CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

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FEDERAL COURT DISMISSES EQUAL PROTECTION ATTACK ON COMMISSIONERS

The owner of a parcel of land zoned commercial sought repeatedly to gain zoning approvals to allow him to expand his wholesale propane gas business. The zoning regulations specifically prohibited the installation of fuel storage tanks larger than 10,000 gallons and also prohibited the wholesale of fuels. The plaintiff, as well as other businesses, had been approved for fuel storage tanks larger than 10,000 gallons in the past but once this error was discovered, no further approvals were given. Despite being alerted by the planning and zoning commission and its staff that no more approvals for oversized tanks would be given and that a wholesale fuel business was a prohibited use, the plaintiff continued in applying for zoning approvals, including an application for a zone change to permit what he wanted.

After suffering denials, the plaintiff filed a lawsuit in federal court alleging, among other things, that he was being denied equal protection of the laws because similarly situated property owners had been given permission to do what he was denied from doing. In particular, he pointed to two local businesses that were approved for oversized fuel storage tanks 6 years earlier. In denying this claim, the court referenced several well established principles.

"In the land use context, timing is critical. Courts must be sensitive to the possibility that differential treatment – especially differential treatment following a time lag – may indicate a change in policy rather than an intent to discriminate." In this case, the Commission and its staff became aware that past approvals for oversized storage tanks had been done in error. They did not need to keep repeating this error and their corrective action was not a violation of equal protection principles. *see Musco Propane LLP v. Town of Wolcott et al., 3:10CV-1400 (CT Dist 2012)*

TRIAL COURT FINDS THAT A SITE PLAN RUNS WITH THE LAND

A trial court reviewed a decision by a zoning board of appeals that concerned a cease and desist order. This cease and desist order stated as a zoning violation that a home occupation had ceased because the permit holder no longer resided at the property. The zoning regulations specifically provided that a home occupation terminates under these conditions. An occupant of the property claimed he had the right to continue the home occupation as it was allowed by a site plan approval and such approvals could not be made unique to the permit holder but instead attached to the land.

In finding that the home occupation site plan ran with the land, the Court relied on case law that declares that special permits, variances and

Written and Edited by
Attorney Steven E. Byrne
790 Farmington Ave., Farmington CT 06032
Tel. (860) 677-7355
Fax. (860) 677-5262

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wetlands permits all run with the land. The court ignored the fact that several land use treatises, as well as a Connecticut Supreme Court decision all state that a site plan can be limited in duration by attaching to the owner/user of the land based on valid zoning reasons. While the Court's decision does not find support in any case law which involves a site plan approval or zoning permit, it is consistent in regard to other land use permits. *see Madore v. ZBA,, 54 Conn. L. Rptr. 519 (2012).*

ABSTENTION IS NOT A VOTE

An application for a variance came before a zoning board of appeals. Due to a conflict of interest, one member disqualified himself. This left 4 members of the Board qualified to vote. Notwithstanding there being only 4 members, the applicant requested that the pubic hearing close and a decision be made. The Board voted 3 in favor and one abstention. The Board interpreted its vote as a denial. An appeal to court followed.

Connecticut General Statute § 8-7 expressly requires an affirmative vote of 4 members of a zoning board of appeals in order for a variance request to be approved. The applicant claimed that under Connecticut law, a vote in abstention is counted with the majority. Thus the 1 abstention should have been counted with the 3 votes in favor of its application providing the required 4 votes. The Court disagreed stating that § 8-7 is clear on its face – "When a statute specifically requires a number of affirmative votes, an abstention is not counted with the majority." With only 3 votes in favor of the application, the Board was correct to consider the application denied. *see Green Falls Associates LLC v. ZBA, 138 Conn. App. 481 (2012).*

REVOCATION OF ZONING PERMIT AS ENFORCEMENT TOOL

A property owner had sought approval to remove an existing house and replace it with a new home and a deck. The property was located within an area subject to Coastal Area Site Plan Review. A suitable application and site plan were submitted to the planning and zoning board, which, after a public hearing, approved the application. Construction was well underway when the town assistant planner conducted a site inspection. She found numerous incidences where the construction was not in compliance with the approved site plan. The matter was brought before the board which, after a hearing, revoked the zoning permit that had been issued pursuant to the approved site plan. An appeal to court followed.

The court approved this enforcement mechanism as the zoning regulations provided authority to revoke a zoning permit under these circumstances. The court also found that section 8-12 of the general statutes provides for remedies in addition to an enforcement action [injunction] to cure zoning violations which could be used

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790 Farmington Ave., Farmington CT 06032
Tel. (860) 677-7355
Fax. (860) 677-5262

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along with the revocation of a zoning permit. *see Voll v. PZC, 54 Conn. L. Rptr. 569 (2012).*

PERSONAL RELATIONSHIP BETWEEN APPLICANT'S ATTORNEY AND BOARD MEMBER LEADS TO DISQUALIFICATION

An application for a use variance to permit the use of a parcel of property as an automobile sale and repair facility came before a zoning board of appeals. The applicant's attorney was the sole representative for the applicant at the variance hearing. This attorney was also the business and personal attorney for one of the Board members. This member did not disqualify himself and his vote was needed to approve the variance.

An appeal to court followed where is was ruled that the relationship between the applicant's attorney and the Board member was too close of a personal relationship. Thus, the Board member's participation in the hearing tainted the process. The Board's decision was voided with a new hearing ordered. *see Caruso v. Zoning Board of Appeals, 54 Conn. L. Rptr. 505 (2012).*

HEARING REQUIRED WHEN REVOKING PERMIT

A site plan to renovate a small commercial building was granted. About one year later, the site plan was revoked by the Commission due to after discovered evidence which indicated that the site plan should not have been granted. This revocation decision was appealed to court.

The court remanded the matter back to the commission because the action taken was done without the benefit of a public hearing. Before revoking its site plan approval, the holder of the site plan should have been given the opportunity to respond to the new evidence. While not stated by the court, a site plan approval and related permits are viewed as a property interest. Our state and federal constitutions guarantee the right to due process before one can be deprived of a property right. *see Demos Realty v. Planning & Zoning Commission, 54 Conn. L. Rptr. 579 (2012).*

ANNOUNCEMENTS

ANNUAL CONFERENCE

The Federation's Annual Conference will take place on March 14, 2013 at the Aqua Turf Country Club. The price per person will be $43.00. A more complete announcement will be mailed out in January.

ABOUT THE EDITOR

Steven Byrne is an attorney with an office in Farmington, Connecticut. A principle in the firm of Byrne & Byrne, 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.

Written and Edited by
Attorney Steven E. Byrne
790 Farmington Ave., Farmington CT 06032
Tel. (860) 677-7355
Fax. (860) 677-5262