2015 CONNECTICUT SUPREME COURT YEAR IN REVIEW
Nibbling Around the Edges of Perennial Issues

Key cases address aggrievement questions and zoning variances

By DWIGHT MERRIAM

Connecticut has always been a good place for land use lawyers, because it has more than its fair share of land use cases. Connecticut, along with Massachusetts, Rhode Island, New York, Maryland, Pennsylvania, Florida and California, is a leader not only in the amount of litigation, but in the influence through its cases and occasional policy reaction on the development of the law. Perhaps it is because in these states land use is most highly regulated in the areas most sought or attractive for development or reuse.

Although there were a few important land use cases in the U.S. Supreme Court this year—Reed v. Town of Gilbert, Arizona, on what constitutes content-based sign regulation, and Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, holding that disparate-impact claims are cognizable under the Fair Housing Act—this was something less than a bombastic year for us in Connecticut. Instead, there was some interesting nibbling around the edges of several perennial issues.

The term “aggrievement” is not widely used in many states to address standing, but it is a term we use here in the Nutmeg State. Aggrievement may be statutory, based on the location of property relative to the subject matter of the land use proceeding (including the right of an owner-applicant and an applicant-with-an-interest to appeal); or, classical, determined by the possibility of injury to the specific personal and legal interests of a property owner. The Connecticut Supreme Court considered aggrievement in Handsome v. Planning and Zoning Commission of the Town of Monroe, a decision with a fact pattern that reads like a law school final exam insofar as it is not every day that we see such a case. It is worth careful reading.

Handsome Inc. applied for a special exception permit to build a 20,000-square-foot industrial building on a 9.9-acre property in the Design Industrial Zone. The commission approved the application in 2003 with, count 'em, 36 conditions, and an expiration date in 2008. Three weeks before the expiration date, the commission denied Handsome's application for a permit extension because Handsome had failed to make required progress reports and had not yet begun construction of the industrial building.

The trial court sustained Handsome's appeal, concluding that the commission "had no option but to approve" the application. The commission did not appeal and some eight months later granted the extension, subject to the setting of a bond and several additional "requirements" and "clarification[s]." As you might guess, this precipitated another appeal by Handsome, which the commission challenged on several grounds, chief among them that Handsome lacked standing to appeal. Why? Because before the extension was granted Handsome had lost title to the property through the strict foreclosure of a mechanics lien.

The trial court held that because the judgment of strict foreclosure was never recorded in the town land records, Handsome remained the record owner and had standing to appeal. It also found that the principal officers of Handsome were statutorily aggrieved and could appeal as applicants and owners because “their personal and legal interests in the property had been specially and injuriously affected by the commission’s action.”

The Connecticut Supreme Court reversed the trial court, holding that the plaintiffs, both Handsome and the principal officers, were not aggrieved and did not have standing to appeal. Handsome was not statutorily aggrieved because it lost its interest in the property in the foreclosure. The principals were neither statutorily aggrieved because they had no property interest nor classically aggrieved since they “demonstrated no direct injury.” The case is worth reading carefully, not only for its comprehensive exposition of the law of aggrievement in Connecticut, but even more so for how it distinguishes many of these cases.

There are many potential pitfalls for land use lawyers in this area and sometimes less than careful attention is paid. There is currently a case at the local level where the applicant for a zoning approval is an LLC that was dissolved years ago because of the failure to report and pay its fees to the state. Was that application void from the beginning?

There was another instance this year where a neighborhood group appealed a commission decision and only during the trial did it become known that the sole plaintiff brought to court to prove aggrievement had transferred the property to an LLC some time ago. The judge allowed the matter to be continued and another plaintiff was brought in to establish aggrievement.

The long and the short of this is, it may be prudent to check the title of plaintiff-appellants in land use cases before the action is brought, while the action is pending, and during and after trial.

FOI Issue

The Handsome-Monroe contretemps kept on giving this year with a companion case, Planning and Zoning Commission of the Town of Monroe v. Freedom of Information Commission. The Freedom of Information Commission, when it commenced con-
sideration of the extension ordered by the trial court, went into executive session. The Supreme Court held that the commission's executive session was not justified under either the pending claims or pending litigation exceptions to the Freedom of Information Act because there were no pending claims and no pending litigation.

The commission ruled the executive session to be unlawful, but the trial court sustained the commission's appeal and reversed the FOIC. Two matters were taken up in that executive session, one on how the commission was going to respond to the trial court's decision ordering it to extend the permit and another on what the commission was going to do about Handsome's noncompliance with the original conditions. As to the first matter, the FOIC determined that the prior appeal had been "finally adjudicated" before the executive session and was therefore not pending; and, as to the second matter, the FOIC found that there was nothing pending as to any claim or litigation involving the failure to complete the conditions on the original permit.

The trial court agreed with the FOIC on the first matter, but as to the conditions, held the pending litigation exception did, in fact, apply since the zoning commission was considering enforcement.

On appeal, the Connecticut Supreme Court sided with the FOIC and observed: "A public agency may convene an executive session under the pending claims or pending litigation exception only to discuss matters that are in connection with a prospective or pending lawsuit or legal proceeding." More important, the commission in its executive session did not discuss bringing a zoning enforcement action in court, but only considered "taking nonjudicial action in a matter that was not pending in any court or forum other than the zoning commission itself."

Now, here is one of those you-learn-something-new-every-day kind of things you can pull out of a decision like this: "Even if the zoning commission members had considered initiating a zoning enforcement action, [the exception] still would not have applied because the zoning commission cannot be a party to its own regulatory proceeding." That is, because the commission was the decision-making body in the proceeding, it is not "a party" to the proceeding. Got it? It takes a while to sink in, but it is the law.

Finally, the term "finally adjudicated," which is not defined in the Freedom of Information Act, apparently has not previously been, well, finally adjudicated by our highest court. The court concluded that "a matter is 'finally adjudicated' under the act either upon completion of an appeal to the highest possible tribunal or upon expiration of the parties right to appeal" and found that this matter had been finally adjudicated because the time for all appeals had passed. The zoning commission argued that the case was not finally adjudicated because the commission could still be held in contempt if it failed to carry out the trial court order, but the Supreme Court would have none of that.

Variances Appeared

We give the shortest treatment to the longest decision, Verrillo v. Zoning Board of Appeals of the Town of Branford, rendered by the Appellate Court, not because it is unimportant—it is one of the most comprehensive treatments of variance law ever—but because if we started down that path, 50 pages long in the slip opinion, we would be together until next week.

What happened here is typical. The owners of a dimensionally nonconforming coastal property wanted to rebuild it and needed numerous variances. The zoning board of appeals granted the variances and a neighbor appealed. The trial court sustained the appeal and the Appellate Court in a magnum opus decision by Judge Herbert Gruendel affirmed the judgment. It is loaded with quotes from the hearing and the deliberations, a full treatment of variance cases, a complete analysis of practical confiscation as grounds for hardship, the law of nonconforming uses, and an important recognition that the individual statements of members of the board did not constitute a "collective, official reason for its decision."

The late UCLA law professor Donald Hagman noted in his land use law hornbook that 90 percent of the variances are granted illegally. Most Connecticut land use practitioners would agree, and might well say it is even greater than that. We don't see more of the illegally granted variances reported because they are not appealed. Often the neighbors don't care that there is no practical difficulty or unnecessary hardship and that there has been no proof of confiscation.

It might have been good in the Verrillo case for these property owners, and for their neighbors, if they were able to rebuild this house, but multiple dimensional variances are not the answer. The best approach not only along our shorefront with all of its nonconforming buildings, but also in neighborhoods close to our downtowns, most of them built before zoning, is to use a special permit enabling site-specific modest expansions and rebuilding. The zoning commission, not the zoning board of appeals, would have that authority limited by whatever it chooses to have in its regulations, and there would be no hardship test.

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