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Buying Some Time To Settle Zoning Appeals

Deals can be negotiated, but details will be released to public, courts

By DWIGHT H. MERRIAM

The statute of limitations for zoning appeals requires that they be brought just 15 days after the decision is published. Compare this with 60 years for asbestos claims, or even three years for torts.

You get a zoning decision and "bang" — in just a couple of weeks you have to decide whether to sue and get the complaint served. There is little time for reflection or bargaining.

In 2001, the General Assembly amended the zoning appeals statute (Section 8-8(e)) to allow the parties by agreement to suspend the pleadings for "mediation." That's a bit of a misnomer since no particular type of alternative dispute resolution is required. Really, all it does is provide a little breathing room and saves assembling an often-voluminous record (remember, in Connecticut zoning appeals are record appeals – there's no trial *de novo*). It saves researching and writing a brief, at least while the discussions are ongoing. With extensions, you can get up to a year, and more with the court's permission, to negotiate.

Any party can opt out and terminate the mediation at any time by notifying the court. Whether you use the mediation stay or not, the process for settling is the same.

First, you will need to get the commission's counsel to communicate a proposal. More often than not, at the public hearing and vote, the commission was unrepresented. Having a lawyer on board can often help move the controversy toward a resolution by adding new objectivity and an assessment of the legal realities.

If there are other parties to the appeal, such as environmental intervenors or neighbors, you need to have them agree to the settlement as well. The court cannot approve a settlement unless all parties agree. There is no point going through the process of getting the zoning commission's approval on a settlement if the other parties can't agree.

The commission can meet in executive session, closed to the public, to discuss a settlement. The zoning matter should be noticed in the call of the meeting: "Executive session to discuss pending appeal, *Big Time Development v. P&Z.*"

No vote to settle should take place in the closed session. The commission can reach a consensus: "How many of you think you might be interested in settling along these lines?" While the appellant's lawyer may be invited into the executive session, the commission's counsel may also come in and out of the session to talk with the appellant's lawyer and the representatives of any other parties.

Now, here comes the part where many land use lawyers may get tripped up. What local process do you follow for the notice and vote on the settlement? The Practice Book was amended effective Jan. 1, 2007 with clear direction:

"…No decision that is appealed under General Statutes §§ 8-8 or 22a-43 shall be modified by settlement or stipulated judgment unless the terms of the settlement or stipulated judgment have been approved at a public meeting of the municipal agency that issued the decision. The proposed settlement shall be identified on the agenda of such meeting, which meeting shall be posted in accordance with the applicable requirements of General Statutes, §§ 1-210 *et seq.*, and the reasons for such approval shall be stated on the record during such public meeting of such agency and before the court.... No notice of the court proceeding other than normal publication of the calendar and notice to the parties is required unless otherwise ordered by the court." P.B. § 14-7A.

You need a public meeting. It can't be done in executive session. The proposed settlement must be identified in the notice of the meeting: "**Big Time Development Decision** — discussion and vote regarding settlement proposal in the pending appeal, *Big Time Development v. Hometown Planning & Zoning Commission*, No. CV 09 0012345 S, in accordance with the Motion attached hereto."

This example of the notice refers to an attached motion. You don't have to do that, but a good settlement process will almost always have a detailed Stipulated Judgment outlining the terms of the deal negotiated between the lawyers and with the commission in the executive session so it is clear what the commission and the other parties want.

The notice of the regular or special meeting must be posted like any other.

There is no room for a breezy discussion and a vote on a simple motion. The Practice Book requires that the reasons for the settlement to be stated on the record during the public meeting. The best practice is to include those reasons in the motion attached to the notice of the meeting. If the discussion on the vote produces changes, so be it. The motion can be amended.

Although the vote is taken in a public session, it is not a public hearing and the commission is not required to allow public participation.

Dwight Merriam is a partner in the Hartford office of Robinson & Cole. He represents developers, local governments, landowners and advocacy groups in land development and conservation issues.

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Court Approval

The last step is getting the court's approval. Section 8-8(n) provides that you can't withdraw or settle an appeal until there has been a hearing before the Superior Court and "such court has approved such proposed withdrawal or settlement." Before the Practice Book amendment, many of us thought it prudent to publish notice of the upcoming court hearing in the local newspaper, but that is no longer necessary since the Practice Book has established the necessary process and notice requirements.

The standard for the court's approval is not the same as that for an appeal. When holding the § 8-8(n) hearing, the court must review the settlement "to determine that it has been reached without any improper conduct by the parties and is fair and equitable to the applicant and the public interest which the commission is charged with protecting." *Mead School for Human Dev. Inc.*, 18 Conn. L. Reporter, No. 7, 260, 261 (Nov. 22, 1996). "The court may inquire about the procedure followed by the agency, inquire of the parties whether settlement was reached by coercion or intimidation, and consider any other factors the court deems appropriate." P.B. § 14-7A.

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Finally, the worst thing that can happen is to have an intervenor show up at the 11th hour, often years after the appeal commenced, and want in solely to kill the settlement. We'll save that issue for another day, but you may wish to follow *Gilbert Homes Inc. v. Town of Putnam Zoning Commission* now pending before the Appellate Court, where the trial denied an abutter's motion to intervene two years after the appeal was taken. ■