Court Update

CBDA DEVELOPMENT, LLC V. TOWN OF THORNTON

One Bite At the Apple Applies to Planning Board Decisions
New Hampshire Supreme Court, No. 2014-0775, 4/7/2016

In 2012, the Thornton Planning Board denied CBDA's site plan application for a recreational campground. In 2013, CBDA submitted another application, and, although the second application addressed some of the board's concerns from the first site plan, not all issues had been resolved. Therefore, the board determined, under the *Fisher*doctrine, that it could not consider the subsequent application because it did not materially differ in nature and degree from the first application.

The planning board was citing the doctrine set forth in the case of *Fisher v. Dover*, 120 N.H. 187 (1980), where the Court held that a board of adjustment cannot lawfully reach the merits of a subsequent application unless there is a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application. This so-called "one bite at the apple" rule is intended to preserve the finality of zoning board decisions, protect the integrity of the zoning plan, and prevent an undue burden on other property owners.

Here, the Court answered a long-awaited question: whether this doctrine applies to successive site plan applications before planning boards. The Court determined that the policy rationales of *Fisher* applied equally to zoning boards and planning boards. Planning boards, like zoning boards, engage in quasi-judicial decision-making when hearing and deciding on applications; therefore, the need for finality and certainty of the administrative decision is the same. In addition, because planning boards have the ability to attach conditions to site plan approvals, planning board decisions similarly affect the development of municipalities. Thus, the community does rely on the planning board to uphold the integrity of the zoning plan. Furthermore, the fact that planning boards are required by statute to consider "completed" applications does not prohibit application of the *Fisher* doctrine. RSA 676:4, I(b) imposes a procedural requirement that planning boards to specify by regulation what constitutes a "complete" before it will consider the merits of an application. On the other hand, the question of material change in circumstances or in nature and degree of use is a fact-sensitive inquiry that

As a final matter, the Court upheld the planning board's determination that CBDA's modified application was not materially different than its first. Although CBDA had addressed some of the board's concerns, the subsequent application did not resolve one of the board's principal reasons for denial: the permanency and immobility of the homes in the proposed park. Therefore, the record supported the board's refusal to consider CBDA's second application.

Practice Pointer: This means that before accepting a subsequent application, the planning board, like the zoning board, must determine whether there has been a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application.