

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

From: Barbara J. Saint André

Date: October 23, 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 July, August, and September of 2007, as well as a few from October since it was a slow summer for opinions. Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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, are included. These cases are not appellate cases and therefore do not have precedential value, but are often considered persuasive by trial court judges.

ZONING

Chamseddine v. Zoning Board of Appeals of Taunton, 70 Mass. App. Ct. 305 (2007)

In this somewhat unusual case, the court considered the interplay between the provision of the Subdivision Control Law that allows the planning board to have certain land in a subdivision set aside for up to three years as a park, and the effect of a zoning bylaw amendment during that three year period that renders the set aside lot non-buildable. Under G.L. c. 41 §81U, a planning board may require a subdivision plan to show a park or parks, and the board may by endorsement on the plan provide that no building may be erected on the park or parks for up to three years without its approval. As the Appeals Court noted, the purpose of the three year period is to allow the city or town an opportunity to acquire the land. In this case, during the three year period, the City amended its zoning bylaw to increase the contiguous upland requirement, which the lot did not meet. The City argued that the lot was not “grandfathered” under the separate lot exemption of chapter 40A §6 because, at the time the zoning bylaw was amended, the lot was not available

for residential use. The Appeals Court disagreed, stating that the three year restriction on building did not change the character of the land from single and two family residential, and the lot therefore had the benefit of the grandfather statute.

Mellendick v. Zoning Board of Appeals of Edgartown, 69 Mass. App. Ct. 852 (2007)

The court upheld the grant of special permits by the board of appeals for the construction of affordable houses on three undersized lots pursuant to a local zoning bylaw provision. The zoning bylaw required the applicant to meet certain residence and income requirements in order to qualify for the special permits for the undersized lots. The bylaw also required the board to find that the specific site is appropriate for the construction on an undersized lots. (Undersized for Edgartown; each lot was at least one acre but the zoning district required three acre lots.) Plaintiff abutters claimed that the board was required to take into account the potential effects of the housing on endangered or protected species and their habitat. The court found that the board properly interpreted the bylaw as not requiring it to consider endangered species and habitat in ruling on the special permits. The court also noted that the state Division of Fisheries and Wildlife had this responsibility.

Eastham v. Chaves, 69 Mass. App. Ct. 1118 (unpublished 2007)

The Town brought an enforcement action against Chaves' predecessor in title to enforce its zoning bylaws to enjoin commercial activities in a zone where the use was not allowed. After Chaves acquired the locus, the town sent him two zoning enforcement letters, neither of which were appealed by Chaves to the board of appeals. The Town then added Chaves to the lawsuit as a defendant. The Town moved for summary judgment, and Chaves defended on the basis that there were material issues of fact as to whether the use was a protected nonconforming use. The Superior Court granted the Town's motion on the grounds that Chaves could not claim a grandfathered use where he had failed to exhaust his available administrative remedy, an appeal to the board of appeals. The Appeals Court affirmed the long-standing requirement in zoning cases that parties exhaust their administrative remedies.

Wright v. Bellingham, 2007 WL 1884657 (Land Court, 2007)

In this case, the Land Court invalidated a zoning bylaw amendment (the Amendment) enacted by the Bellingham Town Meeting. The amendment provided a prerequisite to the grant of any special permit by the planning board which would result in 50 or more dwelling units or 100 or more bedrooms. These developments, referred to as Major Proposals, could be granted by the Planning Board only if town meeting had first approved a "Concept Plan" by a two-thirds vote. The court stated that the traditional function of the Town Meeting is to elect town officers and exercise the legislative function of the town. The court found that the Town Meeting does not lend itself to the type of adjudicatory role mandated in the Amendment. It also noted that the Amendment was wholly lacking in standards to guide town meeting in evaluating the Concept Plan, as well as lacking in procedural safeguards assuring parties the right to present their views. Although the Land Court disagreed with plaintiff's argument that the Amendment did not make the Town Meeting a de facto special permit authority, it found that the Amendment granted the

Town Meeting veto authority over the grant of a special permit, a function that is not permitted under the statutory scheme of G.L. c. 40A for special permits.

COMPREHENSIVE PERMITS

Middleborough v. Housing Appeals Committee, 449 Mass. 514 (2007)

This case affirmed that a financing commitment from the New England Fund (NEF) qualifies as a subsidy from the federal or state government such that the developer may apply for a comprehensive permit. In order to apply for a comprehensive permit under G.L. c. 40B, the proposed development must be subsidized by the federal or state government under a program to assist the construction of low or moderate income housing. Since the Housing Appeals Committee (HAC) first ruled that the NEF was an eligible federal subsidy program, a number of cities and towns have questioned whether the NEF is indeed a federal subsidy program. The Appeals Court had ruled in this case that the NEF did qualify as a federal subsidy. On further appeal, the Supreme Judicial Court (SJC) upheld that ruling, although on somewhat different grounds. The SJC first stated that it must give deference to the HAC's decision. It noted that the word "subsidy" is not defined in G.L. c. 40B, but is broadly defined in the HAC regulations. The Court further relied on an earlier ruling in which it had found that a low-interest loan from MHFA constituted a subsidy under chapter 40B, and saw no difference in the low-interest loan provided under the NEF.

Oceanside Village, LLC v. Scituate Zoning Board of Appeals, HAC (2007)

The Housing Appeals Committee (HAC) ordered the issuance of a comprehensive permit for 250 units of condominiums, after the developer appealed the Board's decision to grant a permit for 150 units with a number of conditions. The hearing officer ruled that the approval of the permit was actually a denial of the permit, thus shifting the burden of proof in the hearing. The HAC also ordered the town's DPW to grant necessary approvals for municipal sewer, despite the limited capacity of the town's wastewater treatment facility. The Board argued that the DPW was not a "local board" under chapter 40B, and therefore the HAC did not have jurisdiction to enter such an order. The board further argued that the Town's twenty year period of studying the priority areas in town for sewer based on factors such as septic system failures and soil conditions, was a valid local need that outweighed the regional need for low and moderate income housing. In addition, there were issues raised as to density, planning concerns, water, fees, and a host of other issues. This case is on appeal to the Superior Court.

SUBDIVISION

Murphy v. Planning Board of Hopkinton, 70 Mass. App. Ct. 385 (2007)

This case re-affirmed the futility of collateral attacks on a local land use decision well after the appeals period has expired. In order to obtain an approval not required (ANR) endorsement of his plan, Murphy's predecessor in title, Mizen, in 1982 agreed to the planning board's imposition of a condition on the ANR plan that prohibited access to a lot known as Lot 25 from

the abutting Penny Meadow Lane. Mizen also entered into an agreement with the Board memorializing the condition, and the agreement was filed at the Registry of Deeds along with the plan. At the time, Mizen had a special permit allowing access through wetlands to another abutting street, Ash Street. The special permit, however, was never used, and when Murphy purchased the lot in 1997, he was unable to obtain permits to cross the wetlands. He brought suit, challenging the ANR condition as beyond the planning board's authority (but, of course, seeking to keep the benefit of the ANR itself). The court stated that it did not need to reach the issue of whether the planning board could impose a condition on an ANR plan, since any challenge to that condition had to have been made within the statutory appeal period. The court found that the challenge to the condition was of necessity a challenge to the ANR endorsement, which could not be brought 20 years after the fact. The court then went on to reject Murphy's challenge to the validity of the restrictions on statutory and common law grounds.

Blue View Construction, Inc. v. Franklin, 70 Mass. App. Ct. 345 (2007)

This case involves yet another obscure provision in the Subdivision Control Law, §81DD. The plaintiff claimed that the issuance of a comprehensive permit by the board of appeals for a proposed development by an abutter in effect constituted a modification of a subdivision approval in violation of G.L. c. 41 §81W, thereby entitling plaintiff to damages under c. 41 §81DD. The approved subdivision in 1987 was submitted jointly by Blue View's predecessor in title and an abutting land owner, and provided for construction of a road on that abutting land owner's property to Blue View's property, which was then subdivided into seven lots. After a somewhat complicated history, a comprehensive permit was granted to the abutting landowner for its property. Blue View contended that the comprehensive permit in effect amended the subdivision without the approval of Blue View, the owner of the subdivision, or its lender. The Court, however, found that the subdivision plan had long been abandoned. Moreover, the Court noted that G.L. c. 41 §81W applies only to modifications of subdivision plans made by a planning board, and thus had no effect on the board of appeals.

Ducey v. Waltham Board of Survey and Planning, 15 LCR 362(2007) (Long, J.)

The Land Court dealt with two little-used sections of the Subdivision Control Law (SCL) in this case. Plaintiff sought approval not required (ANR) endorsement of a plan to divide a lot in two, claiming that each of the resulting lots would have on it a building that was in existence at the time the SCL went into effect and remains standing, thus exempting the plan from the definition of subdivision under G.L. c. 41 §81L. The problem was that one of the structures, a dairy barn, was not constructed until 1952, and the SCL was accepted by Waltham in 1944. Plaintiff relied on an obscure provision of G.L. c. 41 §81EE that required every board with powers under the SCL to file its regulations within 60 days of January 1, 1954 with the Registry of Deeds and Recorder of Lands. Waltham did not file a copy of its regulations with the Registry until 84 days after the January 1, 1954 date. Thus, the plaintiff argued that the SCL was terminated in Waltham, and did not become effective again until the Regulations were properly filed on March 24, 1954, and the dairy barn therefore was constructed prior to the effective date of the SCL in Waltham. The court ruled, however, that, under the terms of §81EE, the Board's powers under the SCL were merely suspended in 1954 from the date the Regulations should have been

recorded, until the regulations were properly filed. The Land Court went on to find that the former dairy building did not, in any event, satisfy the requirements for a building under §81L, as the building was too dilapidated to be considered still standing. The Court noted that the roof was severely dilapidated, the plumbing was inoperable, it had not been used for many years, and it had been exposed to the weather for an extended time period due to the condition of the roof as well as broken windows, rendering it uninhabitable.