QUINLAN™

February 10, 2019 | Volume 13 | Issue 3

Zoning Bulletin

in this issue:

Fees—Developer seeks refund of development fees paid to school district

School district based fees on hypothetical new schools it was not going to build

Citation: *Summerhill Winchester LLC v. Campbell Union School District, 2018 WL 6695971 (Cal. App. 6th Dist. 2018)*

CALIFORNIA (12/4/18)—This case addressed the issue of whether facility fees imposed by a school district on a developer were justified.

The Background/Facts: SummerHill Winchester LLC ("SummerHill") owned a 100-unit residential development project (the "Project") in the City of Santa Clara, within the boundaries of the Campbell Union School District ("CUSD"). In 2012 and 2013, SummerHill paid to CUSD, under protest, development fees of $499,976.96. SummerHill later filed a legal action in superior court, seeking a refund of the fees it had paid to CUSD. SummerHill contended that the development fees were invalid and unreasonable because they were "excessive," "not roughly proportional or reasonably related to the burdens caused by the Project," and "lack[ed] an essential nexus between the amount of the school development fees imposed on the Project and CUSD's alleged need to construct certain improvements and facilities for reasons that [were] attributable to the Project." More specifically, among other things, SummerHill alleged that the fees were based on a faulty fee study, which failed to identify the new facilities that would be necessary for new students generated by new residential development. In fact, SummerHill noted, the fee study used hypothetical schools that CUSD was not going to build as the premise for calculating the fees imposed on SummerHill.

The trial court agreed with SummerHill, and invalidated the fees and ordered SummerHill's fees be refunded.

CUSD and the Campbell Union School District Governing Board (hereinafter, collectively, "CUSD"), appealed. CUSD maintained that it used a reasonable methodology to calculate the fee.

DECISION: Judgment of Superior Court affirmed.

THOMSON REUTERS®

Mat #42479375

Affirming the trial court's opinion, the Court of Appeal, Sixth District, California concluded that CUSD's fee study failed to "contain the data required to properly calculate a development fee."

The Court of Appeal explained that, in California, statutory law authorizes a school district to levy a fee against new residential construction for the purposes of funding the construction or reconstruction of school facilities. (See Ed. Code § 17620, subd. (a)(1).) The court also explained that, as set by prior court precedent, fee studies must satisfy a three-factor test: (1) There "must be a projection of the total amount of new housing expected to be built within the District" (since the fee is to be assessed per square foot of development); (2) "[T]he District [must] determine approximately how many students will be generated by the new housing" (in order to measure the extent of the burden imposed on schools by the new development); and (3) "[T]he District must estimate what it will cost to provide the necessary school facilities for that approximate number of students." The court explained that since the process involves projections, figures need not be exact, but must show a "requisite connection between the amount of the fee imposed and the burden created." "[F]acilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development," said the court.

Here, the court found that CUSD failed to satisfy the three-factor test in that its fee study: (1) failed to project the "total amount of new housing expected to be built within the District," but instead projected a "vague and unrestricted figure" that provided "no guidance" for CUSD to determine whether new school facilities were needed due to anticipated development; (2) failed to "realistic[ally] estimate how may students would be generated by new development"; and (3) was unable to estimate the cost to provide necessary school facilities because it was unable to identify facilities needed to satisfy quantified needs, since the needs could not be quantified without quantification of the amount of new development or amount of new students.

The court concluded that CUSD's decision to enact a development fee in this case was invalid because CUSD "did not decide that its enrollment increases would necessitate the construction of new schools but nevertheless based the amount of the development fee on the cost of building new schools." The court found that this "discontinuity" precluded the CUSD "from being able to demonstrate a reasonable relationship between the impact of new development and the development fee," as required.

CUSD argued that even if it failed to satisfy the three-factor fee test, the fee imposed against SummerHill was valid because CUSD "applied an 'alternative' 'reasonable methodology' that was sufficient to support the fee." CUSD maintained that because its enrollment already exceeded its capacity "every single additional student generated by new development [would] result in a financial impact on the District." The court accepted the validity of that statement, but concluded that it failed to satisfy the statutory requirement that CUSD demonstrate "a relationship between the amount of the fee and impact of development on the need for new or reconstructed school facilities." Here, found the court, "the fee study's use of hypothetical new schools that CUSD

Contributors

Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write to West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

THOMSON REUTERS®

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-229-2084
email: west.customerservice@thomsonreuters.com
ISSN 0514-7905

was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed . . . ."

See also: *Shapell Industries, Inc. v. Governing Board, 1 Cal. App. 4th 218, 1 Cal. Rptr. 2d 818, 70 Ed. Law Rep. 1148 (6th Dist. 1991).*

See also: *Garrick Development Co. v. Hayward Unified School Dist., 3 Cal. App. 4th 320, 335, 4 Cal. Rptr. 2d 897, 72 Ed. Law Rep. 913 (1st Dist. 1992).*

Nonconforming Use/ Vested Rights—Town finds property owner has illegally converted buildings to dwellings

Property owner contends payment of taxes on buildings for more than 15 years entitles it to continue nonconforming dwelling use

Citation: *Board of Supervisors of Fairfax County v. Cohn, 2018 WL 6566782 (Va. 2018)*

VIRGINIA (12/13/18)—This case addressed the issue of whether Virginia Code § 15.2-2307(D) creates a vested right to an originally illegal use of a building or structure after the owner has paid taxes to the locality for that building or structure for 15 years or more.

The Background/Facts: Douglas A. Cohn and Kathryn J. Cohn (the "Cohns") own real property (the "Property") in an R-1 zoning district in Fairfax County (the "County"). In August 2016, the County Zoning Administrator (the "ZA") issued a Notice of Violation ("NOV") to the Cohns. The NOV alleged that the Cohns were in violation of County Zoning Ordinance § 2-501. That ordinance limited property in an R-1 zoning district to "not more than one (1) dwelling unit on any one (1) lot." The County found that because a garage and garden house on the Cohns' Property had been converted to dwellings, the Cohns had "three (3) complete and separate dwellings" on the Property, in violation of the zoning ordinance. The NOV ordered the Cohns to remedy the violation by removing kitchens, electrical circuits, and plumbing in the garage and garden house dwellings, and ceasing the use of all but one dwelling unit on the Property.

The Cohns appealed the NOV to the County Board of Zoning Appeals ("BZA"). On appeal to the BZA, evidence showed that the building permits issued for the garage and garden house had specifically noted that there were "no kitchens or bathrooms approved for the structure." However, the Cohns argued that because they paid taxes on the Property for more than 15 years, Virginia Code § 15.2-2307(D) protected "the buildings and structures on the Property and their use as dwellings from being declared unlawful."

Code § 15.2-2307(D) provides that "[n]otwithstanding any local ordinance to the contrary, if . . . (ii) the owner of the building or structure has paid taxes to the locality for such building or structure for a period of more than the previous 15 years, a zoning ordinance shall not provide that such building or structure is illegal and subject to removal solely due to such nonconformity. . . ."

The BZA ultimately upheld the determination of the ZA, finding the Cohns in violation of the County zoning ordinance.

The Cohns appealed the BZA's decision to circuit court. Again, the Cohns argued that Code § 15.2-2307(D)(ii) prevented the County from declaring their use of the buildings and structures on the Property to be illegal.

The circuit court reversed the decision of the BZA. The circuit court reasoned that Code § 15.2-2307(D)(ii) protects "nonconforming structures from future zoning amendments so long as taxes have been paid on the property." The court found that since 1998, the Cohns' garage and garden house had been "occupied as dwelling units," and the Cohns had "paid taxes on the Property as assessed by Fairfax County." Accordingly, the court concluded that Code § 15.2-2307(D)(ii) protected the Cohns from having to "destroy or otherwise modify the structures." The circuit court held that the Property, "including all three nonconforming structures, [were] protected under [Code § 15.2-2307(D)(ii)]."

The County's Board of Supervisors (the "Board") appealed. The Board contended that Code § 15.2-2307(D)(ii) did not protect illegal uses of structures and buildings, and that the circuit court failed to properly interpret the plain language of the statute.

DECISION: Judgment of circuit court reversed.

Agreeing with the Board, the Supreme Court of Virginia held that, pursuant to the plain meaning of the statute's language, only the *structures* of the Cohns' garage and garden house were protected by Code § 15.2-2307(D)(ii); the uses of those structures as dwellings were not protected.

The court explained that "[w]hile a 'building' or 'structure' may be constructed for a use or purpose, the use or purpose is not the building or structure itself." The court found that, by its express terms, the vested right preserved by subsection (D) was "limited to a prohibition regarding the removal of a building or structure."

Here, the court found that the Board had not attempted to have the structures of the garage or garden house removed or declared illegal. The NOV only concerned the use of those structures. The court concluded that Code § 15.2-2307(D)(ii) did not protect the Cohns' use of the garage and garden house as dwelling units and, therefore, did "not prevent the County from requiring the Cohns to cease their illegal use of the structures and to remove the kitchens and other accoutrements that support[ed] the illegal use of the structures as dwelling units."

Nonconforming Use/ Short-term rentals—Township says short-term rental of home violates zoning ordinance

Homeowner claims short-term rental use was a legal, nonconforming use

Citation: *Donald Kintner and Michelle Kintner v. Zoning Hearing Board of Smithfield Township and Township of Smithfield Appeal of: Township of Smithfield, 2019 WL 178486 (Pa. Commw. Ct. 2019)*

PENNSYLVANIA (1/14/19)—This case addressed the issue of whether the short-term rental of a portion of a home in a residential zone constituted a valid, nonconforming use under the township's zoning ordinance.

The Background/Facts: Donald Kintner and Michelle Kintner (the "Kintners") owned a single-family home in an R-1 zoning district in the Township of Smithfield (the "Township"). In 2008, the Kintners began advertising the rental of a portion of their home for short-term rental through Airbnb—an online hosting platform that matches guests with short-term rentals. At that time, the Township's zoning ordinance permitted only the following uses in the R-1 zoning district: one-family detached dwellings; commercial seasonal camps; forestry and forestry reserves; wildlife refuges; membership clubs, camps, and associations; municipal recreation and entertainment facilities on lots of five or more acres; and communications towers on municipal property.

The Township became aware of the Kintners' rental listing and ordered the Kintners to cease and desist "all vacation rental operations." Nonetheless, the Kintners continued to rent their home through Airbnb.

In December 2016, the Township amended its zoning ordinance to add a definition for "short-term rental." The amended ordinance also specifically prohibited such short-term rentals in specified areas, including in the R-1 zoning district.

Thereafter, the Township again became aware that the Kintners were listing their home for short-term rentals on Airbnb. In January 2017, the Township issued a second enforcement notice to the Kintners. The notice informed the Kintners that they were in violation of the Township's zoning ordinance, and directed the Kintners to cease their rental operation.

The Kintners appealed the January 2017 zoning enforcement notice to the Township's Zoning Hearing Board (the "ZHB"). The Kintners argued that the enforcement notice should be dismissed because they had been engaged in short-term rentals of their home since 2008—before the zoning ordinance explicitly prohibited short-term rental use in the R-1 zoning district. The Kintners argued that their rental use was therefore a legal nonconforming use and should be permitted to continue.

The ZHB ultimately upheld the zoning enforcement notice. The ZHB concluded that the Kintners' rental use did not, as they had argued, constitute a valid nonconforming use, as their short-term rental operation was not a use permitted in the R-1 zone in 2008 either. Specifically, the Board determined that the rental use did not fit within the zoning ordinance's definition of the permitted "one-family detached dwelling" use.

The Kintners appealed the Board's ruling to the trial court. The court reversed the Board. The court concluded that short-term rentals were permitted in a single-family residential district unless clearly prohibited by the ordinance. The trial court concluded that there was "no proof" that the Kintners' short-term rental use was "incompatible" with the zoning ordinance's definition of "family." The court thus concluded that the Kintners' short-term rental use was a valid, nonconforming use of their home.

The Township appealed.

THE COURT'S DECISION: Judgment of Court of Common Pleas reversed.

The Commonwealth Court of Pennsylvania held that the Kintners' short-term rental use of their home did not constitute a legal, nonconforming use under the pre-2006 Township zoning ordinance as the Kintners' short-term tenants did not qualify as "family" under the zoning ordinance.

In so holding, the court first explained that a valid, nonconforming use is "a use that predates the enactment of a prohibitory zoning restriction . . . ." The court further explained that "[t]he right to maintain a pre-existing nonconformity is available only for uses that were lawful when they came into existence and which existed when the ordinance took effect. Pre-existing illegal uses cannot become nonconforming uses with a protected right to exist upon enactment of a new ordinance prohibiting them."

Whether the Kintners' short-term rental use was a valid, nonconforming use prior to the 2016 prohibition on the use depended on the language of the pre-2016 zoning ordinance. Again, that zoning ordinance permitted "one-family detached dwelling" uses in the R-1 zoning district. The zoning ordinance defined "family," in relevant part, as "[a]s many as six (6) persons living together as a single, permanent and stable nonprofit housekeeping unit . . . ."

Looking at that definition, the court concluded that "[g]iven that the short-term Airbnb rentals necessarily involve remuneration to the Kintners from a series of transitory tenants, the Kintners' rental operation clearly violated pre-2016 amendment requirements regarding permanence, stability, unity, lack of profit motive," among other things. Thus, the court concluded that "from the moment the Kintners began offering a portion of their home for short-term rental through Airbnb, they were in violation of the [z]oning [o]rdinance's requirement that a 'family' reside in an R-1 zoned, one-family detached dwelling." Therefore, the court concluded that, contrary to the trial court's holding, "the Kintners were engaged in an illegal, nonconforming use of their home."

See also: *Marchenko v. Zoning Hearing Board of Pocono Township, 147 A.3d 947 (Pa. Commw. Ct. 2016)* (deeming short-term rentals of single-family dwellings permissible because that use did not contravene the relevant zoning ordinances' definitions of "family" or "single-family" dwelling).

See also: *Shvekh v. Zoning Hearing Board of Stroud Township, 154 A.3d 408 (Pa. Commw. Ct. 2017)* (deeming short-term rentals of single-family dwellings permissible because that use did not contravene the relevant zoning ordinances' definitions of "family" or "single-family" dwelling).

See also: *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board, 164 A.3d 633 (Pa. Commw. Ct. 2017), appeal granted, 180 A.3d 367 (Pa. 2018)* (involving a zoning ordinance that did not define a permissible "family" as a group of people using the entirety of a home in a non-profit fashion).

See also: *Reihner v. City of Scranton Zoning Hearing Board, 176 A.3d 396 (Pa. Commw. Ct. 2017).*

Housing Discrimination—Ordinance restricts treatment centers for current addiction of substance used in illegal manner

Operator of sober living residences argues city ordinance illegally discriminates against recovering addicts

Citation: *Cornerstone Residence, Inc. v. City of Clairton, 2018 WL 6389723 (3d Cir., Dec. 31, 2018)*

The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

THIRD CIRCUIT (PENNSYLVANIA) (12/31/18)—This case addressed the issue of whether a city zoning ordinance that prohibits "treatment centers" in residential areas, and defines such "treatment centers" as a use providing housing or counseling because of "[c]urrent addiction to a controlled substance that was used in an illegal manner or alcohol. . .," on its face, discriminated against recovering addicts in violation of the federal Fair Housing Amendments Act.

The Background/Facts: Cornerstone Residence, Inc. ("Cornerstone") is a non-profit corporation that operates sober living residences for recovering drug and alcohol addicts. Cornerstone wanted to establish such a residence in the City of Clairton (the "City"). In furtherance of that goal, Cornerstone

purchased a house in the City and sought an occupancy permit from the City. The City denied Cornerstone's permit upon finding that the residence would constitute a "Treatment Center," which was prohibited in residential areas of the City pursuant to a City zoning ordinance (the "Ordinance").

Cornerstone challenged that denial. Among other things, Cornerstone argued that, on its face (i.e., based on the language of the Ordinance itself), the Ordinance discriminated against recovering addicts, which were a protected group under the federal Fair Housing Amendments Act ("FHAA")—by limiting where residences that serve recovering addicts may be located. Here, the City Ordinance defined "Treatment Center" as including: "A use (other than a prison or a hospital) providing housing for three or more unrelated persons who need specialized housing, treatment and/or counseling because of . . . [c]urrent addiction to a controlled substance that was used in an illegal manner or alcohol. . . ." (City of Clairton Ordinance § 337-12.) Cornerstone argued that the Ordinance facially discriminated against recovering addicts because: (1) the phrase "was used" expands the phrase "current addiction" to include recovering addicts, which are a protected group under the FHAA; and (2) "the context and structure of the Ordinance reflect the legislative intent to adopt that meaning."

The FHAA prohibits housing-related discrimination against handicapped persons, and defines "handicap" as "a physical or mental impairment which substantially limits one or more of such person's major life activities . . . but . . . does not include current, illegal use of or addiction to a controlled substance." (42 U.S.C.A. § 3602(h).) Thus, the FHAA provides that current addicts are not a protected group. Notably, however, federal courts have held that recovering addicts are a protected group.

The district court dismissed Cornerstone's claim, holding that the Ordinance's definition of "Treatment Center" did not violate the FHAA.

Cornerstone appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Third Circuit, held that the Ordinance did not facially discriminate against recovering addicts in violation of the FHAA.

In so holding, the court found that the plain meaning of the Ordinance's definition of Treatment Centers did not include recovering addicts. The court found that "[t]he plain meaning of [the Ordinance's language] '[c]urrent addiction to a controlled substance that was used in an illegal manner or alcohol' [was] most naturally read to be limited to current addicts" (which were not a protected group under the FHAA).

Cornerstone had argued that the Ordinance's phrase "was used" transformed the term "current addiction" into "current and past addiction." The court rejected that argument, finding it placed "inordinate weight on the phrase 'was used.' " The court found that "[o]ne can be currently addicted to a drug that was used in the past. That the use occurred in the preceding days or weeks does not alter one's status as a current addict."

The court also found that, even if the terms of the Ordinance were "ambiguous," "the overall context of the Ordinance confirmed the City's interpretation." The court found that the Ordinance, read as a whole, "reflected a familiarity with and an intent to conform to the FHAA." Specifically, the court noted that the Ordinance included another category of "Group Homes" that encompassed recovering addicts, and the Ordinance stated an express intent to comply with all provisions of the FHAA.

Accordingly, the court concluded that the Ordinance's definition of Treatment Center included only the unprotected class of current addicts.

Nonconforming Use—Applicant proposes to demolish and reconstruct an existing nonconforming multi-family dwelling

City denies application, finding demolition would extinguish applicant's right to reconstruct

Citation: *Renaissance Real Estate Holdings, L.P. v. City of Philadelphia Zoning Board of Adjustment, 2018 WL 6375533 (Pa. Commw. Ct. 2018)*

PENNSYLVANIA (12/06/18)—This case addressed the issue of whether an applicant's proposed voluntary demolition and reconstruction of an existing nonconforming multi-family dwelling would extinguish the nonconforming use.

The Background/Facts: Renaissance Real Estate Holdings, L.P. ("RREH") owned property (the

"Property") in a residential zoning district in the City of Philadelphia (the "City"). The Property was improved with a three-story, vacant, detached residential structure comprised of a three-family dwelling. That dwelling was a lawful nonconforming use.

In October 2015, RREH applied to the City's Department of Licenses and Inspections (the "Department") for a zoning/use registration permit for the proposed "complete demolition of all existing structures and for the erection of a new three[-]unit multi-family dwelling . . . ." on the Property. RREH claimed that the existing dwelling structure was structurally defective and proposed to replace it with a "[c]ode-compliant building dedicated to the same use, three-family dwelling."

The Department denied the application.

RREH appealed to the City's Zoning Board of Appeal (the "ZBA").

The ZBA denied the appeal. In doing so, among other things, the ZBA explained that under the City's Zoning Code § 14-305(10)(c), a nonconforming structure or use destroyed voluntarily must be "reconstructed in compliance with the Zoning Code for the zoning district where it is located." The ZBA determined that RREH's demolition of the existing structure on the Property would "result in extinguishment of the prior three-family use, and any subsequent development would be required to comply with the RSA-3 district's standards, which do not permit multi-family dwellings."

RREH appealed the ZBA's decision to the trial court. The trial court affirmed.

RREH again appealed. On appeal, RREH argued, among other things, that it had not voluntarily destroyed the structure on the Property and that therefore the ZBA's reliance on Zoning Code § 14-305(10)(c) was misplaced. RREH emphasized that it intended to continue the use of the property as a three-family dwelling, and was seeking to undertake "cosmetic improvements," allowing the nonconforming use to "resume."

DECISION: Judgment of Court of Common Pleas affirmed.

The Commonwealth Court of Pennsylvania held that, based on the "clear language" of the City's Zoning Code § 14-305(10)(c) and relevant case law, RREH's proposed voluntary demolition of the existing nonconforming multi-family dwelling on the property would extinguish the nonconforming use. As a result, the court held that "any reconstruction would require compliance with Zoning Code provisions for the RSA-3 district, which does not permit multi-family dwellings."

RREH had argued that it enjoyed a vested property right in the three-family use, which was "constitutionally protected and [could not] be abrogated unless it constitute[d] a nuisance, [was] abandoned by the owner, or [was] extinguished by eminent domain." Here, RREH maintained that the Property was not a nuisance, had not been abandoned, and was not taken through eminent domain. RREH argued that it had filed a zoning application to continue the non-conforming use in a replacement structure. Unless prohibited by ordinance, RREH asserted, a nonconforming use may be replaced. Again, RREH had argued that, because it had not yet demolished the existing structure, its reconstruction of the nonconforming use was not prohibited by Section 14-305(10)(c) of the Zoning Code and that it was entitled to rebuild the structure.

The court rejected RREH's argument. The court noted that "[a] municipal ordinance prohibiting the restoration of a nonconforming structure when it is eliminated is a valid exercise of the police power." Citing prior caselaw, the court said that "[t]he reconstruction of a structure for a specific nonconforming use is not allowed if the zoning ordinance specifies that such construction is prohibited." Here, the court found that City Zoning Code § 14-305(10)(c) prohibited RREH from replacing the nonconforming structure because RREH had sought permission from the ZBA to demolish the existing structure.

See also: *Korngold v. Zoning Bd. of Adjustment of City of Philadelphia, 147 Pa. Commw. 93, 606 A.2d 1276 (1992).*

See also: *Keebler v. Zoning Bd. of Adjustment of City of Pittsburgh, 998 A.2d 670 (Pa. Commw. Ct. 2010).*

See also: *Money v. Zoning Hearing Bd. of Haverford Tp., 755 A.2d 732 (Pa. Commw. Ct. 2000).*

Zoning News from Around the Nation

MAINE

Maine's Land Use Planning Commission is exploring "whether to change the 'adjacency principle,' which limits where new zones for subdivisions or businesses can be located." Currently, commercial buildings are restricted to within one mile by road of "existing, compatible development." The Commission is considering allowing new residential and commercial development within seven miles of "rural hubs, and 1 mile from a public road."

Proponents of the proposal say that the "current 1-mile rule encourages sprawl instead of strategic development," and contend that the proposed rule change would help to prevent sprawl and scattered development. Opponents, however, argue the change would "encourage development in Maine forests." Reportedly, the Commission is expected to make a decision on the proposed rule change by March or April.

Source: *Public News Service; www.publicnewsservice.org*

MASSACHUSETTS

In late December 2018, Governor Charlie Baker signed into law legislation that applies the Commonwealth's 5.7% hotel and motel room tax to short-term accommodations rented out for 14 days a year or more. The legislation also provides municipalities with the authority to level additional local taxes.

Source: *Greenfield Recorder; www.recorder.com*

NEW YORK

The Town of Bedford is being sued over a zoning ordinance that limits the location of sales of e-cigarettes, other electronic nicotine delivery systems, and vape. The plaintiffs, which include several businesses, allege that the ordinance is invalid because it's "directed at the perceived social evil of electronic nicotine delivery devices rather than the regulations of land use." The Town maintains the ordinance is a valid zoning law intended to address " 'negative secondary effects' on the surrounding community."

Source: *Rockland-Westchester Journal News; www.lohud.com*

RHODE ISLAND

Effective March 1, 2019, a new state law allows building height in special flood hazard areas (SFHA) to begin to be measured from the base flood elevation (BFE) of the area. The law also allows a structure in an SFHA to adhere to a BFE as determined by the state's Coastal Resource Management Council (if more stringent than the Federal Emergency Management Agency's calculations). The legislation is intended to "improve a municipality's infrastructural resiliency to coastal flooding following a large storm event."

Source: *The Narragansett Times; www.ricentral.com*

QUINLAN™

February 25, 2019 | Volume 13 | Issue 4

Zoning Bulletin

in this issue:

Short-term and vacation rentals/ Preemption/Injunction—City adopts resolution interpreting zoning ordinance as banning short-term rentals

Airbnb contends state law preempts and prohibits short-term rental bans

Citation: *City of Miami v. Air BnB, Inc., 2018 WL 6332240 (Fla. 3d DCA 2018)*

FLORIDA (12/5/18)—This case addressed the issue of whether a city ordinance prohibiting certain short-term and vacation rentals in a suburban residential zone was preempted by a state statute precluding the prohibition of vacation rentals.

The Background/Facts: In March 2017, the City of Miami (the "City") adopted a resolution on short-term rentals. The resolution affirmed the City's zoning regulations "as they pertain to short-term/vacation rentals" and "direct[ed] the City Manager to continue vigorously enforcing regulations pertaining to lodging uses." The resolution affirmed the City of Miami's zoning ordinance, Miami 21, which limits the T3 zoning district to "residential" use, defined as "land use functions predominantly of permanent housing." The City's resolution adopted a 2015 Zoning Interpretation of Miami 21 that declared "using a Single Family residence or Two Family-Housing (a duplex) within a T3 transect zone to provide rental accommodations per night, week, or anything less than one month would constitute an activity in violation of Miami 21."

After the resolution was adopted, Airbnb—an online hosting platform that matches guests with short-term rentals— along with several City residents who rent their properties through Airbnb (collectively, hereinafter "Airbnb"), sued the City for declaratory and injunctive relief. Among other things, they argued that the City's vacation rental ban in the T3 zone was preempted by state law.

The preemption statute cited by Airbnb, Florida Statute § 509.032(7)(b), provides that "[a] local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals." The statute defines a "vacation rental" as a "condominium" or a "house or dwelling unit" rented on a transient basis. Notably, the statutory preemption "does not apply to any local law, ordinance, or regulation adopted on or before June 1, 2011." The 2016 version of Miami 21, addressed in the City's March 2017 resolution, was identical in its material provisions to the Miami zoning code in effect in 2009.

THOMSON REUTERS®

Mat #42479378

Ultimately, the trial court granted Airbnb's motion for temporary injunction. It concluded that "Miami 21 does not prohibit vacation rentals and the City was therefore preempted under section 509.032(7)(b), Florida Statutes (2016) from enforcing its Zoning Interpretation and pronouncing any ban on short-term vacation rentals." Among other things, the temporary injunction issued by the court enjoined the City from "enforcing any ban on or from instituting or enforcing its vacation rental ban in the City pending a final hearing . . . ."

The City appealed.

DECISION: Judgment of Circuit Court reversed, and matter remanded.

The District Court of Appeal of Florida, Third District, held that the trial court's injunction against the City's "vacation rental ban" was overbroad.

In so holding, the court explained that in order to obtain a temporary injunction, Airbnb had to demonstrate: "(1) the likelihood of irreparable harm if the temporary injunction [was] not entered; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) entry of the temporary injunction [would] serve the public interest." Moreover, the court emphasized that "[i]njunctions must be specifically tailored to each case . . . . In other words, injunctions 'should never be broader than is necessary to secure to the injured party relief warranted by the circumstances involved in the particular case.' "

Here, the court concluded that Airbnb had failed to show that they had a substantial likelihood of success to sustain such a broad injunction as that issued by the trial court. The court found that the injunction here failed to recognize that under certain circumstances Miami 21 could prohibit short-term or vacation rentals in the T3, and was not preempted by Florida Statute § 509.032(7)(b).

Again, Miami 21 (adopted in 2016 and identical to the code in effect in 2009) limited the T3 zoning district to "residential" use, defined as "land use functions predominantly of permanent housing." And, Florida Statute § 509.032(7)(b), provides that "[a] local law, ordinance, or regulation [enacted after June 1, 2011] may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals."

The court concluded that "Miami 21 is not preempted by State law because it places land-use restrictions on all properties located in the T3 zone, which include properties used as short-term or vacation rentals." The court found that Miami 21 prohibited short-term and vacation rentals in T3 zones that convert a property's use to something other than "predominantly or permanent housing." Thus, a property used solely for short-term or vacation rentals was prohibited in the T3 zone. However, a property used predominantly for permanent housing, and used only incidentally for a short-term or vacation rental may not violate Miami 21, found the court. Accordingly, the court concluded that to the extent the City interpreted Miami 21 to ban "all short-term rentals," such an interpretation was "overbroad because a short-term rental may not always alter a property's use as 'predominantly of permanent housing.' " In any event, the court concluded that the trial court here had "failed to recognize that Miami 21 [was] not preempted and prohibit[ed] certain short-term rentals that compromise the residential characteristic of T3 properties." In other words, the court concluded that because the trial court's injunction banned the City from prohibiting any vacation or short-term rentals in the T3 zone, it was overbroad.

Case Note:

There was also an issue of whether Airbnb's rentals constituted "lodging" under Miami 21. The appellate court determined that resolution of that issue was not necessary to its holding here with regard to the injunction. The court did note, however, that "[d]ue to the varied nature of the Airbnb rentals . . . some may qualify as lodging [as defined under Miami 21] and some may not."

Contributors

Corey E. Burnham-Howard

Zoning Bulletin is published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. For subscription information: call (800) 229-2084, or write to West, Credit Order Processing, 620 Opperman Drive, PO Box 64833, St. Paul, MN 55164-9753.

POSTMASTER: Send address changes to Zoning Bulletin, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

THOMSON REUTERS®

610 Opperman Drive
P.O. Box 64526
St. Paul, MN 55164-0526
1-800-229-2084
email: west.customerservice@thomsonreuters.com
ISSN 0514-7905

Due Process—Coalition challenges city sign-off process, which exempts developments from compliance review

Coalition says it violates due process requirements

Citation: *Venice Coalition to Preserve Unique Community Character v. City of Los Angeles, 2019 WL 141477 (Cal. App. 2d Dist. 2019)*

CALIFORNIA (01/09/19)—This case addressed the issue of whether the process by which a City's Director of Planning issued a sign-off to exempt small-scale development projects in a neighborhood from project permit compliance review was subject to due process protection—requiring that the community be provided an opportunity for notice and a hearing.

The Background/Facts: When approving or denying development projects in its Venice community, the City of Los Angeles (the "City") employs two different, but parallel processes. One process involves the "Venice specific plan," which governs all development in Venice. The other process is pursuant to the California Coastal Act, with which all development in Venice must also comply. Relevant here, to comply with the specific plan, all development projects in Venice must either undergo a project permit compliance review, or obtain a determination that a review is not required. Thus, for many small-scale development projects in Venice, the City's Director of Planning may issue a "Venice Sign-Off" ("VSO"), which exempts the project from a project permit compliance review.

In February 2016, Venice Coalition to Preserve Unique Community Character and Celia R. Williams (collectively, "Venice Coalition") filed a complaint for declaratory and injunctive relief against the City and the City's Department of City Planning (hereinafter, collectively, the "City"). Among other things, Venice Coalition's alleged that the City was violating due process requirements of California law by "engag[ing] in a pattern and practice of approving development projects without affording the community an opportunity for notice and a hearing." More specifically, Venice Coalition took issue with the issuance of VSOs without notice and a hearing.

The City contended that the VSO process was "ministerial" and therefore did not trigger due process protections.

The trial court agreed with the City, and issued summary judgment in the City's favor.

Venice Coalition appealed.

DECISION: Judgment of superior court affirmed.

The Court of Appeal, Second District, Division 8, California, also agreed with the City that the VSO process was "ministerial" and therefore did not trigger due process protections.

The court explained that local governments take three types of actions in land use matters: legislative, adjudicative, and ministerial. Legislative actions "involve the enactment of general laws, standards or policies, such as general plans or zoning ordinances." Adjudicative actions "involve discretionary decisions" that apply laws to specific development projects such as zoning permits. "Ministerial actions involve nondiscretionary decisions based only on fixed and objective standards, not subjective judgment; an example is the issuance of a typical, small-scale building permit."

As Venice Coalition had argued, the federal and state Constitutions prohibit the government (including the City) from depriving persons of property without due process of law. (See U.S. Const., 5th Amend.; Cal. Const., art. I, § 7, subd. (a).) Looking at the three types of actions taken by local governments, the court said that adjudicative actions "that implicate significant or substantial property deprivation" "generally require the procedural due process protections of reasonable notice and an opportunity to be heard." On the other hand, "[l]egislative action generally does not require due process protections because 'it is not practical that everyone should have a direct voice in legislative decisions; elections provide the check there,' " said the court. And, "[m]inisterial actions do not generally trigger due process protections because they are 'essentially automatic based on whether certain fixed standards and objective measurements have been met,' " explained the court. In other words, the court explained that, in general: land use decisions that require a public official to exercise judgment are discretionary and require notice and a hearing, while land use decisions that "require a public officer to perform 'in a prescribed manner in obedience to the mandate of legal authority' without regard to his or her own judgment are ministerial and do not trigger due process protections."

Here, the court found that in issuing a VSO, the City's Director of Planning essentially uses checklists to determine whether or not a proposed project meets specified objective criteria. The court concluded that issuances of VSOs were thus ministerial and therefore not entitled to notice and a hearing. Accordingly, the court concluded that the City's VSO process did not violate due process requirements.

See also: *Calvert v. County of Yuba, 145 Cal. App. 4th 613, 622, 51 Cal. Rptr. 3d 797, 166 O.G.R. 537 (3d Dist. 2006), as modified, (Jan. 3, 2007).*

Case Note:

The court's decision also addressed other causes of action brought by Venice Coalition not discussed in this summary.

Process/Final Action—Telecommunications provider challenges oral decision of city zoning board

Parties dispute whether oral decision is appealable "final action" under federal law

Citation: *T Mobile Northeast LLC v. City of Wilmington, Delaware, 2019 WL 150630 (3d Cir. 2019)*

The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

THIRD CIRCUIT (DELAWARE) (01/10/19)—This case addressed the issue of whether an oral decision of a zoning board of appeals was a "final action" under the review provision of the federal Telecommunications Act of 1966 ("TCA") (47 U.S.C.A. § 332). It also addressed the issue of whether the timing requirement in the TCA's review provision is jurisdictional. Finally, it addressed whether an untimely supplemental complaint can relate back and cure an unripe initial complaint.

The Background/Facts: T Mobile Northeast LLC ("T Mobile"), a wireless telecommunications service provider, applied to the Zoning Board of Adjustment ("ZBA") of the City of Wilmington (the "City") for permission to erect an antenna in the City. The ZBA ultimately denied the request in an oral decision. T Mobile then filed a legal action within 30 days of the ZBA's oral decision, challenging the denial. Two days after the City filed its answer in the action, the ZBA issued its written decision on T Mobile's application. Nearly a year after the ZBA issued its written denial, T Mobile filed a motion in its case, seeking leave to amend or supplement its initial complaint to note the issuance of that written decision.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment in favor of the City. The district court concluded that T Mobile's initial complaint was "irreparably unripe" because both the TCA and Delaware law required the ZBA to issue a written decision before the ZBA's action could be considered "final" (and thus subject to appeal under the TCA review provision).

The TCA grants "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof" a right to have that locality's decision reviewed by "commenc[ing] an action" "within 30 days" in district court. (47 U.S.C.A. § 332(c)(7)(B)(v).) The TCA also states that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." (47 U.S.C.A. § 332(c)(7)(B)(iii).)

Thus, the district court concluded that T Mobile had filed its initial complaint too soon. The court also concluded that T Mobile's supplemental complaint could not fix the ripeness problem because it was filed past the 30-day window for seeking review of the ZBA's final action.

T Mobil appealed. On appeal, T Mobil contended that there was jurisdiction to hear its case. It advanced two alternative grounds for reversal: that its complaint was ripe because the ZBA's oral decision qualified as a "final action" under the review provision of the TCA, and, in the alternative, that its supplemental complaint related back to and cured any ripeness problem with its initial complaint.

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

Disagreeing with T Mobile's first argument, the United States Court of Appeals, Third Circuit, held that that an oral decision of the ZBA does not qualify as a "final action" under the TCA's review provision. However, the court agreed with T Mobile that jurisdiction was proper in the District Court because the timing requirement in the TCA's review provision was non-jurisdictional, and T Mobile's supplemental complaint therefore related back and cured the ripeness problem with the initial complaint. The Third Circuit concluded that the District Court should thus have reached the merits of the dispute.

In so holding, the court explained that the terms "act," "final action," and "decision . . . to deny" are not defined in the TCA. Furthermore, the court found that the TCA failed to make clear whether "final action" should be read to encompass all decisions to deny, including oral ones. However, looking at the "text and structure" of the TCA, Delaware procedures, Supreme Court reasoning, decisions of sister circuits, and policy arguments, the court found they all supported the conclusion that "a writing is in fact a requirement for a denial to be final" under the TCA's review provision. In light of that conclusion, the court held that, here, the ZBA's oral decision was not a "final action" ripe for judicial review. As such, T Mobile's initial complaint's cause of action was "not ripe."

Having determined that T Mobile's initial complaint was not ripe for review because the oral decision that it challenged did not constitute a final action, and noting that T Mobile's supplemental complaint was filed more than 30 days after the ZBA's written "final" decision and was therefore untimely under the TCA's review provision (see 47 U.S.C.A. § 332(c)(7)(B)(v)), the court noted that the district court only had jurisdiction if T Mobile's supplemental complaint "cured the ripeness flaw in its initial complaint by relating back to the original filing date." That would only be possible, noted the court, if the 30-day time limit in the TCA's review provision was non-jurisdictional. And, the court concluded that it was non-jurisdictional.

The court explained that a Supreme Court-issued "readily administrable bright line for determining whether to classify statutory limitation as jurisdictional" was to determine "whether Congress has clearly state[d] that the rule is jurisdictional." "[A]bsent such a clear statement," the court said that it should treat the restriction as "nonjurisdictional in character." Here, the court concluded that the 30-day time limit in the TCA's review provision was not

jurisdictional because the text and context of the TCA, and historical treatment of timing requirements in similar statutes, did "not reveal a clear intent from Congress to make the review provision's timing requirement jurisdictional."

Finally, the court also concluded that, under Federal Rules of Civil Procedure Rule 15(d), an untimely supplemental complaint (such as that filed by T Mobile here) can, by relating back, cure an initial complaint that was unripe.

See also: *Delaware Riverkeeper Network v. Secretary Pennsylvania Department of Environmental Protection, 903 F.3d 65 (3d Cir. 2018).*

See also: *T-Mobile South, LLC v. City of Roswell, Ga., 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015).*

See also: *Sebelius v. Auburn Regional Medical Center, 568 U.S. 145, 133 S. Ct. 817, 184 L. Ed. 2d 627 (2013).*

See also: *Musacchio v. U.S., 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016).*

Case Note:

T Mobile had asserted that there should be a new requirement imposed on localities to address a locality's failure to act (and timely issue a final decision). The court found that the TCA's "shot clock"—which allows a wireless carrier to sue for a locality's failure to act—was sufficient as it was the policy choice of Congress that the court was not "free to change."

Standing/Validity of Regulations/Short-term rentals—Individuals and organization challenge constitutionality of city's shared housing ordinance

Court evaluates its jurisdiction to hear challenge based on standing of individuals and organization

Citation: *Keep Chicago Livable v. City of Chicago, 2019 WL 178566 (7th Cir. 2019)*

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

SEVENTH CIRCUIT (ILLINOIS) (01/14/19)—This case addressed the issue of whether individuals and/or an organization had standing to challenge the constitutionality of a city's shared housing ordinance.

The Background/Facts: In 2016, the City of Chicago (the "City") passed an ordinance (the "Shared Housing Ordinance" or the "Ordinance") to regulate home-sharing activities where property owners ("hosts") rent rooms and houses for temporary stays. The Ordinance requires hosts to register with the City and acquire a business license before listing their units for rent. City-approved hosts are also subject to health, safety, and reporting requirements.

Keep Chicago Livable is a non-profit organization that focuses on educating home-sharing hosts. Keep Chicago Livable and six individuals (collectively, the "Plaintiffs") challenged the constitutionality of the City's Shared Housing Ordinance. The Plaintiffs alleged that the Ordinance "violated the First Amendment by impermissibly restraining non-commercial speech as well as by compelling speech through content-based disclosure requirements," and by offending their "right to intimate and expressive association." They also alleged that the Ordinance violated the Equal Protection Clause (of the United States Constitution) by "arbitrarily treating shared-housing arrangements differently than guest suite and hotel rentals." Further, they alleged that the Ordinance was "void for vagueness" under the Due Process Clause (of the United States Constitution).

The Plaintiffs asked the district court to issue a preliminary injunction on their claims. The district court denied that request. Among other things, the district court found that the Ordinance regulated economic activity, not speech.

The Plaintiffs appealed.

DECISION: Judgment of district court vacated, and matter remanded.

The United States Court of Appeals, Seventh Circuit, held that the district court had failed to determine whether any of the Plaintiffs had "the requisite injury or threat of injury to establish the standing necessary for federal subject matter jurisdiction." Accordingly, the Seventh Circuit vacated the district court's determination on the preliminary injunction issue, and remanded the matter for a determination of standing.

The Seventh Circuit explained that standing (i.e., the legal right to bring a judicial action) is a prerequisite to federal jurisdiction (i.e., jurisdiction of the federal courts to evaluate the challenges brought under federal law). The court further explained that individual standing requires a "threefold demonstration" of: "(1) an injury in-fact; (2) fairly traceable to the defendant's action; and (3) capable of being redressed by a favorable decision from the court." The alleged injury must be both "concrete and particularized" as well as "actual and imminent, not conjectural or hypothetical," said the court. Further, the court explained that a different analysis is required to determine organizational standing. When an organization—such as Keep Chicago Livable—brings an action to remedy an injury to the organization, the organization must allege a concrete and particularized injury to the organization, said the court. When an organization brings an action on behalf of its members, the court explained that it must show that: (1) "its members would otherwise have standing to sue in their own right"; (2) "the interests it seeks to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in their lawsuit."

Here, the court could not conclude that any of the Plaintiffs—the six individuals or Keep Chicago Livable—

had standing. The court found that none of the individuals made a "clear, requisite showing of an ongoing, concrete, and particularized injury caused by the Ordinance and capable of being redressed in a favorable ruling in [the] appeals." Specifically, the court found that: one of the individuals no longer owned property in the City; three of the individuals failed to allege how the Ordinance was preventing or hampering any of their home-sharing activities in the City; and two of the individuals were out-of-town renters who had failed to establish whether they still wished to visit the City and, if so, how the Ordinance was inhibiting them from doing so. Moreover, the court found that Keep Chicago Livable had failed to allege a "concrete and particularized injury to the organization," but had instead "shown little more than a 'mere interest in a problem.' " Further, even assuming that Keep Chicago Livable had brought the action on behalf of its members, the court found that the organization was "unable to identify an individual plaintiff with standing to bring any claim."

See also: *Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 34 Env't. Rep. Cas. (BNA) 1785, 22 Envtl. L. Rep. 20913 (1992).*

See also: *Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).*

Case Note:

In its decision, the court acknowledged that, although facts on the record before it did not establish standing by any of the Plaintiffs, on remand, they may be present evidence establishing standing.

Proceedings/Ripeness/ RLUIPA—Church contends city's zoning code violates Religious Land Use and Institutionalized Persons Act

Church appeals district court finding that its claims are not ripe and moot

Citation: *Church of Our Lord and Savior Jesus Christ v. City of Markham, Illinois, 2019 WL 244735 (7th Cir. 2019)*

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

SEVENTH CIRCUIT (ILLINOIS) (01/17/19)—This case addressed the issue of whether a church's claims, challenging a city's zoning code under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") were ripe and/or moot.

The Background/Facts: In 1985, Reginald McCracken ("McCracken") purchased a single-family residence (the "Property") in an R-3 One-Family Residential zoning district in the City of Markham (the "City"). McCracken was the pastor of The Church of Our Lord and Savior Jesus Christ (the "Church"). The Church converted the Property into a house of worship. The City Zoning Code did not expressly provide for any conditional uses in the R-3 district, and only permitted churches as a conditional use in the City's R-1 district. No provision in the City Zoning Code expressly identified churches as a permitted use.

At some point, the City filed a legal action against the Church in state court. The City sought an injunction to halt the Church's operation on the Property without a valid conditional use permit.

The Church requested a continuance from the district court to apply for a conditional use permit with the City. The court granted the continuance. The Church then applied for a conditional use permit, but did not request needed variances from the City's parking regulations. Eventually, the City denied the Church's conditional use permit application.

Following the denial of the conditional use permit, the Church sued the City. Among other things, it argued that the City's Zoning Code violated the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") (42 U.S.C.A. § 2000cc *et seq.*). The Church argued that a church was a permitted use of the Property, such that the City's insistence on a conditional use permit was incorrect and "constituted a substantial burden on the [C]hurch's religious exercise" in violation of RLUIPA. Alternatively, the Church argued that a church was a conditional use in R-3 districts, which would mean that the City Zoning Code provides no districts in which religious facilities are permitted as of right, "thereby violating RLUIPA's equal terms and unreasonable limitations provisions."

The City maintained that, under the City Zoning Code, churches were a conditional use in R-3 districts, but were permitted as of right in the City's commercial and industrial districts. Accordingly, the City argued that there could not possibly be on equal terms or unreasonable limitations problem, and, thus, no violation of RLUIPA.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the City. The district court ruled that the Church's claims were not ripe when the Church filed its action because the Church had failed to apply for necessary parking variances. The district court also ruled that the Church's claims were moot because the City had ultimately (while the litigation was pending) issued a parking variance and a conditional use permit to the Church.

The Church appealed.

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

The United States Court of Appeals, Seventh Circuit, held that the ripeness of the Church's claims did not hinge on the pursuit of parking variances because they said "nothing about whether the [C]hurch's use of the Property [was] permissible." The court also held that the City's issuance to

the Church of a conditional use permit did not moot the Church's claim that it did not need one and was instead entitled to be treated as a permitted use as of right.

The Seventh Circuit emphasized the importance of the fact that the Church's equal terms and unreasonable limitations RLUIPA claims hinged on the City's interpretation of the zoning code rendering churches a conditional use in the R-3 districts, rather than a permitted use as of right. On the other hand, noted the court, if the Church's interpretation that churches are a permitted use in the R-3 district is correct, then the Church's equal terms and unreasonable limitations claims "fall away, leaving only its substantial burden claims," said the court. Thus, said the court, the "key question" in the case was whether operating a church on the Property was a permitted or conditional use. Since the district court did not answer that question, the Seventh Circuit remanded the matter for the district court to address.

Proceedings/Equitable Waiver—Zoning board grants equitable waivers to applicant

Abutting property owners argue statutory equitable waiver requirements were not met

Citation: *Dietz v. Town of Tuftonboro, 2019 WL 275312 (N.H. 2019)*

NEW HAMPSHIRE (01/08/19)—This case addressed the issue of whether statutory equitable waiver requirements were not met such that a zoning board of adjustment's grant of equitable waivers to a property owner that had constructed portions of a structure within a setback was in error.

The Background/Facts: Sawyer Point Realty, LLC ("Sawyer Point") owned a house (the "Property") along the shores of Lake Winnipesaukee in the Town of Tuftonboro (the "Town"). The Property was located within the Town's Lakefront Residential Zoning District (the "District"). The Town's zoning ordinance required buildings within the District to be located at a minimum 50-foot setback from the lake.

In 1999, Sawyer Point added a second floor addition (the "1999 Addition") to its house. The existing structure was located within the setback, but the Town granted a building permit for the 1999 Addition, noting it would cause "no change in the footprint." In 2008-2009, Sawyer Point constructed a second addition to its house, adding a portion to the second floor and an addition of the side of the house facing away from the lake (the "2008 Addition"). Portions of the 2008 Addition were within the 50-foot setback. Sawyer Point applied for and obtained from the Town's Zoning Board of Adjustment ("ZBA") a variance and a building permit for the 2008 Addition.

A 2014 survey of the Property revealed that, in regard to the 2008 Addition, more of the new structure was within the setback than had previously been represented to the Town's ZBA. After learning of that discrepancy, owners of abutting property, David F. and Katherine W. Dietz (the "Dietzes") sought injunctive relief against Sawyer Point. The Dietzes argued that Sawyer Point had built within the setback without obtaining the required approvals, and asked that the court order the removal of the unlawful construction.

Sawyer Point then applied to the ZBA for equitable waivers under New Hampshire's equitable waivers statute, RSA 674:33-a, for the portion of the 1999 Addition within the setback and for the portion of the 2008 Addition that was within the setback but not within the scope of the 2008 variance.

The equitable waivers statute, RSA 674:33-a, provides that "[w]hen a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance," the zoning board of adjustment can grant an equitable waiver from the requirement, "if and only if" the ZBA makes certain specified findings, including that: the violation was not noticed or discovered until after substantially completed; the violation was "not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith . . . but was instead caused by either a good faith error in measurement or calculation . . . or by an error in ordinance interpretation or applicability made by a municipal official . . . "; the violation does "not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property"; and the "cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected."

The ZBA granted the equitable waivers.

The Dietzes then appealed the grant of those equitable waivers to the trial court.

The trial court upheld the ZBA's grant of the equitable waivers to Sawyer Point.

The Dietzes appealed. Among other things, the Dietzes argued that: (1) the trial court erred because RSA 674:33-a requires the ZBA make written factual findings as to each element of the statute, and the ZBA failed to do so here; (2) the trial court erred because RSA 674:33-a, I(d) allows for an equitable waiver only if past construction was made in ignorance of the facts constituting violation, and Sawyer Point was not ignorant of the facts, but was aware that the additions were within the setback; and (3) the trial court erred in its application of the balancing test set forth in RSA 674:33-a, I(d) because Sawyer Point failed to present evidence to show the cost of correcting the zoning violation, and the ZBA failed to consider the "cumulative effect of the failure to enforce lakefront setback throughout the Town."

DECISION: Judgment of trial court affirmed.

The Supreme Court of New Hampshire rejected all of

the Dietzes' arguments and affirmed the ZBA's grant of the equitable waivers to Sawyer Point.

The court first held that, contrary to the Dietzes' assertions, RSA 674:33-a did not expressly require the ZBA make written factual findings as to each element of the equitable waivers statute. The court found that the language of the statute required that the ZBA "simply set forth 'the basis' for its decision in the minutes." Here, the court found that the ZBA's meeting minutes reflected that the ZBA "discussed and analyzed the four equitable waiver requirements."

Next, the court held that, contrary to the Dietzes' assertions, RSA 674:33-a, I(d) does not allow for an equitable waiver only if past construction was made because of the applicant's ignorance of the facts constituting violation. The court explained that the statute also allows for an equitable waiver based on an error made by a municipal official without the applicant also having erred in measurement or calculation. The Dietzes had argued that because Sawyer Point was not ignorant of the facts, but was aware that the additions were within the setback, the equitable waivers were issued in error. The court disagreed. The court concluded that, due to its reliance on "an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority," Sawyer Point was "ignoran[t] of the facts constituting the violation," and thus met that equitable waiver requirement under RSA 674:33-a, I(d).

Finally, the court also rejected the Dietzes' argument that the trial court erred in its application of the equitable waiver statute's balancing test since Sawyer Point had not presented evidence of the cost of correcting the zoning violation. The court held that the ZBA members could properly use "their own knowledge and experience—as well as their common sense—to conclude, as they did, that the cost of tearing down portions of the 1999 and 2008 Additions would 'far outweigh[ ] any public benefit.' " Moreover, the court held that, contrary to the Dietzes' assertions, the equitable waiver statute's balancing test did not require the ZBA to consider the "cumulative effect of the failure to enforce lakefront setback throughout the Town," but rather, the statute clearly limited the scope of the cost-benefit analysis to the specific zoning violation at issue. (See RSA 674:33-a, I(d).)

See also: *Property Portfolio Group, LLC v. Town of Derry, 163 N.H. 754, 48 A.3d 937 (2012).*

See also: *Biggs v. Town of Sandwich, 124 N.H. 421, 470 A.2d 928 (1984).*

Zoning News from Around the Nation

NEW HAMPSHIRE

The State House Judiciary Committee has "kill[ed]" a bill (House Bill 104), which would have established a three-member state Housing Board of Appeals to "hear appeals of final decisions by municipal boards involving housing development." Currently, appeals can only be heard in court. A similar bill is expected to be introduced in the Senate.

Source: *New Hampshire Business Review; www.nhbr.com*

Republican state Rep. Dave Testerman reportedly "plans to sponsor legislation to clarify municipal regulation of [tiny houses.]"

Source: *Concord Monitor; www.concordmonitor.com*

OHIO

In December, the Ohio House of Representatives and Senate agreed to modifications to House Bill 500, which would make a number of changes to Ohio's township laws, including:

- giving a board of township trustees the authority to charge a fee against those appealing a zoning decision;
- giving a board of township trustees authority to suspend a member of a township zoning commission or township board of zoning appeals after charges are filed against a member, but requiring a hearing for removal no later than 60 days after the charges are filed;
- in limited home rule townships, making optional the current requirement that a township must submit a proposed zoning amendment or resolution to a planning commission.

Source: *Ohio's Country Journal; www.ocj.com*

OREGON

To address a housing shortage, the Oregon legislature will take up a bill (House Bill 2001) that seeks to "require cities with populations larger than 10,000 to allow up to four homes to be built on land parcels currently zoned exclusively for single-family housing."

Source: *Willamette Week; www.wweek.com*

Source: *Portland Mercury; www.portlandmercury.com*

WYOMING

Pending in the state legislature is a bill (Senate File 49) that would remove county zoning law application to the construction or expansion of private schools. A recently introduced amendment to the bill would subject private schools to "the same rules currently regulating public and charter school facilities" and would only apply to schools registered as nonprofit corporations in Wyoming. The amended bill has passed out of the legislature's Education Committee. Proponents of the bill argue that it helps ensure all students a "right to an 'education.' " Opponents of the bill had argued that it takes away local input on site planning, economic vision, and environmental and quality of life issues. The bill next goes to the full Senate for a first reading.

Source: *Casper Star Tribune; https://trib.com*