

# Zoning and Due Process Rights

## *Vermont Supreme Court: Zoning Bylaw Must Include Specific Standards to Ensure Property Owners' Due Process*

In what may prove to be one of its more controversial decisions on municipal land use regulation, the Vermont Supreme Court has 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. *In re Appeal of JAM Golf, LLC*, 2008 VT 110.

The case involved the Vermont National Country Club, a planned residential development (PRD) permitted for 296 residential units and an 18-hole golf course. Developer JAM Golf, LLC, sought to amend the PRD approval to allow ten more lots in a wooded area bounded by three fairways, another residential development, wetlands and open space.

The DRB’s decision was appealed to the Environmental Court, which denied the amendment. The Environmental Court held that JAM Golf’s 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.

In its subsequent appeal to the Supreme Court, JAM Golf challenged the Environmental Court’s interpretation of sections 26.151(g) and 26.151(l). The Supreme Court never reached JAM Golf’s arguments. Instead, it concluded that section 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.” The Supreme Court then struck section 26.151(g) from the zoning ordinance.

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, South Burlington’s city plan requirement for “protection” of wildlife habitat and scenic views was too ambiguous to be enforceable without more specific standards for how protection could be accomplished. Since any development by necessity must reduce wildlife habitat and scenic views, applicants and courts could not know how much less than total preservation of these resources might qualify as sufficient “protection” under the ordinance.

Examples of standards that might overcome this problem include minimum habitat protection percentages, habitat restoration requirements, limits on tree and vegetation removal, and habitat buffer requirements, all of which could provide performance-measuring benchmarks. At the same time, a developer could be allowed flexibility and the opportunity to utilize design layouts to attain protection goals, as long as these performance standards are met. Another approach may be the use of required set-asides for the provision of open space, especially if the zoning or subdivision ordinance includes criteria stating a preference for particular natural areas or habitats that occur on a

development site. Standards for protection of scenic views could include building size, bulk, location and height restrictions, sign and fencing regulations, as well as standards for on-site landscaping.

VLCT does not anticipate widespread invalidation of local zoning bylaws and plans by Vermont courts as a result of the *JAM Golf* decision. However, planning commission members and others involved in drafting municipal plans and zoning ordinances should give the decision careful consideration. Plans and bylaws should contain goals for protecting a community's important resources and characteristics against thoughtless development. But these goals may be unenforceable if specific standards addressing how to achieve these goals are not provided in the bylaw or plan. As the Supreme Court stated, a bylaw must specify sufficient standards and safeguards to guide applicants and decision makers in the development review process. 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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