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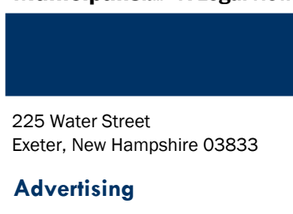

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Inside this issue:

Impact of Uncontroverted Evidence on the Variance Criteria

In Malachy Glen Associates, Inc. v. Town of Chichester, ___ N.H. ___ (Docket Nos. 2004-886 and 2006-111; Issued March 20, 2007) the Supreme Court affirmed the reversal of the ZBA and ordered that the area variance be granted. Prior to the enactment of any Town wetlands ordinance, Malachy had obtained site plan approval for a self-storage facility with structures and paved surfaces within 100 feet of a wetland. Prior to construction, an ordinance was enacted creating a 100 foot buffer around all wetlands. Malachy applied for a variance from this ordinance and went through two courses of appeals before the Court found that latest denial was unlawful and unreasonable, in part, for failure "to consider the evidence placed before it."

In this decision, the Court restated many elements of the variance criteria from its recent opinions: (1) the requirement that the variance "not be contrary to the public interest" is "related to" the requisite of being "consistent with the spirit of the ordinance"; (2) contrary to the public interest means the variance must unduly, and in a marked degree conflict with the ordinance; and (3) in making that determination, the ZBA must ascertain whether the variance would "alter the essential character of the locality" or "threaten the public health, safety or welfare." The uncontroverted evidence showed this project was in an area consisting of a fire station, a gas station and a telephone company, that the variance for encroachment for the driveway had been granted, and that applicant's wetlands consultant had testified that the project would not injure the wetlands in light of the closed drainage system, detention pond and open drainage system designed for the project to protect the wetlands. The Court also rejected the ZBA's argument that it is not bound by the conclusions of the experts in light of their own knowledge of the area, in part, because the ZBA's statements were conclusory and not incorporated into the denial. "The mere fact that the project encroaches on the buffer, which is the reason for the variance request, cannot be used by the ZBA to deny the variance."

On hardship, the Court stated that "special conditions" require that the applicant demonstrate that its property is unique in its surroundings, that the proposed project is "presumed reasonable" if it is a permitted use, and that an area variance may not be denied because the ZBA disagrees with the proposed use of the property. The Court rejected the argument that other reasonably feasible methods were available to the applicant via the elimination of a number of the desired storage units. The

Cont.

Upcoming Events:

Local Government Center's 66TH ANNUAL CONFERENCE - NOVEMBER 7 – 9, 2007

Donahue, Tucker & Ciandella, PLLC will be an exhibitor at the LGC Annual Conference being held November 7 – 9, 2007 at the Radisson Hotel in Manchester, NH. Please stop by to see our booth, speak with our municipal attorneys, and obtain copies of our writings of legal interest to municipalities. We will also be raffling a $500.00 gift certificate to Wentworth by the Sea Hotel and Spa in New Castle, NH and you are invited to participate in the raffle.

Impact of Uncontroverted Evidence on the Variance Criteria Cont.

Court stated that "the ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application." While noting that if the proposed project could be built without the area variance, then it is the applicant's burden to show that such alternative is cost prohibitive, the Court stated that "the ZBA may consider the feasibility of a scaled down version of the proposed use, but must be sure to also consider whether the scaled down version would impose a financial burden on the landowner." Here, the Court recognized that reducing the project by 50% would result in financial hardship to the applicant and that no reasonable trier of fact could have found otherwise.

As to substantial justice, the Court quoted the passage from Attorney Loughlin's treatise that "any loss to the individual that is not outweighed by a gain to the general public is an injustice" and noted that the ZBA should look at "whether the proposed development was consistent with the area's present use." The Court held that the ZBA's reason of "no evidence" that a scaled down version of the project would be economically unviable "is not the proper analysis under the 'substantial justice' factor." Since the ZBA applied the wrong standard, the trial court is authorized to grant the variance if it found as a matter of law that the requirement was met. In this case, the trial court had found via uncontroverted evidence that the project was appropriate for the area, did not harm the abutters or nearby wetlands, and that the general public would realize no appreciable gain from denying this variance.

This case underscores the importance for ZBA's to support their decisions with sufficient evidence and not rely on their member's own knowledge or opinions. At the very least, if the ZBA has concerns, the decision should be tabled to allow staff or independent consultants to review the presented evidence.

For additional information or questions, please contact Attorney Christopher Boldt.

Junkyard Enforcement in New Hampshire.

The Legislature has provided municipalities with several tools to abate junkyards and enforce zoning regulations. With the recent human infection of Eastern Equine Encephalitis and the threat of West Nile Virus, municipalities around the State are opting to enforce their junkyard regulations in an effort to remove the human vectors of these diseases, thereby diminishing mosquito breeding grounds. What follows is a short synopsis of some options to enforce a municipality's junkyard zoning ordinances.

1. Cease & Desist Order in District Court. For smaller violations, such as a low number of junk automobiles, a municipality can use a Cease & Desist Order pursuant to RSA 676:17-a. A Cease & Desist Order has the benefit of being much quicker than a Superior Court action, and the municipality may ultimately abate the violation without owner permission. For example, if a landowner has four or five unregistered and uninspected motor vehicles on his property, the municipality may easily abate such a violation by towing the vehicles to a scrap yard after obtaining the appropriate District Court order. Larger junkyards, however, will be beyond the municipality's ability to abate, and may contain environmental hazards which a municipality should not undertake to abate absent exigent circumstances.

A proper Cease and Desist Order must be carefully drafted to conform to the provisions of RSA 676:17-a. The law also calls for specific service on parties which may not be aware of the violation. For these reasons, all but the most experienced zoning enforcement officers should consult with counsel prior to issuing a Cease and Desist Order.

2. Superior Court A second option for a municipality to abate a junkyard is the "Notice of Violation" option under RSA 676:17. A municipality sends a "Notice of Violation" to the violator and, if different

Junkyard Enforcement in New Hampshire Cont.

than the violator, the landowner. This Notice of Violation should include notice of what junkyard ordinances are being violated as well as put the recipient on notice that he could be liable for fines up to $550 per day that the violation continues as well as the municipality's attorney's fees, costs and expenses.

If the violator does not remove the junk to the satisfaction of the municipality, the municipality then files a Petition for Injunctive Relief with the Superior Court. The Superior Court has the power to grant injunctive and other equitable relief ordering the violator to remove the offending materials himself. Moreover, this route also has the added benefit of ensuring the municipality recovers its attorney's fees, costs and expenses. RSA 676:17 (II) provides that the Court must award a municipality its attorney's fees, costs and expenses if it is the prevailing party.

3. Informal Notice A third and less formal process is to send a notice to the violator and landowner that their behavior and/or use of the property constitute a violation of the Zoning Ordinance. Often, a landowner will simply come into compliance after being asked informally. An informal notice has the added benefit of creating a record of evidence to submit should Court action become necessary.

Unfortunately, New Hampshire's various procedures for abating a junkyard remain somewhat complicated and may require involvement of legal counsel. Fortunately, the Legislature has written enforcement laws in such a manner as to require an award of attorneys' fees to the prevailing municipality. This decreases the municipality's financial exposure in abating junkyards.

For additional information or questions, please contact Attorney Christopher T. Hilson.

Recent Case Law on Conversion of Seasonal Dwellings.

The decision in Severance v. Town of Epsom, __ NH __ (Slip Op. May 1, 2007) pertains to an expansion of a pre-existing use of a camp and the decision is instructive on the larger issues which pertain to seasonal and year-round use of camps.

The case addressed whether seasonal residential use was permitted under the Town zoning ordinance and whether year-round use of a seasonal dwelling constitutes a substantial change of a pre-existing non-conforming use. The Court held that, because single family residential dwellings were permitted in the subject zone, and because the Town ordinance did not differentiate between seasonal and year-round usage, the Town could not claim that a year round residential use was prohibited. The Court disagreed with the Town's determination that there was an expansion of seasonal to year-round use which would constitute a substantial change in use. Applying the expansion of a non-conforming use analysis set forth in New London Land Use Assoc. v. New London Zoning Board, 130 NH 510 (1988), the Court held that no substantial change would result from the use of the subject property on a year-round, rather than seasonal, basis. To support its decision, the Court noted that "… the nonconforming use of the dwelling on an undersized lot is the same whether the occupancy is seasonal or year round" and that year-round occupancy "… would not substantially affect the surrounding neighborhood, roads, municipal resources or the environment." Id. at 5.

In making this ruling, the Court was careful to indicate that an analysis of what activity falls within the category of a permitted expansion of a non-conforming use is a fact-driven question. The Court indicated that the terms of the particular ordinance and the effect of any increased use on other properties must be factored in when making decisions on the merits of a change from seasonal to year-round usage. The decision should prove helpful to many communities that grapple with the question of conversion of seasonal residences.

For additional information or questions, please contact Attorney Sharon Somers.