



Rhode Island Zoning Review

1999-2000

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Rhode Island Zoning Review is a summary of statutory and judicial changes to Rhode Island zoning law during the 1999-2000 Supreme Court term and the January 2000 Session of the General Assembly.

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Miller Scott & Holbrook maintains an extensive practice in zoning and land use law. In addition to developing and presenting zoning cases to zoning boards, we work with other attorneys on a consulting or referral basis to handle land use cases from the initial site plan stage of a project through Superior Court and Supreme Court appeals.

High Court Says Towns Can Regulate the "Upland," But Don't Go Near the Water

Cities and towns in Rhode Island have no authority to regulate the construction of residential boat docks or wharves because that authority resides exclusively in the Coastal Resources Management Council, held the Supreme Court in *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999).

When an owner of waterfront property on the Kickemuit River in Warren, without going before the Warren Zoning Board, obtained CRMC approval to construct a 102-foot dock, the Town filed suit in Superior Court to block the construction on the ground that its zoning ordinance required a special-use permit for a residential boat dock in an R-40 district. The trial justice rejected this contention, declaring that CRMC possesses "exclusive jurisdiction over recreational boating facilities."

On appeal to the Supreme Court, the Town argued that while the Legislature has granted to CRMC the authority to regulate the construction of residential boating facilities in tidal waters, the Legislature has also evinced a clear intention to grant municipal governments the authority to regulate construction of residential docks in tidal waters under the Zoning Enabling Act and the Comprehensive Planning and Land Use Act. Thus, according to the Town, the landowner had to get approval from *both* the Warren Zoning Board and the CRMC in order to build his proposed dock.

Noting that the sole issue presented

was one of statutory interpretation, the Court said that while there is some overlap in jurisdiction with respect to "upland" areas, in purely tidal areas beginning at the mean high-water mark, the CRMC exercises exclusive jurisdiction. This conclusion was based on "two ancient and still vital doctrines" – the public-trust doctrine and the common-law right of riparian property owners to "wharf out."

Under the public-trust doctrine, the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public, explained the Court, although it can delegate the authority to regulate such land, which it expressly did in the CRMC enabling act, R.I.G.L. § 46-23-6(2). Since no such explicit grant of authority was given to municipal governments in the Zoning Enabling Act or the Comprehensive Planning and Land Use Act, only the CRMC can regulate land below the high water mark.

The right to "wharf out" gives riparian landowners the right to construct whatever wharf or dock is necessary to gain access to navigable waters, as long as such construction does not interfere with navigation or the rights of other riparian land owners. However, as with any aspect of common law, that right is subject to limitation by statute, and the Legislature has chosen to limit the right to wharf out by requiring land owners to gain approval from the CRMC before constructing a wharf or a dock in tidal

waters. But, said the Court, no language in the Zoning Enabling Act or the Comprehensive Planning and Land Use Act can reasonably be understood as further limiting the common-law right to wharf out; therefore this common law right is only restricted by CMRC regulations.

The Court emphasized that its holding is not to be construed as restricting the traditional zoning power of municipalities, and said the CRMC must still defer to local zoning regulation for all projects that extend above the mean high-water mark into the uplands. For example, if the CRMC approves a wharf for a commercial ferry operation, the municipality can still exercise its zoning power to regulate construction of buildings, landscaping, lighting, and any other use of the upland.

Similarly, said the Court, a municipality still retains its traditional zoning power to regulate the use to which land is put. For example, if the land owner in this case were to use the dock for commercial purposes, such as to sell bait to boaters on the river, the Town could seek to enjoin that use under its zoning authority. Or if the CRMC were to approve an application for construction of a floating restaurant in a commercial district, the town would continue to exercise its traditional authority over such items as liquor licenses or hours of operation.

Comment: Although some language in this opinion could be read as asserting that municipalities have *no regulatory jurisdiction at all* below the high water mark, the Court's examples of permissible zoning regulation suggest that the dividing line is not so bright. True, the construction of *residential, noncommercial boating docks* may not be regulated by the municipality, but as the Court pointed out, if that same dock is used for commercial purposes, the municipality can step in and halt the use even though no upland activity is involved. ❖

Majority Vote of SHAB Means Majority of Full Housing Board

The State Housing Board of Appeal (SHAB) has authority to overturn municipal zoning decisions based on the Low and Moderate Income Housing Act, R.I.G.L. § 45-53-1 et seq., but only if it has the vote of at least five Board members, ruled the Rhode Island Supreme Court in *Union Village Development Associates v. North Smithfield Zoning Board of Review*, 738 A.2d 1084 (R.I. 1999).

The North Smithfield Zoning Board had denied an application for a comprehensive permit to build an eighty-unit apartment complex for the elderly under the Low and Moderate Income Housing Act. On appeal, SHAB found that the proposed development was consistent with local needs and that the town had acted unreasonably in denying the permit on safety grounds. The Board ordered the town officials to issue the permit.

However, only five members of the nine-member Board attended the hearings on appeal, and the decision to reverse the North Smithfield Zoning Board was based on a 3–1 vote, with one member recused from voting. The Town appealed to the Rhode Island Supreme Court, which decided the case on this narrow issue:

Does R.I.G.L. § 45-53-5, which requires SHAB to decide appeals “based upon a majority vote,” mean a majority *of those voting* or a majority *of the nine members on the Board*?

The Supreme Court ruled that a majority of the full nine-member Board was required, even though the Board, pursuant to statutory authority, had enacted procedural rules, one of which purported to authorize decisions on appeals on a vote of fewer than five members. The Court said when the language of a statute is clear and unambiguous, the statute must be interpreted literally and the words of the statute must be given their plain

and ordinary meanings. The plain meaning of the language in § 45-53-5, said the Court, is that a majority of the nine members must vote, and any vote lacking five members' approval would be invalid as a matter of law.

As a further reason for its decision, the Court noted the statutory nature and composition of the Board. It pointed out that R.I.G.L. § 45-53-7(a) specifically designates how each position on the Board should be filled,

“The plain meaning of the language in § 45-53-5 requires... at least five votes.”

which indicates the General Assembly's intent that because the Board would be invested with significant discretionary power to review low and moderate income housing decisions made by and affecting every city and town government in the state, such broad power should be exercised only by a majority vote of the entire nine-member Board.

Finally, the Court cited the rule of statutory construction in R.I.G.L. § 43-3-5, which requires courts to construe “[a]ll words purporting to give a joint authority to three (3) or more officers or persons...as to give the authority to a majority of them.” The Court said that since SHAB had vacated the Zoning Board's decision and ordered the town officials to issue the building permit for the apartment complex by a vote of only four board members and by a plurality of only three of those four members, that vote was insufficient as a matter of law. ❖

A limited number of copies of the first issue of the *Rhode Island Zoning Review*, for the years 1998-1999, are available on request by phoning 401-847-7500 or sending an email to counsel@millerscott.com. Also, that first issue may be viewed online at www.millerscott.com.

Nonprofit Corporation Lacks Standing to Appeal Zoning Amendment

Among the potential problems facing landowners who band together to appeal a zoning amendment are undesirable publicity and personal liability for attorney's fees and costs, and even possible sanctions for the filing of a frivolous appeal. So why not form a nonprofit corporation and, as anonymous shareholders, prosecute the appeal under the protective covering of the corporation's limited liability?

That kind of thinking probably led to the incorporation of the Smithfield Voters for Responsible Development, Inc., by a group of town residents and landowners who were concerned about a proposed \$45 million retail shopping center on a 75-acre site in their town. When the Smithfield Town Council amended the zoning ordinance to allow the development, these residents turned to Superior Court, but not in their own names. They formed Smithfield Voters as a nonprofit corporation to prosecute the appeal for them.

And they – or rather, it – won in Superior Court. The Superior Court justice struck down the zoning amendment, whereupon the shopping center and the various municipal defendants petitioned the Supreme Court for certiorari, contending, among other things, that Smithfield Voters lacked standing to appeal the zoning change.

Without reaching any of the substantive grounds for the petition, the Supreme Court in *Smithfield Voters for Responsible Development, Inc. v. LaGreca*, 755 A.2d 126, 2000 R.I. Lexis 143 (R.I. 2000), agreed with the petitioners that the nonprofit corporation did not have standing to appeal and therefore reversed the Superior Court and upheld the validity of the zoning amendment.

The Court reached this result by analyzing R.I.G.L. § 45-24-71, which allows appeals to be brought by “an aggrieved party or by any legal resident

or landowner of the municipality or by any association of residents or landowners of the municipality.” Smithfield Voters conceded that it was neither an aggrieved party nor a legal resident or landowner of Smithfield, but claimed it had standing under § 45-24-71 as an “*association* of residents or landowners of the municipality.”

Not so, said the Supreme Court. “We have consistently distinguished between associations and corporations as constituting different types of entities in the eyes of the law,” explained the Court, concluding that “the word ‘association’ as used in § 45-24-71 refers to an unincorporated entity that is distinct from and different than a corporation.” Since the Smithfield Voters for Responsible Development was a nonprofit corporation, it did not have standing as an “association” to appeal the Smithfield Town Council's zoning amendment.

The Court pointed out that this distinction has a rational basis. Since courts are loathe to “pierce the corporate veil” and hold shareholders liable for the corporation's misdeeds, the General Assembly apparently believed that residents and property owners who seek to challenge the legality of a zoning amendment should not be able to insulate themselves from either personal responsibility for any attorney's fees, costs, or other expenses that might be assessed in connection with zoning appeals, or from public identification of their relationship to such a legal challenge.

Comment: Although this case dealt only with the right of a non-landowning corporation to appeal an *amendment* to a zoning ordinance, its holding implies that such corporations cannot file appeals from zoning board *decisions* either, since only aggrieved parties can appeal a zoning board decision under § 45-24-69 and the basic test for aggrievement is injury to one's property.

❖

Officials Entitled to Immunity in Drafting Zoning Ordinance

Even if municipal officials attempt to rezone property for their own personal and political interests, they cannot be sued for damages as long as their actions are “legislative in character,” declared the Supreme Court in *Maynard v. Beck*, 741 A.2d 866 (R.I. 1999).

A group of property owners and former officials of the Town of Charlestown brought two suits against current town officials, including town council and planning commission members and the town planner, for their part in efforts to adopt a new zoning ordinance.

Although the plaintiffs ultimately conceded that various procedural claims were moot, in their appeal from dismissal of their actions in Superior Court they insisted that town officials should be held accountable for altering portions of the proposed draft zoning ordinance to make it inconsistent with the town's Comprehensive Plan; for attempting to rezone certain pieces of property for their own personal and political gain; and for violating open meetings laws in their deliberations. Specifically, the plaintiffs sought damages for violation of their substantive and procedural due process rights under 42 U.S.C. § 1983.

On that issue the Superior Court justice, relying on the United States Supreme Court decision in *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998), ruled that the defendant officials all enjoyed legislative immunity and therefore could not be sued for their involvement in the rezoning process. On appeal, the plaintiffs argued that the officials were not acting in a legislative capacity when they drafted the proposed zoning ordinances, but were acting “only consistent with their self-interest.” (*continued*)

Rejecting this argument, the Supreme Court said that as long as the officials' actions – apart from all considerations of intent and motive – were legislative in character, the doctrine of absolute legislative immunity protects them from such claims. The Court also observed that the doctrine of legislative immunity is not reserved solely for legislators; officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions.

Finally, the Court rejected the plaintiffs' further argument that the officials' actions did not rise to the level of legislative policy-making and therefore were administrative rather than legislative. The Court pointed out that since the duties of the planning commission members were carried out as an advisory arm of a legislative body, the town council, as required by statute, they were an integral part of the legislative process and these officials were therefore entitled to invoke legislative immunity for their legislative-assistance activities, just as the town council defendants were entitled to legislative immunity for their discretionary and policy-making decisions as municipal legislators.

Comment: While this strong statement of legislative immunity for officials involved in adopting municipal ordinances should be a source of comfort to planning board and town council members, it is also disturbing to think of insulating unscrupulous officials from liability even if they, as alleged in this case, use their positions to rezone certain property for their own personal and political gain. It should be remembered, however, that the Rhode Island Ethics Commission has jurisdiction to impose strong sanctions on this kind of behavior by local officials. See R.I.G.L. § 36-14-1 et seq. ❖

Advice is Cheap – But Zoning Boards Cannot Dispense It

When a Superior Court justice issued a restraining order barring the enforcement of certain parking restrictions the Town of East Greenwich had tacked on to a liquor license transfer, the Town did not seek to vacate the order – it tried an end run around the Court's order by way of the Zoning Board. The Town asked the Board to render an advisory opinion establishing the applicable parking restrictions, and then it tried to enforce *that decision* – despite the existence of the restraining order – by moving for summary judgment in Superior Court.

Well, it didn't work. The motion justice called the Zoning Board's opinion a "nullity" and on appeal, the Supreme Court agreed. *Franco v. Wheelock*, 750 A.2d 957 (R.I. 2000).

In this case, the East Greenwich Town Council approved the transfer of Class B-V alcoholic beverage, victualing, and entertainment/dance licenses to The Blue Parrot Yachting Tavern "subject to compliance... [with] the Town zoning requirements relative to parking which limit the occupancy to 193 patrons, plus employees." The Blue Parrot, protesting that it had always complied with the building code and zoning laws and that in the past the town had never enforced the parking and patron capacity restrictions that it now sought to impose, went to Superior Court for relief.

Within a week after the Court issued the restraining order to stop the Town from enforcing the parking restrictions, the Town Council voted unanimously to amend its previous approval of the license transfer to delete all reference to the Blue Parrot's alleged capacity restrictions. However, at the same meeting, it also voted to have the zoning enforcement officer request a ruling from the Zoning

Board as to just what parking restrictions applied to the Blue Parrot.

Although the Town's solicitor said at the public hearing that the purpose of the meeting was merely to *advise* the Town Council so that a proper determination could be made about the parking requirements, the Town later asserted that the Board had decided the substantive issue, fixing the number of parking places for patrons at 193. Since the Blue Parrot had not appealed this decision, the Town argued that it was final and the pending Superior Court action was moot. The Supreme Court, however, pointed out that the Zoning Board's decision was designated as an "advisory opinion," and said that since an advisory opinion is not binding, the Blue Parrot lacked standing to appeal it.

The Town also argued that the Board had jurisdiction to render the disputed decision under R.I.G.L. § 45-24-57,

"...the board's advisory opinion was simply a nonbinding, unauthorized, and unenforceable determination."

which provides that a zoning board of review has "the following powers and duties: ... To *hear and decide other matters* according to the terms of the ordinance or other statutes, and upon which the board may be authorized to pass under the ordinance or other statutes" (Emphasis by Court). The Supreme Court countered by saying that the language "hear and *decide*" does "not go so far as to authorize advisory opinions – let alone opinions that the town can later assert were binding on all interested parties after assuring the participants that the opinions would be merely advisory."

Finally, said the Court, another statute, § 45-24-54, gives *to the zoning enforcement officer* – not to the zoning board – the authority to "provide guidance or clarification" by providing "information to the requesting party as to the determination" of

a particular zoning violation and/or restriction. Since the Town Council did not take that route, but attempted instead to get an advisory opinion from the zoning board of review, the Court said, “the board’s advisory opinion was simply a nonbinding, unauthorized, and unenforceable determination.”

The Court concluded that since the zoning board’s advisory opinion was a nullity, it could not be used by the Town as a predicate step towards enforcing the parking restrictions against the restaurant without violating the Superior Court’s restraining order.

Comment: In noting that “no such appeal [from a zoning enforcement officer’s failure to respond under R.I.G.L. § 45-24-54] was taken here,” the Supreme Court implied that instead of asking its zoning enforcement officer to secure a ruling on parking restrictions from the zoning board, the Town of East Greenwich should have just asked the zoning officer to answer the question himself, and if a written response was not received within 15 days, the Town could then get the question before the zoning board by appealing the zoning officer’s inaction under R.I.G.L. § 45-24-54.

However, since the inaction of the zoning officer, as a municipal employee in the scope of his employment, would be imputed to the Town, the appeal would, in effect, pit the Town against itself. Thus the proceeding would be open to the same charge leveled by the Supreme Court against the zoning board’s advisory opinion in *Franco* – the board would have “no case or controversy” before it and therefore would have no jurisdiction to issue a decision.



The Final Word on Administrative Finality

Although not a zoning case, *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 2000 R.I. Lexis 169 (R.I. 2000) affirms and explains the doctrine of administrative finality as it applies to all administrative agencies, including zoning boards of review.

In holding that a medical corporation was barred by the doctrine of administrative finality from receiving a certificate of need to establish a freestanding ambulatory surgical center because its nearly identical application had been denied the year before, the Court first distinguished three other doctrines that require quasi-judicial administrative agencies as well as courts to give varying degrees of deference to their earlier decisions:

- *stare decisis*, which “dictates that courts should adopt the reasoning of earlier judicial decisions if the same points arise again in litigation,” although the Court noted that this principle is not absolute and courts may abandon previously adopted rules of law under the right circumstances;
- *collateral estoppel*, a “more rigid doctrine” that bars litigation of an issue when that issue has been determined by a valid and final judgment; and
- *res adjudicata*, which has an “even greater preclusive effect” because it makes a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or that could have been presented and litigated in that action.

In addition to these doctrines, Rhode Island has promulgated a doctrine of administrative finality, which bars an administrative agency from granting an application for relief when it has already denied a prior application for the same relief, *unless the applicant shows a change in material circumstances during the time between the two applications*.

Although related, *res adjudicata* differs from administrative finality, explained the Court, in that the former doctrine functions as an absolute bar to a second cause of action on any matters that were actually raised or that could have been raised in the first proceeding, whereas administrative finality provides for a qualified and limited preclusion, barring a second application for substantially similar outcome from an administrative agency unless the applicant can demonstrate a change in material circumstances between the two applications.

The Court gave three reasons for applying the doctrine of administrative finality to decisions rendered when an administrative agency has acted in a quasi-judicial capacity: (1) It prevents “repetitive duplicative” applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene; (2) It limits arbitrary and capricious administrative decision-making, while still preserving the ability of an agency to revisit earlier decisions when circumstances have changed; and (3) by requiring decision-makers to articulate the changed circumstances that support a different decision on a subsequent application, administrative finality provides for effective judicial review of these decisions.

The Court also discussed what the applicant must show to get a new petition before an administrative board:

“What constitutes a material change will depend on the context of the particular administrative scheme and the relief sought by the applicant and should be determined with reference to the statutes, regulations, and case law that govern the specific field. The changed circumstances could be internal to the application, as when an applicant seeks the same relief but makes important changes in the application to address the

concerns expressed in the denial of its earlier application. Or, external circumstances could have changed, as when an applicant for a zoning exception demonstrates that the essential nature of land use in the immediate vicinity has changed since the previous application.”

The Court said the applicant has the burden of identifying the substantial changes that have occurred since the prior application, which means that neither zoning board members nor those opposed to the application have any obligation to show that there has been no change in circumstances. Also, said the Court, the zoning board must “articulate in its decision the specific materially changed circumstances that warrant reversal of an earlier denial of the relief sought.”

Finally, the Court said that, unlike the doctrine of *res adjudicata*, which gives preclusive effect only to a final judgment, the doctrine of administrative finality can be raised even if the earlier denial is being appealed.

Comment: Although not citing *Marks v. Zoning Board of Review*, 98 R.I. 405, 203 A.2d 761 (1964), which held that if a zoning ordinance requires that a specific period of time elapse before a successive similar application may be filed, *both* changed circumstances *and* the ordinance-required delay must take place before the zoning board may consider a subsequent similar application, the Court in *Johnston Ambulatory* implicitly reaffirmed this holding. Thus applicants for zoning relief in those cities and towns which require a six-month or one-year delay before allowing a subsequent application should be aware that they still have to prove a material change in circumstances, even though they have waited the requisite period of time before putting in another application. ❖

Proposed Communications Tower Knocked Down But Not Out

Two of the three federal requirements for erecting wireless communications towers over local protests were found not established as a matter of law in *SNET Cellular, Inc. v. Angell*, 99 F.Supp.2d 190 (D. R.I. 2000), and thus the U.S. District Court granted the defendant town’s motion for summary judgment in part and denied it in part.

When SNET Cellular, an interstate cellular communications company, applied to the Richmond Zoning Board for a special-use permit to build a 190-foot antenna tower on a rural residential parcel, residents opposed to the application hired an attorney and the battle was joined. After 15 months and eight special meetings, the Board denied the application, finding that none of the four requirements for a special-use permit in the Richmond Zoning Ordinance had been satisfied. SNET filed suit in federal court to reverse this decision under the Federal Telecommunications Act, 47 U.S.C. § 332, and R.I.G.L. § 45-24-69(a).

The Court first explained that while the Federal Telecommunications Act requires companies providing cellular telephone services to cover a specified geographic area, it generally leaves local governments free to regulate the *location* of the necessary communications towers. However, it does impose three basic limitations on local regulation: (1) applications must be processed with reasonable promptness; (2) denials of applications must be based on substantial evidence; and (3) the zoning board’s decision must not effectively prevent the provision of cellular service in the area.

The Zoning Board met the first two requirements as a matter of law, said the Court. Although it did take the Board 15 months to render a decision, the Court pointed out that the Act qualifies the timeliness requirement by

stating that the “nature and scope” of the request must be taken into consideration. Also, the legislative history of the Act makes clear that the personal wireless service industry is not to be given preferential treatment in the processing of requests.

Here, SNET’s application was filed shortly after another application to erect a communications tower, and the Zoning Board, made up of unpaid volunteers, was busy with that prior application plus its regular business. In addition to its regular monthly meetings, the Board held eight special meetings devoted entirely to hearings on SNET’s application. SNET itself asked for a continuance at one meeting. Nevertheless, SNET complained to the District Court that the Zoning Board was dilatory because it ended the special hearings at 10 p.m.; it did not meet on weekends; and it continued to conduct other business at its regularly scheduled monthly meetings.

The Court was not sympathetic. In holding that the timeliness requirement was satisfied, the Court commented that SNET went beyond complaining about a lack of preferential treatment to which Congress had said it was not entitled – it complained, in effect, “that the preferential treatment that it did receive was not preferential enough.”

As to the second limitation on local power, the Court ruled that the record amply supported the Board’s conclusion that SNET had failed to establish that the proposed tower satisfied any of the four requirements for obtaining a special-use permit under the Richmond Zoning Ordinance:

- Compatibility with Neighboring Uses. The property was located in a sparsely populated area and was surrounded by property zoned for residential use. Several neighbors testified that the proposed tower would mar their scenic views, and the expert witnesses for each side expressed “conflicting and somewhat conclusory opinions regarding the tower’s compatibility with neighboring

uses.” The Court said that, given the height of the proposed tower, the residential character of the surrounding land, and the relative dearth of evidence that the tower would be compatible with neighboring uses, the Board had ample reason to conclude that this requirement had not been satisfied;

- Consistency with Purposes of Comprehensive Plan. Real estate brokers and appraisers presented by each party disagreed about whether the application was consistent with the Town’s Comprehensive Plan. The Board relied heavily on the testimony of another expert witness, a municipal planner, who gave reasons for his

“[SNET] complains, in effect, that the preferential treatment that it did receive was not preferential enough. That argument fails as a matter of law.”

opinion that the proposed tower would be inconsistent with the Comprehensive Plan. The Court said that in light of the split of opinion between the realtors and the “more germane qualifications” of the planner, the Board’s acceptance of the planner’s opinion was “easily justified.”

- Compatibility with Orderly Development of Town. Since the Town’s Comprehensive Plan for future development contemplated that the area would remain one of “single family homes in a rural setting involving the presence of woods, open fields, scenic vistas and the proximity of an historic village,” and SNET failed to present sufficient evidence on the subject, the Court said it was reasonable for the Board to conclude that granting the special-use permit would not be compatible with the orderly development of the Town.

- Environmental Compatibility. The Board acknowledged that the proposed tower satisfied the soil erosion, water supply protection, highway impact, traffic circulation, and noise and safety

compatibility requirements of the Richmond Zoning Ordinance, but found that it would have an adverse impact on surrounding property values. SNET argued that the testimony of its expert witness should have been accepted by the Board since he had conducted a study of the effect of communications towers on property values in other communities. However, the Court ruled that since the objectors’ expert was well qualified and had pointed out to the Board what he considered to be flaws in the study relied upon by SNET’s expert, it was “perfectly reasonable” for the Board to attach greater weight to the testimony of the objectors’ expert.

However, with respect to the third federal limitation on local regulation of communications towers – prohibition of wireless services in the area – the Court denied summary judgment for the Town, stating that this “fact-intensive” issue was not appropriate for resolution in a zoning board hearing and the affidavits and other materials submitted to the Court raised disputed factual issues that could not be resolved on a motion for summary judgment.

Comment: Note that this case involved the question of whether a particular proposal for a communications tower met the requirements of local law, not the more general question of whether the local law itself violates the Federal Telecommunications Act; for example, by effectively barring communications towers from the community. The reason this is important is because a different standard of review applies, depending on the nature of the claim. Claims that local laws violate the Federal Act are reviewed *de novo* by the court, while claims that a zoning board erred in deciding that a proposed facility did not meet zoning requirements are reviewed under the more deferential “substantial evidence” test.

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For a review of federal cases interpreting the “local control” provisions of the Federal Telecommunications Act, see

Foster & Carrel, *Towers of Babble: The Continuing Struggle over Wireless Siting Issues Under the Telecommunications Act of 1996*, 31 Urban Lawyer 849 (1999).

Martin, *Communities and Telecommunications Corporations: Rethinking the Rules for Zoning Variances*, 33 Am. Bus. L.J. 235, 245 (1995).

Martin, *Courts Interpret Telecommunications Act of 1996: Can Cellular Phone Companies Put Towers Wherever They Want?* 27 Real Estate L.J. 390 (1999).

O’Neill, *Wireless Facilities Are a Towering Problem: How Can Local Zoning Boards Make the Call Without Violating Section 704 of the Telecommunications Act of 1996?* 40 William & Mary L.Rev. 975 (1999).

BULLETIN

On Friday, September 22, 2000, President Clinton signed into law the Religious Land Use and Institutionalized Persons Act, which was designed by its sponsors to overcome the Supreme Court’s 1997 decision overturning the Religious Freedom Restoration Act as it applied to zoning regulation of church buildings (*City of Boerne v. Flores*). The new act forbids state and local governments from applying zoning restrictions in a manner that imposes a substantial burden on religious exercise.

No Legislative Zoning Changes; Attempt to Nullify *Newton* Fails

Although more than a dozen bills were introduced in the 2000 legislative session to amend the Zoning Enabling Act, none were enacted into law. Two proposed amendments with arguably the biggest potential impact, H7447 (applicable generally) and S2131 (applicable only to the Town of Westerly), were introduced to nullify the impact of *Newton v. Zoning Board of Review of City of Warwick*, 713 A.2d 239 (R.I. 1998), in which the Rhode Island Supreme Court rejected an attempt to combine a special-use permit with a dimensional variance, both because it was not allowed by the applicable zoning ordinance and because the zoning enabling act defines a “dimensional variance” as requiring a “*legally permitted beneficial use*, not in conjunction with a use granted by special permit.”

Since neither of these bills was enacted into law, this negative legislative history appears to nail down the principle of Rhode Island zoning law that a special-use permit cannot be combined with a dimensional variance. ❖

Online Article Explains How to Get Around *Newton* Ban on Combining Zoning Relief

The Supreme Court's prohibition against granting a dimensional variance in conjunction with a special-use permit, most recently confirmed in the 1998 *Newton* decision (see article above), does not necessarily tie the hands of a city or town council that wants to work around it.

That's the gist of an article by Roland F. Chase entitled “Zoning Relief: Why NOT Both a Variance and a Special-Use Permit?” After analyzing all of the relevant Supreme Court decisions, Mr. Chase suggests that while the *Newton* case and others like it do indeed preclude the use of a dimensional variance, measured by the “more than a mere inconvenience” standard, when the applicant also seeks a special-use permit, there is no reason why the local legislative body cannot make the desired dimensional relief available under the standard applicable to the special-use permit.

This article, which is to be published in a forthcoming issue of the *Rhode Island Bar Journal*, is available on the Miller Scott & Holbrook web site, www.millerscott.com.

Miller Scott & Holbrook is a full-service law firm located in downtown Newport, one block from the County Courthouse and a few blocks from City Hall. Although our primary client base is in Newport County, we represent clients throughout Rhode Island, appearing before zoning and other administrative boards as well as municipal, state and federal courts.

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