



Issued by Governmental Law Practice Group

November 1, 2005

PROPER APPLICATION OF ZONING LAWS RESULTS IN DISMISSAL OF \$800 MILLION CLAIM

Authors:

Michael S. Bogren

Direct: (269) 226-8822

mbogren@plunkettcooney.com

David K. Otis

Direct: (517) 324-5612

dotis@plunkettcooney.com

Philip A. Erickson

Direct: (517) 324-5608

perickson@plunkettcooney.com

Manistee Salt Works Development Corporation v. City of Manistee, Case No. 4:040CV-95 (W.D. Mich. October 13, 2005).

Consistent application of zoning ordinances by municipal planning commissions and legislative bodies and clear communication with developers are keys to mitigating potential liability related to zoning, planning and permitting projects.

Such was the case recently in the U.S. District Court for the Western District of Michigan when Plunkett & Cooney attorneys Michael S. Bogren and David K. Otis were successful in obtaining dismissal of an \$800 million suit brought by an energy company against the City of Manistee.

The plaintiff sought a Special Use Permit (SUP) under the city's zoning ordinance to construct and operate a 425 Megawatt coal-fired power plant in the City of Manistee. The plant was proposed to be built on Manistee Lake, which empties into Lake Michigan. The city's consultant initially recommended approval of the special use permit.

Subsequently, the city learned of the potential involvement of the Michigan Municipal Power Agency and that the plant may enjoy tax-exempt status. The city proposed that the plaintiff pay a "community service fee" to compensate for the loss of taxes, however the plaintiff refused.

On April 15, 2004, after numerous public hearings and the consideration of hundreds of pages of documents submitted by those both favoring and opposing the proposed project, the planning commission voted to deny the special use permit on the grounds that the permit did not comply with height standards; was not compatible with adjacent land use; was not in the best interests of community health, safety and welfare; and would strain the city's resources. The City Council affirmed the commission's decision five days later.

The plaintiff then filed suit, alleging violations of equal protection and substantive due process under the Fourteenth Amendment. The plaintiff claimed that the power plant would have generated over \$800 million, and that the city's denial of the SUP resulted in damages of over \$50 million when reduced to present value.

The U.S. District Court for the Western District of Michigan granted summary judgment in favor of the city, adopting the arguments advanced by Plunkett & Cooney on behalf of the city. Regarding the equal protection claim, the court rejected the plaintiff's argument that it should be compared to all other SUP applicants, regardless of the use being sought. Instead, the District Court agreed with the city's argument and held that the plaintiff could not identify a similarly situated applicant: "The plaintiff needed to show that the defendant city permitted another special use applicant to strain its resources, increase pollution, enrage its citizens, blemish its skyline, and generate no tax revenue when it denied the plaintiff's permit."

Turning to the substantive due process claim, the District Court agreed with the city's position and found that the plaintiff did not have a constitutionally protected property interest in obtaining the SUP. The court stated, "[I]t is the existence of discretion that invalidates the plaintiff's property interest for substantive due process purposes . . ."

In addition, the District Court found that the decision of the city was rationally related to legitimate government purposes even if the plaintiff had a protected property interest. Based on the exhaustive effort that the city had undertaken in deciding the plaintiff's SUP application, the court stated: "puzzling to the court is how this decision could ever be found to be devoid of a rational basis."

Finally, the District Court stated that the decision of the city was rationally related to legitimate government purposes even assuming that the city was motivated to deny the permit by the plaintiff's refusal to pay a "community service fee." The court declined to retain jurisdiction over state court claims asserted by the plaintiff.

This case, with the demand for over \$50 million in damages, serves as a reminder that municipal planning commissions and the legislative bodies, themselves, need to take care to apply the factors set forth in their zoning ordinances to the facts of each case, and to clearly articulate the reasons for their decisions in writing. The actions of the City of Manistee in carefully applying its zoning ordinance enabled it to obtain summary judgment as to the federal claims against the city.