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Why a judge ordered a new 5,000 s/f Mass. seaside house to be torn down

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Anyone with plans for a real estate project in Massachusetts will want to learn the lessons of the recent case of Johnson v. Zoning Board of Appeals of Marblehead. Readers of the Boston Globe were recently treated to a front page photo of Walter Johnson's brand new, 5,000 s/f seaside Marblehead being torn down. By court order. How in the name of the law did this happen?

In the 1990s, Johnson decided to subdivide his land, sell off part of it and build a new house where his garage had stood. He obtained a permit. His neighbors objected. They thought the new house would be too big and block their view. So they appealed to the Marblehead zoning board, which voted 3-2 to revoke the permit. By state law, it takes four votes to overturn an issued permit, so Johnson's permit was actually sustained -- but now Johnson at least knew a board majority thought his house was illegal.

Next stop, a Land Court appeal. The Land Court denied the neighbors' request for a preliminary injunction to stop Johnson from building. But the judge said any decision to build would be at Johnson's risk. Johnson went ahead and commenced construction of the house despite this express warning. And then the Land Court ultimately ruled against him, finding that the lot was too narrow.

So now Johnson's only recourse was to seek a special permit for a non-conforming use. Here's where it gets interesting. A majority of the members of the board voted in the affirmative on the question of whether Johnson met the bylaw criteria for issuance of a special permit -- but they voted 4-1 to deny the special permit anyway, because they found the house was too big. On appeal the courts found that the board's decision was not "arbitrary and capricious," and upheld it. And so the house was destroyed.

Johnson's mistake should be obvious: do not build first and litigate later.

And there is a more fundamental issue at stake. The courts thought the zoning board retained discretion to deny a special permit, even though the board voted that Johnson met the bylaw criteria for a special permit. While it is true that there are Massachusetts cases saying boards can do this, those cases are based on bylaws that authorize but do not require consideration of the factors listed in the bylaw. Marblehead is different: its bylaw says the board must consider the enumerated criteria. So the board effectively ignored mandatory criteria. Thus, we respectfully disagree with the court ruling upholding a self-contradictory board ruling.

This "yes but no" board decision is reminiscent of something U.S. Supreme Court Justice Antonin Scalia once said. In a dissent in a criminal case in 2000, Justice Scalia warned that without a consistent principle to explain all the relevant case law, the Court would become a "nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy."

In the Johnson saga, the state courts appear to have given zoning boards the power to wield an

unlimited, indeed Caesarian, authority. A zoning board can give a thumbs up and a thumbs down at the very same time to the same project based on the very same evidence and legal criteria. That is the essence of arbitrariness. For property owners and developers, this is disconcerting. And if "caution" was not the watchword for litigating a real estate case prior to the Johnson saga, it sure is now.

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