

Imagery Date: May 2004

44°26'03.87" N 73°10'04.97" W elev. 439 ft

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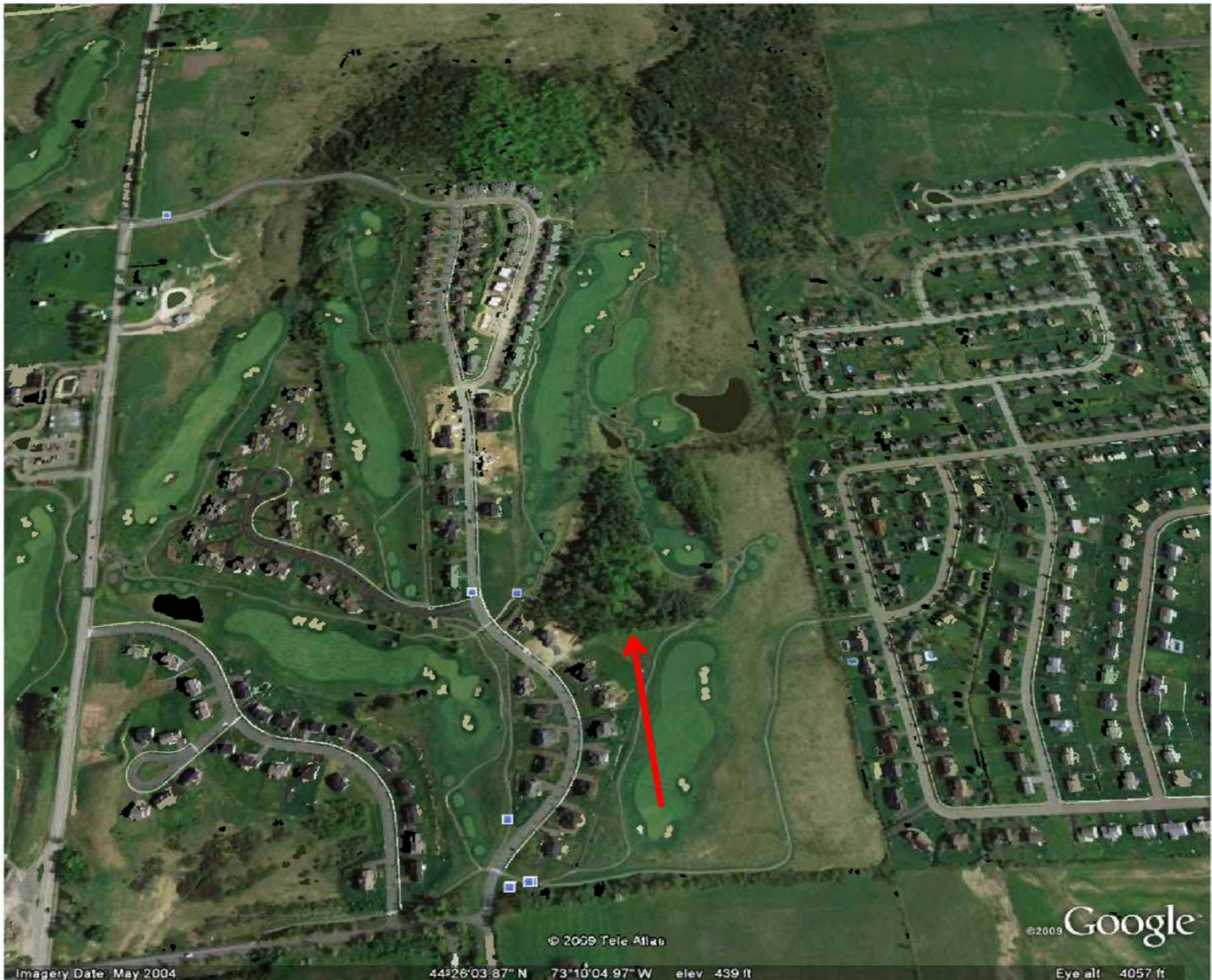
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JAM Golf, LLC. v. City of South Burlington

Case Review

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City of South Burlington Zoning Ordinance

Section 26.151: A Planned Unit Development and Planned Residential Development shall comply with the following standards and conditions:

(g) Will protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features.

Environmental Court Conclusion

The project as proposed at this density and surrounding a roadway therefore does not meet §26.151(g) of the Zoning Regulations. . . . The project woodland is an important wildlife habitat in a pivotal location connecting habitat to the north with habitat and open land to the south. It is also an important special feature as a mature grove of mixed species on a knoll in the landscape. Despite the fact that the golf course fairways and former agricultural fields are also “open land,” this feature provides a very different kind of important visual or scenic interest in the landscape, worthy of protection under this section.

JAM Golf Claim in the Supreme Court

Applicant challenges both the court's interpretation of the ordinance and its underlying findings of fact. Specifically, applicant asserts that § 26.151(g): (1) requires that PRD designs "protect" only important wildlife habitat and scenic views; and (2) allows developers to offer mitigation in order to meet this requirement. Applicant complains that the habitat and view at issue here are not, and cannot be, considered "important" from the court's findings. JAM Golf, LLC (2008).

Supreme Court's *sua sponte* Conclusion

Unfortunately, the ordinance as written is essentially standardless. Although applicant challenges the court's interpretation of the ordinance, rather than attacking the ordinance itself, § 26.151 is flawed, since it provides no standards for the court to apply in determining what would constitute a failure to "protect" the listed resources. JAM Golf, LLC (2008).

Unconstitutional “Vagueness” Under Vermont Law

There are actually three overlapping theories under which a delegation of standardless zoning approval power is found unconstitutional: (1) a delegation of legislative power without adequate standards violates the separation of powers required by the state constitution; (2) the power to grant or refuse zoning permits without standards denies applicants equal protection of the laws; and (3) administration of zoning without standards denies landowners due process of law because it does not give them notice of what land uses are acceptable. In re Handy (2000).

Non-delegation Doctrine

When legislative power is delegated to administrative officials it is constitutionally required that adequate guides and standards be established by the delegating legislative body so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative body. Handy quoting Gino's of Maryland, Inc. v. City of Baltimore, (MD, 1968).

Equal Protection

Without definite standards an ordinance becomes an open door to favoritism and **discrimination**, a ready tool for the suppression of competition through the grant of authority to one and the withholding from another.... A zoning ordinance cannot permit administrative officers or boards to pick and chose the recipients of their favors. Handy quoting Osius v. City of St. Clair Shores, (MI, 1956).

Due Process

This Court has already accepted the third rationale, which is concerned with **assuring that the landowner be given fair notice of what it can and cannot do with the land.** Miserocchi, 170 Vt. at 325, 749 A.2d at 611. The point is that zoning permit applicants are entitled to know: “What facts must I present to gain the Board's approval?” Stucki v. Plavin, 291 A.2d 508, 511 (Me.1972); see also Wakelin v. Town of Yarmouth, 523 A.2d 575, 577 (Me.1987) (landowner must be able to discern what use can be made of the land); Hardin County v. Jost, 897 S.W.2d 592, 595 (Ky.Ct.App.1995) (same). In re Handy (2000).

Vagueness Defect in Section 26.151(g)

JAM Golf

From a regulatory standpoint, therefore, §26.151(g) provides no guidance as to what may be fairly expected from landowners who own a parcel containing wildlife habitat or scenic views—both common situations in Vermont—and who wish to develop their property into a PRD. Such standardless discretion violates property owners' due process rights. In re Miserocchi, 170 Vt. 320, 325, 749 A.2d 607, 611 (2000). JAM Golf, LLC (2008).

Vagueness Standard under *In re Pierce*

Zoning ordinances must “provide ... appropriate conditions and safeguards” to guide the decision maker. Kilburn, 131 Vt. at 124, 300 A.2d at 526 (quotation omitted). While we will invalidate ordinances that “fail [] to provide adequate guidance” and therefore lead to “unbridled discrimination,” we will uphold standards even if they are general and will look to the entire ordinance, not just the challenged subsection, to determine the standard to be applied. Id. at 125, 300 A.2d at 526; see also Handy, 171 Vt. at 348-49, 764 A.2d at 1238 (citing Vincent v. State Ret. Bd., 148 Vt. 531, 535, 536 A.2d 925, 928 (1987); State v. Chambers, 144 Vt. 234, 239, 477 A.2d 110, 113 (1984)). In re Pierce (2008)

Vagueness Analysis under *In re Pierce*

While it is true that § 5.21 provides no concrete standards to consider each individual modification to the zoning regulations, neighbor's argument misunderstands the nature of a PRD. The Legislature authorized PRDs to “encourage flexibility of design and development of land in such a manner as to promote the most appropriate use of land, ... and to preserve the natural and scenic qualities of the open lands of this state.” 24 V.S.A. §4407(3) (repealed 2004). In order to achieve these goals, particularly the encouragement of flexible planning, “[t]he modification of zoning regulations by the planning commission ... may be permitted simultaneously with approval of a subdivision plan.” *Id.* Such modifications, or “waivers,” are part of the process of approving a PRD—a type of concentrated housing development permitted in exchange for open space which, by its very nature, does not fit the traditional zoning scheme. *In re Pierce* (2008)

Vagueness Standard under JAM Golf

Zoning ordinances must "specify ... sufficient conditions and safeguards" to guide applicants and decision makers. Town of Westford v. Kilburn, 131 Vt. 120,122, 300A.2d 523,525 (1973). We will not uphold a statute that "fail [s] to provide adequate guidance," thus leading to "unbridled discrimination" by the court and the planning board charged with its interpretation. Id. at 125, 300 A.2d at 526; see also In re Handy, 171 Vt. 336, 348-349, 764 A.2d 1226, 1238 (2000); State v. Chambers, 144 Vt. 234,239,477 A.2d 110, 112-13 (1984). JAM Golf, LLC (2008)

Vagueness Standard Comparison

In re Pierce: While we will invalidate ordinances that “fail [] to provide adequate guidance” and therefore lead to “unbridled discrimination,” we will uphold standards even if they are general and will look to the entire ordinance, not just the challenged subsection, to determine the standard to be applied. [emphasis added]

JAM Golf, LLC: We will not uphold a statute that “fail[s] to provide adequate guidance,” thus leading to “unbridled discrimination” by the court and the planning board charged with its interpretation.

Vagueness Analysis Under JAM Golf

"Protect," as defined in §26.151, cannot be the equivalent of total preservation, because the same regulations allow for development, which, by necessity, must reduce wildlife habitat and affect scenic views. How much less than total preservation qualifies as sufficient protection, however, we cannot know, because the regulations do not say. Even had the trial court endeavored to apply a "reasonableness" measure to this term, §26.151 would be unworkable. The language of the regulations offers no guidance as to what degree of preservation short of destruction is acceptable under the statute. JAM Golf, LLC (2008)

Vagueness Analysis under *In re Pierce*

While it is true that § 5.21 provides no concrete standards to consider each individual modification to the zoning regulations, neighbor's argument misunderstands the nature of a PRD. The Legislature authorized PRDs to “encourage flexibility of design and development of land in such a manner as to promote the most appropriate use of land, ... and to preserve the natural and scenic qualities of the open lands of this state.” 24 V.S.A. §4407(3) (repealed 2004). In order to achieve these goals, particularly the encouragement of flexible planning, “[t]he modification of zoning regulations by the planning commission ... may be permitted simultaneously with approval of a subdivision plan.” *Id.* Such modifications, or “waivers,” are part of the process of approving a PRD—a type of concentrated housing development permitted in exchange for open space which, by its very nature, does not fit the traditional zoning scheme. *In re Pierce* (2008)

Kolsaka v. Town of Georgetown (Maine, 2000)

Here, the Georgetown Ordinance requires that all development “conserve natural beauty.” However, all development, to some extent, destroys or impairs “natural beauty.” If the provision means that *all* natural beauty must be conserved, then all development must be banned. Because the provision cannot reasonably be interpreted to ban all development, the question becomes: How much destruction is okay? Or, put another way; How much conservation is required? On this question, however, the Georgetown Ordinance, like the ordinance in *Stucki*, is silent. Neither developers nor the ZBA are given any guidance on how to interpret the “conserve natural beauty” requirement. Instead, developers are left guessing at how much conservation is necessary, and the ZBA is free to grant or deny permits as it sees fit.

Vermont Precedent Cited in JAM Golf

Town of Westford v. Kilburn (1973) (Zoning ordinance provision authorizing Board to allow commercial uses upon determination that they “promote the public health, safety, convenience and welfare” was an unlawful delegation of discretion in violation of the State enabling act.)

State v. Chambers (1984) (Statute authorizing state’s attorney or chief medical examiner to order an autopsy when in the interest of the public health, safety and welfare was not an unconstitutional delegation of discretion.)

In re Miserocchi (2000) (Court narrowly construed bylaw provision concerning nonconforming uses to avoid an issue presented by a “standardless approval procedure”).

In re Handy (2000) (Court invalidates statutory provision containing no standards to the granting of consent by selectboards for development impacted by interim zoning bylaws.)

JAM Golf Result

We thus strike this provision of the ordinance and reverse the Environmental Court's conclusion that the project fails to meet its requirements.