VERMONT SUPREME COURT DEEMS PROVISION OF TITLE 24 CHAPTER 117 UNCONSTITUTIONAL

In a decision that all municipalities should take note of, the Vermont Supreme Court ruled that 24 V.S.A. § 4443 (d) is unconstitutional. *In re Handy v. Town of Shelburne, Vt. Nos. 98-015 and 98-016 (November 17, 2000).*

In sum, 24 V.S.A. § 4443(d) provides that if proposed zoning amendments have been publicly noticed for a hearing, the zoning administrator may not issue a permit if the application relates to the proposed zoning amendments. Under the statute, a permit may only be issued for such a project if the selectboard or city council, following a public hearing, indicates in writing that it consents to the issuance of the permit. The purpose of 24 V.S.A. § 4443(d) appears to be to allow municipalities to apply the intent of proposed zoning amendments to zoning permit applications submitted during this interim period.

In its decision, the Court focused on the fact that 24 V.S.A. § 4443(d) does not spell out the process that the municipalities must follow in implementing the statute. In fact, based on the absence of clear standards for applying the statute, the Court rendered it unconstitutional.

In re Handy actually involves two separate cases with two separate appellants. The cases were both decided by the Environmental Court under 24 V.S.A. § 4443(d) and consolidated in an appeal before the Vermont Supreme Court.

The appellant Paul Handy submitted an application for conditional use and variance approval to the town of Shelburne after public notice of proposed zoning amendments had been issued by the town but prior to adoption of the zoning amendments by the selectboard. The appellant Jolley Associates submitted an application for conditional use approval to the town of Shelburne after the proposed zoning amendments were adopted by the selectboard but prior to the effective date of the zoning amendments, which by statute is 21 days after adoption for urban municipalities.

Both appellant Handy and appellant Jolley Associates stood to benefit significantly from having their respective applications reviewed under the existing rather than the proposed zoning. In both cases the new zoning would prohibit the use proposed by the appellants and the existing zoning treated the projects as conditional uses.

After it examined and rejected the Environmental Court's interpretation of 24 V.S.A. § 4443(d)'s timing requirements, the Vermont Supreme Court shifted its analysis to its own concerns regarding the construction of the statute. In a rare decision, the Vermont Supreme Court decided to base its decision on a legal rationale that was not addressed by the Environmental Court or argued by any of the parties to the case.

Even though no party raised the issue, the Vermont Supreme Court, in its decision, expressed grave concerns regarding the lack of standards in the statute for a selectboard or city council to follow in a review of a zoning permit application under 24 V.S.A. § 4443(d). The Court cited several cases, including its recent decision in *In re Miserocchi* that invalidated a local nonconforming use bylaw, in which it ruled that the lack of standards rendered a zoning ordinance unconstitutional. At the end of the day, the Vermont Supreme Court ruled in *Handy* that the lack of criteria and standards in 24 V.S.A. § 4443(d) renders the statute unconstitutional for the following reasons:

> (1) a delegation of legislative power without adequate standards violates the separation of powers required by the state constitution;
> (2) the power to grant or refuse zoning permits without standards denies applicants equal protection of the laws; and
> (3) administration of zoning without standards denies landowners due process of law because it does not give them notice of what land uses are acceptable.

In striking down 24 V.S.A. § 4443(d) as unconstitutional, the Vermont Supreme Court recognized that some rule must be in place for municipalities to follow when permit applications are submitted in the interim period between proposing and effectively adopting amendments to existing zoning. Accordingly, the *Handy* decision provides that when permit applications are submitted while zoning amendments are pending, municipalities must apply Vermont's vested rights rule to determine whether the existing zoning bylaws apply.

The vested rights rule is set forth by the Vermont Supreme Court *in Smith v. Winhall Planning Commission, 140 Vt. 178 (1981).* In *Handy*, the Vermont Supreme Court described the vested rights rule as "normally" vesting "a right in the developer to develop under the zoning ordinance in effect at the time of application." However, the Court noted that when it adopted this rule in *Smith v. Winhall Planning Commission*, which is the minority rule in the country, it explained that the rule "particularly fit a situation where no zoning amendment is pending at the time of application." Moreover the Court pointed out that under its vested rights rule a zoning application must be "validly brought and pursued in good faith." Accordingly, the Court sent both the *Handy* and the *Jolley Associates* cases back to their respective local zoning boards to be decided based on the new vested rights/good faith analysis.

So what does this case mean for municipalities? It means that when an application for a zoning permit is submitted after proposed zoning amendments have been publicly noticed, but before the zoning amendments are adopted and effective, 24 V.S.A. § 4443(d) no longer applies. This means that the zoning administrator is no longer prohibited from acting on a zoning permit during this interim period without the consent of the selectboard or city council. This does not, however, mean that municipalities may ignore the fact that an application is being submitted while zoning amendments are pending.

Instead of applying 24 V.S.A. § 4443(d) the governing zoning authority in a municipality (the zoning board of adjustment, the development review board or planning commission depending upon the type of application submitted) must decide whether the applicant has a vested right to have its application reviewed under the existing zoning. As discussed above, under Vermont's vested rights rule applications submitted while zoning amendments are pending must be reviewed under the existing zoning effective at the time the application is filed unless it is determined that the applicant is not acting in good faith. *Accordingly, the good faith analysis should now be a preliminary issue for local review of applications submitted during the interim period between the time zoning amendments are officially proposed and the time the amendments become effective.* If the appropriate zoning authority determines that the applicant is not acting in good faith, then the existing bylaws may not be applied to the project.

The question arises how does a municipality determine whether an applicant is acting in good faith? In *Handy*, the Vermont Supreme Court cited several cases from other states that set forth this good faith standard. *See Stowe v. Burke, 122 S.E.2d 374, 379-80 (N.C. 1961); Penn Township v. Yecko Bros., 217 A.2d 171, 173 (Pa. 1966); see generally City of Jackson v. Lakeland Lounge, 800 F. Supp. 455, 461-62 (S.D. Miss. 1992) (collecting cases); G. Hanes & J. Minchew, On Vested Rights to Land Use and Development, 46 Wash. & Lee L. Rev. 373, 398-400 (1989).* These cases provide some guidance on what the good faith standard is.

In addition, as an example of how the good faith analysis works, the Vermont Supreme Court indicated that appellant Jolley Associates would have a higher "burden to show that it did not engage in a race to put in some development proposal before the ordinance became effective." The inference being that an applicant who rushes an application to take advantage of the provisions in the existing zoning that would not be available under the pending zoning amendments is not acting in good faith. Ultimately, zoning authorities must address the good faith issue based on the facts and circumstances of each case.

What is lost as a result of this decision is the opportunity for developers who wish to take advantage of proposed zoning amendments to have a project approved prior to the final adoption of the zoning amendments. The zoning amendment process can be lengthy, particularly for municipalities that vote on zoning amendments by Australian Ballot. Prior to this decision, 24 V.S.A. § 4443(d) allowed a selectboard or city council to approve a project under proposed zoning while zoning amendments are pending. This flexibility no longer exists under the law.

In sum, *In re Handy* is a significant decision that should be reviewed and discussed by the selectboard and local zoning and planning boards. The Law Center may be reached at 800/649-7915 with specific questions regarding the impact of this decision on your municipality.

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