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MEMORANDUM

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

From: Barbara J. Saint André

Date: April 7, 2008

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 January, February and March of 2008, as well as one case just released by the Supreme Judicial Court regarding advertising on MBTA property. Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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

Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357 (2008)

This case involving the denial of a permit to demolish an existing house on an undersized lot and build a new, larger house that conforms to all required setbacks, was the subject of a client advisory in January of 2008. Please refer to that advisory.

Massachusetts Bay Transportation Authority v. Somerville, Mass. (2008)

In this decision issued just last week, the Supreme Judicial Court (SJC) ruled that municipal zoning regulations do not apply to billboards and commercial advertising signs located on property owned by the MBTA. The MBTA had erected outdoor advertising

on its premises in Somerville and Melrose. The cities argued that only services, equipment, and facilities of the MBTA are exempt from local regulations, not advertisements. Although the MBTA is exempt from local regulation pursuant to its enabling statute, the Court noted that a statutory agency is not necessarily exempt from all regulation. A regulation can be applied to an exempt entity such as the MBTA where the regulation serves an important purpose and would have no effect or a negligible effect on the entity's ability to fulfill its essential government function. The Court found that the zoning ordinances would have more than a negligible effect on the MBTA's ability to fulfill its essential government function to provide mass transportation services, because the income generated by the advertising on MBTA facilities is used by the MBTA to help defray the costs of transportation. The advertising signs challenged by the cities would generate almost \$200,000 per year in revenue to the MBTA. The SJC also noted that the MBTA enabling statute authorized the MBTA to raise revenues through commercial advertising and required the MBTA to maximize revenues from non-transportation sources. Accordingly, the Court ruled that the MBTA is exempt from the local zoning regulations.

Mejias v. Zoning Bd. of Appeals of Lynn, 2008 WL 222276 (Unpublished Mass. App. Ct., 2008)

This is an appeal of the grant of a dimensional variance. The applicant sought to combine two lots and build a four-unit residential structure. The combined square footage of the lots was undersized for the proposed structure. The site was situated in a general residential district, where the construction of "row houses" was prohibited. Affirming the Lynn zoning board of appeals, the Superior Court cited unique shape and topography of the site as justification for granting the variance. Also, the Superior Court found the proposed construction was not within the definition of a row house as defined in the Lynn zoning ordinance. The Appeals Court reversed the decision of the Superior Court, finding no evidence in the record supporting unique shape and topography on the undersized lot. Additionally, the Appeals Court found the proposed structure to materially match the definition of a prohibited row house under the Lynn zoning ordinance. The Court noted that granting of a variance is generally inappropriate simply because a lot is undersized, and a dimensional variance for proposed construction cannot be issued where that type of construction is specifically prohibited. Further, the Court noted that the two lots, when combined, were sufficient to build a two-family house, and therefore there was no unique shape and topography that justified a variance for a four-family house.

L'Esperance v. Salem Board of Appeals, 2007 WL 4563859 (Land Court, 2007)

This case interprets the "merger doctrine" of G.L. c.40, §6 and the Salem Zoning Ordinance, which requires that adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities. At issue was one of four contiguous lots held in common ownership since 1974. In 1959, Michael and Blanche Francullo obtained three contiguous lots and built a house on the combined land. In 1974, Michael conveyed to himself and Blanche the fourth lot, Lot 328, which has over 7000 square feet of land, and is contiguous

to their other land. In 1974, the minimum square footage for a buildable lot was 7000 square feet; in 1977 it was increased to 15,000 square feet. The building inspector determined that Lot 328 was a grandfathered lot, was buildable and issued a building permit. A neighbor appealed and the Salem ZBA upheld the building inspector's decision. The neighbor, under G.L. c.40A, §17, brought the current action appealing the ZBA's decision.

After the usual sparring over standing and other procedural challenges, the court found that Lot 328 was not buildable, as it had merged with the other three contiguous lots. The owner of the lots urged the court to look beyond the literal language of the statute and to focus instead on its purpose, which was to prevent a landowner from creating a dimensional nonconformity if he could have used adjoining land to avoid or diminish the nonconformity. The owner argued that purpose of the doctrine was not served by merging the lots because the owner could not have used the adjoining land to diminish the lot's nonconformity, as the adjacent lot was a previously developed, conforming lot. The court, however, found the language of c. 40A §6 and the local bylaw to be clear and unambiguous, and held that merger will apply to lots that are both conforming and nonconforming. The court noted, as long as one part of a lot is nonconforming, all contiguous lots, conforming or not, are to be considered an undivided parcel.

Philbert v. Zoning Board of Appeals of Randolph, 2008 WL 275062 (Land Court, 2008)

In this matter the Land Court determined a patio is not within the definition of "building" under the Randolph Zoning Code, and therefore the construction of a patio on a lot which contained a nonconforming single family home did not require a special permit or variance.

Plaintiff applied to construct a patio adjacent to her pre-existing nonconforming single-family dwelling. The building commissioner denied the home owner's building permit application stating the proposed construction was an expansion of a nonconforming structure and a violation of the zoning code's lot coverage requirement. The ZBA agreed with the building commissioner's decision, and determined the proposed patio construction was not in harmony with the general purpose and intent of the zoning ordinance.

On appeal to the Land Court, plaintiff argued she was entitled to a building permit because the patio was an as-of-right use which did not increase the nonconforming nature of the single-family dwelling because the patio should not be considered a "building" under zoning code. The Land Court noted "building" was not defined in the zoning code, but was defined in the Code of Massachusetts Regulations and Black's Law Dictionary as a structure enclosed within walls and having a roof. Therefore, the Court determined that a patio is not a "building", does not require a special permit or variance, and the plaintiff was entitled to a building permit.

SUBDIVISION

Terrill v. Planning Board of Upton, 71 Mass. App. Ct. 171 (2008)

In this case rescission of a prior constructive approval for a subdivision plan was not allowed. Plaintiffs submitted an application for approval of a subdivision plan, and although the planning board voted to deny approval of the plan, no certificate of denial was filed with the town clerk. Plaintiffs properly resorted to the procedures under G.L. c.41, §81V and requested that the clerk issue a certificate of constructive approval. The certificate of constructive approval was issued, and the landowners then secured a construction mortgage from the bank. Thereafter, the Planning Board voted to rescind the constructive approval without the consent of mortgagee.

The Appeals Court, looking to the provisions of G.L. c.41, §81W, noted that where an approved subdivision plan has been mortgaged, rescission of the subdivision may not affect the lots in the subdivision which have been sold or mortgaged in good faith without the consent of the good faith owner or mortgagee. Therefore, the board's rescission was invalid because the board failed to obtain consent from the bank. The Appeals Court considered the board's argument that the landowners failed to prove the mortgage was entered into in good faith, and concluded the board did not offer any evidence to support lack of good faith. The fact that the bank was informed that the approval was made constructively did not alter the fact that the mortgage was an arm's length transaction for valuable consideration. The Court stated, "Where a mortgagee's interest is acquired in good faith and for valuable consideration, rescission of prior constructive approval is a nullity without consent of the mortgagee. The statute mandates such consent."

Dennis v. Planning Board of Winchester, 71 Mass. App. Ct. 179 (2008)

In this case, rescission of a prior constructive approval was allowed. Original land owners had applied for approval of a subdivision plan. The plan was denied by the Planning Board two days after the expiration of the ninety day review period. The land owners appealed the board's decision to Superior Court where the judge ruled that the subdivision plan had been constructively approved, but remanded the case back to the board. As the decision of constructive approval was wrapped up in the appeals process, no certificate of constructive approval was ever recorded. The Appeals Court's decision to allow rescission was based on the landowner's procedural mistake, because at the time the board rescinded the constructive approval, "the certificate of constructive approval had not been issued or recorded in the registry of deeds", unlike the Terrill case discussed above. The court noted that constructive approval is not "self-actuating", and the recording of the certificate of constructive approval and subdivision plan are necessary for securing final approval.

The Appeals Court also noted that the board's rescission did not require consent from the bank or the land owners because the mortgage with the bank was not secured by the subdivision plans, the bank did not rely on the subdivision plans when granting the mortgage, and "both parties knew of the board's intent to disapprove the plan." Therefore, the Appeals Court concluded that

the bank's position was in no way disturbed, and rescission of prior constructive approval was allowed.

COMPREHENSIVE PERMITS

Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35 (2008)

In this decision just released by the Supreme Judicial Court, the SJC determined that the Housing Appeal Committee (HAC) "exceeded its authority under G.L. c. 40B by ordering the [Groton Electric Light Department] (or the town) to convey the sight line easement on the town's property because the Act confers no authority on the committee to order a municipality to convey an easement and, in so doing, the committee contravened State law." The local board of appeals had denied the comprehensive permit for, among other reasons, several safety hazards, including a lack of stopping sight distance for motor vehicles traveling south by the site entrance/exit, and the lack of adequate access for emergency vehicles due to only one site entrance. The HAC overturned the board of appeals, despite agreeing that the access road, if built with no changes to the sight lines, would constitute a safety hazard. The HAC determined that the safety hazard could be eliminated by regrading and clearing vegetation on abutting property owned by the Town and under the control of GELD. Although GELD was not willing to grant the developer an easement for this purpose, the HAC determined that it had the power to require GELD to grant the easement. Further, the HAC determined that the lack of a second access could be remedied by a dirt roadway that would require a crossing of 15 feet of town property, and that, if GELD did not grant that easement as well, it would order it to do so.

The SJC found that the HAC did not have the authority to "directly or indirectly" order the conveyance of an easement, which is an interest in land. An order directing the conveyance of an easement cannot be derived from the power granted under G.L. c. 40B to issue "permits and approvals" in the same manner as local boards or officials who would otherwise act with respect to the application. In addition, the SJC found that the requirement that Town Meeting approve the conveyance of an interest in land was more than a "local requirement"; the requirement of Town Meeting approval is imposed by state law, which the HAC is not authorized to waive. This case marks a significant victory for protection of local autonomy in an area where rulings in favor of cities and towns are few and far between.

511 Washington Street, LLC v. Hanover Zoning Board of Appeals, No. 06-05 (HAC, 2008)

Here the Housing Appeals Committee (HAC) determined that the purpose of the Comprehensive Permit Law, G.L. chapter 40B, is not to guarantee an economic return to the developer, but neither should a developer be prevented from making a change in a development that has become uneconomic unless the board of appeals has established that there are countervailing local concerns.

In this case the developer was granted a 40B permit to construct 74, age restricted rental units. After construction was complete, the developer sought to change the development to non-age restricted rental housing in order to make the project economically feasible. The Hanover Board of Appeals denied the request. The HAC concluded that the development with the age-restriction made the project uneconomic, whereas the lease up projections without the age-restriction would likely make the project economic. The HAC then determined that maintaining affordable rental housing supported the local need for affordable housing, but keeping the project age-restricted was not supported by any evidence of local need. Therefore, the HAC directed the board to remove the age-restricted condition on the comprehensive permit because the board had not established a countervailing local concern to support the denial.

South Center Realty, LLC v. Town of Bellingham Zoning Board of Appeals, 07-03 (HAC, 2008)

In this case, a Presiding Officer of the HAC determined that certain CDBG units that DHCD had included in the Subsidized Housing Inventory (SHI) did not meet the requirements for low and moderate income housing under G.L. c. 40B. The ZBA had denied the comprehensive permit on the grounds that the town of Bellingham had already exceeded the 10% statutory minimum requirement for affordable housing units as reflected in the SHI. The applicant, however, appealed the denial and challenged the inclusion of the CDBG units.

The Presiding Officer determined that various types of CDBG units in the town did not meet the requirements of chapter 40B. The “old-form” owner occupied units did not qualify for the SHI because they did not include an affordability use restriction, as required by 760 CMR 56.02. The “new-form” owner occupied units did not qualify for the SHI because the HAC determined that the 15 year lien that is recorded for each property is not a use restriction, does not guarantee affordability of a housing unit, and only guarantees affordability of a rehabilitation project. The rental units did not qualify because the 5-year term of the Rental Agreement was too short to comply with the DHCD’s requirements of a minimum 15-year use restriction. The removal of the CDBG units reduced the Town’s low and moderate income housing percentage to 9.45%. Therefore, the Presiding Officer denied the ZBA’s motion to dismiss the appeal,

New DHCD Regulations Governing Comprehensive Permits

Effective February 22, 2008, the Department of Housing and Community Development issued new regulations governing comprehensive permits and the Local Initiative Program. The new regulations contain sweeping changes from the prior regulations. Due to the scope of the changes, a separate client advisory on the new regulations will be prepared. In addition, new Guidelines implementing the Regulations were issued on March 23, 2008, covering items such as the Subsidized Housing Inventory, affirmative fair housing marketing plans, limitations on profits and distributions, and the Local Initiative Program (LIP).