WHAT THE JAM GOLF DECISION WILL MEAN FOR YOUR MUNICIPALITY

We reported in the October 2008 *VLCT News* that the Vermont Supreme Court had struck down two sections of a South Burlington zoning ordinance on the grounds that the sections were so vague and delegated such standardless discretion to the City's Development Review Board (DRB), that they violated property owners' due process rights. At that time we predicted that the case, *In re Appeal of JAM Golf, LLC*, 2008 VT 110, would prove to be one of the Vermont Supreme Court's more controversial decisions on municipal land use regulation. That prediction is apparently coming true as *JAM Golf* buzz grows around the state. Planners, attorneys, and zoning officials are all talking about the case and offering their opinions on what impact it might have on local land use programs. The purpose of this article is to explore what the *JAM Golf* case might mean for Vermont's municipal land use programs and give some practical guidance on how to deal with issues that may arise from the case.

What happened in *JAM Golf*?

The *JAM Golf* case involved the Vermont National Country Club, a planned residential development (PRD) in South Burlington permitted for 296 residential units and an 18-hole golf course. Several years ago, developer JAM Golf, LLC sought approval from the South Burlington DRB to amend the PRD approval. The proposed amendment would allow ten more residential lots in a wooded area bounded by three fairways, another residential development, wetlands, and open space.

The South Burlington DRB denied the proposed amendment, and the denial was then appealed to the Environmental Court. The Environmental Court denied the amendment, holding that the proposal did not satisfy section 26.151(g) of the city zoning ordinance requiring PRDs to "protect important natural resources including … scenic views" and "wildlife habitats." The Environmental Court also held that the proposal failed to satisfy section 26.151(l) of the zoning ordinance, requiring PRDs to conform to a City plan requirement that residential developments "protect" wildlife habitat.

JAM Golf appealed the Environmental Court's decision to the Vermont Supreme Court. Among other things, JAM Golf's attorney challenged the Environmental Court's interpretation of sections 26.151(g) and 26.151(l), asserting that the record did not support the Environmental Court's conclusions that the project did not protect wildlife habitats or protect scenic views.

The Supreme Court never reached JAM Golf's arguments on these points. Instead, the Supreme Court concluded that section 26.151(g) of the South Burlington zoning ordinance provided "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." The Supreme Court then struck section 26.151(g) from the zoning ordinance stating, "Such standardless discretion violates property owners' due process rights."

The Supreme Court also struck section 26.151(l) from the ordinance. It held that while municipalities may require development to conform to a municipal plan, municipal officials may not deny permission for a project where there is not a specific policy set forth in the plan stated

in clear and unqualified language that creates no ambiguity. According to the Supreme Court, any development, by necessity, will reduce wildlife habitat and scenic views, but because the municipal plan failed to define what was to be protected and lacked sufficient standards as to how or when development should be restricted to accomplish this protection, it was too vague to be enforceable.

Has this vagueness argument ever been raised before?

Yes, but not often. The notion that a statute or ordinance is void when it forbids conduct in terms so vague that a person of common intelligence must guess at its meaning has actually been part of Vermont law (and the law everywhere else, for that matter) for quite some time. While the "void for vagueness" doctrine has been asserted most frequently in criminal cases, it has been raised in civil cases as well. See, for example, *State v. Dragon*, 133 Vt. 620 (1975)(criminal statute prohibiting theft of something affixed to real property), *State v. Trucott*, 145 Vt. 274 (1984)(criminal statute prohibiting operation of a motor vehicle while intoxicated), *Kimball v. Hooper*, 164 Vt. 80 (1995)(civil lobbying disclosure statute); *In re S.M.*, 175 Vt 524 (2003)(civil home education statute), *Richards v. Nowicki*, 172 Vt. 142 (2001)(municipal septic ordinance).

The Vermont Supreme Court first considered the vagueness argument in the land use context in 1973. At issue in the case of *Westford v. Kilburne*, 131 Vt. 120 (1973) was a Westford zoning ordinance requiring zoning board approval for certain commercial activity. The ordinance only required the board of adjustment to "give due consideration to the public health, safety, convenience and welfare" of the town's inhabitants when issuing a permit and provided no other standards for review. The Supreme Court held that this did not provide the zoning board sufficient standards to guide its decision. "As a consequence of a failure … to spell out guiding standards, the applicant for a permit is left uncertain as to what factors are to be considered by the board of adjustment." *Id* at 124. The court noted that a balance must be found. Zoning ordinances "should be general enough to avoid inflexible results," yet "they should not leave the door open to unbridled discrimination." *Id*. at 126.

More recently, the Supreme Court addressed the vagueness issue in the context of a Clarendon zoning ordinance regulating nonconforming uses. *In re: Miserocchi*, 170 Vt. 320 (2000). The Clarendon ordinance required zoning board approval to change a nonconforming use to another nonconforming use, and for the reestablishment of a nonconforming use after a period of discontinuation. Unfortunately, the ordinance failed to provide any criteria to guide the zoning board in considering these approvals. The Supreme Court said that such a decision "arrived at without reference to any standards or principles is arbitrary and capricious; such ad hoc decision-making denies the applicant due process of law." *Id*. at 325.

So, what makes the *JAM Golf* decision unusual?

What distinguishes the *JAM Golf* case from the Supreme Court's other land use decisions is the manner in which the court dealt with the ordinance's ambiguity. In the past, the court has dealt

with ambiguous zoning ordinances by construing the ordinance in favor of the property owner, reasoning that since zoning ordinances are in derogation of common law property rights, any uncertainty in the ordinance must be decided in the owner's favor. *Appeal of Week*, 167 Vt. 551 (1998). This has allowed the court to issue decisions while preserving the integrity of the offending ordinance.

For example, in *Miserocchi*, the Supreme Court worked around the ambiguous Clarendon ordinance by construing the ordinance narrowly, ultimately allowing the landowner to change the use of the structure from one noncomplying use to another noncomplying use without a permit. In *JAM Golf*, the Supreme Court took the unprecedented step of striking the offending provisions of the ordinance completely. Even in *Miserocchi*, where the Supreme Court expressly recognized constitutional due process concerns arising from the lack of guiding standards, the court did not strike down the offending provisions of the Clarendon ordinance.

What message should local planning officials take from the *JAM Golf* decision?

While VLCT still does not anticipate widespread invalidation of local zoning bylaws as a result of the *JAM Golf* decision, officials drafting zoning ordinances should give the decision careful consideration. While bylaws should contain goals for protecting a community's important resources against thoughtless development, these goals must be supported by specific standards showing how the goals might be achieved. What was true in 1973 remains true today. Zoning ordinances must be general enough to avoid inflexible results yet specific enough not leave the door open to unbridled discrimination by local officials.

Planning officials should review their zoning ordinances: Is there guidance as to what may be expected from landowners who wish to develop their property in conformance with the ordinance? Are there standards describing how or when development will be restricted to accomplish the municipality's resource protection goals? Will an applicant know what factors and criteria will be considered by zoning officials when their project is reviewed? Remember, if an ordinance does not contain sufficient standards to guide applicants and zoning officials in the review process, the ordinance may be construed in favor of the applicant or, after *JAM Golf*, struck entirely. The result in either case is likely to be the same: the development will not conform, in some measure, to one or more of the municipality's resource protection goals.

In light of *JAM Golf*, how should local zoning officials handle the assertion that an ordinance provision is vague?

Given *JAM Golf's* increasing notoriety, it is almost certain that some permit applicants will assert that a particular bylaw provision is so vague that it should be considered void and not applied to their proposed project. Zoning administrators and members of development review boards, zoning boards of adjustment, and planning commissions should remember that municipal zoning bylaws are presumed valid. *McLaughry v. Town of Norwich*, 140 Vt. 49 (1981). While the law is clear that ambiguity in a zoning ordinance must be decided in favor of the property

owner, local officials are not required under *JAM Golf* to determine whether a provision might be void. That is a question for the Environmental Court on appeal.

A copy of the case can be obtained at http://info.libraries.vermont.gov/supct/current/op2006-307.html. If you have questions about the *JAM Golf* case, your zoning and subdivision ordinances or your town plan, contact the VLCT Municipal Assistance Center. Our team of attorneys and an AICP-certified planner can evaluate your ordinances, bylaws, and plans and recommend language to make them more effective and compliant with the *JAM Golf* decision.

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***VLCT News*, March 2009**