

To: Board of Selectmen
Town Manager/Administrator
Zoning Board of Appeal
Planning Board
Building Commissioner

From: Barbara J. Saint André

Date: April 11, 2007

Re: Update on Relevant Land Use and Zoning Decisions

This memorandum sets forth a brief overview of relevant land use and zoning decisions issued by the Appeals Court and the Supreme Judicial Court in the first three months of 2007. Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are confronted with making decisions involving similar issues. This memorandum does not address every single decision involving land use issued by the Massachusetts appellate courts. Some decisions were omitted if they were purely procedural in nature or did not provide any new substantive analysis. In addition, selected cases from the trial courts, specifically Land Court and Superior Court, are included. These cases are not appellate cases and therefore do not have precedential value, but are often considered persuasive by Land Court and Superior Court judges.

ZONING

Rourke v. Rothman, 448 Mass. 190 (2007)

In this case, the Supreme Judicial Court (SJC) considered the interpretation of G.L. c. 40A §6 relative to grandfathered lots. Rothman sought to build a single family home on a lot that did not meet the minimum area or frontage requirements of the zoning bylaw, claiming that the lot was “grandfathered”. When a building permit was denied, he appealed to the Board of Appeals, which found that the lot was grandfathered and overturned the Building Inspector. A group of neighbors appealed. In order for a lot to be grandfathered under G.L. c. 40A §6, it must, at the time of recording or endorsement, have at least 5000 square feet of land, 50 feet of frontage, not be held in common with adjoining land, and have “conformed to then existing requirements.” Whether the lot “conformed to then existing requirements” was the only issue in dispute.

The history of the zoning bylaw and lot is somewhat complicated. The lot was created in 1915 with 8000 square feet and 80 feet of frontage. The town adopted zoning in 1954 which required 15,000 square feet and 100 feet of frontage. At that time, the lot was still in common ownership with adjacent land. The lot was still buildable, however, because the 1954 bylaw contained a provision that pre-existing lots could be built upon if they were either separately owned or contained at least 5000 square feet. The lot did not become unbuildable until May of 1970, when the zoning bylaw was amended to allow an exemption only for lots that had at least 5000 square feet and were owned separately in 1954. Prior to that amendment, however, in March of 1970, the lot had been transferred into separate ownership. The zoning bylaw was later further amended to drop this exemption altogether and adopt the grandfather provisions of G.L. c. 40A. The SJC held that the lot “conformed to then existing requirements” in 1970, and thus was buildable. It concluded that the fact that the lot was buildable only due to an exemption in the bylaw did not affect the fact that it was buildable, and thus conformed with the requirements of the bylaw at the time. The court found that the bylaw in effect in March of 1970 simply had different frontage and area requirements for a lot based on whether it was in existence prior to 1954 and if so, if it was separately owned.

Uxbridge v. Griff, 68 Mass. App. Ct. 174 (2007)

The town of Uxbridge sought enforcement against defendant for violation of its zoning bylaw by virtue of Griff’s use of his land to operate a motorcycle cross country (motocross) practice course. The zoning bylaw permitted, in the Industrial District, any lawful use that was not dangerous by reason of fire, explosion or other hazards, or injurious, noxious or detrimental to the town or populace by reason of dust, odors, gas, smoke, vibration or other nuisance. At trial, neighbors, town officials, and police officers testified to the “unbearable” noise, dust, disturbance and safety issues. The Trial Court found that the use was noxious and dangerous and violated the zoning bylaw. The Appeals Court affirmed, agreeing that the evidence supported a finding that the noise alone was noxious, and the use therefore not allowed. It also upheld a finding of civil contempt against Griff for holding an event at the site after the Trial Court had entered a preliminary injunction against the use. Finally, it noted that Griff’s attempt to appeal the decision of the town’s board of appeals was correctly dismissed by the Trial Court as Griff failed to file a notice of the action with the town clerk within 20 days as required by G.L. c. 40A.

Andrews v. Amherst, 68 Mass. App. Ct. 365 (2007)

In this case, the court upheld a vote of the Amherst Town Meeting that re-zoned a portion of the plaintiff’s property from light industrial to flood prone conservancy (FPC), a zone that, needless to say, was more restrictive than the light industrial zone. The re-zoning resulted from a citizens’ petition. The court noted that a municipality has broad authority to establish zoning districts, and that a court would not invalidate a legislative decision of the town based on the alleged motive of the town meeting or the sponsors of the re-zoning article. Plaintiff alleged that the rezoning was spot zoning, in that his land had been singled out for more restrictive zoning than surrounding land that was indistinguishable. The court found that, where a large portion of the locus had been flooded, it was not irrational to include more of the land as a flood prone area than the minimum of 50 to 75 feet on either side of a watercourse specified in the bylaw. There was no need to show that every square foot of the locus was prone to flooding. On the issue of underinclusiveness, the court found that the properties surrounding the locus are zoned

residential low density, subject to agricultural preservation restrictions, and within a farmland conservation overlay district. Thus, the locus was not singled out, as the surrounding land already was subject to similar restrictions to those found in the FPC.

Giuffrida v. Zoning Board of Appeals of Falmouth, 68 Mass. App. Ct. 396 (2007)

Plaintiff is the successor to Francis Daddario, who applied to the Board of Appeals for a special permit to excavate his land for sand and gravel in 1994. The Board referred the matter to the Cape Cod Commission (CCC), which had jurisdiction over the project as a development of regional impact (DRI). The CCC disapproved the plan, and Daddario appealed. The Board of Appeals granted the special permit subject to conditions, including a three year time limit on the special permit. While Daddario was still awaiting resolution of his appeal of the CCC decision, he applied for an extension of the special permit, which was denied by the Board on the basis that a subsequent bylaw amendment rendered the earth removal work a prohibited use in the district. In the meantime, the appeal of the CCC decision was finally resolved in favor of the CCC. The court in *Giuffrida* therefore dismissed this appeal as moot, because the earth removal project contemplated by the special permit could not proceed without the CCC approval. *Giuffrida's* attempt to argue that the project was not a DRI, and CCC permission was not required, was deemed to be waived as it had not been raised by Daddario in the CCC appeal.

Orange v. Shay, 68 Mass. App. Ct. 358 (2007)

The court in this case determined that the defendant's use of his property for gravel removal was not a protected nonconforming use. The defendant owns an eight acre parcel of land, a portion of which was used commencing in the 1930's for sand and gravel removal, well before the Town of Orange adopted zoning. The use was expanded in the 1950's, although there was conflicting evidence as to the extent of the expansion. The Superior Court found that the use had not expanded to the entire parcel in the 1950's. Moreover, the Superior Court found that, whatever the expanded use of the property in the 1950's may have been, that expanded use had been abandoned after 1958. A portion of the property was used for sand and gravel removal prior to the Town enacting a zoning bylaw amendment in 1981 that required a special permit for all earth removal operations. In 2001, the use of the property increased, including the truck traffic, noise, and dust associated with the use. The Appeals Court upheld the Superior Court's ruling that the increased use of the property was an impermissible expansion of a nonconforming use, and affirmed the Superior Court's permanent injunction against defendants from further removal of earth material from the site.

Fordham v. Butera, 68 Mass. App. Ct. 907 (2007)

This case involved a challenge to Section V.B.5 of the Weston zoning bylaw, which allowed the zoning board of appeals to grant permits for storage for commercial and business activities in a residential zone. The Appeals Court agreed with a Land Court ruling invalidating the provision, as Section V.B.5 did not provide any standards to guide the board of appeals in determining whether to grant the permits. The Appeals Court reiterated the long-standing prohibition against granting a board "untrammelled discretion" in its decision making.

COMPREHENSIVE PERMITS

Marion v. Massachusetts Housing Finance Agency, 68 Mass. App. Ct. 208 (2007)

This involves a challenge to the Massachusetts Housing Finance Agency's (MHFA) determination of funding eligibility for a comprehensive permit project. In June of 2001, the developer (Well-Built Homes, Inc.) applied to the Fall River Five Cents Savings Bank for a written determination of project eligibility for a proposed 192 unit development. The project eligibility letter is a prerequisite to applying for a comprehensive permit. It received the letter, then filed its application with the town. The Board of Appeals granted a permit for only half the units, which Well-Built appealed to the HAC. The HAC invalidated the eligibility determination and ordered Well-Built to obtain a new one. Well-Built obtained a new letter from MHFA, and the town sought review from the HAC. While the matter was pending before the HAC, the town brought this action for declaratory relief, or alternatively as a request for a certiorari review of the MHFA determination. The Trial Court dismissed the appeal on the grounds that the town had not exhausted its administrative remedy before the HAC, and the Appeals Court affirmed. The Appeals Court further agreed that the MHFA eligibility determination was not reviewable under the certiorari statute as it was not a judicial or quasi-judicial action. The court noted in a footnote that the HAC has since issued its decision, which the town has appealed to the Superior Court.

Taylor v. Board of Appeals of Lexington, 68 Mass. App. Ct. 503 (2007)

In this case, the board of appeals granted a comprehensive permit to Rising Tide Development, which appealed certain conditions imposed by the board to the Housing Appeals Committee (HAC). A group of abutters, including Taylor, filed an appeal with the Superior Court. Under the comprehensive permit law, G.L. c. 40B, the developer's appeal is to the HAC, but other aggrieved parties may appeal only to the courts. After the HAC ruled in favor of the developer, the abutters appealed the HAC decision, and that appeal is still pending. Meanwhile, the developer moved to dismiss the original appeal by the abutters on the grounds that the original comprehensive permit had been superseded by the new permit issued by the HAC. The Appeals Court agreed with the abutters that there are significant procedural and substantive differences between the two distinct appeals provided for under Chapter 40B. Accordingly, the abutters right to appeal to the Superior Court could not be eliminated by the HAC's order that a revised comprehensive permit be issued.

Zoning Board of Appeals of Groton v. Housing Appeals Committee, Middlesex Superior Court Civil Action No. 05-3733L

The developer, Washington Green, LLC, submitted an application for 44 condominium units of mixed-income housing on property next to the Groton Electric Light Department (GELD) power substation. The Board denied the permit on several grounds, including the noise from the substation, the fact that the substation would be an attractive nuisance to the children living in the development, and the inadequate sight lines for traffic. The HAC overturned the Board of Appeals and ordered it to issue the permit. To address the sight line deficiency, the HAC ordered the GELD to grant an easement to the developer over a ten foot strip of land, which the developer was required to keep cleared and mowed. The Board appealed, and the Superior Court

upheld the HAC. The court deferred to the HAC's weighing of the evidence, and found that there was substantial evidence to support the HAC's findings on the issues such as whether the noise from the substation would create an undue disturbance to the residents. Most interestingly, the Superior Court upheld the HAC order that GELD grant an easement to the developer. The court acknowledged that the giving up of a property right by the town is not to be taken lightly. It found, however, that the easement "amounts to a minimal giving up of a property right." It therefore found that, under the circumstances, a vote of town meeting was not essential. This case has been appealed.

Cohasset Water Commission v. Cohasset Zoning Board of Appeals, 68 Mass. App. Ct. 1103 (Unpublished, 2007)

The court found that the Water Commission lacked standing to appeal a comprehensive permit issued by the Board of Appeals. The court found that Water Commission is a municipal board, and, as such, it is not generally considered a "person" for purposes of determining standing.

ENVIRONMENTAL

Moot v. Department of Environmental Protection, 448 Mass. 340 (2007)

The Supreme Judicial Court invalidated the regulations of the Department of Environmental Protection (DEP) that exempted "landlocked tidelands" from the licensing requirements of G.L. c. 91. This case contains a detailed explanation of the public trust doctrine as applied to public tidelands, and concludes that only the Legislature has the authority to relinquish the Commonwealth's and public's interests in the tidelands within the Commonwealth. Legislation has been filed in the General Court in response to this decision, which has far-reaching effects on many properties in the Commonwealth.

2007.03.11 Update on land use law (2700-07)