CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Spring 2013 Volume XVII, Issue 2

65th ANNUAL CONFERENCE

At its latest Annual Conference, Federation members were treated to a presentation on the topic of municipal commission member liability as it relates to decisions they make in that capacity. Many members have faced a growing trend that when a decision made by their agency is appealed to court, they are often named as individual defendants. This potential for personal liability has caused concern to many Federation members. Just how justified this concern is was the subject addressed by our speaker, Attorney James Stedronsky of Litchfield Connecticut. Drawing on his personal experience as well as recent case decisions, Jim entertainingly concluded that while personal lawsuits can not always be prevented, the current state of the law is that land use agency members are immune from such personal attacks unless they behaved in a reckless manner. If you were unable to attend the conference and would like to obtain a copy of the presentation materials, please send a message to us at cfpza@live.com and we will get them to you.

In addition, the 65th Annual Conference featured the presentation of a number of service awards by the meeting's moderator, James Steck. These deserving individuals were recognized for their selfless commitment to their communities in a role that often goes unappreciated. March 20, 2014 has been set for next year's Conference. Please reserve the date.

SITING COUNCIL'S JURISDICTION OVER WIND TURBINES AFFIRMED BY COURT

An application to construct 3 wind turbines was approved by the Connecticut Siting Council. These turbines would be over 80' tall with propellers having a circumference of over 80'. Each turbine would have a generating capacity of 1.6MW each and be connected to the electrical power grid. Following accepted procedure, the turbine applicant by-passed local zoning and filed its application with the Connecticut Siting Council. A neighborhood group objecting to these turbines intervened in the Siting Council Process. They appealed the Council's approval of the application to the court on several issues, one of which being that the application should have been before the local zoning board as the Siting Council did not have jurisdiction over the application.

The Siting Council's jurisdiction is derived from the General Statutes. In this case it was Connecticut General Statute § 16-50k which provides that the Siting Council is authorized to regulate facilities. Since 'facilities' is defined as a project using fuel, the neighborhood group argued that the wind turbine project was not a facility as it did not use fuel to generate power. The court rejected this argument as this was too narrow a definition of fuel. The Court reasoned that fuel is defined as something which is burned, it can also include something which provides

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power, such as water or wind. Thus, jurisdiction of this project was correctly with the Siting Council. *See* Fairwindct Inc. v. Connecticut Siting Council, *CV-11-6011470 (2012).*

U.S SUPREME COURT RELIES ON 'REASONABLE OBSERVER' TO DETERMINE WHAT IS A BOAT

The Supreme Court of the United States was provided the task of determining whether a floating house was a vessel. The floating house in question did not have a motor, nor did it have a rudder or any other means of propulsion or steering. Instead, it was a flat bottomed floating residence that was tied to a dock where it was hooked up to water, sewer and power services. When a dispute over dock fees emerged between the 'boat' owner and the municipally owned marina, the municipality sought to seize the floating home under maritime law claiming it was a vessel. This dispute eventually found its way to the Supreme Court.

The issue before the court was whether this floating home was a vessel under maritime law. The law in question defined a vessel as a watercraft or other contrivance capable of being used as a means of transportation on water.

In reaching its decision that this floating home was not a vessel, the Court stated what could be called a "reasonable observer test" which is that "a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking at the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." Thus, if it doesn't quack or waddle like a duck, it's not a duck. Since this floating home, to a reasonable observer, would not be capable of being used as a means for water transport, it was not a vessel and thus not subject to maritime laws.

This decision by the Supreme Court should prove useful in the realm of enforcing zoning regulations as it will allow for the reasonable application of regulations to uses of land which appear to any reasonable person to be one thing but the owner claims it to be something else. *See* Lozman v. City of Riviera Beach, *No. 11-626 (1/15/13)*

PARKING REQUIREMENTS NOT TO BE USED TO ENFORCE OCCUPANCY LIMITS

A zoning enforcement officer sought an order from a court for a temporary injunction because the owner of a sports bar had ignored a cease and desist order regarding the number of occupants in its business. The approved site plan showed 60 parking spaces for this business use. Under the applicable zoning regulations, this would allow the bar to have 180 occupants at any given time. There was evidence that at special events, this bar would have far more people in attendance.

The Court denied the request for a temporary injunction. It did so because it viewed parking requirements

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in zoning regulations as a traffic control measure and not as a direct method of enforcing building occupancy limits. After all, a minivan or SUV can deliver a far greater number of persons to a business than an economy car. The court also found that the town's interpretation and application of its parking restriction to regulate occupancy limits ignored mass transit, a peculiar thing for a city to do. *See Massi v. Phoenix Management Group One, 54 Conn. L. Rptr. 605 (2012).*

COMMISSION REMOVES RESTRICTION ON METHODONE CLINIC

What was viewed as a first of its kind regulation in this State, a planning and zoning commission had adopted a zoning regulation which had the effect of limiting where drug treatment centers, such as methadone clinics, could locate. This was done by creating a floating zone which made these uses special permit uses and thus subject to additional requirements.

The regulation came under attack from several directions, including the U.S. attorney's office, which claimed the regulation discriminated against drug treatment centers. The Commission has since removed this regulation from its regulations.

Commissions must tread carefully in the regulation of drug treatment centers and similar uses, such as half-way houses and sober houses. Such uses can come under the protection of the Americans With Disabilities Act as well as other Federal Laws, providing them with legal remedies far beyond those of other land owners.

The legalization of medical marijuana may add to this list of protected uses.

CLEARING OF DRAINAGE DITCH IS AN EXEMPT ACTIVITY

A farmer may maintain drainage ditches as an exempt activity as was the case where the property owner had removed about 5 cubic yards of organic debris from a drainage ditch. Such was the ruling of a court which analyzed CGS sec. 22a-40(a)(1) and listed the 6 specified activities which are NOT allowed as of right for property used for farming.

Since farming is a favored activity, these specified activities which are not 'as of right' are not be interpreted in such a way that it would be not be overly restrictive. *See Taylor v. Fairfield Conservation Commission, 54 Conn. L. Rptr. 657 (2012).*

ABOUT THE EDITOR

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