IN RE JAM GOLF: GOOD NEWS, BAD NEWS, OR OLD NEWS?

In re Jam Golf, 2008 VT 110, decided by the Vermont Supreme Court on August 22, 2008, has caused considerable concern among municipal land use planners and regulators and their consultants and counsel. Viewed closely, the separate elements of the decision seem to present good news, bad news, and, perhaps, old news. They also suggest some lessons that drafters of land use plans and regulations and, perhaps, the Legislature, should take to heart.

The part-owner of a 450-acre planned residential development (PRD) in South Burlington had applied for an amendment of the PRD permit to allow 10 additional lots on an undeveloped 7-acre parcel. The Development Review Board denied the application. On appeal *de novo*, the Environmental Court also denied the application, holding that the project did not satisfy two provisions of the South Burlington zoning ordinance requiring (1) that a PRD "protect important natural resources including… scenic views" and "wildlife habitats" and (2) that a PRD conform to the city plan, which required residential developments to protect wildlife habitat.

On appeal, the Supreme Court addressed three critical issues:

(1) Whether expert testimony on wildlife corridors was admissible under the *Daubert* standard;
(2) whether the provisions of the ordinance concerning protection of scenic views and wildlife habitats were valid; and
(3) whether the provisions of the city plan were appropriately incorporated in the zoning ordinance and were sufficiently specific to be enforceable.

The Supreme Court held that the expert testimony was admissible but that the ordinance provision protecting scenic views and wildlife habitats lacked sufficient standards to be enforceable consistent with Due Process and that the provisions of the city plan, though properly incorporated in the ordinance, were similarly lacking in standards and too ambiguous to be enforceable. The Supreme Court accordingly reversed the decision of the Environmental Court but remanded the case to that court for a determination whether the project satisfied other provisions of the zoning ordinance that had not been addressed in the prior decision. The case remains pending before Judge W right on those issues

1. Expert testimony: Good News.

The Supreme Court's holding on expert testimony is essentially good news for those who offer such evidence on environmental issues. The applicant had challenged the evidence of the City's expert concerning the location of wildlife corridors on the ground that it lacked reliability because not based on the "scientific knowledge" required by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 505 U.S. 579 (1993), as applied by the Vermont courts in the interpretation of Vermont Rule of Evidence 702. The applicant had challenged the expert's evidence as too speculative and subjective to constitute scientific knowledge. The Supreme Court rejected this argument as so broad that it would rule out expert testimony in all such cases. The expert's testimony here was reliable because it "was based on the type of facts and data with

which wildlife experts are familiar—topographic features and wildlife movement patterns" that were generally used by experts in the field. The issue for the trial court was the adequacy of the expert's "factual basis and methodology," not whether, standing alone, it met the City's burden of proof. The effect of this decision is to shift the focus in areas involving many kinds of environmental impacts. In such cases, *Daubert's* standard of strict adherence to "the methods and procedures of science" should yield to the more flexible standard found in VRE 702 of a basis in "reliable principles and methods" and their proper application by the expert.

2. The Zoning Ordinance: Bad News, Good News, or Old News?

Bad News? In the Supreme Court, the applicant had challenged the Environmental Court's interpretation and application of the provision of the City's zoning ordinance protecting scenic views and wildlife. The Supreme Court, however, did not reach those issues, because it held that the ordinance provided no standards to guide a determination of the degree of protection required. Since the ordinance permitted some development in the affected area, protection could not be absolute. Accordingly, there must be some guidance to landowners that would allow them to know how to strike the balance between protection of "important natural resources" and development. In reaching this conclusion, the Court relied on earlier decisions that had struck down zoning provisions in which lack of standards and guidance led to "unbridled discrimination" in their application amounting to a Due Process violation. *See Town of Westford v. Kilburn*, 131 Vt. 120, 300 A.2d 523 (1973) ("promoting the public health, safety, convenience and welfare" as basis for special exception did not satisfy enabling act requirement of "appropriate conditions and safeguards"); *In re Miserocchi*, 170 Vt. 320, 749 A.2d 607 (2000) (absence of standards in nonconforming use exception provision required narrow construction of it to avoid uncertainty and Due Process objections, citing *Kilburn* and non-zoning cases); *In re Handy*, 171 Vt. 336, 764 A.2d 1226 (2000) (absence of standards in statutory provision allowing Selectboard to consent to use of existing ordinance while amendment pending violated Due Process, citing *Kilburn* and *Miserocchi*). The Court also cited *State v. Chambers*, 144 Vt. 234, 477 A.2d 110 (1984), in which the Court looked to other provisions of the applicable statute to find adequate standards to guide the state medical examiner and attorney general in ordering an autopsy.

Since the cases striking down regulatory or statutory land use provisions involved either very general police power standards or no standards at all, the decision in *In re JAM Golf* may certainly be criticized for its slender foundation. Nevertheless, the case makes clear that a Due Process standard of specificity will be applied to mandatory provisions of zoning and other land use regulations. The question for drafters is how to attain the requisite degree of specificity, a question on which the cases cited by the Court give little guidance. Perhaps a starting point, at least for the *JAM Golf* situation, may be found in the planned unit development enabling legislation, 24 V.S.A. § 4417(c)(4), which provides that the standards to be applied in reviewing a PUD "may vary the density or intensity of land use otherwise applicable" under the bylaws with respect to location, design, use and other characteristics of the PUD or its lots, structures, and open space.

To generalize, perhaps the formula that future drafters should follow is to set out specific positive requirements for the proposed use that will achieve a more generally stated goal. For

example, in *In re Pierce Subdivision Application*, 2008 VT 100 (8/1/08), a neighbor had challenged approval of a PRD on the grounds that the bylaw provisions concerning waiver of existing zoning regulations were unconstitutionally vague. Citing *Kilburn*, *Miserocchi*, *Handy*, and *Chambers*, the Supreme Court found that, given the purposes of the PRD enabling statute to encourage flexibility in development, and viewing the bylaw as a whole, the Constitutional challenge failed. The bylaw contained both general standards reflecting its overall objectives and specific standards setting forth requirements as to such matters as density, uses, and height and bulk restrictions. The standards had been properly applied by the Planning Commission and the Environmental Court in approving the waivers requested by the applicant.

<u>Good News?</u> The Supreme Court's decision on the applicant's second objection that the ordinance provision requiring a PRD to conform to the city plan is not permitted by the enabling act is sort of good news. The Court held that the language of 24 V.S.A. § 4410 permitting a municipality to use "any regulatory tools" whether or not enumerated in the statute, so long as the bylaws conformed to the plan and the general goals of 24 V.S.A. § 4302, was broad enough to allow incorporation of the plan in the ordinance. The question remains whether that is a useful or effective drafting step.

<u>Old News?</u> The Court held that the provisions of the plan applicable to protection of wildlife habitat, like the previously discussed ordinance provision, lacked sufficient specificity and clarity to be enforceable. Here, the Court turned to a line of cases that had interpreted Act 250's Criterion 10, requiring a finding that a project "[i]s in conformance with any duly adopted local or regional plan." 10 V.S.A. §6086(a)(10). *In re John Russell Corp*., 2003 VT 93, 176 Vt. 520, 838 A.2d 906, was cited for the proposition that, to be enforced as a regulation, a plan provision must contain a specific policy and standards to be enforced. In that case, general plan language in support of protecting rural character and residential development was deemed insufficient to establish a prohibition against industrial uses in the area in question. The Court has thus now extended this aspect of its Act 250 jurisprudence to the comparable use of plan provisions in municipal bylaws. Though *Russell* and its predecessor cases recognized that Criterion 10 permits resort to municipal bylaws for interpretive purposes if a plan is ambiguous, that provision was obviously of little benefit in *JAM Golf*, given the nature of the Court's holding on the basic ordinance provision involved.

It would seem that in its Criterion 10 decisions, the Supreme Court has been sending towns (and perhaps the Legislature) a two-part message: (1) Plans need not have regulatory effect; that effect is best achieved through bylaws. (2) If a plan must be given regulatory effect, because a town has no bylaws or wishes to incorporate plan provisions in its bylaws, those provisions must articulate a specific policy and standards. The ultimate lesson would seem to be, let the plan be abstract and visionary but implement it through bylaws that conform to its purposes closely and contain specific, clear, and enforceable standards. South Burlington's choice at this point is either to eliminate the reference to the plan from its ordinance or to add to the plan the specifics that the Court found also lacking in the ordinance provision.

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