Neighbor lacks standing to challenge wind turbine

'Visual abutter' isn't 'aggrieved' by project

By: Eric T. Berkman June 12, 2014

A woman who claimed a wind turbine that was to be built less than a mile from her Cape Cod home would block her ocean view and reduce her property value lacked standing to challenge the town's approval of the project, the Appellate Division of the District Court has ruled.

The area in question is within the Old King's Highway Regional Historic District, a large swath of the Cape designated by the Legislature as a region in which any new structure or change to an existing structure must be approved as appropriate.

After the town of Dennis approved the wind turbine, neighbor Rosemarie Austin appealed to the district's regional commission, which found the project to be inappropriate.

The plaintiff applicant subsequently sued the regional commission in District Court, where the trial judge found that the commission acted inappropriately and reinstated approval of the turbine. The judge also found, however, that Austin did have standing as a "visual abutter" to challenge the project.

The Appellate Division for the Southern District reversed, ruling that Austin was not a "person aggrieved" within the meaning of the statute that designated that region of Cape Cod as a historic district.

"We have found no authority, anywhere, sanctioning the concept of one's status as a 'visual abutter' (or even using that term) so as to qualify him or her as a 'person aggrieved' under this Act or any similar statute, or to otherwise confer standing on a person," Judge H. Gregory Williams wrote for the court.

"However mindful we are that the aim of the Act is to preserve the [historic district] as a 'landmark compatible with the historic, cultural, literary and aesthetic tradition' of Cape Cod … Austin's aesthetic concerns, even paired with the speculative diminution of the value of her property, are not enough to have supported a conclusion by the trial court that she qualified as a person aggrieved so as to challenge the decision of the Dennis Committee before the [regional commission]," the judge continued.

The 14-page decision, *Aquacultural Research Corporation, et al. v. Old King's Highway Regional Historic District Commission, et al.*, is Lawyers Weekly No. 13-026-14. The full text of the ruling can be ordered at masslawyersweekly.com.

'One-sided view'?

Michael P. Sams of Kenney & Sams in Southborough, who represented the applicant, called the ruling a "thorough and up-to-date analysis of the law on standing."

Sams also said a judicial recognition of the concept of "visual abutter" status with standing to oppose projects could have opened up almost any project for appellate review by historic district commissions.

"Certainly from the perspective of those who have to make [approval] decisions, it would have increased the potential for appeals on almost every occasion and would have certainly made it much more difficult to gain any sort of finality going through the committee and [district commission] stage," he said. "While I can't speak to the standing issue outside the Old King's Highway historic committee structure, presumably this standing ruling would apply to other district committees as well."

Matthew L. McGinnis of Ropes & Gray in Boston, who argued on behalf of the regional commission, said the decision shows a "one-sided view" of standing in historic district appeals.

While the ruling makes clear that applicants seeking to build structures in a historic district have standing to appeal when they are denied the right to build such a structure, it also suggests that neighbors whose property values could drop as a result of such a structure will not necessarily have the standing to appeal an approval, he said.

"I think that's wrong," said McGinnis, whose client is exploring the option of further appellate review. "It's inconsistent with the text and the purpose of the Old King's Highway Act [that created the historic district]."

More immediately, McGinnis said, the decision "risks undermining the authority of the regional commission to preserve and protect the Old King's Highway District as it's empowered to do. That's especially problematic."

Boston real estate and land use litigator Daniel P. Dain said the court — without couching it in such terms — seemed to believe that Austin's "visual abutter" status as a basis for standing failed the "special and different" test. In other words, while she likely would be able to see the wind turbine, so would plenty of other people in the vicinity, meaning she could not show a particularized injury.

That is an issue that "goes to the heart of the role of courts in local land use," Dain said, adding that while local boards are in the best position to weigh the benefits and harms that a project could pose to the community at large, courts are in a better position to protect the interests of those who might suffer an actual injury that is different from what might be felt generally.

"In these limited circumstances, courts will step in and review the merits of the local land use decision," Dain said.

The case presented a "slight twist" since the Appellate Division found that the regional commission itself lacked jurisdiction to hear Austin's appeal from the town because she lacked standing, Dain said.

"But the principle is the same. Local boards are capable of weighing community impacts. Appeals are appropriate only where the impact is personal and different from the impact in general," he said.

Cape conflict

In 1973, the Legislature designated a large portion of Cape Cod surrounding Route 6A as the "Old King's Highway Regional Historic District" in order to limit construction that might alter the character of the region.

The plaintiff, Aquacultural Research Corp., wanted to build a 242-foot-high wind turbine on its property in Dennis in order to defray costs associated with its shellfish cultivation and wholesale operation.

In July 2010, the plaintiff applied to the town's historic district committee for approval of the project. The committee approved its application following two public hearings.

Two months later, Austin appealed the committee's decision to the regional commission, which determined that the Dennis committee had exercised "poor judgment" in approving ARC's application.

The regional commission then denied ARC a certificate of appropriateness. In doing so, it did not address whether Austin actually had standing as an "aggrieved person" to appeal the committee's decision.

ARC appealed the regional commission's decision to Orleans District Court.

After two years of litigation and a three-day trial, Judge Brian R. Merrick reversed the regional commission's decision. In his findings, he also stated that while Austin was not an abutter to the ARC property, she was a "visual abutter" whose property value could be impacted by the turbine, which he described as "incongruous" in its proposed setting.

Accordingly, Merrick concluded, Austin did have standing to appeal the Dennis committee's approval to the regional commission.

The regional commission appealed Merrick's reversal.

Lack of standing

The Appellate Division declined to address whether the regional commission acted appropriately, finding instead that Austin lacked standing to challenge the town's approval and thus the case never should have come before the commission in the first place.

Williams said in order to challenge a town's approval of a project, a non-abutter must claim that the project would violate a private right, a private property interest or a private legal interest.

Here, Williams observed, the trial judge found that because the turbine would be "very visible" from Austin's property, she was a "visual abutter" who would suffer a particularized harm to her home and see a detrimental impact on the character of her neighborhood.

But no case authority could be found to support the concept of a "visual abutter" with standing to challenge a project.

Instead, the judge said, the Appellate Division had previously made clear in its 2000 decision, *Allen v. Old King's Highway Regional Historic Dist.*, that subjective fears about aesthetics, neighborhood appearance, architectural incompatibility or loss of neighborhood feeling are all insufficient to claim "aggrieved person" status.

Such harms — which are indistinct from that suffered by the public at large — are exactly what Austin was claiming in her challenge, Williams said.

"[She asserted] that [the turbine's] looming presence would be detrimental to the character of the area generally, that it would tarnish the view from her home … and that it might reduce the value of her home (which, again, was itself not even described, and the value was not quantified in any way)."

Those aesthetic concerns, even paired with the speculative impact on the value of her property, are not enough to support the trial court's conclusion that she had standing to challenge the Dennis committee's approval of the project, the Appellate Division concluded, ordering that the case be restored to where it was at the time of approval. **MLW**

For JUMPBOX

CASE: *Aquacultural Research Corporation, et al. v. Old King's Highway Regional Historic District Commission, et al.*, Lawyers Weekly No. 13-026-14

COURT: Appellate Division of the District Court

ISSUE: Did a woman who claimed that a wind turbine slated to be built less than a mile from her Cape Cod home would block her ocean view and reduce her property value have standing to challenge her town's approval of the project?

DECISION: No