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Special Exception/Variance/Public Interest—Area residents challenge zoning board's grant of special exception and area variances for construction of large homeless shelter

Residents argue that zoning board erroneously applied a "flexible" public interest standard in evaluating the non-profit

Contributors

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applicants' variance requests

Citation: *Neighbors for Responsive Government, LLC v. District of Columbia Board of Zoning Adjustment, 2018 WL 5068814 (D.C. 2018)*

DISTRICT OF COLUMBIA (10/18/18)—This case addressed the issue of whether a zoning board's grant of zoning relief (in the form of a special exception and area variances) for construction of a large homeless shelter in a "residential apartment" zoning district was proper. Among other things, the case addressed the issue of a zoning board's application of a "flexible" public interest standard where the zoning relief applicant is a non-profit entity.

The Background/Facts: In 2016, the Council of the District of Columbia (the "Council") enacted the Homeless Shelter Replacement Act of 2016 (the "Act"). The Act authorized the construction of new emergency homeless shelters in the District of Columbia (the "City"), including one 50-family shelter on a large, City-owned tract in Ward 3 (the "Site"). That Site was located in a Residential Apartment ("RA") zoning classification, which permitted all types of urban residential development, including emergency homeless shelters. A shelter for more than four persons in an RA zone, however, required the City's Board of Zoning Adjustment ("BZA") to approve the shelter as a special exception. The RA zone restricted lots to one primary structure per lot, and imposed a maximum building height permitted as of right at 40-feet and three stories.

In order to fulfill the vision of the City government and the purpose of the Act, the City's Department of General Services ("DGS") proposed a plan to construct on the Site, a 50-family residential unit in a six-story, 69-foot tall building. The DGS applied to the BZA for a special exception and variance relief. In August 2017, the BZA granted DGS' requests for zoning relief. In granting that zoning relief, the BZA found that DGS had satisfied the applicable conditions for approval of the proposed shelter use as a special exception and for area variances allowing the shelter to be the second primary structure on the lot and to exceed the height permitted in an RA-1 zone as of right.

A group of area residents led by Neighbors for Responsive Government (collectively, "NRG") filed a timely petition to the District of Columbia Court of Appeals to review the BZA's decisions. The NRG challenged the grant of the special exception, contending that the proposed shelter was so large that it could not be found to be "in harmony with the general purpose and intent" of an RA-1 Zone, as required by City code. The NRG challenged the grant of the variances. The NRG argued that the BZA erred in applying a principle that it could be more flexible in evaluating a request for a variance and finding an exceptional condition when the applicant is a non-profit organization seeking the variance to enable it to serve a public need. The NRG contended that such flexibility was only available when the non-profit was seeking to expand or continue an existing, previously authorized use on its property—which was not the case here. The NRG also argued that the BZA erred in relying on the Act's designation of the Site because the Act did not override zoning requirements or mandate the use of the Site for that purpose. Finally, the NRG argued that the BZA should have denied the variances because the exceptional condition necessitating relief was self-imposed in that, instead of choosing other possible locations, DGS chose the Site, knowing a variance would be needed.

DECISION: Judgment of Board of Zoning Adjustment affirmed.

The District of Columbia Court of Appeals rejected all of the NRG's arguments, concluding that the BZA properly granted the zoning relief requested by DGS.

Responding to NRG's challenge to the special exception, the court noted that City requirements for special exception approval imposed "no *per se* limit on the maximum size of an emergency shelter in an RA-1 Zone." The court further noted that "an increase in population density [such as with a 50-family homeless shelter] [was] not 'necessarily incompatible' with a residential neighborhood." Rather, the court said that compatibility depended on whether the proposed shelter would have an "adverse impact on the neighborhood in terms of traffic, noise, or other effects." The court found there was "sufficient evidentiary support" for the BZA's findings that the proposed shelter would not have an adverse impact on the neighborhood's residential neighbors.

Responding to NRG's challenge to the variances, the court first rejected NRG's proposed limitation of the BZA's flexibility in evaluating requests for variance relief to enable non-profit entities to serve an important public need or purpose. The court noted that the rationale for such flexibility was that the "public need for the use is an important factor in granting or denying the variance." The court held that "when a nonprofit organization applies for a variance as being necessary to enable it to meet a public need or serve the public interest without undue burden, the BZA has discretion to take the public benefit into account in assessing whether the requirements for a variance are met (including the existence of an exceptional condition affecting the property), regardless of whether the applicant seeks to expand or continue an existing, authorized use, or to add or substitute a new use of the property in question." Accordingly, the court found no legal error in the Board's decision to apply the "flexible" public interest standard in this case in which the applicant, a non-profit (governmental) entity, sought to add a new use to its property to meet a substantial public need for an emergency homeless shelter in the ward.

The court also rejected the NRG's argument that the BZA had erred in relying on the Act's designation of the Site. NRG argued that the Act did not override zoning requirements or mandate the use of the Site for that purpose. The court found that the BZA was not under the impression that the Act overrode zoning requirements or compelled it to grant the variances DGS sought. Still, the court said that did not mean that the Council's designation of the Site was immaterial to the question of whether the Site was subject to an exceptional condition for purposes of granting the requested variances. The court noted that the Council had made a legislative determination of a critical public need to utilize the Site for the homeless shelter because it was "uniquely valuable" and "uniquely suitable" for that purpose. The court determined that the BZA "properly considered that determination, not as overriding applicable zoning requirements, but in applying those requirements to the application at hand."

Finally, the court agreed with NRG that it was "fair" to characterize DGS' need for variance relief as self-imposed or self-inflicted since DGS chose the Site knowing it would need the variances. Still, the court noted that such a self-imposed difficulty "is not a bar to an area variance." The court found substantial evidence supported the conclusion that the Site was the only property in Ward 3 that could feasibly be used for the shelter needed there. Thus, the court found

that DGS could not be said to have deliberately preferred a site requiring variance relief over an acceptable alternative location that would not have needed such relief. Accordingly, the court concluded that the BZA did not abuse its discretion in granting the area variance despite DGS having chosen the property knowing it would need a variance.

See also: *Gilmartin v. District of Columbia Bd. of Zoning Adjustment, 579 A.2d 1164 (D.C. 1990).*

Case Note:

NRG had also argued that the variances being sought were actually use variances and not area variances. The court rejected that claim.

Decisions of boards or officers—Planning board denies site plan application, opining that proposed facility would not be a good fit for the area

Noting the site plan application met all zoning requirements, applicant challenges denial as illegally subjective despite all objective criteria being met

Citation: *Trustees of Dartmouth College v. Town of Hanover, 2018 WL 5796932 (N.H. 2018)*

NEW HAMPSHIRE (11/06/18)—This case addressed the issue of whether a planning board unreasonably denied a site plan application. More specifically, it addressed whether a planning board had the authority to deny a site application despite the application meeting all zoning requirements.

The Background/Facts: In March 2016, the Trustees of Dartmouth College ("Dartmouth") submitted to the Town of Hanover's Planning Board ("the Board") a site plan application for the construction of an Indoor Practice Facility ("IPF"). The proposed IPF was to be a 69,860 square foot facility within the college's 41-acre athletic complex located in the Institutional Zoning District ("I-District") in the Town of Hanover (the "Town"). The proposed IPF site abutted a neighborhood of single-family homes in a Single Residence zoning district. Pursuant to the Town zoning ordinance, the I-District allowed for large facilities for educational and recreational purposes but set stringent height limitations and setback requirements on buildings in close proximity to residential districts.

Abutters of the proposed IPF site "vigorously opposed" the IPF. Among other things, they voiced concerns that the building's height would "block an unreasonable amount of sunlight and cast shadows on their homes."

The Town's Zoning Administrator informed the Board that the IPF would be

fully compliant with the Town's zoning ordinances, including ordinances regulating height restrictions, setback requirements and building-to-lot size ratio limitations. Board staff recommended approval of Dartmouth's site plan application for the IPF with 21 conditions. Dartmouth agreed to comply with all 21 conditions. Nevertheless, the Board ultimately voted to deny the application. Citing the Town's Site Plan Review Regulations, the Board based its denial on three enumerated reasons: (1) the application did not conform with the Town's Master Plan; (2) the application would have negative impacts on "the abutters, neighborhood and others, town services and fiscal health"; and (3) the application did not "relate to the harmonious and aesthetically pleasing development of the [T]own and its environs."

Dartmouth appealed the Board's denial of its site plan application for the IPF to the trial court. The trial court concluded that the Board's decision was "lawful and reasonably based upon a particular concern that the IPF 'would block an unreasonable amount of sunlight from reaching abutting homes.' "

Dartmouth again appealed. Among other things, Dartmouth argued that the trial court's decision was unreasonable and legally erroneous because the court: "(1) relied upon factual claims and a rationale, not supported by the evidence or the [B]oard's deliberations; and (2) upheld a planning board decision that was based upon ad hoc decision-making and personal feelings, rather than objective or discernible facts, to find that the application failed to meet the general considerations."

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

Agreeing with Dartmouth, the Supreme Court of New Hampshire held that, since Dartmouth's site plan application complied with the Town's specific zoning ordinances and site plan regulations, the Board unreasonably and erroneously denied Dartmouth's site plan application.

In so holding, the court explained that a planning board's site plan review is intended to ensure "that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public." In performing its review, the court noted that a planning board does not have the authority to deny a particular use "simply because it does not feel that the proposed use is an appropriate use of the land."

Here, the court concluded that the Board exceeded its authority because, although the site plan application met all zoning requirements, the Board "essentially decided" that the IPF was: "(1) too large and imposing, despite the project's compliance with Hanover's I-District zoning ordinances regulating a structure's height and size; (2) too close to the abutting neighborhood, despite the project's compliance with the unique setback and height restrictions imposed by its proximity to a residential neighborhood; and (3) not a harmonious or aesthetically pleasing fit with the development of the [T]own and its environs, despite the fact that the IPF constitute[d] a permitted use within a 'special district' that not only contemplate[d] large warehouse and recreational facilities, . . . [but included] two indoor sports facilities of similar sizes." The court held that "a planning board cannot supersede the specific regulations and ordinances that control the site plan review process with their own personal feelings and then justify their reasoning through the application of general considerations." While a planning board may rely on its own judgment and experience, it must

base its decision on more than the mere personal opinions of its members, said the court.

See also: *Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481, 202 A.2d 232 (1964).*

See also: *Condos East Corp. v. Town of Conway, 132 N.H. 431, 566 A.2d 1136 (1989).*

Case Note:

In overturning the trial court, the Supreme Court of New Hampshire also held that the evidence did not reasonably support the trial court's findings. Specifically, the court found that, contrary to the trial court's findings, the Board had not denied Dartmouth's application because the IPF would deprive abutting homes of sunlight. In fact, the Supreme Court of New Hampshire found that the Board members only briefly touched on that issue, and, in actuality, based their denial on their "feelings" that the proposed IPF did not meet the standard of being a harmonious and aesthetically pleasing development.

Case Note:

In its decision, the Supreme Court of New Hampshire emphasized that it was not suggesting that site plan reviews should be "reduced to the mechanical process of determining conformity with specific zoning and site plan regulations." However, the court also made clear that a planning board cannot solely base its decision upon general considerations that, in doing so, override the site plan's conformity with specific regulations and ordinances.

Time for proceedings—Environmental group challenges tree removal agreement between city and utility

Utility argues that group's challenge must be dismissed as untimely for failing to meet statute of limitations

Citation: *Save Lafayette Trees v. City of Lafayette, 293 Cal. Rptr. 3d 222 (Cal. App. 1st, Oct. 23, 2018)*

CALIFORNIA (10/23/18)—This case addressed the issue of whether causes of action based on violations of planning and zoning law were timely served.

The Background/Facts: On March 27, 2017, the City of Lafayette (the "City") approved a tree removal agreement (the "Agreement") with Pacific Gas and Electric Company ("PG&E") which authorized and imposed conditions on the removal of up to 272 trees within PG&E's local natural gas pipeline rights-

of-way. On June 26, 2017, Save Lafayette Trees, Michael Dawson, and David Kosters (collectively, "Save Lafayette Trees") filed a petition challenging the Agreement. The petition was served the following day. Among other things, the petition alleged that the City: (1) failed to comply with the California Environmental Quality Act ("CEQA") before approving the Agreement; and (2) approved the Agreement in violation of the substantive and procedural requirements of the planning and zoning law, the City's general plan, and the tree ordinance (collectively, "planning and zoning law claims").

PG&E filed a demurrer to the petition. PG&E contended that the petition was time barred by California statutory law—Government Code section 65009, subdivision(c)(1)(E). That statute requires that an action challenging a decision regarding a zoning permit be filed and served within 90 days of the decision. Specifically, section 65009, subdivision (c)(1), provides that:

> no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: . . . (E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit.

The "matters listed" in sections 65901 and 65903 include "conditional uses or other permits when the zoning ordinance provides therefor" and "variances from the terms of the zoning ordinance." (§ 65901, subd. (a).)

PG&E explained that while Save Lafayette Trees' petition was timely filed on June 26, 2017, it was not served until the next day, which was after the 90-day deadline.

Save Lafayette Trees maintained that its claims fell outside the scope of section 65009. Alternatively, it maintained that even if section 65009 applied to its planning and zoning law claims, its CEQA claim was timely filed and served under the statute of limitations provided under the state's Public Resources Code. Public Resources Code section 21167, subdivision (a), allows 180 days from an agency's decision to challenge that decision as having a significant effect on the environment.

Finding for PG&E, the trial court sustained the demurrer. The court found that Save Lafayette Trees failed to serve the action within the 90-day period for service set forth in section 65009(c)(1)(E).

Save Lafayette Trees ultimately appealed. On appeal, it argued that its planning and zoning law claims were subject to the 180-day statute of limitations for challenging City Council decisions found in section 6-236 of the City's Municipal Code rather than the 90-day statute of limitations in section 65009 of the state's Government Code. Save Lafayette Trees pointed to the fact that the Agreement for tree removal was not an issuing "permit" regulated under the Government Code, but rather was an agreement making exceptions to the requirements of the City's tree ordinance subject to the City's Municipal Code section 6-1705. Save Lafayette also argued that section 65009 did not apply because, in entering the Agreement with PG&E, the City was not acting in one of the roles specified in sections 65901 and 65903—namely as a board of zoning adjustment, zoning administrator, or a board of appeals. Finally, and alternatively, Save Lafayette Trees argued that section 65009 was not applicable to its CEQA cause of action because the statute of limitations in section 65009

conflicted with the more specific CEQA statute of limitations found in the Public Resources Code.

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

The Court of Appeal, First District, Division 3, California, held that Save Lafayette Trees' planning and zoning law claims were untimely and thus properly dismissed. The court, however, also found that the CEQA cause of action was timely filed and served.

In so holding, the court rejected Save Lafayette Trees' arguments that the 90-day statute of limitations in section 65009 did not apply. The court found it irrelevant that the City had entered into an agreement approving the removal of trees under the section 6-1705 of the City's Municipal Code, rather than issuing a permit for their removal. The court found no difference between such an agreement and a permit in this instance. Accordingly, the court found that since section 65009 applied to an action challenging "any decision" of a "legislative body" regarding a permit provided for by a local zoning ordinance, section 65009's 90-day statute of limitations applied here.

The court also rejected Save Lafayette Trees' argument that the City Municipal Code's 180-day statute of limitations for actions challenging City Council decisions applied. The court found that section 65009 expressly conflicted with the local ordinance, and thus preempted it.

The court also found, with regard to the application of section 65009, that it was irrelevant that the City was not acting as a zoning board when it approved the tree removal Agreement. The court found that section 65009 applied to "matters listed" in sections 65901 and 65903 (including zoning permits), "regardless of the legislative body charged with making the decision."

Still, the court agreed with Save Lafayette Trees that section 65009 did not apply to its CEQA action. The court found that section 65009, subdivision (c)(1)(E) and Public Resources Code sections 21167 and 21167.6 both related to the same subject: "the time period within which service of a petition challenging approval of a zoning permit must be made." The court explained that, in cases such as this—where the statutes cannot be harmonized—the more specific applies. Thus, in the case, the court concluded that the more specific Public Resources Code provisions governed. Applying the Public Resources Code's 180-day statute of limitations, the court concluded that Save Lafayette Trees' CEQA action was timely filed and served.

See also: *Royalty Carpet Mills, Inc. v. City of Irvine, 125 Cal. App. 4th 1110, 1119, fn 6, 23 Cal. Rptr. 3d 282, 35 Envtl. L. Rep. 20017 (4th Dist. 2005).*

Standing—In judicial action, special use permit applicant contends that group challenging its permit lacked standing

Challengers argue applicant waived that standing argument by not raising it at administrative level

Citation: *York v. Athens College of Ministry, Inc., 2018 WL 5729088 (Ga. Ct. App. 2018)*

GEORGIA (11/02/18)—This case addressed the issue of whether the grant of a special use permit was a legislative or quasi-judicial action—thus impacting when a challenge to a party's standing must first be made—at the administrative or judicial level.

The Background/Facts: Athens College of Ministry, Inc. ("ACM") sought to build a college campus in Oconee County (the "County"). In furtherance of the proposed development, ACM applied to the County Board of Commissioners (the "Board") for a special use permit. Property owners in the area—Kevin York and Icy Forest, LLC (collectively, the "Objectors")—sent a letter to the Board, objecting to ACM's special use permit application. Eventually, following a public hearing, the Board granted ACM the special use permit, subject to specific conditions.

The Objectors then filed in the County Superior Court a petition for writ of certiorari, challenging the grant of the special use permit. ACM and the County moved to dismiss the Objectors' petition. They argued that the Objectors lacked the required legal standing to challenge the Board's decision. Specifically, they argued that the Objectors had failed to show that they would be damaged in a way that was uncommon to similarly situated property owners.

The Objectors argued that ACM and the County could not now challenge the Objectors' standing because they waived that challenge by failing to raise the issue of standing before the Board. Specifically, they contended that the decision to grant the special use permit to ACM was quasi-judicial, and, therefore, ACM and the County were required to raise any standing issue before the Board. The Objectors argued that the failure to raise the standing issue before the Board resulted in a waiver of any standing challenge since the trial court's review was limited to the arguments raised before the Board.

ACM and the County countered, arguing that the Board's decision to issue the special use permit was legislative. As such, they maintained that the trial court could therefore review the issue of standing in the first instance.

The trial court agreed with ACM and the County, concluding that the Board's issuance of the special use permit was legislative and that therefore the standing issue could be raised in the first instance before the trial court. The trial court then ruled that the Objectors lacked standing to challenge the Board's decision because they failed to show special damage or injury.

The Objectors appealed. On appeal, they argued that the trial court erred in addressing the standing issue and dismissing their petition.

DECISION: Judgment of superior court reversed.

Agreeing with the Objectors, the Court of Appeals of Georgia held that the decision by the Board to issue the special use permit was quasi-judicial, not legislative, and, thus that the County and ACM had waived their challenge to the Objectors' standing by not raising the issue of standing before the Board.

In so holding, the court explained that "[w]hen a party seeks certiorari review in the trial court of a decision of an administrative body acting in a quasi-judicial capacity, the trial court is bound by the facts and evidence presented to the administrative body, and the issue of standing is waived if it was not raised before the administrative body." On the other hand, explained the court, when a party seeks review of a local government's legislative decision, the trial court may hear newly introduced evidence, including with regard to the question of standing.

In determining whether the Board's decision to issue the special use permit to ACM was quasi-judicial or legislative, the court detailed the following test:

> Generally, [a quasi-judicial] decision operates to address a specific dispute or determine rights and obligations of a particular party or parties. The resulting decision seeks to establish those rights and obligations or otherwise resolve the dispute, and is immediate in application. A legislative decision, on the other hand, is usually marked by a general inquiry, often not limited to the facts and circumstances of specific people or properties, which results in a rule of law or course of policy that will apply in the future.

The court noted that the decision making process "for applying preexisting standards to individual circumstances"—such as where a special permit is sought under terms set out in the local ordinance—is adjudicatory with the governing body (i.e., here, the Board) acting in "a quasi-judicial capacity to determine the facts and apply the law."

Here, the court found that the Board, in assessing ACM's special use permit application, analyzed the application against 10 objective "standards for special use consideration" set forth in the County ordinance. The court concluded that this process used for the Board's decision—involving the determination of facts and application of the facts to the ordinance's legal standards—was a decision-making process akin to a judicial act. Thus, the court concluded that the Board's determination to grant the special use permit was quasi-judicial. Accordingly, the court also concluded that ACM and the County waived their challenge to the Objectors' standing since they failed to raise the issue before the Board.

See also: *Druid Hills Civic Ass'n, Inc. v. Buckler, 328 Ga. App. 485, 760 S.E.2d 194 (2014) (disapproved of by, Hourin v. State, 301 Ga. 835, 804 S.E.2d 388 (2017)).*

See also: *City of Cumming v. Flowers, 300 Ga. 820, 797 S.E.2d 846 (2017).*

Case Note:

The trial court, in deciding that the Board's decision was legislative, had interpreted Georgia statutory law—OCGA § 36-66-3 (4) as governing this dispute. That statute defines a "zoning decision" as a "final legislative action by a local government," including "[t]he grant of a permit relating to a special use of property." But the appellate court disagreed with this interpretation, noting that the statute defined a "zoning decision," not a "special use permit" or "special use approval" decision. In other words,

the appellate court concluded that the statute did not, on its face, "make a local government's issuance of any and all 'permit[s] relating to a special use of property' 'legislative action[s],' regardless of the process that was used to make any such decision." The court emphasized it was the decision-making process used by the local entity that determined whether the entity's decision was quasi-judicial or legislative. Here, the court concluded that the Board's decision was a "quasi-judicial" (not legislative) action by a local government resulting in "[t]he grant of a permit relating to a special use of property." (See OCGA § 36-66-3(4)(E).) Thus, the court concluded that OCGA § 36-66-3(4)(E) did "not apply or compel the conclusion that the Board's decision was legislative."

Zoning News from Around the Nation

MASSACHUETTS

The City of Lowell is considering a zoning law change that would limit the number of unrelated tenants to three people per apartment unit.

Source: *Boston 25 News; www.boston25news.com*

MICHIGAN

In November, Michigan voters approved Ballot Proposal 1, legalizing recreational use of marijuana in the state. Under the measure, possession of recreational marijuana is illegal "at K-12 schools or lands owned by the federal government, such as national forests or parks." Local governments must now establish regulations related to the commercial sale of recreational marijuana, and can, among other things, adopt an ordinance to ban marijuana sales or adopt local zoning laws to regulate marijuana businesses.

Source: *Cadillac News; www.cadillacnews.com*

WASHINGTON

The City of Olympia has adopted new regulations that "relax restrictions and legalize more types of modest multifamily dwellings citywide." Among other things, the new regulations allow more housing types in zoning districts, and loosen restrictions such as building size limits.

Source: *Sightline Institute; www.sightline.org*

