

ENVIRONMENTAL COURT UPHOLDS MUNICIPAL RIGHT TO REGULATE THE STATE

In an extremely favorable decision for municipalities, the Environmental Court upheld the right of municipalities to broadly regulate the state through zoning bylaws under 24 V.S.A. § 4409. *In re: Appeal of State of Vermont, Department of Buildings and General Services*, Docket No. 245-10-00 Vtec (February 5, 2002).

The case involves a dispute between the town of Windsor and the state Department of Buildings and General Services over a conditional-use permit granted by the Windsor Zoning Board of Adjustment (ZBA). The permit authorized the state to construct a three-bay garage at the Southeast State Correctional Facility. The state appealed the issuance of the permit and objected to numerous conditions in the permit, including the building materials to be used, building color, the foundation, source of power for the garage and lighting.

In a motion for summary judgment, the state argued that the town exceeded its authority to regulate state projects under 24 V.S.A. § 4409 by attaching such conditions to the permit. The town countered with its own motion for summary judgment, in which it noted that the state's arguments were clearly contrary to the plain meaning of 24 V.S.A. § 4409.

Twenty-four V.S.A. § 4409 is the section of the state zoning enabling law (Title 24 of Chapter 117) that limits the ability of municipalities to regulate certain facilities that provide a public benefit. To this end, the statute prohibits municipalities from banning outright facilities such as schools, churches, public utilities and public facilities in general from being located in town.

Under 24 V.S.A. § 4409 municipalities that do not make "reasonable provision" for the location of the listed facilities in its zoning bylaws may only regulate such facilities with regard to "size, height, bulk, yards, courts, setbacks, density of buildings, off-street parking and loading facilities and landscaping or screening requirements." The town of Windsor argued that it had made reasonable provision for the proposed state facility by allowing it as a conditional use in its bylaws. Because it made reasonable provision for the facility, the town took the position that under 24 V.S.A. § 4409 it could regulate the facility without any limitations.

The Environmental Court agreed with town's argument and granted the town's motion for summary judgment. In rendering its decision the Court stated:

[I]f the municipality provides for the location of the listed uses, then it may regulate them as it would regulate any other use. Section 4409(a) does not provide two separate and independent regulatory authorizations, one to regulate location and other to regulate the dimensions, parking, landscaping and screening of the listed types of facilities. Nor does §4409(a)(2) provide some sort of exemption for state owned facilities based on the state's sovereignty. Rather, the uses listed in § 4409(a) are all treated the same under the statute, whether they are private for profit, nonprofit, religious, municipal or state uses.

The Court's decision is important to municipalities for two main reasons. First, it clearly rejects the state's contention that the state is somehow exempt from municipal

land use regulation. As the Court pointed out in its decision, the statute simply does not exempt state facilities from regulation.

Second, the decision confirms that under 24 V.S.A. § 4409, as long as municipalities identify zoning districts where the facilities listed in the statute are at least permitted as conditional uses, municipalities are free to regulate these facilities like they would any other uses. That means permits may be conditioned or even denied if the evidence establishes that the proposed project does meet the criteria in the bylaws.

VLCT recommends that municipalities review their zoning bylaws to make sure that you have made reasonable provision for the facilities listed in 24 V.S.A. § 4409. If your bylaws do not address these facilities, municipalities must determine in which districts it wants the various facilities to be located and whether the facilities will be permitted or conditional uses in the district.

Unfortunately this matter is not over for the town of Windsor and the state of Vermont as the state almost immediately appealed the decision to the Vermont Supreme Court. The state appears to be determined to limit the ability of cities and towns to regulate its facilities through local zoning. VLCT is very concerned about the state's efforts to effectively exempt itself from local review and we will closely track the appeal as it moves through the Vermont Supreme Court. We also encourage local officials concerned about the state's position to contact their local representatives.

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