

## LEGAL AND REGULATORY NOTES

### Regulating an Economic Interest: The Vermont Supreme Court's Test for Vagueness

In 2008, the Vermont Supreme Court struck down two sections of South Burlington's land use regulations on the grounds that they were so vague they delegated "standardless discretion" to the Development Review Board (DRB) in reaching its decision, thereby denying property owners' their rights to due process under the 14<sup>th</sup> Amendment of the United States Constitution. *In re Appeal of JAM Golf, LLC*, 2008 VT 110. The court found that the City's zoning bylaw didn't provide sufficient guidance to its DRB, resulting in the exercise of "unbridled discrimination" by the board. *In re Appeal of JAM Golf, LLC*. In a case recently decided by the Vermont Supreme Court, *In re Beliveau NOV, Town of Fairfax v. Beliveau*, a homeowner asserted (among other things) that definitions in Fairfax's land use regulations were unconstitutionally vague. At first this seems like a similar case to JAM Golf, but it turns out it isn't. Here, the Court reviewed the facts through a slightly different lens, applying a "less strict" test for vagueness. The Court determined the regulations in question affected an "economic interest" rather than a "constitutional right." This, along with the fact that the homeowner didn't go through the permitting process and thus failed to seek clarification from the municipality, resulted in the Court approaching "the vagueness challenge ... with a critical eye."

In May 2008, the administrative officer notified the homeowner, Leon Beliveau, that he changed the use of his property from a "single-family dwelling" to "rooming-and boarding house" without a permit. According to the letter, the homeowner could apply for a permit to change the use of the property or cease operating his business. The homeowner took no action to correct the situation, and continued to rent out rooms in his house. The administrative officer issued a formal notice of violation (NOV) on June 5, 2008, and the homeowner appealed it to the DRB. The DRB upheld the NOV and the

homeowner brought an unsuccessful appeal to the Environmental Division of the Vermont Superior Court (after a remand by the Vermont Supreme Court to find additional facts). The homeowner brought this appeal to the Vermont Supreme Court contending that the definitions of "family" and "rooming-and-boarding house" "fail[ed] to provide the required notice, clarity and precision to permit a homeowner [to] determine what is necessary for compliance."

In its decision, the Vermont Supreme Court said that "[l]aws and regulations are unconstitutionally vague when they either fail to provide sufficient notice for ordinary people to understand what conduct is prohibited, or allow arbitrary and discriminatory enforcement." The Court, citing *In re Rusty Nail Acquisition, Inc.*, 2009 VT 68 (a case involving regulations applied by the State Liquor Control Board), determined "[t]he vagueness test is less strict when applied to a regulation that affects economic interests, not constitutional rights, and when an aggrieved party can seek clarification of [the regulation's] meaning or resort to an administrative process." The Court pointed out that the administrative officer recommended the homeowner apply for and obtain a permit for the change of use and as part of the review process the homeowner could have discussed with the DRB the "precise meaning of any words." The homeowner also had the opportunity to participate in the statutory bylaw amendment and adoption process before the planning commission or selectboard. Because these avenues for clarification and participation exist locally, "the concern that people will not be able to understand what conduct is prohibited is greatly tempered [,]" and the Court noted that it "[is] unlikely to intervene for persons who had the opportunity to clarify their responsibilities and did not use it." The homeowner, after the initial citation, neither ceased the violation, nor sought clarification by applying for a permit to

change the use as initially directed by the administrative officer; rather he challenged the unconstitutionality of the regulation after receiving the formal NOV, a caution to property owners to avail themselves of the local process before questioning the legitimacy of any local regulation.

Regardless of whether the homeowner sought clarification at the local administrative level, the Court nevertheless found that the definitions in the Town's regulations for "family" and "rooming-and-boarding house," when read together, gave the administrative officer and DRB adequate guidance to avoid a claim of standardless discretion; and provided "a general understanding of how to comply with the bylaws[.]"

This decision releases some pressure on municipal regulations that built up after the JAM Golf decision. The Court's scrutiny of whether a land use regulation is unconstitutionally vague is moderated if the regulation specifically affects an economic interest and whether a property owner sought answers to his or her questions prior to asserting that the regulation was unclear. Even with the positive implications in the administration of municipal land use regulations, it does beg the question when do land use regulations *not* affect an economic interest? This decision does not change lessons learned from JAM Golf – that municipal regulations must be clear to avoid a claim of a due process of violation – but it does highlight the potential for a less strict application in certain instances.

The case is archived at <http://info.libraries.vermont.gov/supct/current/op2012-135.html>.

Stephanie Smith AICP, Senior Associate  
VLCT Municipal Assistance Center