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When Is a ZEO's Decision Not a Decision?

The Supreme Court Provides Some Guidelines in *Piquet v. Town Of Chester Et Al.* 306 Conn. 173 (2012)

By Ira W. Bloom

Land use practitioners have often struggled with the important question of whether any "order, requirement, or decision" from the "official charged with enforcement of the zoning regulations" (most often the local zoning enforcement officer, or ZEO) can be appealed to the local Zoning Board of Appeals (ZBA) pursuant to Conn. Gen. Stat. § 8-7. The ZEO is often asked to render opinions on a variety of issues. Sometimes those opinions address existing conditions (e.g., a particular **existing use** may violate the regulations), but sometimes an opinion is sought as to a future contingency (e.g., a lot will support a house of a certain size in the particular zone.). It is understood that if the ZEO issues a notice of a zoning regulation violation, coupled with a cease and desist order, such a "decision" can certainly be appealed to the ZBA. But what of the situation where the ZEO is asked for his or her opinion as to future construction options available for a particular lot? Is such a letter from the ZEO merely "advisory" and not subject to an appeal?

In a recent case of *Piquet v. Town of Chester et al.*, 306 Conn. 173 (2012), the Supreme Court of the State of Connecticut, for the first time, defined what constitutes a "decision" by a zoning enforcement officer to the ZBA pursuant to Conn. Gen. Stat. § 8-7. Until this case, the Supreme Court had never clarified the issue as to which types of "decisions" could be appealed in this manner. Some opinions from the ZEO are appealable decisions, while some are merely advisory. Some clarification of the issue finally exists.

A starting point for the Supreme Court's analysis was the appellate court decision in *Holt v. Zoning Board of Appeals*, 114 Conn. App. 13 (2009). In this case, Carol Holt purchased a residential lot. The prior owner had obtained a letter from the ZEO informing him that the lot could be used for a single-family dwelling and indicating the maximum allowable size for such a dwelling on the lot. Approval for a dwelling was subject to often routine requirements for the area, such as a Coastal Management Area site plan. This letter was given to Ms. Holt. An objecting, abutting property owner eventually filed an appeal of this letter to the local ZBA, which sustained the appeal, finding that the Holt lot could not be properly developed. Ms. Holt appealed, and the trial court dismissed the appeal on the ground that the ZBA lacked jurisdiction over the appeal because the letter from the ZEO was not an "appealable decision." The appellate court, noting that no "bright line rule has been so far established" in deciding which opinions are appealable, concluded that "the determination of whether the action of a zoning enforcement officer amounts to a decision appealable under § 8-7 depends on the particular facts and circumstances of each case." The appellate court concluded that the ZEO's opinion was an "advisory letter" which must await a final determination through the issuance of appropriate permits. The appellate court noted, however, that it was "not conclud[ing] that all letters issued by zoning enforcement officers interpreting zoning regulations, and applying them to specific situations, are not appealable." Accordingly, the situation was ripe for a Supreme Court review. Indeed, our Connecticut Bar Association Planning and Zoning Section filed an *amicus* brief in *Piquet* urging such a review.

One can easily become absorbed in the details *Piquet* rather than in the Supreme Court's more general conclusions regarding the ZEO and appealable decisions. Mrs. Piquet had resided with her husband in their Chester, CT home for 14 years. She and her husband wanted to be buried next to each other in the home's backyard. When her husband died, she had him interred in the backyard under the supervision of a funeral director. (We will save the analysis of how this impacted the home's property assessment for another article.) The town's ZEO issued her a cease and desist order for a violation of the Chester zoning regulations (it was not a principal use or a special principal use allowed under the regulations). She filed an appeal with the ZBA. The following month, the ZEO sent another letter to Mrs. Piquet informing her again that the burial was a violation of the zoning regulations, but specifically withdrawing the cease and desist order for the purpose of allowing the plaintiff some time to remedy the violation. Consequently, the plaintiff, Mrs. Piquet, then notified the ZBA that she was withdrawing her appeal of the cease and desist order. Two years later, Mrs. Piquet brought her own action in court requesting a declaratory judgment that she had the right to use her property for the internment of her husband's remains (and also for her own remains later). A motion for summary judgment was granted for the defendants in that case. On appeal to the appellate court, however, the appellate court ruled that Mrs. Piquet had failed to exhaust her administrative remedies by not appealing the ZEO's second letter to the ZBA, which resulted in a remand by the appellate court and a dismissal of her action. The Supreme Court upheld this decision. In other words, the Supreme Court held that the second letter from the ZEO, which restated that a violation existed, but also withdrew the cease and desist order and gave Mrs. Piquet more time to address the problem, was an appealable decision by the ZEO and thus had to be appealed before she could resort to her own declaratory action.

The decision by the Supreme Court generated an impassioned dissent, which argued that the second letter hardly would have led a reasonable person to think that an appeal to the ZBA was necessary. In fact, the dissent noted that the plaintiff actually withdrew her pending ZBA appeal after receiving this let-

ter. Nevertheless, for our purposes the majority opinion attempts to clarify which "decisions" are appealable and which are not. The Supreme Court specified the following guidelines:

1. When a landowner receives notice from a "zoning compliance officer" that an existing use of the property is in violation of the regulations, that is a decision from which the landowner can appeal to the ZBA under § 8-7. The Supreme Court went on to say in further explanation of this type of situation that when a landowner obtains "a clear and definite interpretation of the zoning regulations applicable to the landowner's current use of his or her property," the landowner may appeal that interpretation to the ZBA.

2. On the other hand, when the ZEO provides an interpretation that is "contingent on future events," that interpretation will not be appealable to the ZBA, and the landowner "must wait a subsequent, final determination following that interpretation—e.g., the issuance of a certificate of zoning compliance—in order to appeal to the local zoning board of appeals." Such interpretations may be deemed "hypothetical," as the Supreme Court declared the ZEO's letter in the earlier *Holt* situation.

3. When the ZEO issues a letter notifying a landowner that he or she is in violation of the regulations, "the landowner may appeal that interpretation **regardless of whether the letter is accompanied by a cease and desist order or other remedial action**." [emphasis added] Accordingly, the decision by the ZEO need not also include a cease and desist order to be appealable to the ZBA.

This clarification is helpful for those of us who practice in this area. However, a few additional thoughts are in order: (a) With regard to Mrs. Piquet and the second letter sent by the ZEO (withdrawing the cease and desist but restating that there was a zoning regulation violation), the Supreme Court majority concluded that this was clear and specific, and formed the basis of an appeal. As noted, the dissent disagreed. The practical lesson may be that if one receives **any** written communication (with or without a cease and desist order) stating that a violation exists, this must be viewed as an appealable decision regardless of any other actions or suggestions by the ZEO; and (b) Communications from the ZEO regarding future events—the potential for development, for example—are not appealable since they will require subsequent permits which can be appealed at that later time. Yet, a concern may be raised regarding the Supreme Court's suggestion that an appeal must await for, to use the Supreme Court's example, a certificate of zoning compliance. Such an application would require the submission of plans and drawings just to get an appealable "decision" on whether a lot can be developed at all. Perhaps there should be a less onerous and costly route to an effective appeal to the ZBA or to obtaining finality in a decision by the failure of an aggrieved party to appeal. Some practitioners have resorted to filing applications for zoning permits and publishing notice thereof just to get a final, unappealable ruling that a lot (such a legal nonconforming lot) is buildable.

In sum, now there is some clarification of this important issue and a better understanding of when a ZEO's opinion becomes an appealable decision. **CL**

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