

LAND USE & ENVIRONMENTAL LAW

Plaintiff Digs Deep For Resolution To Burial Case

COURT CREATES STANDARD FOR WHEN 'ZONING INTERPRETATION' LETTER MUST BE APPEALED

By **CHRISTOPHER J. SMITH**

Put yourself in the plaintiff Elise Piquet's shoes.

Almost eight years ago, you interred the remains of a loved one on your residential property. Both you and your deceased loved one hoped to be buried side by side on your property.

Approximately 10 months later, you received a letter entitled "Cease and Desist Order" sent by the town's zoning enforcement officer (ZEO). The order stated that the town's "zoning regulations do not allow for private burials on residential property." You were further advised that "upon receipt of this Order you have 30 days to comply with the town's zoning regulations, or appeal this Order to the town's zoning board of appeals."

You contacted your attorney, who advised you that the zoning regulations are not clear as to whether a private burial can occur on a residential property. Your attorney noted that a strong argument could be made that a private burial could qualify as an "accessory use" of your residential property. Pursuant to her advice, you appealed the order to the Zoning

Board of Appeals (ZBA) and filed a request for variance approval. The ZBA scheduled a hearing.

Your appeal generated a significant amount of local and national media attention. The morning of the hearing, your attorney received a letter advising you that the zoning enforcement officer was "withdrawing the subject Order to permit you and the Department of Public Health to remedy the [zoning] violation.... I must emphasize that the purpose of the [w]ithdrawal is to give the parties time to remedy the violation. If the violation is not remedied, it may be necessary for me to revisit the matter and determine what, if any, further action I would need to take to appropriately enforce the [town's zoning] regulations." (Emphasis added.)

The hearing was cancelled. Based upon the ZEO's "withdrawal" letter, you withdrew your ZBA appeal and variance request.

Two years later, the town had not taken any further action. You desired finality on this issue, and commenced a court action requesting a judgment declaring that you have a right to use your property for the interment of your loved one and, upon your death, the interment of your remains.



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The town moved for summary judgment. The trial court granted the motion, holding that burying the remains of your loved one on your residential property is not a permitted use.

Jurisdiction Question

You appealed to the Appellate Court. After oral argument, the court raised, sua sponte, the issue of subject matter jurisdiction. In a 2-1 decision, the

Court held that the ZEO's withdrawal letter "was a decision by the zoning enforcement officer that [you] could have appealed to the zoning board of appeals, or [that you] could have amended [your] then pending appeal [to the zoning board of appeals] to include the [ZEO's withdrawal letter]."

Therefore, since you didn't exhaust your administrative right to appeal to the ZBA, you could not subsequently bring a separate action for declaratory relief. The Appellate Court concluded that the trial court did not have subject matter jurisdiction, and reversed the trial court's judgment and remanded the matter with direction to dismiss your action. *Elise Piquet v. Town of Chester, et al.*, 124 Conn. App. 518, 524 (2010).

You then appealed to the Supreme Court. In *Elise Piquet v. Town of Chester, et al.*, 306 Conn. 173 (2012), the court affirmed the Appellate Court's dismissal of your lawsuit based upon lack of subject matter jurisdiction for failing to exhaust your administrative remedies. A sharply divided court voted 4-3 that you should have appealed the ZEO's "withdrawal" of the order to the ZBA because the withdrawal letter still referenced what the ZEO considered to be an ongoing zoning violation on the property (the improper burial on residential property).

Specifically, the Supreme Court held that when a ZEO issues a letter notifying a landowner that he or she is "in violation" of the applicable zoning regulations, if the landowner desires to challenge such determination, the landowner must exhaust his or her administrative remedies and appeal the ZEO's

interpretation to the ZBA "regardless of whether the letter is accompanied by a cease and desist order or other remedial action." The landowner cannot bring a separate lawsuit.

Referring to *Holt v. Zoning Board of Appeals*, 114 Conn. App. 13 (2009), the Supreme Court also held that when a ZEO "provides an interpretation [of the zoning regulations] that is contingent on future events, that interpretation will not be appealable, and the landowner must await a subsequent, final determination following that interpretation — e.g., the issuance of a certificate of zoning compliance"

The Supreme Court's dissenting justices noted that "[w]hether an interpretation [of a zoning regulation] is an appealable decision should not be a secret.... [We] would adopt a rule requiring zoning compliance officers to clearly identify interpretation letters that constitute appealable decisions as such.... by including unambiguous language at the bottom of the letter notifying the recipient of her right to appeal, such as the language included in the [ZEO's order] in this case." The dissent concluded that you did not have to appeal the withdrawal letter to the ZBA.

Historically, this had been the approach taken by most zoning officials, and what most land use practitioners understood to be law. However, this was the minority opinion.

You just left your attorney's office after reviewing the Supreme Court's decision. Your attorney told you that the decision raises a number of questions concerning traditional zoning practice such as whether

one must appeal a ZEO's "notice of violation" (not a cease and desist order), or possibly a zoning official's letter to a landowner or prospective land purchaser opining that a certain use is not allowed on a particular property. Your attorney questioned how this decision may affect appeal rights relative to traditional "notices of violation" by other municipal or state agencies. However, this doesn't help you.

Your concern is: Do you have to remove your loved one's remains from your property, and can your remains be interred next to your loved one upon your death? Your attorney's advice: It depends as to whether the ZEO decides to pursue a judicial enforcement remedy, but you should have a contingency plan to ensure that your and your loved ones' remains end up side by side whether or not they're on your property. ■

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