

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

From: Barbara J. Saint André

Date: July 20, 2007

Re: Quarterly 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 months of April, May, and June 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 Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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

Mongeau v. Marlborough, 2007 WL 1793137, F. 3d (1st Cir. 2007)

In this case, the United States Court of Appeals for the First Circuit affirmed its long-standing rule that a plaintiff in a land dispute must prove that the defendant municipality engaged in conduct that “shocks the conscience” in order to prevail on a claim that the municipality violated his substantive due process rights. The plaintiff alleged that he agreed to sell three parcels of land to the city in exchange for a sum of money and a promise by the city that he would be able to construct a 60 foot by 80 foot building on the remaining land. Marlborough’s building inspector twice denied a building permit application for lack of frontage and access, as well as lack of site plan approval. The town board of appeals granted a variance, subject to site plan review. The building inspector was on the site plan review committee, which did not approve the site plan until after the variance had been extended. The variance lapsed while an appeal of

the conservation commission approval, which plaintiff alleged the building inspector was behind, was pending. Another building permit application was denied.

Plaintiff then brought suit claiming deprivation of due process, alleging that the building inspector's refusal to issue the building permit was the result of plaintiff's refusal to make an unspecified mitigation payment to the city. For purposes of the city's motion for judgment on the pleadings, the court assumed that the allegations were true. The court held that the allegations of hostility and animus on the part of the building inspector were not enough to state a federal claim. The court stated that all appeals by developers from adverse land use decisions involve some claim that the municipal board or official abused or exceeded its authority, but the federal courts have been hesitant to become involved in local planning disputes unless there is a truly horrendous situation. The court indicated that it was possible that bribery or threats could constitute a substantive due process claim, but those were not present here.

Kibbe v. Douglas, 69 Mass. App. Ct. 1108 (Unpublished Rule 1:28, 2007)

In this case, plaintiff sought to build a single family home on an undersized lot, claiming it was protected as a "grandfathered" lot. The court, however, upheld a decision of the Land Court that the grandfathered lot provision of G.L. chapter 40A §6 did not apply to the lot, because at the time of the zoning bylaw change that made the lot nonconforming, there was a trailer on the lot which was connected to municipal water, electricity, and telephone, and had been occupied as a single family home for a number of years. The court ruled that the fourth paragraph of Section 6, the so-called grandfather protection for lots held in separate ownership from adjoining land when the lots become nonconforming, applies only to vacant land. Grandfathered lot protection does not apply to reconstruction of a single or two family house. See Dial Away Co. v. Zoning Board of Appeals of Auburn, 41 Mass. App. Ct. 165 (1996). The existence of the trailer on the lot when the lot became nonconforming precluded the use of the grandfathered lot exemption.

Carabetta v. Truro Board of Appeals, 2007 WL 1705636 (Land Court, 2007)

This is a somewhat usual grandfathered lot case involving interpretation of the "merger" doctrine, which provides in general that adjoining lots in common ownership must "merge" for zoning purposes to form a conforming lot, or as close to conforming as possible. The Carabettas sought to build a single family house on Lot 3 on Sandpiper Avenue, but were denied a permit by the Building Inspector. After the board of appeals upheld the Building Inspector, they appealed to the Land Court. Lot 3 complied with all of the dimensional requirements of the Truro Zoning Bylaw, but had been in common ownership with an adjacent lot, Lot 22, for a period of 13 years starting on February 27, 1984. The Building Inspector, and board of appeals, had therefore determined that Lot 3, although conforming, had "merged" for zoning purposes with Lot 22, which was a nonconforming lot. A single family residence had been constructed on Lot 22 in 1977, even though Lot 22 at that time had become nonconforming.

The Land Court determined that Lot 22 had been grandfathered under the Truro Zoning Bylaw, however, which provided greater protection to lots than G.L. c. 40A §6. The court found that the town zoning bylaw did not specifically require that grandfathered lots must be kept in separate ownership, and therefore determined that the doctrine of “merger” did not apply under the local zoning bylaw. The court also noted that, even under G.L. c. 40A §6, it would not find that Lot 3 was not buildable, where the two lots came from different chains of title and were never conveyed in the same deed during the 13 years they were in common ownership, and the two lots came out of separate subdivisions approved ten years apart.

McDonnell v. Zoning Board of Appeals of Natick, 15 LCR 248 (Land Court, 2007)

In this case, the Land Court upheld a condition imposed on a variance that imposed a side yard setback greater than the setback required by the Zoning Bylaw. Plaintiff appealed certain conditions that were imposed on a variance granted to her to allow her to build an addition on her single family house. The house was located on a corner lot, which did not comply with current lot area and frontage requirements. The house also did not conform to the front yard setback. The addition would intrude into the thirty foot required front yard setback from North Main Street. Under the Natick Zoning Bylaw, only one front yard setback is imposed on a corner lot, and therefore required side yard setback from the other street, New Road, was 12 feet. Condition number three of the variance, however, required that the addition “shall not be closer than 25.2 feet from New Road.” Plaintiff argued that the condition was unreasonable, arbitrary, and capricious, as the condition imposed a side yard setback in excess of that required by the Zoning Bylaw. The Land Court, however, found that there is no prohibition against a Board of Appeals, when granting a variance from one setback requirement, from imposing a more stringent setback requirement in another area. It noted that a condition imposed on a variance is valid unless it is shown to have no substantial relation to the public health, safety, or welfare. The court found that the purpose of the setback met this test, given that the house was on a corner lot, and the addition would be close to the intersection. Thus, the increased setback on New Road related to public safety and was within the discretion granted to the local board of appeals.

COMPREHENSIVE PERMITS

Boothroyd v. Zoning Board of Appeals of Amherst, 449 Mass. 333 (2007)

In this case, the Supreme Judicial Court determined that the Amherst Board of Appeals had the authority to determine there was a regional need for affordable housing even after the town had fulfilled its minimum obligation of 10% affordable housing units, and the Board of Appeals decision to grant a comprehensive permit was upheld. Under the comprehensive permit statute, G.L. c. 40B, a board of appeals may override certain local requirements, such as zoning bylaws, if the local requirements are deemed inconsistent with local needs. This determination requires the Board to balance the regional need for affordable housing against local health, safety, and planning concerns. When a city or town has not reached its minimum housing goal under chapter 40B, the regional need for affordable housing is deemed compelling. In this case, the

Board of Appeals considered a comprehensive permit application filed after the city had reached its 10% goal. A group of residents, including some abutters, challenged the permit, arguing that, once the City met the minimum affordable housing goal, the zoning bylaws must be imposed.

The court disagreed, finding that nothing in Chapter 40B divests a local board of appeals of the authority to grant a comprehensive permit once the city or town has met its minimum housing goal. The court noted that, once the minimum housing goal is met, the local board of appeals may exercise its discretion to apply the zoning bylaw, and is not required to grant a comprehensive permit. The court's decision, however, allows a city or town to grant comprehensive permits even after attaining the minimum affordable housing goal, if the local board of appeals finds that there is still a need for affordable housing and that it outweighs any local concerns.

Wrentham v. Housing Appeals Committee, 69 Mass. App. Ct. 449 (2007)

This case is, in some ways, a follow-up to the Boothroyd case. In this case, the board of appeals denied a comprehensive permit on the grounds that it found that the town had reached its minimum housing goal of 10%. The developer appealed to the Housing Appeals Committee, which overturned the board's finding that the town was over 10% and remanded the matter back to the board for a hearing and decision on the merits of the application. The board filed a complaint in the Superior Court, arguing that the HAC lacked jurisdiction since the town had met its minimum housing requirement. The Superior Court dismissed the town's complaint on the grounds that the HAC order was not final or appealable, and that the town must first exhaust its administrative remedies through the remand process and full agency review. The Appeals Court affirmed the Superior Court.

The Appeals Court first ruled that decisions as to whether a town has met its minimum housing requirement is factual question entrusted to the HAC. Relying on the Boothroyd case, the Appeals Court pointed out that, even if the town were correct that it had met its 10% minimum, the board should still provide a full hearing to the comprehensive permit application, as the board may find that the need for affordable housing still exists. The Appeals Court then went on to cite the familiar law that judicial review is not generally available for agency decisions that are not final. Since the HAC order of remand left the board with discretion as to how to act on the application after the public hearing, it was not a final decision and therefore not appealable.

SUBDIVISIONS

Berg v. Lexington, 68 Mass. App. Ct. 569 (2007)

A developer was granted subdivision approval and a special permit with site plan review for the construction of houses on three non-contiguous parcels of land located on Grandview Avenue, a paper street. A group of abutters appealed. The first issue presented to the court was whether the

three lots qualified as grandfathered lots. The abutters argued that two of the parcels were not grandfathered because the parcels were comprised of more than one lot, and the lots were not in the same ownership. For example, Parcel 1 consisted of two lots, one owned by Robert Ericson, and one owned by Robert and Constance Ericson. The two lots, taken together, met the minimum requirements for a grandfathered lot, but each lot individually would not. The court held that the treatment of the Parcels as single lots for zoning purposes was consistent with Chapter 40A §6 and that the Parcels were grandfathered under the applicable Zoning Bylaw provisions.

The second issue was whether the Parcels were buildable due to the fact that the frontage was on a paper street. The Zoning Bylaw required that frontage be on a street, road, or way, which was defined in the same manner as G.L. c. 41 §81L definition of subdivision, and the Zoning Bylaw further stated that, to build more than one new dwelling on an unaccepted way, the applicant must file a subdivision plan. Plaintiffs argued that, as abutters to Grandview Avenue, the developer under subdivision regulations was required to obtain their consent to the filing of the subdivision plan. The court found that the applicants, as owners of Parcels abutting on Grandview Avenue, had the right to make the street passable for its entire length. Thus, either by way of a definitive subdivision plan, or by Planning Board requirements regulating access to lots on subdivision plans predating the subdivision control law, the Town could require the construction of ways and installation of municipal services to the Parcels. The court therefore declined to decide if a subdivision was required, where the applicant was willing and had the right to improve the street to meet planning board requirements for a subdivision.