



# Rhode Island Zoning Review

2002-2003

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*This issue of Rhode Island Zoning Review summarizes statutory and judicial changes to Rhode Island zoning law during the 2002-2003 Supreme Court term and the January 2003 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.*

## Supreme Court Says No to Horses; Sonny Rides Off into the Sunset

He was only a little guy, 31 or 32 inches tall when full-grown, but the miniature horse Sonny was lassoed by the law and sent to pasture outside of Ridgewood Estates, in *Ridgewood Homeowners Assoc. v. Mignacca*, 813 A.2d 965 (R.I. 2003).

Sonny had been living in the Cranston subdivision known as Ridgewood Estates with his owners, David and Kathy Mignacca, who had started to build a stable for him in their backyard when some of the neighbors and the Homeowners Association objected. Although the Cranston Zoning Board and the Superior Court backed the Mignaccas, the Supreme Court said no to miniature horses on Ridgewood Estates.

Sonny was tripped up by two legal obstacles. A restrictive covenant applicable throughout the subdivision said plainly, "No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot..." and, "No kennels or other structure for the keeping of such pet shall be maintained on the premises," although there was an exception for up to two dogs and cats. Furthermore, the Cranston Zoning Ordinance required a minimum of ten acres to keep a horse, six more than the Mignaccas owned.

When the case reached the Superior Court, the trial justice refused to enforce the restrictive covenant, finding that it was ambiguous and arbitrarily enforced by the Association, and that the equities of the situation

did not support an injunction against Sonny's presence on the Mignacca property.

On the zoning issue, the justice ruled that a non-zoning provision of the Cranston Ordinances, which allowed the keeping of a horse as long as the owner has more than 20,000 square feet for use as a pasture, rendered it unnecessary for the Mignaccas to obtain a variance from the 10-acre zoning restriction.

Both of these decisions were brought to the Supreme Court, which padlocked the gate against Sonny by ordering the entry of a judgment permanently enjoining the Mignaccas from keeping a miniature horse on their property in Ridgewood Estates.

### Restrictive covenant issue

The Supreme Court flatly disagreed with the Superior Court justice's conclusion that the restrictive covenant was ambiguous. Although it acknowledged that arbitrary enforcement, or under-enforcement, of a restrictive covenant may be a defense in some circumstances, the Court said that to establish such a defense the defendant must prove that the plaintiff has waived the covenant through "substantial and general noncompliance."

Alternatively, said the Court, a waiver of the right to enforce a restrictive covenant can be demonstrated when unenforcement causes such a radical and permanent change in the area that it would be plainly

unjust to enforce the restriction because its original purpose can no longer be accomplished.

Neither of these grounds for refusing to enforce a restrictive covenant apply in this case, said the Court, noting also that the General Assembly had addressed the problem of covenants becoming obsolete with the enactment of R.I.G.L. § 34-4-21, which creates a 30-year limitation on the enforcement of restrictive covenants.

In discussing the restrictive covenant issue, the Court also brushed aside the Mignaccas' argument that the neighbors were barred from complaining about Sonny by their own violation of various restrictive covenants in the Ridgewood Estates deeds. For example, freestanding garages, sheds, and cabanas had been erected on other Ridgewood Estates properties in violation of different restrictive covenants. Totally irrelevant, said the Supreme Court, explaining that "the enforcement of one covenant or the failure to enforce that covenant has no bearing on the validity of a different covenant, in the event that both are contained in the same deed."

Finally, the Court disagreed with the trial justice's conclusion that the equities favored the Mignaccas because Sonny's presence on the Mignacca property did not cause any hardship to the neighbors. Enforcing a restrictive covenant is important to all who are burdened and benefitted by the restriction, said the Court, and precisely for that reason those seeking to enforce restrictive covenants need not establish money damages or any other hardship to receive equitable relief.

### Zoning issue

The Court did not dwell on the zoning issue. As to the effect of the non-zoning ordinance requiring a 20,000 square-foot pasture to keep a horse, the Court said that was irrelevant for three reasons. First the Court quoted the general rule that when two ordinances irreconcilably conflict,

the more recent one prevails. Since the zoning provision requiring ten acres to keep a horse was the more recent ordinance, the Court said it trumped the non-zoning provision.

Second, the Court noted that an "act of general applicability" had been held to supersede an inconsistent home rule charter provision, and said that ergo, the zoning ordinance in this case, enacted pursuant to the zoning enabling act, superseded the non-zoning ordinance.

Finally, the court said that a zoning ordinance cannot destroy the force and effect of a restrictive covenant. Thus, even if keeping a horse was permitted by the zoning ordinance, the restrictive covenant applicable throughout Ridgewood Estates would take precedence and bar application of the ordinance.

With respect to the Zoning Board's decision to grant the Mignaccas a variance to keep Sonny on their property, the Supreme Court said that, since no findings of fact or conclusions of law were compiled on the record to support the Board's decision, the matter should have been remanded to the Board. The Court also slapped at the trial justice for exceeding his authority by conducting a view of the Mignacca property and by calling the Cranston City Clerk to request a copy of the non-zoning provision he relied on to bypass the zoning restriction.

**Comment:** The Supreme Court said that the zoning provision requiring "not less than 10 acres" for the raising and keeping of animals to be a permitted use was in conflict with the separate city ordinance stating that, "No person shall keep any horse within any closely built-up residential area unless he shall have available...at least twenty thousand square feet of pasture area."

As a matter of statutory construction, it is not clear why these two provisions are necessarily conflicting. First, the non-zoning provision by its terms only applies to "any *closely built-up* residential area," which would seem to exclude Ridgewood Estates with its two-acre minimum lot size requirement.

Furthermore, the non-zoning provision does not purport to grant a right to keep horses on any lot with a 20,000 square-foot pasture; it just forbids keeping a horse on any lot without such a pasture. In other words, it could be read as saying, in effect, "Assuming that it is otherwise allowed, you cannot keep a horse on a lot that does not have a 20,000 square-foot pasture." Even a ten-acre house lot in Ridgewood Estates could conceivably be so filled with wooded and developed areas that it would not have 20,000 square feet of pasture land. Keeping a horse on such a lot would be permitted by the zoning ordinance but prohibited by the non-zoning provision. The two ordinances would not be at all conflicting. ❖

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## Zoning Board Cannot Turn Down Frontage Variance for Landlocked Lot

A dimensional variance allowing access to a land-locked lot must be granted, regardless of the use proposed for the lot, if denial would prevent the lot from being used at all, held the Rhode Island Supreme Court in *Lischio v. Zoning Board of North Kingstown*, 818 A.2d 685 (R.I. 2003).

The Lischios owned two “left over” lots – lots resulting from various condemnation actions and the development of a residential subdivision on adjacent land. One of the lots contained 16 acres of undeveloped land, but was completely landlocked. However, the other, much smaller lot, which had been part of the residential subdivision, was designated on the subdivision final plan map “for roadway purposes only,” and it lay between the larger lot and a road running through the residential subdivision.

The 16-acre parcel was zoned for general business, but all the surrounding land, including the Lischios’ smaller lot, was zoned as rural residential. Also, the town’s comprehensive plan designed the entire area for low-density-residential development.

Since their major parcel was zoned for general business, the Lischios decided use it for a mini self-storage facility, a permitted use under the North Kingstown Zoning Ordinance. To gain access to it they planned to build a road across their smaller lot that would connect with the existing road in the residential subdivision. But first they faced two legal obstacles: they needed a *use* variance to build the road on the smaller lot, because it was zoned residential, and a *dimensional* variance for the larger lot, because the ordinance required 200 feet of frontage on a public road but it would have only 51 feet of frontage on the proposed road running through their smaller lot.

The zoning board was totally unsympathetic to their plans, denying both of the variance requests. So the Lischios appealed to Superior Court,

which gave them half a loaf, reversing the zoning board’s denial of the use permit for the smaller lot but upholding the board’s denial of their request for a dimensional variance for the larger lot.

The Lischios were not particularly grateful for a decision allowing them to build a road to a vacant lot, so they petitioned the Supreme Court for certiorari, arguing that since their larger lot had no frontage or access to any public highway, a dimensional variance was necessary for *any* proposed use of the property and therefore denial of the requested relief created an unnecessary hardship far in excess of the more-than-a-mere-inconvenience standard of proof for a dimensional variance.

### Supreme Court decision

The Supreme Court agreed with the Lischios, quashed the Superior Court judgment, and ordered that court to issue the dimensional variance allowing the construction of the self-storage facility.

The Supreme Court gave three reasons for its decision. First, it noted that the zoning board had failed to set forth any findings of fact or its reasons pursuant to R.I.G.L. § 45-24-41(d)(2) for denying the dimensional variance.

Second, the Court said the Lischios had demonstrated by substantial evidence that the hardship they would suffer by a denial of the requested relief amounted to a deprivation of all beneficial use of the property, which the Court characterized as “a showing far in excess of the burden necessary for a dimensional variance.”

Third, and most important, the Supreme Court said the Superior Court had misapplied the statutory requirements for a dimensional variance by inappropriately resting its decision on the *particular use* the Lischios proposed for their property (a mini self-storage facility) instead of on the *type and extent of the relief* they were seeking.

At the Superior Court the trial justice, in upholding the zoning board’s denial of the dimensional variance, had explained that “not all permitted uses of a parcel are compatible with the surrounding area,” and noted the substantial evidence before the board that a dimensional variance for a mini self-storage facility would alter the character of the community and contravene the intent of the comprehensive plan and/or the zoning ordinance.

Strongly disagreeing, the Supreme Court said that once a particular use has been designated in the zoning ordinance as a “permitted use,” there is no way it can be incompatible with

*A permitted use cannot be incompatible with the surrounding area because “a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area.”*

the surrounding area because “a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area.”

### Proper focus of zoning board

What the zoning board should have focused on is the nature and extent of the dimensional relief sought, said the Court, regardless of the proposed use for the property. As examples of applications for dimensional relief that should be turned down under this test, the Court cited a height variance for a structure so massive or out of place as to alter the general character of the surrounding area, or a side-yard variance that would eliminate the front yard or sidewalk in a residential neighborhood, a result completely incompatible with the surrounding parcels.

The Court noted that the situation would be entirely different if the

proposed use required a special-use permit as well as a dimensional variance; then the zoning board would have to decide under R.I.G.L. § 45-24-42 whether granting the permit for a particular use designated as a special use in the zoning ordinance, coupled with dimensional relief, would adversely affect the surrounding area. But where the proposed use is a permitted use, said the Court, the board's inquiry is confined to the "extent and nature of the dimensional relief requested."

**Comment:** City and town council members who read this opinion – or hear about it from their solicitors – might want to take another look at just what uses are listed as permitted uses in their zoning ordinances.

The City of Newport, for example, allows sewage treatment facilities and pumping stations as a matter of right in its most exclusive residential districts. One can only imagine the consternation and amazement that would follow a zoning board decision granting a dimensional variance to locate such a facility on Bellevue Avenue, nestled between two mansions. And yet, if an application for such relief were

submitted and the board followed the Supreme Court's ruling in this case, that could well be the result. The board members would have to figuratively hold their noses, ignoring any possibility of smelly effluvia from the treatment facility, while deliberating in the abstract about the impact of an abbreviated setback on a generic permitted use.

The moral of the story? Local zoning boards should, of course, follow the law as interpreted by the Supreme Court. When considering whether to grant dimensional relief for a permitted use, board members should look only at the nature and extent of the relief requested and not at the particular use proposed.

But...those who make the law would be well-advised to comb through the permitted-use table or sections of their zoning ordinances, to ensure that every permitted use is an acceptable use in every part of the zoning district. If not, make it a special use, subject to the requirements for a special-use permit. Then the zoning board members will be required to look at the particular use proposed to see if it meets the criteria established for a special-use permit. ❖

## No Appeal from City's Refusal to Amend Zoning Ordinance

No matter how strong the case may be for amending a zoning ordinance, if the city or town council says no, that's the end of it. There is no appeal from a council's refusal to adopt a proposed zoning amendment, according to *P.J.C. Realty, Inc. v. Barry*, 811 A.2d 1202 (R.I. 2002).

In this case, Brooks Pharmacy petitioned the City Council of Pawtucket to amend the zoning classification of a half-dozen lots from Residential Two Family to Commercial General. Approval was recommended by the Pawtucket Department of Planning and Redevelopment and by the Planning Commission.

At the public hearing before the City Council, Brooks Pharmacy put two expert real estate witnesses on the stand to testify that the proposed zoning amendment was consistent with the city's Comprehensive Plan.

None of this swayed the Council, which voted unanimously to deny the petition.

Next step, Superior Court. Brooks Pharmacy sought three remedies: judicial relief under R.I.G.L. § 45-24-71, the enabling act provision authorizing appeals from zoning ordinances; a writ of mandamus; and a declaratory judgment. The trial court dismissed the request for judicial relief but found that the proposed changes were consistent with the Pawtucket Comprehensive Plan, so it granted a declaratory judgment to that effect and a writ of mandamus ordering the City Council to pass the amendment.

On cross-appeals, the Supreme Court first rejected the trial court's decision to issue a writ of mandamus forcing the City to adopt the proposed amendment. Noting the "well settled" rule that a writ of mandamus is appropriate when the duty to be enforced demands no special discretion, judgment or skill, the Court

## Scituate Zoning Board of Review Gains Right to Appoint Additional Alternate Member

The Town of Scituate has received legislative approval to appoint a third alternate member to its zoning board of review. R.I.G.L. § 45-24-56(h), added by P.L. 2003-222 and P.L. 2003-279, modifies the basic requirement of § 45-24-56(b) that zoning boards have two alternate members.

This change increases to four the number of towns in Rhode Island that have an extra alternate member on their zoning boards. Earlier amendments to the zoning enabling act made similar changes for Jamestown in 1996 and Little Compton in 1999 (see *1998-1999 R.I. Zoning Review*, p. 4)

and Charlestown in 2002 (see *2001-2002 R.I. Zoning Review*, p. 2).

Each of these amendments establishes procedures governing the appointment and use of alternate members, including the conditions under which they may take the place of a regular member and vote on a matter. The amendments also state that by ordinance the municipality can establish the term of service of alternate members, fill vacancies in their number, and remove members for due cause. These provisions are the same as those originally provided for all cities and towns in R.I.G.L. § 45-24-56(b). ❖

ruled that the issuance of a judgment for mandamus was beyond the authority of the Superior Court. The enactment of an ordinance is not a clear ministerial duty, said the Court, pointing out that a municipal council has discretion in enacting an ordinance, whether relating to zoning or to other subject matter.

The Court acknowledged that the Zoning Enabling Act of 1991 introduced judicial review of zoning ordinances in R.I.G.L. § 45-24-71(a) but said that this provision was simply inapplicable by its terms. Noting that it was the only section of the enabling act that dealt with judicial review of an action by a city or town council, the Court pointed out that § 45-24-71 was limited to the *enactment of or an amendment to* a zoning ordinance, and that it contained no provision authorizing any judicial tribunal to review or overrule the *refusal* of a municipal council to enact a municipal ordinance.

The Supreme Court did give Brooks Pharmacy a consolation prize on the remaining issue: whether the trial justice was correct in rendering declaratory judgment stating that the City of Pawtucket had a duty to conform its zoning ordinances and amendments to the City's Comprehensive Plan. The Court held that the trial justice did have authority under the Uniform Declaratory Judgments Act, R.I.G.L. § 9-30-1, to construe the obligation of the City to conform its ordinances with the Comprehensive Plan as required by the Rhode Island Zoning Enabling Act.

However, this was slight consolation, as the Court also said that the declaratory judgment power could not have been utilized to compel the city to enact a particular ordinance any more than its equitable power or the remedy of mandamus could be utilized for that purpose.

**Comment:** While this decision appears to slam the door on appeals from a city or town council's refusal to

enact a particular zoning amendment, it may be possible to get some mileage out of the declaratory judgment option.

Under the Uniform Declaratory Judgments Act, the Superior Court has power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." R.I. G.L. § 9-30-1. This would appear to authorize a judgment declaring not only what the municipality is supposed to do under the zoning enabling act, but whether or not the municipality has complied with this obligation. The Act expressly recognizes that issues of fact may be involved in declaratory judgment actions, and states that parties have a right to a jury trial of factual issues and that such issues must be determined in the same way that they are determined in other civil actions. *Id.*, § 9-30-9.

Thus a determined landowner or group of residents may be able to get a Superior Court justice to declare that a city or town's zoning ordinance does not comply, at least in part, with the local comprehensive plan.

That would probably put political pressure on the city or town council to act, and it might even authorize further judicial action if the municipality does nothing. The Uniform Declaratory Judgments Act authorizes "supplemental relief" based on a declaratory judgment or decree "whenever necessary or proper" [§ 9-30-8] but it is not clear what this might entail in the case of a municipality refusing to amend its zoning ordinance.

Theoretically the judge could issue a mandatory injunction ordering the municipality to enact a zoning amendment of its own choosing (not a particular amendment presented to the council, which would be prohibited by *P.J.C. Realty*); if the municipality refused to act, the judge could hold it in contempt, and if the municipality did adopt an amendment, it would be appealable under R.I.G.L. § 45-24-71, which would take the question of compliance with the comprehensive plan to a new forum. ❖

## Supreme Court Explains Appeals Under Low Income Housing Act

Appealing a zoning decision under the Rhode Island Low and Moderate Income Housing Act, R.I.G.L. § 45-53-1 et seq., is a whole different ball game. The law is different, the procedures are different, and there are very few signposts along the way.

But the Supreme Court in *Town of Coventry Zoning Bd. of Review v. Omni Development Corp.*, 814 A.2d 889 (R.I. 2003) has shed some light on the appellant's path. In the course of overturning a decision of the State Housing Appeals Board (SHAB), which had nixed several conditions the Coventry Zoning Board had placed on a proposal for low and moderate income housing, the Court explained

- who has standing to appeal;
- the standard of review that SHAB must apply when passing on an appeal from a zoning board decision;
- the burden of proof on the issue of "infeasibility" of a project with zoning board conditions or requirements;
- whether the Act covers new residential subdivisions or is limited to multifamily construction projects; and
- the specific factors that must be considered by SHAB in reviewing a zoning board decision under the Act.

After noting that the Low and Moderate Income Housing Act provides for a "streamlined and expedited application procedure," the Court turned to the facts of the case. The Omni Development Corporation submitted an application to the Coventry Zoning Board proposing to build 43 single-family homes – 20 affordable homes for low and moderate income families and 23 market-rate dwellings priced for first-time home buyers – on an undeveloped parcel of land. Omni's proposal was for a residential cluster development, and included a request for relief from several subdivision regulations and for exemption from

Coventry's impact fee ordinance, which would have added thousands of dollars to the cost of each unit.

The zoning board met Omni halfway, approving the project but refusing to grant all the relief sought. The Board attached four conditions or requirements to its approval:

(1) vertical face curbs of granite or concrete instead of the asphalt berms sought by Omni; (2) minimum lot size of 15,000 square feet, not counting land deemed unsuitable for development; (3) maintenance of a secondary access road into the development, by widening an existing 12-foot bridge to a 30-foot paved width; and (4) application of the town's development impact fees to the market-rate houses in the project, although not to the low and moderate income houses.

Omni appealed to the SHAB, which knocked out the zoning board's restrictions, concluding that all except the impact fees were unnecessary for health and safety or to protect the environment, were inconsistent with local needs, and created an "unnecessary restriction on affordability." SHAB also overruled the imposition of impact fees on any of the units, but conditioned this decision on any excess profits going to the Town of Coventry to be used for affordable housing initiatives.

On appeal the Supreme Court generally sided with the town's position, overturning the SHAB decision, but remanded the case to SHAB for appropriate findings that could change the result.

### Standing to appeal

On the issue of standing, the Court noted that the appellant was the Town of Coventry Zoning Board of Review and said this was a mistake. Only an "aggrieved" person who has an actual stake in the outcome of the controversy can appeal a zoning board decision under the Low and Moderate Income Housing Act, said the court, and the zoning board is not aggrieved; rather, it is a quasi-judicial adminis-

trative body vested with significant discretion and responsibility to act in the best interest of the community.

However, because of the importance of the case the Court said it would not dismiss the appeal for lack of standing but would give the Town of Coventry, acting through its solicitor, 30 days to intervene as a party.

### The standard of review

As to the standard of review SHAB must apply in reviewing zoning board decisions under the Act, the Court, citing § 45-53-6(a), zeroed in on the key requirement that zoning board decisions under the Act must be "consistent with local needs." The Court pointed out that under the Act any properly enacted zoning ordinance in a community that has met or exceeded its statutory minimum for low and moderate income housing units (ten percent of the total housing units for Coventry) is conclusively presumed to be consistent with local needs. For those communities, said the Court, SHAB has no authority to reverse a zoning board's denial of a low income housing proposal, or to remove any conditions on a board's approval of such a proposal, even if the conditions render the proposal infeasible.

However, in cities and towns that fall short of the statutory minimum, like the Town of Coventry, SHAB is required to examine the zoning board's decision and the ordinance on which it rests to see if they are "reasonable" in light of the state's need for low income housing, the number of low income persons residing in that particular community, and other factors mentioned in § 45-53-3(2). Only if it finds that a particular ordinance fails to meet these criteria may SHAB declare that it is not "consistent with local needs."

A further test is imposed on appeals from zoning board decisions approving low income housing applications with conditions or requirements. In addition to determining whether the conditions and requirements are consistent with local needs, SHAB must also determine whether they make the project "infeas-

ible," defined by the Court to mean that it is impossible for the developer to proceed without financial loss, and that the developer is without viable alternatives.

The burden of proof on the issue of infeasibility is on the developer, said the Court, noting that this burden of proof necessarily entails full disclosure of the financial plans that underlie the project, including accurate cost projections and the anticipated price of the homes to be built.

### Scope of Act

Applying this manifold standard of review to the Town of Coventry's appeal from the SHAB decision, the Court first rejected the argument by the town that the Low and Moderate Income Housing Act only applies to multifamily housing, not to new residential subdivisions. The Court acknowledged that the Act was probably originally enacted to promote multifamily housing, but said that nothing in it prevents a developer from proposing a residential subdivision as affordable housing.

On the four substantive questions raised by the appeal, the Court faulted SHAB for applying the wrong standard and inadequately supporting its conclusions. The Court said, for example, that SHAB overlooked the zoning board's findings that the regulation requiring vertical face curbing was designed to protect the health and safety of the residents of the project and the community. SHAB's conclusion that this regulation was merely a "planning preference" and not consistent with local needs was not supported by analysis or reference to relevant evidence.

The Court also said that SHAB's finding that the vertical face curb requirement created "an unnecessary restriction on affordability" was not the appropriate standard of review. Rather, said the Court, the appropriate inquiry was whether this condition, alone or in combination with others, made it impossible for Omni to

proceed with the proposed development without incurring financial loss.

The Court dealt with the other three substantive issues in much the same way, and concluded by remanding the case to SHAB for further findings, along with specific directions for resolving each of the four substantive issues. ❖

## Attendance at Public Hearing Waives Any Defects in Notice

In two recent non-zoning cases, *Graziano v. Rhode Island State Lottery Com.*, 810 A.2d 215 (R.I. 2002) and *Gardner v. Cumberland Town Council*, 826 A.2d 972 (R.I. 2003), the Supreme Court emphasized the rule that attendance at a hearing generally constitutes a waiver of any defect in notice.

In the zoning context, this generally means that objectors who show up at a hearing cannot later complain that they did not receive proper notice even if the statutory requirements for notice were, in fact, ignored or improperly followed.

The Court did leave the door open just a crack for those who attend administrative hearings despite not receiving proper notice. The Court in *Graziano* said that attendance at a hearing does not prevent “a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue.” This might be shown, for example, by an abutter who did not receive proper notice of a hearing but just happened to be in attendance, perhaps on another matter, and was surprised when an application affecting his or her property was raised and discussed. Even though the abutter might sit through the whole hearing, not missing a word, if he or she had no opportunity to review plans on file, or to research other relevant matters beforehand, because of the defective or nonexistent notice, a strong case for a procedural error of constitutional dimensions would be presented. ❖

## Supreme Court says CRMC, Not Zoning Ordinance, Regulates Commercial Ferry Operations

Commercial ferry operations are totally beyond the regulatory power of the Town of New Shoreham (Block Island), ruled the Supreme Court in *Champlin's Realty Assoc. v. Tillson*, 823 A.2d 1162 (R.I. 2003), even though the ferry docks are located on Great Salt Pond, which the Legislature had deeded to the town in 1887. In holding that such regulatory power was vested solely in the Coastal Resources Management Council (CRMC), the Court also rejected the town's argument that it could bar the ferries from using the docks under its zoning power.

When two new Block Island ferry services proposed to use docks on Great Salt Pond, which was once an inland pond but for more than a century has been open to the sea, the town issued cease and desist orders, based on the town's determination that its zoning ordinance did not permit ferry terminals. The ferry owners quickly went to Superior Court and obtained declaratory relief and an injunction against the town.

On appeal, the Supreme Court upheld the Superior Court's conclusion that the Coastal Resources Management Council had exclusive jurisdiction over the docks since they were located below the mean high-water mark.

The town's primary argument was that it – and not the CRMC – had primary jurisdiction to regulate ferry operations occurring within the pond because in 1887 the Legislature had granted “[a]ll the right, title and interest of the state in and to the Great Salt Pond and the land covered thereby.” Basically the town's position was that since the Legislature had transferred *all* of its interest in the Great Salt Pond to the town, there was nothing left for the CRMC to regulate.

This argument “holds no water,” punned the Court, because granting *title* to the town is not the same as granting to the town the state's responsibilities under the public trust doctrine. Ownership and regulatory

rights are severable, explained the Court, and while the state *can* delegate regulatory powers over tidal lands to municipalities, it does not do so by merely transferring title to those lands, even if it uses such an inclusive phrase as “all the right, title and interest of the state.” In other words, because of the public trust doctrine, the state did not really grant *all* of its interest in the pond to the town; rather it retained its right to regulate the pond for the benefit of the public, because the 1887 Act did not evidence the state's intent to abdicate its public trust responsibilities and police power over the pond.

As further support for its conclusion, the Court cited the adoption in 2001 of R.I.G.L. § 46-23-6(2)(ii)(A), which gives the CRMC, with certain narrow exceptions, “exclusive jurisdiction below mean high water for all development, operations, and dredging...” The Court said that the term “operations” encompasses commercial ferry activities.

The town then pushed its fallback argument: “If we don't have *exclusive* jurisdiction over the Great Salt Pond, at least we have *concurrent* jurisdiction because of our zoning power.” The town pointed out that in *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999), the Supreme Court itself, although holding that CRMC has exclusive jurisdiction over residential, noncommercial boat wharves constructed on tidal land [see 1999–2000 *R.I. Zoning Review*, p. 1], had said that it was not restricting the traditional zoning power of municipalities and that, for example, if a residential landowner were to use his dock for commercial purposes, such as by selling bait to boaters on the river, the town could seek to enjoin that use under its zoning authority. This is just what we are trying to do in this case, said the town, exercising our zoning power to regulate a particular *use* of the docks in question, not to prohibit the *construction* of a dock.

However, this argument was also knocked down by the Court. The



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Court said that its example about a municipality prohibiting the commercial sale of bait from a residential dock “does not give the town authority to prohibit commercial ferries from docking within the pond in an area of the town that is otherwise zoned for commercial use.” The Court said that selling bait, which can presumably be done anywhere in a commercially zoned area, is “more amenable to traditional zoning laws,” but commercial ferry operations “have a much more direct connection to tidal waters” and thus “do not fall within the ambit of activities addressed by traditional zoning ordinances designed to regulate activities on dry land.”

**Comment:** Clearly cities and towns in Rhode Island can forget about trying to regulate any commercial land uses on

### Recent ALR Annotations:

Validity, Construction, and Application of Zoning Ordinances Regulating Display of Noncommercial Flags or Banners, 103 A.L.R.5th 445 (2002).

Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.), 181 A.L.R. Fed. 247 (2002).

tidal lands in *commercial areas* of the municipality. That is strictly a matter for the Coastal Resources Management Council. And some of the expansive language in this case can be read to apply the same rule to *residential areas*, which would mean that unless the CRMC says no, anybody can do anything anywhere below the mean high-water mark on their waterfront property.

Maybe so. But the Court in this case did not disavow its language in the *Thornton-Whitehouse* case that it was not restricting the traditional zoning power of municipalities, nor did it back down from the example it used in that case about a municipality being able to invoke its zoning regulations to prohibit the commercial sale of bait from a residential dock. It just sidestepped the challenge by pointing out that the ferry docks in question were located in commercial areas.

In short, this case and the 1999 *Thornton-Whitehouse* decision have greatly reined in the power of municipalities to regulate uses of tidal lands under zoning. But the door has not been one hundred percent closed. There just might be some room for cities and towns to regulate commercial uses – not only bait shops but especially more offensive uses, like gas pumps and engine overhaul facilities – below the mean high-water mark in residential areas. ❖

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