

## **JAM Golf, LLC Revisited**

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. *In re Appeal of JAM Golf, LLC*, 2008 VT 110. In March, we followed up with an article that explored what the *JAM Golf* case might mean for Vermont's municipal land use programs and which gave some practical guidance on how to deal with issues that may arise from the case.

In that article we pointed out the central message of the *JAM Golf* decision: while zoning bylaws should contain goals that protect a community's important resources against thoughtless development, those goals must be supported by specific standards showing how the goals might be achieved. As we also noted in that article, balance is the key. Zoning ordinances must be general enough to avoid inflexible results yet specific enough not leave the door open to unbridled discrimination by local zoning officials.

But how might local zoning officials know when the proper balance has been achieved? Another Vermont Supreme Court decision may provide some insight on this question. *In re Pierce Subdivision Application*, 2008 VT 100 was decided just three weeks before the *JAM Golf* case. *Pierce* involved a proposed planned residential development (PRD) in Ferrisburgh. The applicant proposed to subdivide a 113-acre portion of the subject property into a 21-lot PRD, with 76 percent of the land reserved for common space.

Under the Ferrisburgh zoning bylaw, a qualified PRD that proposes cluster housing and preservation of open space could be authorized by the planning commission by waiver of the standard rules governing single-house lot development. The subject parcel encompassed three different zoning districts, each of which had a different minimum lot size. Because zoning regulations for these districts would effectively prevent the applicant from clustering houses on the parcel, the applicant requested six waivers of the district zoning regulations to reduce the required minimum lot size and acreage per dwelling, along with frontage, width, depth, and setback requirements.

The planning commission approved the proposed PRD, granting the requested waivers. A neighbor appealed the approval to the Environmental Court asserting, among other things, that the bylaws delegated standardless discretion to the planning commission to grant waivers of the district zoning regulations. The Environmental Court rejected the neighbor's arguments and affirmed the approval of the application. The neighbor then appealed the Environmental Court's decision to the Supreme Court, again arguing that the bylaw's PRD waiver provisions lacked necessary standards, thereby denying adjoining landowners due process and equal protection.

The Supreme Court rejected this argument, noting that while some of the Ferrisburgh bylaw's objectives were general, other provisions imposed specific limits to guide and check the discretion of local officials, including restrictions on the type of units that may be allowed, the percentage of open space required in a PRD, and the timing and form of applications. By providing both general goals and specific standards for PRD review, "the bylaw strikes an

appropriate balance between providing guidance to the [Planning] Commission and avoiding inflexible requirements which would defeat the creativity and flexibility required to effectuate the goals of the PRD alternative to traditional development.”

So what were these goals and standards? The Court found the following bylaw provisions to be “overall objectives and recommendations, rather than specific standards to be measured and met”:

- The PRD is consistent with the municipal plan.
- The PRD is an effective and unified treatment of the development possibilities of the site; and the development plan makes appropriate provision for preservation of streams and stream banks, steep slopes, wet areas, and unique natural and manmade features.
- The development plan is proposed over a reasonable period of time in order that adequate municipal facilities and services may be provided.
- Any open space land will be evaluated as to its agricultural, forestry and ecological quality.

In contrast, the Court found the following bylaw provisions to “contain more specific standards for the approval of a PRD”:

- The overall density of the project does not exceed the number of dwelling units which could be permitted, in the planning commission’s judgment, if the land (excluding the area within the boundaries of any proposed road) were subdivided into lots in accordance with the district regulations and other relevant provisions of these bylaws.
- The uses proposed for the project are residential; dwelling units may be of varied types, including one-family, two-family, or multi-family construction.
- Any modification of the zoning regulations approved under this section shall be specifically set forth in terms of standards and criteria for the design, bulk, and spacing of buildings, and the sizes of lots and open spaces that shall be noted on or appended to the application.
- District regulations on height and spacing between main buildings shall be met.
- To ensure adequate privacy for existing or proposed uses adjacent to the PRD, structures on the perimeter of the PRD shall be set back 50 feet and screening may be required.
- Adequate water supply and sewage disposal facilities shall be provided.
- Each dwelling unit shall have a minimum two-acre lot exclusively associated with it and must comply with the specific standards set forth in Section 4.1 and 4.2 of these bylaws, excluding the lot depth requirement.

- The minimum acreage for a PRD shall be 25 acres; a minimum of 60 percent of the total parcel shall remain undeveloped.

With regard to these provisions, the Court stated:

[W]hile some of the bylaws' objectives are general, other provisions impose specific limits to guide and check the Commission's discretion. These requirements provide restrictions on the type of units which may be allowed, the percentage of open space required in a PRD, and the timing and form of applications.... By providing both general and specific standards for PRD review, the bylaw strikes an appropriate balance between providing guidance to the Commission and avoiding inflexible requirements which would defeat the creativity and flexibility required to effectuate the goals of the PRD alternative to traditional development. The list of particular requirements ... provides sufficient standards for the Commission, and for the court upon review, to evaluate a proposed project's compliance with the bylaws....

How does this compare with the South Burlington bylaw provisions at issue in *JAM Golf*? Remember, section 26.151(g) of the South Burlington zoning ordinance required PRDs to "protect important natural resources including ... scenic views" and "wildlife habitats," and section 26.151(l) of the zoning ordinance required PRDs to conform to a City plan requirement that residential developments "protect" wildlife habitat. With regard to section 26.151(g), the Court opined that it 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." Thus, it violated the property owners' due process rights. Likewise, the City plan requirement for "protection" of wildlife habitat and scenic views was considered by the Court to be too ambiguous to be enforceable without more specific standards for how protection could be accomplished.

While both cases involved PRDs, in the eyes of the Vermont Supreme Court, the South Burlington bylaw clearly lacked the more specific standards found in the Ferrisburgh bylaw. Though the *Pierce* case did not directly involve the resource protection issues at play in *JAM Golf*, the case indicates that general resource protection goals, coupled with more specific protection standards, will likely strike the appropriate balance between providing guidance to zoning officials, applicants, and courts while avoiding inflexible requirements that would defeat the goals of PRD development. Such resource protection standards might address habitat restoration requirements, minimum habitat protection percentages, or limits on tree and vegetation removal. Standards for protection of scenic views could address building size, bulk, location, height restrictions, and landscaping requirements. Municipalities might consider the use of covenants or easements for the provision of open space, as was required in *Pierce*, especially if the zoning or subdivision ordinance includes criteria stating a preference for particular natural areas or habitats that occur on a development site.

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