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Bordering town can't fight permit for plant

No standing even though fire dept could be called in

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A Superior Court judge has ruled that the town of Chelmsford lacked standing to challenge the town of Westford's issuance of a special permit for a developer to build an asphalt manufacturing plant near the Chelmsford line.

Among the permit's conditions were that there be training provided for both the Westford and Chelmsford fire departments on fighting fires in a confined space; that there be access for the Chelmsford Fire Department to conduct annual inspections; and that there be briefings to Chelmsford fire personnel on spill containment procedures.

The two towns are part of a regional "mutual aid agreement" in which any of more than a dozen communities can be called to provide emergency aid in other signatory towns.

Chelmsford, the plaintiff, conceded that a town generally lacks standing to challenge a special permit issued by a neighboring municipality. Nonetheless, Chelmsford argued, because a fire at the plant could result in its firefighters being called in to assist, and because the permit's conditions expressly acknowledged such a risk, its legal interest in protecting the health and safety of its firefighters made it a "person aggrieved" with standing to appeal the special permit under G.L.c. 40A, §17.

Judge Kathe M. Tuttman disagreed.

"To grant the plaintiffs standing on grounds that the Chelmsford Fire Department might have to provide emergency aid to Westford if a fire occurs at the Project would impermissively broaden and dilute the meaning of 'person aggrieved,'" Tuttman wrote, granting a motion to dismiss brought by the defendant developer and Westford town officials.

"While the term 'person aggrieved' is not to be construed narrowly, it must be construed in a way that requires a real, nonspeculative injury, so as to avoid 'chok[ing] the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed,'" she continued, quoting a 1996 Supreme Judicial Court decision, *Marashlian v. Zoning Bd. of Appeals of Newburyport*.

Tuttman also found that Chelmsford's fire chief, a named plaintiff, did not have municipal officer standing to challenge the permit.

The 12-page decision is *Town of Chelmsford, et al. v. Newport Materials, LLC, et al.*, Lawyers Weekly No. 12-126-17. The full text of the ruling can be ordered at masslawyersweekly.com.

Speculative injury

Christopher J. Cunio of Boston, who represented the defendants, said the decision clarifies that municipalities seeking to challenge projects in neighboring communities need unique, non-speculative injuries in order to appeal under Chapter 40A.

It also clarifies that municipal officer standing only applies to officials in the same community as the project who also have duties or responsibilities over the planning or zoning at issue, he said.

"Otherwise, the local permitting process would be totally undermined, and the litigation floodgates would be wide open," Cunio said.

But plaintiffs' counsel Paul J. Haverty said the case entailed precisely the type of unique, non-speculative injuries that would give a neighboring town standing.

"This is an unusual situation, a circumstance where there's a clear and obvious impact to a municipal department in a neighboring town," the Concord lawyer said. "One so clear and obvious that [the Westford Planning Board] actually noted it in its own decision [to issue the permit] and made provisions regarding that impact."

Haverty said Chelmsford is deciding whether to appeal.

Carl D. Goodman, a land-use litigator in Swampscott, said standing has been a major battleground in zoning cases for the past decade.

"The takeaway [from this case] is that neighboring municipalities that seek to challenge zoning decisions are cautioned to seriously analyze whether they can sustain the substantial burden of establishing status as an aggrieved party under Chapter 40A," Goodman said.

Meanwhile, Christopher J. Petrini, a municipal lawyer in Framingham, found it noteworthy that Tuttman, in finding lack of standing, relied in part on the fact that the permit holder submitted an affidavit from a fire protection engineer testifying that the project presented no special or unique danger of fire or explosion, while the town of Chelmsford failed to present a countervailing affidavit or evidence.

"Municipalities or other parties seeking to provide standing would do well to retain an expert to show that the risk of harm necessary to confer standing is one that is real and non-speculative, and to allege such facts in their complaint and attach relevant reports and documents as exhibits," Petrini said.

He also pointed out that cities and towns that are concerned about activities on abutting property in neighboring communities will sometimes cooperate by enacting mirroring zoning or planning regulations that give the abutting community the right to be heard about proposed projects in particular districts.

For example, he said, Framingham and Natick have each enacted, in tandem, zoning regulations governing activity in the "Golden Triangle" retail district, which straddles the two towns and includes Shopper's World and the Natick Mall.

"If such regulations are violated by the host community, this may confer standing upon the neighboring community," Petrini said.

Town of Chelmsford, et al. v. Newport Materials, LLC, et al.

THE ISSUE Did the town of Chelmsford have standing to challenge the town of Westford's issuance of a special permit for a developer to build an asphalt manufacturing plant near the Chelmsford line?

DECISION No (Middlesex Superior Court)

LAWYERS Paul J. Haverty of Blatman, Bobrowski & Haverty, Concord (plaintiff)
Christopher J. Cunio and Katharine K. Foote, of Manion, Gaynor & Manning, Boston (defense)

The plaintiffs sought to challenge the issuance of a special permit for an asphalt plant near the Chelmsford line.

Asphalt plant

In 2009, defendant Newport Materials applied to the Westford Planning Board for a special permit to develop and operate an asphalt manufacturing plant on the Westford portion of a 115-acre lot, zoned for "light industry," that it owned and which sits partially in Chelmsford.

In 2016, after several years of litigation between Newport Materials and the town of Westford over whether the project qualified as "light industry" under the zoning bylaw, the parties settled and agreed the project could proceed with a special permit subject to numerous safety related conditions.

The conditions included a requirement that a foam cart be maintained on the property for firefighting purposes. The conditions also included requirements that the Westford and Chelmsford fire departments be provided annual confined-space training and that they be briefed yearly on spill-containment procedures.

Another condition required that both towns' fire chiefs be granted access to conduct annual inspections of the plant.

None of the conditions obligated the Chelmsford Fire Department to take part; they just obligated Newport, the plant operator, to provide them.

The town of Chelmsford and its fire chief ultimately challenged the project in Superior Court, claiming standing to do so as an aggrieved party under Chapter 40A, §17.

Specifically, the plaintiffs claimed the project was inherently dangerous, posing a severe risk of fire through its use of highly flammable and explosive materials.

The plaintiffs added that, as a signatory to a regional mutual aid agreement, Chelmsford's firefighters could be called to provide aid in an emergency.

They also claimed the fire chief had individual standing as a municipal officer with duties relating to the zoning in question.

No standing

Tuttman rejected the plaintiffs' argument that the town of Chelmsford had standing as an aggrieved party, finding their alleged harms to be "too speculative and remote" to qualify. In doing so, she was unmoved by the plaintiffs' claim that the permit's safety conditions demonstrated the danger posed by the project.

"The existence of these conditions does not lead to the conclusion that the Project is inherently dangerous or poses a unique risk of fire or spill of contaminants," the judge said. "If anything, the myriad of conditions imposed by the … special permit support the conclusion that the Project, if permitted, is as safe as any 'light manufacturing' use permitted by the Bylaw."

Tuttman also stated that Chelmsford's status as signatory to the mutual aid agreement was not enough to make it an aggrieved party.

"Sixteen other communities are signatories to the Mutual Aid Agreement involved here and there are, presumably, many more such agreements between other communities in the Commonwealth," she said. "To conclude that the plaintiffs have standing here would be to grant any community that is a party to a mutual aid agreement the right to challenge another signatory community's decision to allow any number of potential uses within its borders."

Regarding the fire chief's claim of municipal officer standing, which requires no showing of injury to a legally protected interest, Tuttman rejected the notion that Chelmsford's chief had the requisite duties relating to zoning within the same town, Westford, as the subject land. MLW