

For Scientific or Technical Issues, Zoning and Planning Boards May Now Require Case Specific Expert Evidence to Substantiate Decisions.

By Steven Whitley, Esq.

A recent New Hampshire Supreme Court decision, *Continental Paving, Inc. v. Town of Litchfield* (No. 2008-370)(decided April 9, 2009), may have a far reaching impact on the State's local land use boards and the parties who appear before them. The Court's decision may require future zoning or planning board decisions involving technical or scientific issues to be substantiated by expert opinion and/or evidence specific to the proposal at issue, or those decisions may be vulnerable to being overturned.

In *Continental Paving*, the Supreme Court affirmed the trial court's ruling that directed the Town of Litchfield (Town) Zoning Board of Adjustment (ZBA) to reverse its denial and grant a Special Exception to the Applicant, Continental Paving, Inc. (Continental). The Town ZBA denied Continental's request for a Special Exception to build a road through the Town's Wetlands Conservation District. The proposed road would cross a wetland and come within sixty-seven (67) feet of a vernal pool.

In order to obtain a Special Exception, Continental was required to show, among other things, that the building of the road would not conflict with any of the following stated purposes of the Town's Wetlands Conservation District, as stated in the Town's Zoning Ordinance: "...[to] Protect unique, ecologically sensitive and unusual natural areas...[to] Protect wildlife habitats, wildlife corridors and maintain ecological balances...[and to] Protect potential water supplies and existing aquifers...and aquifer recharge areas." To carry this burden, Continental presented two experts who addressed how the proposed road satisfied the above requirements, with each expert tailoring their respective analysis to the specific conditions at the proposed site. Relying, in part, on much more generalized information from a NH Audubon Society Fact Sheet not specific to the proposed site, and without qualified experts to rebut the evidence that Continental presented, the ZBA denied the Special Exception and referenced the NH Audubon Fact Sheet which stated that a 100 foot buffer of natural vegetation should be maintained around vernal pools. On appeal, the trial court vacated the ZBA's denial and instructed it to grant the Special Exception. The Supreme Court affirmed the trial court's ruling.

Under the Supreme Court's standard of review, it will uphold the trial court's decision unless the evidence does not support it or it is legally erroneous. The trial court may set aside a ZBA decision if it finds by a balance of probabilities, based on the evidence before it, that the ZBA's decision was unreasonable. In agreeing with the trial court's decision to grant Continental its requested Special Exception, the Supreme Court found "by a balance of probabilities, based on the evidence before it, that the [trial court could correctly find that the ZBA's decision was unreasonable." The trial court found that the Special Exception requirements described above, "...all require **specialized scientific knowledge** to make a determination" on whether they had been satisfied. The trial court went on to state that the reasons relied upon by the ZBA in denying the Special Exception, "...all require findings based

on specialized or scientific knowledge”, and no member of the ZBA ever identified himself or herself as “...having [this] specialized or scientific knowledge concerning” the proposed road through the Wetlands Conservation District.

The Town made several arguments that the trial court’s decision would place an unreasonable burden on local land use boards and the parties who appear before them, and that the ZBA was within its authority in evaluating the evidence before it, both general and specific, to reject the Special Exception. The Supreme Court disagreed. The Town argued that the trial court’s reasoning would force a ZBA, dealing with scientific or technical issues, to deny a Special Exception whenever an applicant failed to retain an expert with specialized scientific knowledge; or, would force a ZBA to grant a Special Exception when the applicant was the only party who had retained an expert to testify about scientific or technical matters. The Supreme Court did not address this concern head on, but suggested that it would depend upon the facts of each case. The Supreme Court stated that the trial court could have found that based upon the evidence, the ZBA’s decision was unreasonable, and because it so ruled under its standard of review, the Supreme Court would not address the merits of the Town’s concern about future ZBA’s dealing with “specialized scientific knowledge.” To justify the trial court decision, the Supreme Court noted the difference in type and degree of the evidence presented for the ZBA to consider: Continental presented two qualified scientific experts who testified regarding how the road proposal satisfied the Special Exception conditions at the proposed site; compared to only very general information in opposition, in the form of a fact sheet put together by NH Audubon not tailored to the site in question.

What about ZBA members role and obligation to weigh and evaluate all the evidence, including their respective personal opinion or knowledge on an issue before them? Although ZBA (and Planning Board) members may rely on personal knowledge of some factors when reaching a decision, such as traffic conditions, surrounding uses etc., resulting from familiarity with the area, that decision must still be based on more than just personal opinion. Here, the Supreme Court affirmed the trial court’s finding that the lay opinions of ZBA members, based upon general information not specifically addressed to the proposed site, was insufficient to counter the uncontroverted expert opinions presented by Continental. Further, even though the ZBA does not have to accept the conclusions of experts, the Supreme Court found that without evidence in the record that the ZBA questioned the findings, methodology, and/or credibility of Continental’s experts, it cannot base its denial of the Special Exception on mere generalized information or opinion.

The Supreme Court also rejected the Town’s argument that the members of the ZBA may educate themselves, based on information in the record, and rely on that personal knowledge to evaluate the opinions of Continental’s experts. While ZBA members may base their conclusion upon their own knowledge, experience, observations, and expert testimony, the Supreme Court refused to allow individual members to transform scientific information contained in exhibits into “personal knowledge” upon which ZBA members could base their decisions. Lastly, the Town argued that the trial court erred by ruling that the ZBA’s decision was unreasonable because it was based upon general information, was not addressed to Continental’s proposal, and

did not rebut or address the opinions of Continental's experts. The Supreme Court responded that the general bases for the ZBA's denial were specifically addressed by Continental's experts and the road proposal was determined by them to be in compliance with the Special Exception requirements. The trial court's decision was thus reasonable based upon the evidence before the ZBA.

Where does this leave Zoning and Planning Boards and those parties who appear before them? One possible answer is that Zoning Boards and any of the parties who appear before them may have to be prepared to bear the expense of retaining an expert to testify or submit evidence regarding "specialized scientific knowledge" relevant to an issue before the Board. Planning Boards on the other hand, when necessary, are authorized by State statute to charge an applicant for the costs of hiring an expert(s) to assist the Board in addressing precisely these issues. Without this type of testimony or evidence from a qualified expert, it may prove very difficult to rebut a party who has presented expert testimony and/or evidence to address an issue involving "specialized scientific knowledge". The cost of doing business before Zoning Boards may have just risen significantly, both for the parties before them, and the taxpayers within each Zoning Board's municipality.

Local land use board members, and the attorneys who advise them, should be aware of the possible ramifications of this decision. The Supreme Court, purposefully (and perhaps wisely) I believe, did not address when "specialized scientific knowledge" was relevant to an issue before a Board. Instead, the Court stated that it would depend upon the facts of each matter before the Board. It is probably more likely than not, however, that if an applicant, for example, presents such evidence or testimony, any opposing party must as well to ensure that any decision adverse to the applicant is not overturned on rehearing or appeal. This situation favors large scale developers or corporate entities which have access to capital and can afford to pay for expert evidence and/or testimony.

If you or your local land use board is involved in a case that may involve "specialized scientific knowledge" and you have questions, contact the experienced attorneys at Baldwin & Callen for a free 30-minute consultation: 603-225-2585, or contact@nhlandlaw.com, or visit us at www.nhlandlaw.com. We are conveniently located in downtown Concord at 3 Maple Street.