allowed as of right in their zoning district and exempt from regulation under Massachusetts statutory law—G.L. c. 40A, § 3. Citing Massachusetts appellate court precedent, the court found that “the boarding, grooming, and training of dogs not owned or kept as breeding stock by [the property owner] [were] not agricultural uses, because [those] activities [were] not an integral part of the breeding or raising of dogs.” Here, the court found that the Finks bought puppies and pet supplies from others, sold them to paying customers, and stored them on the property before resale. None of that was an agricultural use, concluded the court. Instead, the court found those activities were “an entirely commercial operation that [could] not lawfully take place on the property,” under the Town’s zoning by-laws. In other words, the court concluded that, pursuant to the Town’s by-laws, prohibiting commercial kennels and pet stores in the zoning district in which the Finks’ prop-

erty was located, the Finks could not lawfully sell any dogs that were not bred at the property and could not sell any pet supplies—because those were not agricultural activities exempted from regulation under Massachusetts statutory law, G.L. c. 40A, § 3.

Notably, however, the court did find that the breeding and raising and training of dogs owned by a property owner on the land was an “agricultural pursuit,” allowed under G.L. c. 40A, § 3. Thus, the court concluded that the Finks could, “as a matter of zoning, breed and raise dogs that they permanently own at the property since that is a protected agricultural use.”

The Finks had also argued that, whether or not exempted as agricultural activities, their commercial kennel and pet store were protected from regulation as a preexisting nonconforming use because there had been a kennel on the property since the 1950s—before the Town had zoning by-laws. The court disagreed with the Finks’ argument.

The court explained that “[a] prior nonconforming use is one that is lawfully carried on at the time a zoning ordinance or by-law is adopted that prohibits that use.” The court further explained that, under Massachusetts statutory law—G.L. c. 40A, § 6, “a preexisting nonconforming use is not subject to a subsequently enacted zoning by-law.” However, emphasized the court, “any change or substantial extension of such use” has no such protection. (See G.L. c. 40A, § 6.)

The court acknowledged that the Town first adopted zoning in 1956 and a zoning by-law in 1968. (Since adoption of the zoning by-law, and with each subsequent version of the by-law, commercial kennels and pet store uses were prohibited in the zoning district in which the Finks’ property was located.) The court further acknowledged that at the time the Town first enacted zoning, the then-owners of the Finks’ property boarded and bred dogs. The court found, however, that the Finks’ current use was “substantially different in scope and in kind” from the original owners’ vacation boarding and small breeding operation. While the original owners’ small operation focused on vacation dog breeding, the Finks’ operation was year-round, involving the purchasing and selling of as many as 1600 puppies per year to hundreds of customers, and including a pet store with employees, retail customers, and large delivery trucks coming and going on the property. Accordingly, the court concluded that given the substantial difference in scope and kind of use, the Finks’ commercial kennel and pet store were not protected preexisting, nonconforming uses.

See also: *Town of Sturbridge v. McDowell*, 35 Mass. App. Ct. 924, 624 N.E.2d 114 (1993).

See also: *Almeida v. Arruda*, 89 Mass. App. Ct. 241, 46 N.E.3d 1036 (2016).

## Enforcement—Ten years after constructing some accessory structures, property owners are issued enforcement notices stating those structures violate the township’s zoning ordinance

Property owners argue enforcement notices are barred due to the township’s delay in enforcing the zoning ordinance

Citation: *DiPaolo v. Zoning Hearing Board of Bensalem Township*, 2018 WL 3447525 (Pa. Commw. Ct. 2018)

PENNSYLVANIA (07/18/18)—This case addressed the issue of whether a township’s enforcement notices against landowners for unpermitted accessory structures in a floodplain, which came nearly a decade after the accessory structures were constructed, were barred by laches, estoppel, vested rights or justifiable reliance doctrines.

**The Background/Facts:** In June 2004, Gregory DiPaolo and Kathleen DiPaolo (the “DiPaolos”) purchased vacant property (the “Property”) in Bensalem Township (the “Township”). The DiPaolos’ Property was partially within the 100-year floodplain of a creek. In 2004, the Township’s Zoning Ordinance prohibited the construction and development of property located within the floodplain without zoning, land development and building permits. The DiPaolos applied for, and were granted, a variance from the Township’s floodplain regulations to construct a 2,035 square-foot single-family dwelling partially within the 100-year floodplain of a nearby creek.

In 2005, the Township’s Engineering Inspector examined the DiPaolos’ constructed dwelling for use and occupancy. At that time, the inspector observed a rear deck and additional stone areas not included in the DiPaolos’ construction plan. The inspector issued a report related to work the DiPaolos needed to “complete and/or correct in order to have the remainder of the Property comply with the Zoning Ordinance.” Specifically, the inspector referenced a need for an as-built plan reflecting the rear deck and additional stone areas not include in the DiPaolos’ construction plan. The Township issued a use and occupancy permit for the DiPaolos in July 2005.

In March 2014, the Township’s Engineering Inspector again inspected the DiPaolos’ Property at the request of the Township’s Director of Building and Planning/Zoning Officer. Upon this inspection, the inspector specifically outlined in a report violations of the Township’s Zoning Ordinance—namely a deck, sheds, paving/stone, and a screened gazebo that were all constructed within the floodway without permits or the approval of the Township’s Zoning Hearing Board (the “ZHB”).

Based on the inspector's report, in April 2014, the Township issued two Enforcement Notices to the DiPaolos. The first Enforcement Notice cited the DiPaolos for failing to obtain permits for the sheds on their Property. The second Enforcement Notice asserted violations of the Township's Zoning Ordinance, noting the deck, sheds, paving/stone, and a screened gazebo that were all constructed within the floodway without permits or the approval of the ZHB. The Township instructed the DiPaolos that to abate these violations, the DiPaolos had to remove the structures within the floodplain and floodway and obtain approval from the ZHB for construction/improvements within the floodplain and floodway.

The DiPaolos appealed from the Enforcement Notices. The ZHB voted to deny the DiPaolos' appeals and uphold the Enforcement Notices.

The DiPaolos then appealed from the ZHB decision to the trial court. The trial court denied their appeal and affirmed the ZHB's decision.

The DiPaolos again appealed. On appeal, among other things, the DiPaolos argued that, due to the Township's delay in enforcing the Code and the Zoning Ordinance, the Enforcement Notices were barred by "laches, estoppel, vested rights and justifiable reliance doctrines." Specifically, the DiPaolos argued that: "the Township did not issue violation notices for nearly a decade despite its full knowledge of the DiPaolos' additions to their Property; allowed the DiPaolos to pay for, erect and furnish the deck with the Township's knowledge; and knew or should have known that the DiPaolos would rely on the Township's acquiescence."

**DECISION: Judgment of Common Pleas Court affirmed.**

The Commonwealth Court of Pennsylvania held that the Township's Enforcement Notices against the DiPaolos were not barred by laches, estoppel, vested rights or justifiable reliance doctrines.

The court explained that, under Pennsylvania law, for the DiPaolos to prevail on the defenses of laches, they must "prove both inordinate delay and prejudice from that delay." In other words, they would need to show that the Township "stood by and permitted large expenditures to be made upon the faith of municipal consent informally or tacitly given." To obtain the equitable remedy of a variance by estoppel, the DiPaolos would have to show "municipal inaction amounting to active acquiescence in an illegal use." For equitable estoppel, they'd have to show that "the municipality intentionally or negligently misrepresented its position with reason to know that the landowner would rely upon that misrepresentation." For a vested right, they'd have to show "the municipality has taken some affirmative action such as the issuance of a permit." "Except for the characterization of the municipal act that induces reliance," the court explained that, "all three theories share common elements of good faith action on the part of the landowner: 1) that he relies to his detriment, such as making substantial expenditures, 2) based upon an innocent belief that the use is permitted, and 3) that enforcement of the ordinance would result in hardship, ordinarily that the value of the expenditures would be lost."

The court further explained that "[t]here are five factors relevant to whether a ZHB should grant a variance by estoppel"—all of which must be proven by "clear, precise and unequivocal evidence." The court said "[s]uch variances

are appropriate when a use does not conform to the zoning ordinance and the property owner establishes all of the following: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; (2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant.”

Here, the court acknowledged that the Township issued the use and occupancy permit to the DiPaolos despite the fact that the inspector had observed that the deck violated the Township’s floodplain regulations. However, the court noted that, on its face, the use and occupancy permit was issued for the “single family dwelling” at the Property only, and upon the inspector’s 2005 inspection, the DiPaolos were notified that the deck required a permit or variance. Moreover, the court found the evidence showed that the sheds, the paved/stoned areas and the gazebo were not on the Property in 2005 when the use and occupancy permit was issued. Thus, the court concluded that the issuance of that permit was not an affirmative action by the Township that created vested rights for the DiPaolos.

With regard to the DiPaolos claim that the Enforcement Notices were barred based on laches, estoppel or justifiable reliance because the Township failed to enforce the Code and the Zoning Ordinance, when it should have known of the violation, the Court acknowledged that the Township did not enforce the DiPaolos’ deck violation for nearly 10 years. The court further acknowledged that the Township “may have allowed significant time to pass before issuing the Enforcement Notices.” However, the court found that the DiPaolos failed to offer any basis for the court to rule “that ten years was an inordinate delay, or that they were prejudiced thereby.” Moreover, the court stated that the “mere knowledge of a violation of a zoning ordinance does not in and of itself prove that a municipality actively acquiesced in the use of the property.” Further, the court noted that the law (of estoppel) required passage of time “in conjunction with some form of active acquiescence in the illegal use [,]” which the DiPaolos did not prove in this case.

Additionally, the court concluded that there was “no justifiable reliance” by the DiPaolos under the circumstances. The court found that “the DiPaolos clearly did not act in good faith when they purchased the Property that was located in the floodplain and, for those same ten years, . . . disregarded the Township’s notice about the deck violation and continued to add unpermitted sheds, paved/stoned areas and a gazebo to the Property in open disregard to the floodplain regulations.” Moreover, the court found no evidence to support the DiPaolos’ claim “that they made large expenditures or were otherwise prejudiced due to their reliance on the Township’s purported acquiescence.” Nor, found the court “did they prove that they would suffer any hardship, let alone unnecessary hardship, if the variance [was] denied.”

In summary, the court found that the DiPaolos were essentially “asking that they be permitted to continue their zoning violations regardless of the public safety concerns related to the floodplain and floodway,” and without their

engineer providing the technical evidence and documentation “demonstrating that the increase in the 100-year flood elevation that will be caused by the proposed construction, development, use or activity will have no adverse effect on downstream properties,” as required by the Township Zoning Ordinance.

Finding that the DiPaolos failed to prove the necessary criteria, the court concluded that the Enforcement Notices were not barred by laches, estoppel, vested rights or justifiable reliance doctrines.

See also: *Springfield Tp. v. Kim*, 792 A.2d 717 (Pa. Commw. Ct. 2002).

See also: *In re Kreider*, 808 A.2d 340 (Pa. Commw. Ct. 2002).

See also: *Borough of Dormont v. Zoning Hearing Bd. of Borough of Dormont*, 850 A.2d 826 (Pa. Commw. Ct. 2004).

## Zoning News from Around the Nation

### INDIANA

A zoning applicant has filed a federal lawsuit challenging the City of Fort Wayne’s decision to allow a downtown strip club to reopen. Specifically, the lawsuit argues that denial violated the applicant’s right to free speech and equal protection, and also seeks to void city codes governing adult businesses. The applicant claims its strip club use was grandfathered as a preexisting, nonconforming use, but the city maintains the use had been abandoned for more than one year.

Source: *News-Sentinel*; [www.news-sentinel.com](http://www.news-sentinel.com)

### NEW JERSEY

Jersey City’s Zoning Board recently ruled in favor of a neighborhood association. The association had argued that the “so-called mezzanines on the ground and top floors of the new building [were] so large they should be considered additional stories,”—two more stories than allowable by city zoning ordinances. The city’s zoning laws “do not allow mezzanines to constitute more than 33.3 percent of ‘the total floor area in the room or story in which the mezzanine floor occurs.’ ” Otherwise, if they exceed that size, they are considered additional stories. While opposing sides in this case agreed on the square footage of the mezzanines, they disagreed about what they should be compared to. The neighborhood association had argued that the Zoning Board must compare each mezzanine to the room they are in, and that therefore, in this case, the residential units’ mezzanines were anywhere from 48% to 62% of the total area.

Source: *NJ.com*; [www.nj.com](http://www.nj.com)

### PENNSYLVANIA

The Harrisburg-based Independence Law Center filed a federal lawsuit

Wednesday on behalf of Scott and Theresa Fetterolf, alleging that the Borough of Sewickley Heights violated their civil rights. In October 2017, the Borough served a notice of violation and cease and desist order on the Fetterolfs that said activities including a Bible study, worship night, religious retreats and fundraisers were not permitted in the Borough's historical rural and residential zone without a variance. The Fetterolfs' federal lawsuit reportedly seeks a permanent injunction prohibiting the Borough from enforcing the ordinance it says the Fetterolfs are violating "because the ordinance violates the federal Religious Land Use and Institutionalized Persons Act, along with the Fetterolfs' constitutional rights to freely exercise their religion, speech and assembly."

Source: *Sewickley Herald-Trib*; <https://sewickley.triblive.com>

# Zoning Bulletin

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**Zoning News from Around the Nation**

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## Government and related entities/ Immunity—In seeking to construct an egress, state entity claims immunity from local land use control

Local government argues that such immunity  
should not allow avoidance of public safety

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## concerns

Citation: *Montclair State University v. County of Passaic*, 2018 WL 3716020 (N.J. 2018)

NEW JERSEY (08/06/18)—This case addressed the issue of what factors must be met for a state entity to receive immunity from local land use controls. Specifically, the case addressed whether a state entity must reasonably address public safety concerns, if raised, in order to receive such immunity.

**The Background/Facts:** Since 2004, Montclair State University (“MSU”) had attempted to create a third egress from its Passaic County Campus. Specifically, MSU wanted to convert a campus road on state property that intersected with Valley Road (a county road) from an ingress-only road to an ingress/egress road. MSU consulted with Passaic County (the “County”) and the City of Clifton (the “City”) about the project for almost six years. After conferring with those parties, MSU was able to satisfy most of the public entities’ concerns about the project. In April 2014, MSU submitted to the County permit applications for the new egress. However, believing that MSU’s roadway design failed to meet applicable safety standards, the County refused to issue the requested permits to MSU.

MSU then filed a legal action against the County. MSU asked the trial court to declare that no permit or other local approval was required for its proposed egress project. Alternatively, MSU asked the court to order the County to issue all the necessary permits. (The court allowed the City to intervene in the case.)

The trial court ordered MSU to return to the local planning boards, and when MSU failed to do so, the trial court dismissed MSU’s complaint.

MSU appealed. MSU pointed to New Jersey case law that has recognized that a state higher educational institution, like MSU, is: statutorily vested with control over its property (see N.J.S.A. 18A:64-7); and has a form of immunity, or exemption, from local land use controls when it comes to the use and development of its own property. MSU argued that it had met its obligations under New Jersey case law to achieve that immunity, and that, therefore, the court should declare it immune from needing County permits to proceed with its project. More specifically, MSU pointed to the case of *Rutgers, State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972) (“*Rutgers*”). In *Rutgers*, the Supreme Court of New Jersey held that a state agency can have qualified immunity from local land use controls if “it is able to demonstrate both that the planned action is reasonable and that the agency reasonably consulted with local authorities and took into consideration legitimate local concerns.”

On appeal, MSU argued that it was an abuse of discretion by the trial court to dismiss MSU's complaint without determining whether MSU met its obligations under *Rutgers*.

The Appellate Division agreed with MSU and remanded the matter "for reinstatement of [MSU's] complaint and a trial, if necessary for the judge to determine whether MSU satisfied its obligation under *Rutgers*."

The City petitioned for certification, and the Supreme Court of New Jersey granted that petition. The City argued that in remanding the matter, the Appellate Division had "ignored the prong [of the *Rutgers*' test] that addresses the reasonableness of the action by focusing solely on the act of consultation with local agencies and not considering reasonableness as a distinct query to the proposed project and its affect." In other words, according to the City, a state agency should not be allowed to move ahead with a project so long as the agency itself is satisfied with the reasonableness of its own proposal, "without regard to a dispute between state and local entities as to the project's safety."

**DECISION: Judgment of Appellate Division affirmed as modified.**

The Supreme Court of New Jersey agreed with the City's argument. The court held, as a matter of first impression (i.e., addressing the issue for the first time), that, in addition to the two-fold analysis set forth in *Rutgers* for state agencies to achieve immunity from land use controls, a state agency must also reasonably address public safety concerns, if raised, in order to achieve such immunity.

More specifically, the court held that "when the otherwise immune state agency's improvement directly affects off-site property and implicates a safety concern raised by a local governmental entity responsible to protect public safety with respect to that off-site property, special judicial review and action is required." The court made clear in its decision that, in such cases, "the state entity may not be compelled to submit to review before a planning board." "However, in circumstances such as are presented here, a judicial finding that the cited public safety concern has been reasonably addressed through the planning for the state agency's improvement shall be a necessary additional requirement before a court may either compel local regulatory action or grant declaratory relief that the planned action is exempt from land use regulation." In regard to implementing this additional requirement, the court said it is the trial court that should determine, "on a case-by-case basis, whether it could make such a finding via a summary proceeding or whether a more fulsome proceeding is necessary."

Applying that holding to the immediate case, the court made several conclusions. It first concluded that "MSU is a state entity that enjoys the qualified immunity from local land use controls with respect to

management of its own land and property that was recognized in *Rutgers*.” Next, turning to the review of the exercise of that immunity, the court said that, in order for the trial court (on remand) to grant MSU the relief it seeks, the trial court must: (1) first assess “the inherent reasonableness of the MSU roadway plan in its entirety, including review of the off-site impact”; and (2) also assess whether MSU “reasonably consulted and took into consideration the legitimate concerns of local governmental entities”; and (3) third, assess whether “MSU’s proposed action reasonably satisfie[d] public safety concerns”—because there was “a facially legitimate public safety concern raised” by the County and City with regard to MSU’s proposed egress (namely, the speed limit to be posted on the egress and the planned project as it affected public safety regarding the intersection with the county road), “which would have a direct impact on non-state-owned property.”

Accordingly, on the remand of this matter, the Supreme Court of New Jersey added that “in circumstances such as these, a judicial finding shall be required on the reasonableness of the planned MSU project, specifically as it affects public safety regarding the intersection with the county road.”

See also: *Rutgers, State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972).

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**Case Note:**

*In its decision, the Supreme Court of New Jersey made clear that “an immune entity is not to be subjected to a requirement of submission to planning board review or the like.” Rather, the court here was holding “only that a public entity must show that its planning has reasonably addressed public safety concerns identified by local governments as having a direct impact on non-state public property and that a judicial finding as to the reasonableness of the public entity’s action with respect to public safety shall be required.”*

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## Signs—City’s zoning enforcement officer says signs erected on residential property that disparage a commercial vendor violate municipal zoning regulations with regard to height, size, and location

Residential property owner contends city lacks authority to regulate her signs under Connecticut statutory law because they are not “advertising signs”

Citation: *Kuchta v. Arisian*, 329 Conn. 530, 187 A.3d 408 (2018)

CONNECTICUT (07/24/18)—This case addressed the issue of whether Connecticut General Statutes § 8-2, which authorizes a municipality’s zoning commission to regulate the height, size, and location of “advertising signs and billboards,” permits a municipality to regulate signs erected on residential property that disparage a commercial vendor. In essence, the case addressed the issue of what constitutes an “advertising sign,” for which municipal zoning commissions have statutory authority to regulate the height, size, and location.

**The Background/Facts:** Eileen R. Arisian (“Arisian”) contracted with a commercial vendor for certain home improvements. Apparently disappointed with the vendor’s performance, Arisian erected three signs on her property that disparaged the vendor. At some point, the zoning enforcement officer (“ZEO”) for the City of Milford (the “City”) issued an order notifying Arisian that her signs violated City zoning regulations “limiting the size, height, and number of signs per street line.” The ZEO ordered Arisian to remove her signs.

When Arisian failed to comply with the ZEO’s order, the ZEO brought a legal action. In that action, the ZEO asked the court to order Arisian to remove her signs because they were not in compliance with the City zoning regulations.

Arisian responded by asserting the defense that the City lacked the authority to regulate her signs under Connecticut statutory law—Connecticut General Statutes § 8-2. Section 8-2 authorizes municipality’s zoning commissions to regulate the height, size, and location of “advertising signs and billboards.” Here, Arisian maintained that since

her sign was not an “advertising sign,” the City had no authority to regulate it.

The trial court found that Arisian’s signs violated the City’s zoning restrictions on the size, height, and number of signs. However, the court nonetheless concluded that, as Arisian had argued, the City lacked the authority to regulate Arisian’s signs under § 8-2 because her signs were not “advertising signs” in that they did not promote the sale of goods or services.

The ZEO appealed. On appeal, the ZEO argued that an “advertising” sign, “as that term is used in § 8-2 and as that term is commonly defined, means any sign that makes a public announcement.”

**DECISION: Judgment of Superior Court affirmed.**

Rejecting the ZEO’s argument for a broader meaning to be applied to “advertising signs,” and agreeing with Arisian, the Supreme Court of Connecticut held that Arisian’s signs, which disparaged a commercial vendor, were not “advertising signs,” as regulated by Conn. Gen. Stat. § 8-2. Accordingly, the court concluded that the City’s regulation of such signs was outside the scope of the authority granted to the City under § 8-2.

In reaching its conclusion, the court analyzed the meaning of the term “advertising signs,” as used in § 8-2. Finding no definition of “advertising signs” or “advertise” “anywhere in the General Statutes that provides guidance in the present case,” the court looked to the common meaning of “advertising” as defined in dictionaries contemporaneous with the time of the legislative grant of municipal zoning authority to regulate “advertising signs and billboards”—in 1931. The court found that in dictionaries of that time, “advertising” was defined as “[a]ny form of public announcement intended to aid directly or indirectly in the sale of a commodity, etc., in the promulgation of a doctrine or idea, in securing attendance, as at a meeting, or the like.” In general, the court found that according to contemporaneous dictionaries, around 1931, “advertising” referred to “the promotion of many subjects, of which commercial goods and services were perhaps the most common.” The court found that because the announcement was “intended to aid” the proponent (i.e., the person advertising), the definition “implied that some benefit inured to the proponent through such promotion.”

Again, the ZEO had argued that a broader meaning of “advertise” should be applied here—namely a meaning that encompasses any sign that makes a public announcement. The court disagreed. Linking the contemporaneous dictionary definition it had found of “advertising” to the contemporaneous dictionary definition of “sign” (i.e., a lettered board or notice placed to advertise a business), the court found “further evidence” to support its conclusion that the legislature, in enacting

§ 8-2, did not intend to “cast such a broad net” as proposed by the ZEO. If the legislature had so intended, noted the court, the legislature would have simply granted a municipality the authority to regulate “signs.”

Accordingly, the court concluded that although signs like Arisian’s made a “public announcement” and “could be a distraction to drivers and could raise safety concerns if . . . too big, too tall, or placed in certain locations,” the court was “hard pressed to characterize such signs as advertising.” Moreover, the court noted that, “[t]o the extent that such signs may give rise to similar aesthetic and safety concerns as advertising signs,” it was not up to the court to give the statute a broader meaning than the contemporaneous, common meaning intended by the enacting legislature.

See also: *Burns v. Barrett*, 212 Conn. 176, 189, 561 A.2d 1378 (1989).

## **Standing—Tax lienholder of property challenges local planning board approval of land use application for neighboring property**

Land use applicant argues tax lienholder is not an “interested party” and therefore lacks standing under state statute to bring the challenge

Citation: *Cherokee LCP Land, LLC v. City of Linden Planning Board*, 2018 WL 3650226 (N.J. 2018)

NEW JERSEY (08/02/18)—This case addressed the issue of whether a tax lienholder has standing to challenge a planning board’s approval of a land use application for a neighboring property.

**The Background/Facts:** A predecessor of GAF Corporation (“GAF”) acquired and subsequently subdivided a property in the City of Linden (the “City”) into two parcels of land. GAF retained ownership of one parcel (the “Property”), and sold the other parcel (the “Neighboring Property”) to Linden Chlorine Products, Inc. GAF then transferred the Property to Linden Property Holding, LLC (“LPH”), which entered into a purchase and sale agreement with Goodman North American Partnership Holdings, LLC (“Goodman”). The purchase and

sale agreement was contingent upon Goodman getting City approval to redevelop the Property.

In the meantime, ownership of the Neighboring Property transferred to Cherokee LCP Land, LLC (“Cherokee”). In 2013, Cherokee Equities, LLC purchased three tax sale certificates on the Neighboring Property from the City, initiated tax foreclosure proceedings, and assigned the tax sale certificates to Linden 587, LLC (“Linden 587”).

In May 2014, Goodman submitted a site plan application for development of industrial, warehouse and distribution space on the Property to the City’s Planning Board (the “Board”). The Board approved the application.

Thereafter, Cherokee and Linden 587 challenged the Board’s approval of Goodman’s application. They alleged that Goodman’s proposed project would “eliminate certain points of access to the Neighboring Property, interfere with an existing easement on the Property, and substantially modify storm water management on the Property.”

In response to the legal challenge, Goodman and LPH argued that Cherokee and Linden 587 lacked standing (i.e., the legal right to bring the action). The Board joined in their argument.

With regard to standing, New Jersey’s Municipal Land Use Law (“MLUL”) provides that “[a]ny interested party may appeal to the governing body any final decision of a board of adjustment approving an application for development.” (N.J.S.A. 40:55D-17(a).) The MLUL defines “interested party” broadly to include “any person . . . whose right to use, acquire, or enjoy property is or may be affected by any action taken under [the MLUL].” (N.J.S.A. 40:55D-4.)

Goodman, LPH, and the Board argued that Cherokee and Linden 587 lacked standing to challenge the Board’s approval of Goodman’s application because they were not “interested” parties under the MLUL. They maintained that Cherokee was not the titled owner of the Neighboring Property, and therefore was not an “interested party.” And, they argued that Linden 587 was not an “interested party” because it did not hold title to or a possessory interest in the Neighboring Property.

The trial court agreed that Cherokee and Linden 587 lacked standing to challenge the Board’s approval. The trial court found that Cherokee was not the titled owner of the Neighboring Property and therefore did not have an interest in the Neighboring Property. The trial court concluded that “Linden 587 does not have a present interest in the Neighboring Property as its ownership rights, which include the use and enjoyment of the property, are conditioned upon its right of redemption which it has failed to exercise.” The trial court found “that until redemption and entry of foreclosure, the holder of a tax sale cer-

tificate”—like Linden 587 here—“does not have any vested ownership or present possessory interest in a property that is subject to the tax sale certificate.” As a result, the trial court determined that Linden 587 “cannot be deemed an interested party” based on its status as a tax lienholder and that, as a consequence, dismissal of the legal challenge was warranted.

Cherokee and Linden 587 appealed. They did not challenge the conclusion that Cherokee was not the titled owner of the Neighboring Property. But they did challenge the conclusion that Linden 587 was not an “interested party,” and therefore did not have standing.

The Appellate Division affirmed the dismissal of their complaint.

Cherokee and Linden 587 then petitioned for certification, which the Supreme Court of New Jersey granted. Cherokee and Linden 587 argued that Linden 587, as the holder of tax sale certificates and as a plaintiff in the foreclosure proceedings upon the Neighboring Property, had standing as an “interested party” pursuant to the MLUL (N.J.S.A. 40:55D-4) “because its right to acquire or use the [Neighboring Property] ha[d] been destroyed by the Board’s approval of the Goodman plan.”

**DECISION: Judgment of Superior Court, Appellate Division, reversed, and matter remanded.**

The Supreme Court of New Jersey concluded that Linden 587 did have standing as an “interested party” under the MLUL to challenge the Board’s approval of Goodman’s application.

In so holding, the court analyzed the MLUL’s definition of “interested party.” Again, the MLUL authorized with standing to appeal a decision of a board of adjustment approving an application for development, “[a]ny interested party . . .” (N.J.S.A. 40:55D-17(a).) And, again, the MLUL defined “interested party” as including anyone “whose right to use, acquire, or enjoy property is or may be affected” by a land use application. (N.J.S.A. 40:55D-4.) The court emphasized that to have standing to bring a land use challenge, a party must not only meet the definition of “interested party” but must establish that right “is or may be affected.” (N.J.S.A. 40:55D-4.)

Analyzing whether Linden 587, as a tax lienholder on the Neighboring Property, met the requirements for standing, the court first explained that “the absence of title or possession is not determinative of standing.” The court emphasized that the MLUL “clearly and unambiguously provides that standing may be afforded to those with a ‘right to use, acquire, or enjoy property.’” (N.J.S.A. 40:55D-4.) The court then noted that a purchaser of the tax sale certificate, such as Linden 587 here, has the “right to acquire title” to the property, and “the right to use” the property in a limited manner “in order to make repairs, or abate, remove or correct any condition harmful to the public health, safety and

welfare, or any condition that is materially reducing the value of the property.” (N.J.S.A. 54:5-86(c).) Thus, the court concluded that Linden 587 met the MLUL’s definition of “interested party.”

That conclusion, however, noted the court, was not in and of itself determinative of standing. Not every tax lienholder automatically has standing to challenge a land use application, said the court. Rather, again, the court emphasized that to have standing pursuant to the MLUL, an “interested party,” including a tax lienholder like Linden 587, must show that its “right to use, acquire, or enjoy property is or may be affected” by the action. (N.J.S.A. 40:55D-4.) Here, the court found that Cherokee and Linden 587 had alleged that Goodman’s proposed project would affect their right to enter onto the property to address certain conditions because of the project’s elimination of certain points of access to the Neighboring Property, the interference with an existing easement on the Property, and the modification of storm water management on the Property.

Thus, the court concluded that Linden 587 “may have standing as the holder of tax sale certificates for the Neighboring Property whose ‘right to use . . . [the] property . . . may be affected’ if [Goodman’s] application is granted.”

## Zoning News from Around the Nation

### CALIFORNIA

The state Legislature is considering Assembly Bill 2923, which, as introduced, would authorize the Bay Area Rapid Transit (“BART”) “to ignore local zoning rules, create its own building standards and require that cities conform to BART’s development plans for any of its properties within a half-mile of a station.” Reportedly, the bill is aimed at increasing opportunities for high density “transit villages” near BART stations.

Source: *KPIX*; <https://sanfrancisco.cbslocal.com>

### MASSACHUSETTS

Boston City Councilors have filed legislation “to remove as-of-right designations for chain stores in Boston’s neighborhood business districts.” The proposal would reportedly amend the City of Boston’s Zoning Code “to regulate formula retail uses, also known as chain stores, and require a conditional use permit for any such business to open and operate in a neighborhood business district.” Under the pro-

posal, “chain stores” would be defined as “retail or service establishments that have 11 or more locations worldwide, and two or more of the following features: a standardized array of merchandise, a standardized façade, a standardized décor and color scheme, uniform apparel, standardized signage, a trademark or a servicemark.” The amendment would not prohibit chain stores in any location, but is intended to “give residents and community members the opportunity to weigh in through the public process of obtaining a conditional use permit.” The proposal is aimed at preserving “the cultural fabric of the business district and the ability for locally-owned small businesses to survive and thrive.” If the proposal is approved by the Council, it would then be formally submitted to the Boston Zoning Commission for approval.

Source: *Charlestown Patriot-Bridge*; <http://charlestownbridge.com>

## MISSOURI

In an effort to “combat ‘advertising clutter,’ ” the Jefferson City Council will soon vote on an amended bill that would limit non-commercial temporary signage in the city.

“Non-commercial” signs include election, real estate, political or non-political signs. Under the original bill, “a residential property could have two 5-square-foot, non-commercial signs and an additional two 5-square-foot signs per street frontage during election season.” The Planning and Zoning Commission has approved the bill, but has reportedly recommended there not be a limit on the number of temporary signs on residential properties and that setback requirements for temporary signs be removed. Also under the bill, temporary signs would not be allowed on public rights-of-way unless with prior permission.

Source: *News Tribune*; [www.newstribune.com](http://www.newstribune.com)

## NEW YORK

The New York City Council has approved a plan to rezone a large portion of the Inwood neighborhood. The rezoning will reportedly “create and preserve 4,100 units of affordable housing, including 925 units on city-owned land and 675 units that will be established in market-rate buildings under housing rules that require developers to build affordable housing in projects made possible by rezoning.”

Source: *The New York Times*; [www.nytimes.com](http://www.nytimes.com)