CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Fall 2014 Volume XVIII, Issue 4

DIFFICULTY SELLING LOT IS NOT AN UNUSUAL HARDSHIP

An owner of a parcel of commercially zoned land sought a variance to permit him to use the property as a used car lot. The property was located within a design district which allowed certain office and research uses but did not allow used car lots. The only evidence presented on the issue of unusual hardship was a report from a realtor which stated that due to the restrictions placed upon the lot by the zoning designation, the property was undervalued and at a significant disadvantage as compared to other comparable properties. The property was in an undeveloped state and the owner claimed he was having difficulty selling it. The Board granted the variance, upon which an appeal to court followed.

The State Appellate Court found that the Board's decision was in error. In doing so, the court reaffirmed long standing principles as to when limits placed upon the use of a parcel of property by the zoning regulations amounts to practical confiscation and a finding of unusual hardship. It is not enough to show a diminution in value or frustration in development or investment plans. Instead, it must be shown that the zoning classification of the property destroys its value and renders it unusable for any of the uses permitted. *See Caruso v. ZBA, 150 Conn. App. 831 (2014).*

COMMISSION WITHOUT AUTHORITY TO ALTER CLEAR REQUIREMENT IN REGULATIONS

Where the zoning regulations did not permit parking within a front yard, it was improper for a planning and zoning commission to approve a special permit for a church where the parking lot would be located in a space between the front of the building and the street. The commission had argued that since the parking lot would be outside of the front yard setback and another section of the regulations permitted up to 10% of the required parking to be located in a front yard, it was within the commission's authority to approve this front yard parking scheme.

The State Appellate Court disagreed, requiring the commission to apply its regulations as written, especially where the terms are not ambiguous and no history of how the commission applied this regulation was made part of the record. *See Michos v. PZC, 151 Conn. App. 539 (2014).*

NONCONFORMING STATUS OF UNDEVELOPED LOTS

A Superior Court decision stated that Section 8-2 of the Connecticut General Statutes only protects an undeveloped lot from subsequent zone changes if it is dedicated to a particular use. The case concerned the owner of a vacant commercially zoned parcel of land that did not conform to the required

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

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lot size requirement. The lot predated zoning. The owner, when applying for a special permit to develop the property, stated that the lot was nonconforming as to its size. When he was denied his permit, he appealed the decision to superior court.

Relying on the Appellate Court case entitled Johnson v. Zoning Board of Appeals, 35 Conn. App. 820 (1994), the court ruled that undeveloped lots that do not conform to the zoning regulations are not afforded any protection by section 8-2. The exception is where the lot has been committed to a particular use. Whether it has or hasn't is an item the owner needs to prove, such as where a lot is part of a residential subdivision and thus committed to an approved future single family use. The court did state that municipal zoning regulations can provide protection to undeveloped nonconforming lots. *See Summit Street Development LLC v. PZC, 57 Conn. L. Rptr. 563 (2014).*

WETLANDS COMMISSION HAS SOLE AUTHORITY TO DETERMINE WHETHER USE EXEMPT

A purchaser of a large parcel of property commenced grading activities as well as the construction of a barn and horse riding area. While a building permit had been issued for the barn, no permits had been sought or obtained for the other activities. The wetlands enforcement officer became aware of these activities and sent a cease and desist order to the property owner. After the show cause hearing was held and the order upheld, the owner contacted the commission claiming her activities were exempt from wetlands regulations because she was conducting farming activities. She was instructed to appear before the commission and request a decision as to this issue. When she failed to do so, an enforcement action, seeking an injunction, was brought to court by the Commission. In her defense, the property owner brought a counter-action claiming that her activities were exempt from the jurisdiction of the commission.

The court struck down her counter action because she had failed to resolve the issue of jurisdiction with the commission. The determination of whether an activity is exempt is, in the first instance, to be determined by the commission. Thus, while her activities may very well have been exempt farming activities, she still needed to apply to the commission for this determination. Her failure to do so meant she conceded to the commission's jurisdiction. This allowed the commission's enforcement action to proceed to a successful conclusion. *See Yorgensen v. Chapdelaine, 150 Conn. App. 1 (2014).*

TOWN PLANNER REPORT FOUND TO BE EX PARTE EVIDENCE

An application for a one lot subdivision was denied because the

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

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applicant failed to dedicate any open space as part of the application. During the public hearing, the issue of open space or a fee in lieu of open space was not discussed. At a subsequent meeting after the close of the public hearing, the commission was presented a written opinion by the town planner. Part of her opinion addressed the lack of open space and stated that the application could be denied for that reason. The commission agreed, denying the application.

While the subdivision regulations did support this reason for denial, these regulations also provided that the commission could waive the requirement. Thus, it was not unreasonable for an applicant to not offer open space as part of its application, instead waiting for the Commission to make a request. The fatal flaw to the commission's decision was that this issue was only raised after the close of the hearing, with the commission considering ex parte evidence presented during its meeting to consider the application. This was a violation of the applicant's due process rights and entitled her to a new hearing. *See Ruscio v. PZC, 58 Conn. L. Rptr. 414 (2014).*

U.S. SUPREME COURT OKs PRAYER AT TOWN MEETINGS

A municipality typically opened its council and commission meetings with a short prayer led by an invited minister or other religious leader. Complaints were lodged by certain attendees of these public meetings, stating that they violated the separation of church and state. When the town refused to end the prayers at public meetings, the issue wound up before the nation's highest court.

What amounted to a historical journey, the Court found that since this country was founded, prayer has often been part of government. For example, Congress opens its sessions with a prayer. So long as the prayer is non-judgmental and all faiths are provided an opportunity to take part, prayer can be part of a government meeting or assembly. *See Town of Greece New York v. Gallow, No. 12-696 (5/5/14).*

ANNOUNCEMENTS

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.

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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cfpza@live.com