

# Zoning Bulletin

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## Review of Enforcement of Regulations—Landowner Seeks Declaration on Backyard Internment from Court

Town argues court lacks jurisdiction as landowner failed to appeal letter of zoning enforcement officer

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### Contributors

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Citation: *Piquet v. Town of Chester*, 306 Conn. 173, 2012 WL 3600314 (2012)

CONNECTICUT (08/29/12)—This case addresses the following issue: when does a letter from a town’s zoning enforcement officer constitute a “decision” from which a landowner can appeal? In other words, the case addressed: “what constitutes an appealable decision of a zoning compliance officer?”

**The Background/Facts:** Elise Piquet (“Piquet”) owned property in Chester, Connecticut (the “Town”). After her husband died, she interred her husband’s remains in the backyard of her property under the supervision of a licensed funeral director. Thereafter, the Town’s zoning compliance officer (the “ZCO”) issued a cease and desist order with regard to the burial for violation of the Town’s zoning regulations. Piquet appealed from the cease and desist order, seeking a variance. A month later, on September 16, 2005, the ZCO informed Piquet by letter (the “September letter”) that the burial was not permitted as a principal use or a special principal use in the residential district where Piquet’s property was located. In the September letter, the ZCO also withdrew the cease and desist order for the purpose of allowing Piquet to remedy the violation. Piquet then informed the board of appeals (the “Board”) that she was withdrawing her objection to the cease and desist order, without prejudice.

Two years later, Piquet commenced an action in trial court against the Town and the Town’s planning and zoning commission (hereinafter, collectively, the “Town”). She asked the court to declare that she had the right to use her property for the internment of her husband’s remains and, upon her death, for the internment of her remains as well.

The trial court issued judgment in favor of the Town.

Piquet appealed. The Appellate Court found that Piquet withdrew her variance application and did not otherwise appeal from the cease and desist order or the ZCO’s September letter. The Appellate Court concluded that the trial court did not have subject matter jurisdiction over Piquet’s action because Piquet had failed to exhaust her administrative remedies by not appealing to the Board.

Piquet again appealed. The Supreme Court of Connecticut certified Piquet’s appeal, limited to the issue of whether the trial court lacked subject matter jurisdiction over Piquet’s action because Piquet had failed to exhaust her administrative remedies.

On appeal, Piquet claimed that the Appellate Court incorrectly concluded that she should have appealed to the Board prior to filing her legal action. Among other things, she argued that there was no decision of the ZCO from which she could appeal since the ZCO had withdrawn the cease and desist order. Both Connecticut General Statutes § 8-7 and § 140G.1 of the Town’s zoning regulations provided that the Board

had authority to hear appeals of “any order, requirement or decision” made by the ZCO.

In response, the Town maintained that the cease and desist order and the September letter issued by the ZCO to Piquet represented decisions from which Piquet properly could have appealed to the Board.

**DECISION: Affirmed.**

The Supreme Court of Connecticut held that the ZCO’s September letter to Piquet was a decision from which Piquet could have appealed. The court agreed with the Appellate Court that the trial court lacked subject matter jurisdiction because Piquet had failed to exhaust her administrative remedies prior to filing the declaratory judgment action in court.

Rejecting Piquet’s assertions, the court concluded that the ZCO’s September letter constituted a decision from which Piquet could appeal to the Board. In so concluding, the court addressed, as a matter of first impression (i.e., the first time that court heard the specific issue): “what constitutes an appealable decision of a zoning compliance officer.”

The court held that:

when a landowner receives notice from a zoning compliance officer that the landowner’s existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals pursuant to [CGS] § 8-7 and, when applicable, pursuant to local zoning regulations. Put differently, when a landowner obtains a clear and definite interpretation of zoning regulations applicable to the landowner’s current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals. Conversely, when a zoning enforcement officer provides an interpretation 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—in order to appeal to the local zoning board of appeals.

The court further clarified that: “when a zoning enforcement officer issues a letter notifying a landowner that he or she is in violation of the applicable zoning regulations, the landowner may appeal that interpretation regardless of whether the letter is accompanied by a cease and desist order or other remedial action.”

See also: *Stepney, LLC v. Town of Fairfield*, 263 Conn. 558, 563, 821 A.2d 725 (2003).

See also: *Holt v. Zoning Bd. of Appeals of Town of Stonington*, 114 Conn. App. 13, 968 A.2d 946 (2009).

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**Case Note:**

*Piquet had also argued that an appeal to the Board would have been futile, as*

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would excuse her from failing to exhaust administrative remedies. The court rejected this argument, finding Piquet failed to establish that claim.

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## Telecommunications—Township Denies Wireless Communications Carrier’s Application to Construct Tower

### Communications carrier alleges denial violates the federal Telecommunications Act

Citation: *T-Mobile Cent., LLC v. Charter Tp. of West Bloomfield*, 2012 WL 3570666 (6th Cir. 2012)

*The Sixth Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.*

SIXTH CIRCUIT (MICHIGAN) (08/21/12)—This case addressed the issues of: (1) whether a township’s reasons for denying a wireless communications carrier’s application were not supported by substantial evidence in violation of the federal Telecommunications Act; and (2) whether a township’s denial of a wireless communications carrier’s application prohibited or had the effect of prohibiting the provision of personal wireless services, in violation of the federal Telecommunications Act. In addressing this second issue, the case addresses, as matters of first impression for the Sixth Circuit (i.e., the first time the Sixth Circuit has addressed these issues): (1) whether the denial of a single application from a wireless communications carrier can constitute an effective prohibition; and (2) whether the “significant gap” in service needed to establish an effective prohibition on the provision of personal wireless services focuses on the coverage of the applicant provider or whether service by any other provider is sufficient.

**The Background/Facts:** T-Mobile Central, LLC (“T-Mobile”), a wireless communications carrier in Michigan, identified a gap in coverage in West Bloomfield Township (the “Township”) that adversely affected customers in that area. To remedy this gap, T-Mobile sought to construct a new wireless facility. After initially considering several possible sites—none of which T-Mobile claimed were technically feasible or practically available—T-Mobile decided that the best option would be to construct a facility at a utility site on a property owned by Detroit Edison. The facility contained an existing 50-foot pole,

which T-Mobile wanted to replace with a 90-foot pole disguised to look like a pine tree with antennas fashioned as branches (a “monopine”). This site was not located within the two cellular tower overlay zones designated in the Township’s Zoning Ordinance, where wireless facilities are considered a use permitted by right, subject only to site approval. Therefore, T-Mobile needed to seek special land-use approval and site-plan approval.

On December 17, 2008, T-Mobile filed an application with the Township to obtain special land-use approval for the proposed site. Ultimately, the Township Planning Commission recommended to the Board of Trustees of the Township (the “Board”) that T-Mobile’s application should be denied. The Board denied T-Mobile’s application.

T-Mobile then sought an injunction in district court that would direct the Board to grant its application. Among other things, T-Mobile argued that: (1) the denial of its application was not supported by substantial evidence, in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(iii); and (2) the denial of its application had the “effect of prohibiting the provision of personal wireless services” in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

The district court held that the Township’s grounds for denial were not supported by substantial evidence. The district court also held that T-Mobile could not feasibly locate the facility elsewhere and that the Township had effectively prohibited the provision of wireless services in violation of the federal Telecommunications Act.

The Township appealed.

**DECISION: Affirmed.**

The United States Court of Appeals, Sixth Circuit, first agreed that the Township’s grounds for denial of T-Mobile’s application were not supported by substantial evidence in violation of the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(iii).

The court explained that pursuant to 47 U.S.C.A. § 332(c)(7)(B)(iii): “Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” The court explained that there must be substantial evidence “in the context of applicable state and local law.” Thus, the nature of the evidence relied on by the local zoning board in its decision must be “substantial evidence” that is “substantiated.”

Here, the court found the Township’s reasons for denial were not based on substantial evidence in the record. The court found the evidence relied upon by the Board—such as general concerns from a few residents—was merely “alleged,” not “substantiated.”

Next, the court concluded that the Township's denial of T-Mobile's application violated the Telecommunications Act, 47 U.S.C.A. § 332(c)(7)(B)(i)(II), in that it prohibited or had the effect of prohibiting the provision of personal wireless services.

In so concluding, the court adopted the First Circuit's two-part test to consider whether the denial of an application amounts to an effective prohibition. Under the test, the denial of an application amount to an effective prohibition if there is: (1) a "showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."

Addressing the first part of this test, as a matter of first impression, the Sixth Circuit held that the denial of a single application from a wireless communications carrier can constitute an effective prohibition of personal wireless services. Also as a matter of first impression, the Sixth Circuit held that a "significant gap" in service coverage exists if "a provider is prevented from filling a significant gap in its own service coverage." The court provided that such a significant gap in coverage need not be shown by customer complaints, but that evidence such as RF propagation maps and drive test data, along with a report by an RF engineer, are "suitable to support a claim for a substantial gap in coverage."

Looking at the record in the case at hand, the court found that the denial of T-Mobile's application "prevented T-Mobile from filling a significant gap in its own service coverage."

Addressing the second part of the two-part test—whether there were feasible alternative facilities or site locations—the Sixth Circuit adopted the "least intrusive" standard (as opposed to the "no viable alternatives" standard followed by the First and Seventh Circuits): The wireless communications carrier is required to show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."

Applying that standard here, the court held that T-Mobile satisfied its burden. "T-Mobile made numerous good-faith efforts to identify and investigate alternative sites that may have been less intrusive on the 'values that the denial sought to serve,'" found the court.

The court concluded that the Township's decisions in denying T-Mobile's application had "the effect of prohibiting the provision of personal wireless services" and thus violated 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

See also: *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005).

See also: *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469 (3d Cir. 1999).

## Proceedings—After Planning and Zoning Commission Recommends Approval of Zoning Request, Board of Aldermen Does Not Notify Applicant of Related Hearing

Board then denies applicant's zoning request, and applicant claims due process violation

Citation: *McKee v. City of Starkville*, 2012 WL 3191986 (Miss. Ct. App. 2012)

MISSISSIPPI (08/07/12)—This case addressed the issue of whether a party that has not been aggrieved by the recommendation of the city engineer or advisory committee is still entitled to notice of a hearing before the governing body of the city where the party's zoning request is considered.

**The Background/Facts:** George C. McKee ("McKee") owned property in the City of Starkville, Mississippi (the "City"). In order to expand an existing apartment complex McKee owned, McKee sought to rezone .75 acres of his property from R-2 ("single family/duplex") to R-5 ("multi-family/high-density"). He filed an application with the City. The City's Planning and Zoning Commission ("PZC") unanimously recommended approval of McKee's rezoning request to the City's Board of Aldermen (the "Board"). Despite the PZC's recommendation, the Board denied McKee's request based on its belief that McKee had not sufficiently proven a change in the neighborhood's character.

McKee appealed the Board's decision to the Oktibbeha County Circuit Court, which affirmed the Board's decision.

McKee again appealed. Among other things, he argued that his due process rights were violated because he did not have notice of the Board's meeting where his application was denied. The City contended that, based on the plain language of Mississippi Code Annotated § 17-1-17 (Supp.2011), McKee was not entitled to notice of the Board's meeting.

Section 17-1-17 provides, in pertinent part: "any party aggrieved with the recommendation of the city engineer or advisory committee

shall be entitled to a public hearing before the governing body of the city, with due notice thereof after publication for the time and as provided in this section.”

The City maintained that because the PZC recommended approval of McKee’s rezoning application, he was not an aggrieved party and was not entitled to a public hearing before the Board under § 17-1-17.

**DECISION: Reversed, and matter remanded.**

The Court of Appeals of Mississippi held that McKee’s due process rights were violated when the Board failed to notify him of the board meeting where it considered, and ultimately denied, his rezoning request.

In so holding, the court noted that: “[w]hile the plain language of [17-1-17] supports the City’s position, it produces a result that is inconsistent with . . . existing case law.” Pursuant to case law, “in proceedings before city zoning authorities, due process requires notice and ‘the opportunity to be heard at all critical stages of the process.’ ”

The court acknowledged that if the Board had been bound by the PZC’s recommendations, then McKee would not have been due notice of the Board’s hearing on his zoning request. However, since the Board was not bound by the PZC’s recommendation, and the Board could deny McKee’s request even where the PZC recommended approval, then McKee was due notice of the hearing, said the court. In other words, held the court: “even where a party has not been aggrieved by the recommendation of the city engineer or advisory committee, he is still entitled to notice of the hearing before the governing body of the city where the rezoning request is considered.”

Here, the court concluded that because McKee was not given notice of the Board’s meeting where his rezoning request was denied, he was denied due process. Consequently, the court remanded the case to the Board for a properly noticed hearing on McKee’s rezoning request.

See also: *Thrash v. Mayor and Com’rs of City of Jackson*, 498 So. 2d 801 (Miss. 1986).

## Use/Interpretation—Retail Store Owner Seeks to Install Gasoline Filling Station as Accessory Use

Township denies request, saying only indoor retail sales are permitted in zoning district

Citation: *In re Costco Wholesale Corp.*, 2012 WL 3079258 (Pa. Commw. Ct. 2012)

PENNSYLVANIA (07/31/12)—This case addressed the issue of whether a gasoline filling station was permitted as an accessory use under a township’s zoning ordinance, which required accessory uses meet the standards applicable to the permitted use and the standards included being an “indoor facility.”

**The Background/Facts:** Costco Wholesale Corporation (“Costco”) owned and operated a retail store in the Expressway Corridor Preservation Overlay District (“Overlay District”) in Montgomery Township (the “Township”). Costco proposed to install 16 gasoline fueling pumps in the parking lot next to its existing store. It believed gasoline filling stations were permitted as an accessory use under the Township’s Zoning Ordinance.

The Township’s Zoning Officer informed Costco that the Overlay District permitted indoor retail sales, but not outdoor retail sales, such as gasoline filling stations. The Zoning Officer also rejected Costco’s proffered theory that the outdoor sale of gasoline was a use subordinate and customarily incidental to an indoor retail store.

Costco appealed the Zoning Officer’s determination to the Zoning Hearing Board (the “Board”). After a hearing, the Board denied Costco’s appeal of the Zoning Officer’s determination that Costco’s proposed gasoline filling station was not authorized in the Overlay District. The Board’s decision was based upon its construction of the Zoning Ordinance. It construed the Zoning Ordinance as not permitting gasoline filling stations in the Overlay District. In regard to Costco’s argument that the gasoline filling station was a permitted accessory use, the Board explained that accessory uses were permitted where: (1) the use was subordinate to the permitted Overlay District use; (2) the use was customarily incidental to the permitted Overlay District use; and (3) the use complied “with the standards applicable to the permitted use to which they are accessory.” Here, the Board reasoned that the “standard” applicable to the permitted use of retail sales was that the sales be conducted in an “indoor” facility. Because

the sale of gasoline would take place outdoors, that use would not comply with the standard for a permitted retail use, concluded the Board.

Costco appealed to the trial court. The trial court affirmed. Agreeing with the Board's interpretation of the Ordinance, the trial court found that the Ordinance required a proposed accessory use to comply with the standards applicable to the permitted use to which it was accessory. The trial court held that Costco's proposed sale of gasoline did not meet the standard that retail uses be conducted in "indoor facilities" because a gasoline service station is conducted outdoors.

Costco appealed.

**DECISION: Affirmed.**

The Commonwealth Court of Pennsylvania held that the sale of gasoline was not a permitted accessory use under the Ordinance because accessory uses were permitted only when "in compliance with the standards applicable to the permitted use to which they are accessory" and those standards required the use be conducted in "indoor facilities," and gasoline filling stations were an outdoor facility.

Analyzing the Ordinance, the court found that the only "[s]tandard retail uses permitted by right" were "[s]hops, stores or other indoor facilities for the retail sale of goods or merchandise to the general public . . . ." The Ordinance provided a "long and varied," "exhaustive" list of examples of retail uses permitted by right. The sale of gasoline was not on that list.

The court noted that "indoor" was not defined in the Ordinance. Looking to the plain meaning of "indoor," the court found it was "something done inside a building." Pumping gasoline, noted the court, does not take place indoors. Moreover, "other indoor facilities" must be interpreted, said the court, to include things of the same type as what is included in the preceding list, i.e., "shops" and "stores." A gasoline filling station is not a "shop" or a "store," said the court. In sum, a gasoline filling station is not a shop, store, or other indoor facility, found the court.

Costco had argued, however, that some of the retail uses in the Ordinance's list of retail uses permitted by right took place outside—such as "drive-through" windows. The trial court had explained that the drive-through window of a restaurant was more indoors than outdoors, and the appellate court found its reasoning to be logical.

The court concluded by acknowledging that, logically, Costco's proposed gasoline filling station appeared to be "a natural adjunct to its retail store." Still, the court found it clear that a gasoline filling station was an outdoor facility, and thus did not meet the standard for retail stores (i.e., an "indoor facility") permitted by right under the Ordinance.

Because accessory uses were permitted only when “in compliance with the standards applicable to the permitted use to which they are accessory,” the sale of gasoline was an impermissible use under the Ordinance, held the court.

See also: *Independent Oil and Gas Ass’n of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 572 Pa. 240, 814 A.2d 180, 184, 158 O.G.R. 1019 (2002).

## Zoning News from Around the Nation

### NATIONWIDE

Funded by a \$1.5 million grant from the National Institutes of Health, researchers at the University of Illinois at Chicago plan to study links between zoning laws and increases in physical activity. The university has said that the study “is one of the first to look at the relationships between land use as dictated by zoning laws and its influence on physical activity among adults.” According to the university, researchers have found communities in 36 states that are using zoning laws to make changes intended to increase activity and exercise.

Source: *St. Louis Post-Dispatch*; [www.stltoday.com](http://www.stltoday.com)

### ARIZONA

State and county prosecutors are challenging Arizona’s medical marijuana program. They are reportedly asking a court to rule that the voter-approved law is illegal on grounds that it conflicts with federal drug law. The case pending in Maricopa County Superior Court involves a company applying to operate a medical marijuana dispensary in Sun City. White Mountain Health Center Inc. sued when county officials would not provide zoning clearances needed under the medical marijuana law. Prosecutors are not asking the court to dismiss White Mountain’s lawsuit on grounds that Arizona’s law is illegal.

Source: *The Republic*; [www.therepublic.com](http://www.therepublic.com)

### PENNSYLVANIA

The City of Philadelphia recently switched over to a new zoning code, “culminating a four-year effort to simplify the development process and upgrade the city’s housing stock for modern tastes.” A new 384-page manual now replaces the previous zoning regulations that had been in use since 1962.

Source: *Philadelphia Inquirer*; <http://articles.philly.com>