

STATE AGENCY SUBJECT TO LOCAL PERMIT

In *City of South Burlington v. Vermont Department of Corrections*, the Vermont Supreme Court held that a state agency is not exempt from the exclusivity-of-remedy provisions of state zoning law and that a state agency must raise the issue of “sovereign immunity” within the applicable appeals period for the permit or else the right to raise this issue is forfeited. The Court also strongly implied that the Vermont Department of Corrections (Department) is not exempt from local zoning under the legal theory of sovereign immunity, which provides that governmental entities are immune from certain legal actions. (See also “Vermont Department of Corrections Bound by Conditional-Use Permit,” August 2000, *VLCT News*.)

The Department applied for and obtained a permit from the planning commission for an expansion to an existing prison. The planning commission granted the permit with conditions, including a limit on the number of inmates that could be housed at the prison. The Department violated this condition. When the city attempted to enforce the permit seven years after it was issued, the Department claimed the permit was void based on the legal theory of “sovereign immunity.”

The Court ruled that by accepting the permit with conditions and not appealing it within the statutory time periods, the Department failed to employ its exclusive remedy under 24 V.S.A. § 4472 to challenge the condition. Accordingly, the Court held that the Department is bound by the condition. Unfortunately, the Court did not address the Department’s sovereign immunity argument because it decided the case on the grounds that the Department failed to raise its claim of sovereign immunity within the statutory appeal period. Accordingly, this is an open issue that may be decided in another case.

In conclusion, the impact of the decision is that a state agency that submits to the local permit process is bound by the terms of the permit, unless the permit decision is appealed within the period prescribed by law. In addition, the Court did not address the issue of whether the state is exempt from local zoning under the legal theory of sovereign immunity. Accordingly, municipalities should proceed as if state agencies are not exempt from local zoning until a decision to the contrary is rendered by the Court.

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