CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

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COURT ALLOWS CONFLICT OF INTEREST CLAIM WHERE ISSUE RAISED AFTER CLOSE OF HEARING

An application for an open space subdivision was submitted to a planning commission. A member of the applicant company who also presented the application to the commission had been a friend of one of the commission members. However, the friendship had recently ended and the two were on unfriendly terms. Once the hearing on the application was closed and the decision to deny made, the applicant was made aware of statements by the commission member that this commission member was against the application and was working to see that it was denied. When the decision was appealed to court, the applicant included a claim that the commission member should have recused herself due to her bias against him.

The commission argued that since the issue of a conflict of interest with the commission member was only raised after the public hearing was closed; the issue had been waived and could not be raised now. The applicant disagreed, saying that he raised the issue as soon as practical after he became aware of the negative statements made by the commission member.

The court agreed with the applicant. While the applicant knew of a general ill will between himself and the commission member during the hearing process, he only became aware of the hostile comments once the hearing was over. Thus, the raising of the issue of conflict of interest was not waived. The record did disclose intense action by the commission member in question to have the application denied. Thus, the commission's decision was tainted and a remand of the matter was necessary so that the applicant could have a fair hearing. *See Villages LLC v. Planning & Zoning Commission, 149 Conn. App. 448 (2014).*

HARDSHIP FOUND WHERE SETBACK REGULATIONS ELIMINATE BUILDABLE AREA

The owner of a small island that was nonconforming as to size applied for a variance. The variance would allow for the construction of a boat house, a permitted use, within the required 50'setback from the high water mark. As applied, this setback requirement would eliminate the entire island from being used as a building site. An existing building would be removed with the new building constructed more in conformance with the setback requirement. The Board granted the variance based upon a finding of hardship. An appeal to court followed.

The reviewing court first agreed that a variance was proper as the regulations, as applied, would render the island useless for any permitted use. The court also considered whether the construction of the new boat house would be an expansion of the existing, nonconforming structure. Since the

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existing structure was to be removed, the court found that the board could treat this situation as an application to build on a vacant lot. The court also found it significant that since the new building would comply with newer codes and regulations and would be located further from the water line, it would reduce some of the existing nonconforming aspects on the property. *See Schulhof v. Zoning Board of Appeals, 144 Conn. App. 446 (2013).*

NOTICE OF PUBLIC HEARING IS VALID WHEN ADDITIONAL ISSUES RAISED AT HEARING

A planning and zoning commission, acting as the town's aquifer protection agency, sought to amend its definition of what was a regulated activity. Its regulations included within this definition the repair of internal combustion engines on vehicles. The amendment would add that lawnmowers and other landscape equipment powered by such engines would also be included within the term regulated activity. The owner of a small engine repair business opposed the amendment and when it was adopted by the agency, he appealed this action to the courts.

The appeal eventually found its way to the State Appellate Court which approved of the agency's action. First, the court found that the amendment was supported by evidence in the record. When a land use agency acts to amend its regulations, the court applies a very deferential standard of review. As long as there is any evidence in the record to support the agency's decision to amend its regulations, the court will affirm the decision. The court also found that the notice of the public hearing was adequate as it properly stated the intended agency action.

An agency does not need to anticipate any and all issues which may be raised at a public hearing, only those matters which it intends to address. In this case, it was to amend the regulations. While the business owner raised additional issues at the hearing, such as whether his property was within the aquifer protection area, this did not make the notice defective as these issues were not addressed by the commission and were not part of its decision to amend the regulations. *See Herasimovich v. Planning & Zoning Commission, 149 Conn. App. 325 (2014)*

ONE-YEAR APPEAL PERIOD FOR DEFECTIVE NOTICE APPLIES TO REQUIRED NOTICE BY MAIL

Under Connecticut General Statutes Sec. 8-8(b), an appeal of a land use agency's decision must be taken within 15 days of when notice of this decision is published in a newspaper. Section 8-8(r) extends this appeal period to one year when any notice requirement imposed by law, regulation or ordinance is not complied with by the land use agency in its processing of and decision on an application.

In this case, the local zoning regulations required an applicant for a

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special exception to mail notice of the public hearing to all persons owning property within 300 feet of the land subject to the application. The applicant failed to provide proof that it complied with this notice requirement. Despite this notice defect, the commission approved the application. Several months later, an appeal to court was brought by an abutting neighbor who claimed he never received the mailed notice of the hearing.

The Commission sought to dismiss the appeal as the required notice was not a notice it needed to provide but was instead personal notice that the applicant was to provide. The court disagreed. The zoning regulations required that this notice be provided. The commission, while it delegated the duty of providing this notice to the applicant, was still the responsible party and thus 8-8(r) applied. Thus, the extended appeal period governed and the appeal was timely as it was brought within one year of the commission's decision being published. *See H-K Properties v. PZC Conn. L. Rptr. 615 (2013).*

ONLY ZBA CAN VARY REGULATIONS

A planning and zoning commission amended its regulations to include a provision which stated that the commission, in approving a special exception permit, could approve other uses not otherwise allowed and alter certain requirements in the regulations.

The trial court, citing the recent Appellate Court decision entitled MacKenzie v. PZC, 146 Conn. App. 406 (2013), said that this amendment was improper as it provided the commission powers which are reserved solely for a zoning board of appeals – the authority to vary the zoning regulations. *See Modern Tire v. PZC, 57 Conn. L. Rptr. 525 (2014).*

ANNOUNCEMENTS

Membership Dues

Notices for this year's annual membership dues were mailed March 1, 2014. The Federation is a nonprofit organization which operates solely on the funds provided by its members.

Workshops

If your land use agency recently had an influx of new members or could use a refresher course in land use law, contact us to arrange for a workshop. At the price of $175.00 per session for each agency attending, it is an affordable way for your commission or board to keep informed.

ABOUT THE EDITOR

Steven Byrne is an attorney with an office in Farmington, Connecticut. A principle in the firm of Byrne & Byrne LLC, he maintains a strong focus in the area of land use law and is available for consultation and representation in all land use matters both at the administrative and court levels.

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