# Neighbor of airport can challenge Westerly ordinance

## ***Plaintiff: received no hearing notice over height restrictions***

By: [Tom Egan](https://rilawyersweekly.com/blog/author/tomegan/) September 6, 2018



A property owner did not lack standing to challenge a Westerly ordinance restricting the height of structures in “confliction areas” near runways at the Westerly State Airport, a Superior Court judge has ruled.

The plaintiff property owner argued that the ordinance was unconstitutional and enacted in violation of a right to due process because he was not provided with notice of a public hearing to which he was entitled under state and local laws.

“[N]otice of the public hearing did not comply with [G.L.] §45-24-53(c)(1) and Westerly Code 260-28D(2), requiring a map ‘showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries where appropriate’ to be sent with written notice ‘of the date, time, and place of the public hearing and the nature and purpose of the hearing,’” Judge Sarah Taft-Carter wrote.

The judge went on to reject the town’s argument that the plaintiff did not allege an injury sufficient to create a justiciable controversy.

“Plaintiff has alleged an economic injury to his land caused by the enactment of the Ordinance, specifically pointing to the restrictions placed on his property and other properties located within the Confliction Area,” Taft-Carter stated.

The 21-page decision is Mascola v. Town of Westerly, Lawyers Weekly No. 61-073-18. The full text [can be found here](https://rilawyersweekly.com/blog/2018/08/30/zoning-airport-height-restrictions/):

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**‘Notice is extremely vital’**

The plaintiff was represented by Gregory Massad of New London, Connecticut. Massad noted that the town was obligated, under the Westerly Code, to send notice of the public hearing to affected landowners by certified mail. Further, both the town code and a state statute required such notice to include a map showing the existing and proposed zoning district boundary lines.

“I stand by the long-standing principle that notice is extremely vital, and in our opinion, it was defective,” Massad said.

He also noted the judge’s rejection of the town’s argument that the plaintiff did not allege an injury sufficient to confer standing to challenge the validity of the ordinance.

“We feel there is a significant harm to my client because his property is all of a sudden included in a ‘confliction area’ when at no previous time it was identified as a problem,” Massad said.

“There is a significant financial impact to it being included for the first time as a property that interferes with airport operations and is in a hazard area,” he added.

Providence William J. Conley Jr., who represented the town, did not respond to a request for comment.

Providence attorney John M. Boehnert, who was not involved in the case, observed that the town argued that though the plaintiff did not receive notice of the hearing as required, the appearance of the plaintiff’s counsel at the hearing amounted to a waiver of the claim of defective notice.

“However, because the complaint asserted that plaintiff’s counsel was disadvantaged at the hearing by not having received required notice, this was sufficient to defeat the waiver claim,” Boehnert said. “The court may have also had in mind that not only did the plaintiff not receive required notice, others who received notice did not receive it by certified mail and did not receive the relevant map as required. In other words, the town was not following the rules.”

**Overlay district**

The case arose out of the passage of a zoning ordinance by the Westerly Town Council on Jan. 22, 2018, that created an overlay district regulating airport hazards.

The ordinance set forth “confliction areas,” defined as “areas identified within the Airport Area Overlay District where ground elevation plus the maximum height restriction under current zoning … is within the FAR Part 77 approach surface and conflicts with the regulated imaginary surfaces.”

The ordinance designated the plaintiff’s property as being located in a confliction area near runway 32 of the airport and included the property in the overlay district.

On Sept. 29, 2017, the Westerly Planning Board issued a unanimous advisory opinion in favor of the ordinance, stating that the revised ordinance “is consistent with the Comprehensive Plan, specifically Action Item 3.6, and that the proposed ordinance advances the purposes of zoning as defined in §260-5 General Purposes of the Zoning Ordinance.”

On or about Nov. 27, 2017, the town sent a letter to people who owned property in close proximity to the airport notifying them of a public hearing scheduled for Dec. 18, 2017. The plaintiff later alleged that he was neither sent notice of the hearing by certified mail nor did he receive a “map in the Notice showing the existing and proposed boundaries, zoning district boundaries, existing streets and roads and their names, and city and town boundaries.”

The Town Council held two public hearings — on Dec. 18, 2017, and Jan. 22, 2018 — both of which were attended by plaintiff’s counsel, Massad, who spoke in opposition to the passage of the ordinance on behalf of his client.

The Town Council voted to pass the proposed ordinance by a 6-1 vote at the Jan. 22 hearing.

The plaintiff sued on Feb. 22. The judge dismissed Count II of the complaint, an appeal of the zoning ordinance, as untimely.

The judge then considered a motion by the town to dismiss the other counts of the plaintiff’s complaint, which requested a declaration that the ordinance was unconstitutional as a deprivation of his procedural and substantive due process rights.

**Defective notice**

Taft-Carter noted that G.L.§45-24-53(c) required that when a proposed amendment to an existing ordinance includes a specific change in a zoning district map, public notice must include a map showing the existing and proposed boundaries. The statute also required that written notice of public hearings be sent by registered or certified mail to all owners of real property within 20 feet.

Likewise, Westerly Code 260-28D(2) required public notice of a proposed zoning change to include a map and to be sent by both first class and certified mail.

The letter received by the plaintiff was not sent by certified mail, nor did it include a map.

“Therefore, notice of the public hearing did not comply with §45-24-53(c)(1) and Westerly Code 260- 28D(2),” the judge wrote.

The town argued, however, that “any alleged notice deficiencies were waived upon Plaintiff’s counsel’s attendance and participation at the public hearings.”

Taft-Carter noted that personal attendance at a meeting of a government body constitutes a waiver of the right to object to any defect concerning the notice of any proceedings that occur at that meeting.

The plaintiff alleged, however, that he and his attorney were disadvantaged or aggrieved by the defective notice’s failure to include a map depicting the existing and proposed zoning district boundary lines.

“Attorney Massad argued that this defect negatively impacted his ability to prepare and effectively advocate on Plaintiff’s behalf because he was required to rely on outdated and incomplete data when preparing to defend Plaintiff’s interests at the public hearings,” the judge wrote.

“Thus, for the purposes of this motion only, the Court finds that Plaintiff and his Counsel were disadvantaged or aggrieved by the Town’s defective notice, thereby preserving Plaintiff’s defective notice claim,” Taft-Carter stated.

**Standing**

The plaintiff also asserted that he suffered an economic injury to his property due to its reclassification in a “confliction area” as a result of the ordinance.

Specifically, he alleged that the ordinance injured his property by placing restrictions on the height of a structure constructed on the property. He went on to point out that the ordinance required property owners to submit an application for development plan review to the town’s Planning Board prior to constructing any structure, development or subdivision (other than a single-family residence). The ordinance also required property owners to receive the approval and recommendation of the Federal Aviation Administration and the Rhode Island Airport Corp.

“Therefore, Plaintiff has the requisite standing to bring his claim pursuant to §45-24-71 and is a proper party to bring the instant action because he suffered an injury to his Property caused by the Ordinance,” Taft-Carter concluded.

[**CASE:** Mascola v. Town of Westerly, Lawyers Weekly No. 61-073-18](https://rilawyersweekly.com/blog/2018/08/30/zoning-airport-height-restrictions/)

**COURT:** Superior Court

**ISSUE:**Did a neighbor of Westerly State Airport have standing to challenge a town ordinance that classified his land as being in a “confliction area”?

**DECISION:** Yes

Issue: [SEPT. 10 2018 ISSUE](https://rilawyersweekly.com/blog/issues/sept-10-2018-issue/)