

Environmental Court Tackles DRB Member Bias and Punts

The Vermont Environmental Court has issued a decision sharply critical of the St. Albans town development review board's (DRB) failure to address member bias during a hearing on an application for construction of a new Wal-Mart store. *In re: JLD Properties – Wal-Mart St. Albans 132-7-05 Vtec* (September 2006).

Of particular concern to the Environmental Court were the actions of Ernest Levesque, Jr. Mr. Levesque was a member of the St. Albans town DRB and had served as the zoning administrator for the town of St. Albans in the 1990s. While participating in the hearing on the application to construct a new Wal-Mart store, Mr. Levesque wore a hat bearing the words "ST. ALBANS NEEDS WAL-MART." After the chair of the DRB asked him to remove the hat, Mr. Levesque placed the hat in front of him on the hearing table, where it could be seen by the hearing participants.

Mr. Levesque had received the hat while serving as the St. Albans zoning administrator, as a gift from a Wal-Mart employee after another local permit proceeding. It was also revealed that, some time before serving on the DRB, Mr. Levesque had telephoned the principal of the company seeking the permit to suggest that Wal-Mart first go into an existing retail space in St. Albans so that it would have community support behind it when it applied for a permit to construct a new facility. This last fact was not disclosed to the public at the hearing.

The appellants argued that their constitutional due process right to a fair and open hearing before an impartial decision-maker was violated so egregiously as to require the Environmental Court to conclude that the DRB decision was void or should be vacated, and to remand the matter for further proceedings before the DRB so that it can render a valid decision.

The Court noted that, as a member of the DRB conducting a quasi-judicial hearing on the application, Mr. Levesque had a right to his privately-held opinion, but when he wore a hat with a pro-Wal-Mart inscription while sitting to judge the merits of an application to site a Wal-Mart store, he "destroyed the appearance of fairness that due process requires and to which the stakeholders at the hearing were entitled, whether or not he also departed from the reality of giving the application a fair hearing." The appearance of prejudgment contravened the constitutional standard of a fair trial before an impartial decision-maker: "[Mr. Levesque's] act of disrespect for the integrity of the DRB proceedings, whether or not intended as such, gave both the stakeholders and observers good reason to doubt that the proceedings were being conducted by the required impartial and wholly disinterested tribunal."

Despite its strong criticism, the Environmental Court ultimately refused to remand the case back to the DRB for a new hearing. Instead, it elected to proceed with a *de novo* appeal, turning away from an excellent opportunity to demonstrate to Vermont cities and towns the potential consequences of failing to address DRB member bias and conflicts of interest.

A copy of the decision can be obtained at <http://www.vermontjudiciary.org/tcdecisions/05-132z.JLD-StAWalMart.sjo.pdf>

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