

CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Summer 2013

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CHANGE FROM SEASONAL USE EXPANDS NONCONFORMITY

When a zoning permit was sought from a zoning enforcement officer to locate a Dunkin Donuts franchise in a location previously used by a hamburger restaurant, the application was denied. Under the zoning regulations, both the prior hamburger restaurant and the proposed Dunkin Donuts are classified as 'fast food' restaurants, a use not permitted in the zone where they were located.

Since the hamburger restaurant had existed prior to the adoption of zoning, it was a nonconforming use. The question for the zoning enforcement officer, and later the zoning board of appeals, was whether the Dunkin Donuts use would expand this nonconforming fast food use. The hamburger restaurant had been a seasonal use which opened at 9:00 a.m. whereas the Dunkin Donuts would be a year round use and commence business at 5:00 a.m. Residential uses were located nearby, thus the intensity of this nonconforming business use could have a detrimental effect on them.

The board found that allowing the Dunkin Donuts to operate would result in the expansion of the nonconforming use. The court agreed. Citing well established precedent, the change from a seasonal use to a year round use is an unlawful expansion of a nonconforming use and the board was correct in its decision that a zoning permit could not be issued. This

decision appears to apply to residential uses as well. *See Woodbury Donuts LLC v. Zoning Board of Appeals, 139 Conn. App. 748 (2012).*

COMMISSION CAN DENY RENEWAL OF SPECIAL PERMIT

A special exception permit had been approved to operate a group home. The applicable zoning regulation provided that the approval was valid for one year during which time construction on the project must start. The regulations did provide that an application could be made to renew the permit.

Before the special exception permit expired, the holder applied for and was granted an extension for 11 months. Before another year passed, but after the permit had expired, the holder again applied for extension. This extension was denied because the permit had expired and because the neighborhood had substantially changed with a new school and elder housing coming into the neighborhood.

The court found both reasons to be valid. First, it was proper for the commission to not renew a permit that had expired. Second, renewal permits are viewed by the courts as a successive application for the same property and can be denied when there has been a change of material circumstances. That was the case here due to the changes to the surrounding neighborhood. *See Community Solutions Inc. v. PZC, 54 Conn. L. Rptr. 247 (2012).*

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APPELLATE COURT FINDS DECK ATTACHED TO HOUSE IS NOT A BUILDING

An owner of lakefront property obtained a variance allowing him to construct a home that would extend into the required rear yard setback. The building plans, as presented to the ZBA and later the building official, did not show a deck. Once the home was completed, a deck was built which extended even further into the rear yard setback. No zoning or building permits had been sought. When the deck was discovered by the ZEO, it was agreed that a variance would be sought. When this variance request was denied, the ZEO issued a cease and desist order. The property owner raised the defense that since the deck had been in place for more than 3 years, Connecticut General Statute §8-13a precluded this enforcement action.

CGS § 8-13a provides protection from enforcement for nonconforming buildings that have been in place for 3 or more years. The question here was whether the deck was a building. The trial court agreed with the property owner that it was a building because the deck was an integral part of the dwelling – being attached to it and providing a means of ingress and egress.

The Appellate Court reversed the trial court. This court found that to be a building, the deck would need to meet the definition of a building, which is that it has a roof and walls. Second, the deck was not an integral part of the dwelling

because the building plans did not include the deck and the home was completed without it. Thus, the deck was a structure and not protected by §8-13a.

Afterwards, the decision of this case was effectively nullified by the State Legislature when it amended § 8-13a by extending its protection to structures. *See Tine v. Zoning Board of Appeals, 308 Conn. 300 (2013) and Public Act 13-9.*

STRICT COMPLIANCE WITH BUILDING PLANS REQUIRED FOR VARIANCE

A zoning board of appeals approved a variance request which permitted a landowner to remove an existing dwelling and build a new one in its place. To accomplish this, the owner requested variances from certain sideyard and lot coverage requirements. The Board approved the variance with conditions, including that the new dwelling must conform to the building plans submitted with the variance application.

Sometime later, after the dwelling was built, the owners decided to replace an existing deck with a larger deck. While the new deck would comply with the zoning regulations, it would not conform to the building plans which accompanied the variance application. A cease and desist order was issued to stop the construction of the new deck. When the zoning board of appeals denied their appeal, the dwelling

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owners sought judicial review, which eventually ended up at the State Supreme Court.

One of the issues before the Court was whether the condition attached to the variance that the dwelling conforms to the building plans was enforceable. The certificate of variance recorded on the land records did not contain this condition. The dwelling's owners claimed that since the condition was not on the variance approval recorded in the land records, it was not enforceable. The Court disagreed. The certificate of notice recorded does not need to contain conditions attached to the variance. Instead, this certificate simply provides notice that a variance is attached to the property. It is then left to subsequent purchasers to look further into the exact nature of the variance. *Anatra v. Zoning Board of Appeals, 307 Conn 728, (2013).*

NEWSPAPER DISTRUBUTED FOR FREE CAN BE USED FOR PUBLISHING NOTICES

Whether or not a newspaper is distributed for free to the residents of a town or is available only by paid subscription is not a factor in deciding whether it has substantial circulation. Instead, the focus is on how many residents receive the paper.

In this case, the ZBA published its hearing notices in a free, weekly newspaper that was sent to all residences in town. The court found that this newspaper satisfied the statutory

requirement that the paper used for notices have substantial circulation.

ANNOUNCEMENTS

Membership Dues

Notices for this year's annual membership dues were mailed March 1, 2013. The Federation is a nonprofit organization which operates solely on the funds provided by its members. So that we can continue to offer the services you enjoy, please pay promptly.

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.

Workshop Booklets

Copies of the booklets handed out at workshops are now available to members at the price of \$6.00 each and to non-members for \$9.00 each.

ABOUT THE WRITER

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