

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

From: Barbara J. Saint André

Date: December 31, 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 October, November and December 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 Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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 or administrative agencies, 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

Fifield v. Board of Zoning Appeal of Cambridge, 450 Mass. 1001 (2007)

In this matter, the court reviewed an appeal of a request for zoning enforcement and determined that the owner of the land against whom enforcement is requested is a necessary party to the court appeal. Plaintiff had asked the Building Commissioner to revoke a building permit issued to his neighbor. The request was denied, and Fifield appealed to the ZBA, which upheld the Building Commissioner. On appeal to the Superior Court, Fifield named his neighbor as a defendant and sent him notice and a copy of the complaint by certified mail. The neighbor never signed for the certified mail. The Superior Court dismissed the complaint, finding that the neighbor was not properly served. The Supreme Judicial Court agreed with the Superior Court that the neighbor was a necessary party, even though the owner of land which is the object of a request for enforcement is not a "party in interest" as defined in G. L. c. 40A. The SJC ruled, however, that the case should not have been dismissed, as G.L. c. 40A §17 only requires that the notice and complaint must be sent by certified mail to each defendant; there is no requirement

that the defendant actually receive it. Thus, the neighbor could not defeat the lawsuit by declining to pick up his certified mail.

Steamboat Realty, LLC v. Zoning Board of Appeal of Boston, 70 Mass. App. Ct. 601 (2007)

This case is an appeal from the denial of a variance. The criteria for the grant of a variance in the City of Boston are somewhat different than the criteria under G.L. c. 40A, since zoning in Boston is governed by a special act. Nevertheless, there are sufficient similarities between Boston zoning and chapter 40A to make the case worthwhile reading. At issue was the renovation of an historic house in the Back Bay. A building permit was issued that reflected no change in the roof line. After construction, the roof exceeded the prior height by at least 4 feet. Steamboat then sought a variance, which was denied by the Board and the denial upheld by the Superior Court. Steamboat essentially conceded that it did not meet the criteria for a variance, but argued that equitable principals disfavor enforcing trivial or de minimus zoning infractions, where the violation was not intentional, the cost to correct it is great, and there is minimal harm to the abutters. In balancing the equities, the Appeals Court agreed with the Superior Court that there is great concern about maintaining the integrity of the Back Bay neighborhood, in particular the building heights. The court noted that the Board of Appeal had consistently taken a tough stance against any requests for height variances, denying each application. Finally, the court agreed that the height difference was not de minimus.

Fordham v. Butera, 450 Mass. 42 (2007)

The SJC found that a local zoning bylaw provision was valid as it did not grant the local board of appeals “unbridled discretion.” The Buteras were granted a permit for storage of certain trucks and tools for their landscaping business. A few years later Fordham, an abutter, claimed that the Buteras were violating their permit and sought enforcement. The Building Commissioner issued an order, which was appealed by the Buteras to the board of appeals. After a hearing, the Board voted to amend the permit to allow certain storage on the site. Fordham appealed the decision, and also challenged the validity of Section V.B.5 of the Zoning Bylaw. The Land Court ruled that the Bylaw section was invalid as it granted the board “unbridled discretion” in deciding whether to grant a permit, and the Appeals Court affirmed. The SJC, however, noted that every presumption must be made in favor of a local zoning bylaw. It found that the bylaw language in question sets limitations both as to the location and the type of business that could receive a storage permit. The SJC also noted that Section 1.B of the zoning bylaw limited the board’s permit granting authority by prohibiting any use which is injurious, obnoxious, dangerous or a nuisance through noise, vibration, concussion, odors, etc. The SJC found that, while the board had discretion in granting storage permits, there were sufficient standards to uphold the validity of the bylaw provision.

SUBDIVISION

Krafchuk v. Planning Board of Ipswich, 70 Mass. App. Ct. 484 (2007)

This case has a somewhat complicated sequence of events. The Fagans submitted a preliminary subdivision plan on October 5, 2001, in order to obtain protection from an increase in the minimum lot size that was approved by Town Meeting ten days later. The definitive plan was submitted on May 3, 2002, within seven months of the preliminary plan, and therefore within the time frame of G.L. c. 40A §6. On January 8, 2003, the planning board voted to disapprove the plan, and filed its decision on January 21, 2003. The Fagans asserted that the plan had been constructively approved because the board failed to act within 90 days. After a second public hearing, the board voted to rescind the constructive approval on May 8, 2003, filing that decision with the Town Clerk on June 23, 2003. The Fagans obtained a further hearing, and the board on December 4, 2003 voted to revoke its prior disapproval, and approve an amended plan that was submitted by the Fagans on October 23, 2003. The plaintiffs, who are abutters, appealed each of the various planning board decisions, and the cases were consolidated.

The court noted that, during the public hearing on the definitive subdivision plan, the Fagans submitted two amended plans, and acquiesced to the continued board meetings that ran through January 8, 2003, at which time they requested a vote be taken. The court held that the “belated” assertion of constructive approval was ineffective, as the failure by the planning board to file the notice of final action will not effect constructive approval where the applicant is aware of the board’s deliberations, and the board’s eventual action is a final decision that is appealable. Moreover, the Fagans took no timely action to claim constructive approval by securing a certificate from the town clerk under chapter 81 section 81V. The court also noted that, even if there had been a constructive approval, the board had properly voted to rescind it. Finally, the court found that the amended plan that was finally approved by the board was not protected from the new zoning bylaw provisions, as the amended plan was filed on October 23, 2003, more than seven months after the preliminary plan had been filed. Since the amended plan was not protected by the zoning freeze, the board should not have approved it, and the board’s decision was vacated.

Kitras v. Zoning Administrator of Aquinnah, 70 Mass. App. Ct. 561 (2007)

In this case, the court determined that a subdivision was not entitled to the zoning freeze of G.L. c. 40A §6 where the plaintiffs failed to timely obtain certificates of constructive approval from the town clerk under G.L. c.41 §81V. Under chapter 40A section 6, the eight year zoning freeze for approved subdivisions commences upon “endorsement” of the plan, which requires either an endorsement by the planning board, or a certificate from the town clerk under chapter 41 section 81V evidencing a constructive approval. In this case, plaintiffs were denied a certificate by the town clerk, and failed to bring a timely mandamus action against the town clerk to require the issuance of a certificate. Plaintiffs argued that the eight year zoning freeze took effect even without the town clerk certificate, but the court rejected that argument. Citing the Krafchuk case, it found that final approval is not automatic even in the absence of an appeal. Since plaintiffs had already failed in their mandamus action to obtain the town clerk certificate, they are unable to obtain the eight year zoning freeze for an approved subdivision.

COMPREHENSIVE PERMITS

Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007)

The SJC in this case determined that a local zoning board of appeals may override local zoning requirements when a commercial use is included within an affordable housing development, at least if the commercial use is allowed by the underlying zoning bylaw. The YMCA of the North Shore, Inc. applied for a comprehensive permit for 48 rental units in two separate structures, one of which would include 8,220 square feet of commercial space on the first floor. Although commercial uses are allowed in the zoning district, the proposed commercial element of the development would violate the minimum setbacks. Jepson, an abutter, as well as the Ipswich Housing Authority, which owned property directly across the street, both appealed. As is usually the case in such appeals, the first issue contested was whether plaintiffs had standing to appeal. The court determined that Jepson had standing to appeal based upon flooding of his property, as flooding constitutes an injury to an interest which G.L. c. 40B was intended to protect. The SJC also found that a housing authority may have standing where it owns land that directly abuts a proposed chapter 40B development. The Court distinguished the case of Planning Board of Hingham v. Hingham Campus, LLC, 438 Mass. 364 (2003), where it had determined that a planning board did not have standing to appeal a comprehensive permit because municipal boards and officers are not “persons” for purposes of standing. In this case, the Housing Authority owned land abutting the proposed development, and therefore had standing as an abutter, rather than attempting to rely on its status as a public entity.

On the merits of the case, the Court noted that affordable housing developments do not benefit only those who qualify for the housing. It pointed out the fact that only a minimum percentage of affordable housing units are required for a comprehensive permit development, with the remainder being market rate units. Thus, the Court extended that “flexibility” to include an “incidental commercial component” to provide additional incentives to developers to establish affordable housing. The Court stated that nothing in chapter 40B expressly prohibits the inclusion of incidental commercial uses when such uses are permitted on the property by zoning.

Groton v. Housing Appeals Committee, Suffolk Superior Court CA No. 06-3793 (Oct. 16, 2007)

In this case, the board of appeals granted a comprehensive permit to Groton Residential Gardens. The board subsequently amended the permit to address flooding and ground water concerns. Gardens appealed the modifications to the Housing Appeals Committee (HAC), which appointed a Presiding Officer to conduct the hearing. The town submitted a request to review the Presiding Officer’s proposed decision and present argument to a majority of the HAC. The Presiding Officer denied the request on the grounds that the full HAC was not deciding the case, then unilaterally decided the appeal, striking the modifications made by the board, eliminating several requirements of the original permit, and ordering the building official to issue occupancy permits. The Superior Court (Cratsly, J.) found that the Presiding Officer exceeded his authority and employed unlawful procedure when he decided the dispute. The court found that the state regulations do not permit the Presiding Officer to rule on the economic feasibility of a project or

enforce a permit previously issued by a local board. The Court remanded the matter back to the HAC for further proceedings before the full HAC.

Attitash Views, LLC v. Amesbury Zoning Board of Appeals, HAC No. 06-17 (Oct. 15, 2007)

In this case, the HAC determined that a local zoning board of appeals does not have the right to impose conditions on a comprehensive permit which limit how the housing may be subsidized, involve the board in the drafting of documents to ensure long-term affordability, determine eligibility for renters, influence marketing, determine the monitoring agent, determine how parts of the calculation of the profits limitation will be conducted, or “otherwise insert itself into programmatic aspects of the development.” The HAC ruled that these types of issues are reserved for the “state government”, in particular the Department of Housing and Community Development and MassHousing. The HAC first ruled that the developer did not need to prove that the conditions rendered the project uneconomic, even though such a requirement is found in G.L. c. 40B §23 when a developer appeals conditions imposed by a local board of appeals. The HAC ruled that the requirement that the developer prove that the conditions render the project uneconomic did not apply since the challenge was as to the legality of the conditions. On the merits, the HAC struck down or revised numerous conditions on the grounds that the local board of appeals does not have jurisdiction over issues such as financial arrangements, profit projections, developer’s qualifications, and marketability, which are deemed to be reserved to the subsidizing agency.

WETLANDS

Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859 (2007)

This case determined that the failure of a conservation commission to issue an order of conditions under both the Wetlands Protection Act and its local bylaw within 21 days means that the superseding order issued by the Department of Environmental Protection (DEP) will apply to the project. The plaintiffs applied under the Act and under the town’s Wetland Protection Bylaw for an order of conditions to dredge Oyster Creek. The commission voted to close the public hearing on September 16, 2003, after which it received a letter from abutting property owners. At its next meeting, it voted to re-open the public hearing to accept the letter, then closed it again and voted to deny the project. Oyster Creek applied to DEP for a superseding order on October 8, 2003, twenty-two days after the commission first closed the public hearing. When the commission issued its denial on October 9 or 10, Oyster Creek appealed to the Superior Court. The SJC found that the hearing was closed on September 16, and that the commission had no authority under the bylaw to re-open it. The SJC therefore found that the decision was not timely. It further found that this did not result in a constructive grant of approval. Rather, it found that, where a commission issues its decision after the deadline, it loses the right to insist on the provisions of its local bylaw, and the provisions of the superseding order from DEP shall apply.