

PETRINI & ASSOCIATES, P.C.

Barbara J. Saint André | bsaintandre@petrinilaw.com
The Meadows | 161 Worcester Road, Suite 304 | Framingham, MA 01701
(Tel) 508-665-4310 | (Fax) 508-665-4313

MEMORANDUM

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

From: Barbara J. Saint André

Date: July 5, 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 April, May and June of 2008. Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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.

ZONING

Sweenie v. A.L. Prime Energy Consultants, 451 Mass. 539 (2008)

This case was dismissed by the Superior Court upon a determination that the plaintiffs lacked standing. After the Appeals Court reversed, the Supreme Judicial Court (SJC) overruled it, agreeing with the Superior Court that plaintiffs did not have standing. Defendant was issued a special permit to improve and modernize a gasoline station. The special permit allowed defendant to replace existing underground storage tanks, and raze the existing building and replace it with a smaller one containing a convenience store. Plaintiffs, who are abutters or abutters to abutters, claimed that the renovations would threaten their drinking water, increase traffic, noise, and light, and decrease privacy. The SJC noted that only a person aggrieved may appeal a special permit decision. It found that plaintiffs had not produced credible evidence to substantiate their claims, and that the Superior Court's finding that the claims were speculative was not clearly erroneous, and therefore should be upheld. Judgment dismissing the appeal was affirmed.

Gallivan v. Zoning Board of Appeals of Wellesley, 71 Mass. App. Ct. 850 (2008)

In this case, the court took a dim view of an abutter who waited for several months after issuance of building permit and start of construction to seek zoning enforcement. The case is unusual because Wellesley has a bylaw requiring the building inspector to publish notice of all building permit applications, and mail notice to abutters. Plaintiff received the notice, but did not appeal the issuance of the building permit within the 30 day appeal period. Plaintiff later made a request for zoning enforcement that was denied by the Building Inspector. Plaintiff appealed, claiming that under chapter 40A section 8 she had a right to appeal the denial of the request for zoning enforcement as an aggrieved party. The Appeals Court ruled, however, that the use of a mandamus action to require the building inspector to enforce the Zoning Bylaw is available only in instances where the aggrieved party was not on sufficient notice to permit a timely appeal from the action causing the alleged violation (issuance of the building permit). The Court found that this balanced the rights of the abutter to have an avenue to seek enforcement where he or she could not have reasonably been on notice as to the building permit, with the rights of the owner, who was expending funds building a house in reliance on the building permit. Under the facts of this case, where the abutter was notified of the building permit application, the abutter was on notice, and could not wait until construction was well under way to seek zoning enforcement.

Godfrey v. Board of Appeals of Lancaster, 71 Mass. App. Ct. 1118(2008)
(unpublished)

This case involved the attempt, a la Bjorklund, to tear down a small, 265 square foot structure and replace it with a new home three times as big, yet meeting current setbacks, on an undersized lot. Unfortunately for the applicant, in addition to the difficulties encountered by the plaintiff in Bjorklund in trying to raze a small, nonconforming house and rebuild, in this case, the court determined that the structure had never been legally in existence on the lot. When the lot was created in 1959, the structure already existed. The lot, however, did not comply with existing zoning requirements as to lot size and frontage when created. The court found that the protections of chapter 40A section 6 and the local bylaw for nonconforming structures did not apply to this structure, since it was not lawfully in existence when the lot was created.

COMPREHENSIVE PERMITS

Board of Appeals of Woburn v. Housing Appeals Committee, 451 Mass. (2008)

This SJC decision is a significant victory for municipalities. The Court ruled that the HAC's practice of allowing its hearing officer to determine that certain conditional approvals of comprehensive permits are to be treated as denials is inconsistent with the statute. This determination to treat an approval as a denial is important, because it shifts the burden of proof at the Housing Appeals Committee (HAC). When a permit is granted

with conditions and the applicant appeals to the HAC, the statute provides that the applicant must prove that the conditions render the project uneconomic. Only if the applicant can make this threshold burden of proof does the burden shift to the municipality to show that the conditions are consistent with local needs. In the Woburn case, the HAC found that the developer had not proven that the conditions rendered the project uneconomic, but nevertheless went on to evaluate whether the each condition was consistent with local needs. Thus, the HAC essentially treated the conditional approval as a denial, a practice that the HAC has attempted to enshrine in its regulations. The SJC found that the HAC's determination was contrary to the express terms of the statute and therefore beyond the HAC's authority.

Taylor v. Housing Appeals Committee, 451 Mass. 149 (2008)

This decision upheld the validity of a Department of Housing and Community Development (DHCD) regulation that the date to calculate a municipality's stock of low and moderate income housing is the date on which the city or town's zoning board of appeals files its decision with the municipal clerk. Developers applied for a 36 unit affordable housing comprehensive permit. The Lexington ZBA approved the comprehensive permit with a condition limiting the project to 28 units. Developers appealed to the HAC, which ordered the ZBA to issue a comprehensive permit for 36 units. Abutters appealed to the Superior Court, and filed an emergency motion to dismiss, arguing the HAC lacked subject matter jurisdiction because, after the board's decision, but prior to the HAC's decision, the Town of Lexington achieved the 10% statutory minimum.

The SJC noted that the HAC's administrative decision of Casaletto Estates, LLC v. Georgetown Board of Appeals (2003) set the date the zoning board's decision is filed with the clerk as the appropriate date to calculate if the town has met the 10% goal. In Casaletto, the HAC determined that the language of chapter 40B §20, which states that local zoning requirements are consistent with local needs "when imposed by a board of appeals after a comprehensive hearing", "suggests that a municipality's progress toward the ten per cent threshold should be calculated when restrictions...are actually imposed, that is, at the time the decision of a zoning board of appeals is rendered." Taylor, 451 Mass. at 155. DHCD codified the Casaletto decision in its regulations in 2004. 760 CMR 31.04(1)(a).

The SJC stated that it would overturn a properly promulgated regulation only if inconsistent with the authorizing statute or irrational. The SJC found that the regulation was not inconsistent with the statute, as the regulation filled in a "gap" in the statute. The Court further found that the regulation struck a balance between the interests of the municipalities and those of the developers, and was a permissible policy choice as to which the SJC would defer to DHCD as the administrative body responsible for implementing the statute. Therefore, the SJC denied the abutter's emergency motion and determined the HAC had authority to review the matter.

The effect of this case, and the Canton case that follows, is limited, since the new Regulations promulgated by DHCD now provide that the applicable time to determine if the city or town has reached the statutory minimum for any particular comprehensive permit application

is the date that the application is filed with the board of appeals. 760 CMR 56.03(1). Having found that the regulation which determined compliance with the 10% goal as of the date the ZBA decision is filed was rational, based upon the language of chapter 40B §20, it will be interesting to see if the courts will uphold the new regulation if challenged.

Zoning Board of Appeals of Canton v. Housing Appeals Committee, 451 Mass.158 (2008)

In this case the SJC, echoing the findings of Taylor, determined that the Housing Appeals Committee (HAC) had authority to consider a developer's appeal because Canton did not reach the 10% statutory minimum until after the zoning board's decision was filed. After reviewing a developer's comprehensive permit application, the zoning board of appeals of Canton denied the application primarily because the increased traffic would be inconsistent with the local needs. The developer appealed the decision to the HAC. While the appeal was pending at the HAC, the board of appeals issued comprehensive permits that put the town over the 10% threshold. The board then moved to dismiss the developer's appeal on the grounds that the Town of Canton had achieved the 10% threshold. The HAC denied the board's motion, based on the regulation (760 CMR 31.04), and ordered the board to issue a comprehensive permit to the developer. The board appealed the HAC's decision to the Superior Court, where the court ruled in favor of the town, finding that the regulation skewed the balance of chapter 40B too far in favor of the developer

The SJC reversed the Superior Court's determination because, although the legislative purpose of the statute (c.40B, §20) is to strike a balance between increasing development of affordable housing and preserving traditional municipal authority in land use decisions, the "balance is not unlawfully affected by the timing set forth in the regulation". The SJC noted the HAC was correct in denying the zoning board's motion to dismiss because the 10% threshold was, as noted in the zoning board's original decision, not met until after the board's decision was filed. As the SJC made clear in Taylor, the regulation was not inconsistent with the authorizing statute or irrational, and therefore, the HAC had authority to review to zoning board's decision.

Taylor v. Board of Appeals of Lexington, 451 Mass. 270 (2008)

This decision addresses the thorny procedural morass that ensues when there are two appeals of one comprehensive permit, one appeal by the applicant to the HAC challenging certain conditions imposed on the permit, and the other appeal to the Superior Court by abutters challenging the permit itself. The HAC in this case directed that an amended comprehensive permit be issued to the applicant. The applicant then moved for summary judgment in the pending Superior Court case, arguing that the appeal of the original permit was now moot. The Superior Court agreed with the applicant and dismissed the case, and three of the abutters appealed. The Appeals Court reversed the Superior Court, but the SJC reversed the Appeals Court and affirmed the Superior Court decision. The SJC found that, once the HAC had issued its decision, which effectively required the issuance of a modified comprehensive permit, the original comprehensive permit became "inoperative", and any action by the Superior Court with regard to it would have no practical effect. Thus, the Superior Court appeal was moot. The SJC indicated that aggrieved parties do have the ability to bring a timely appeal to challenge the

operative comprehensive permit, which is the one that the HAC ordered to be issued. The SJC acknowledged that such an appeal could further delay the construction of affordable housing, but noted that “the anomalies created by the separate appeals require a legislative resolution.”

Hingham v. Department of Housing and Community Development, 451 Mass. 501 (2008)

In this case the SJC considered a challenge by the Town to DHCD’s determination that only 25% of the units in a residential building project approved by the Town would be counted toward the Town’s 10% affordable housing goal. DHCD maintains a tally, referred to as the Subsidized Housing Inventory (SHI), of the low and moderate income housing units in each municipality that count toward the 10% goal. Under the regulations in effect at the time, there was no specific provision allowing for an appeal of the SHI calculation. The validity of the SHI number could only be adjudicated by the HAC or courts on an appeal of a comprehensive permit decision. In this case, when Hingham was informed by DHCD that all of the units in the Linden Ponds development would not be counted toward the 10%, the Town brought a declaratory judgment action in Superior Court. The Superior Court dismissed the case, finding that the Town failed to exhaust its administrative remedies, and, on appeal, the SJC affirmed the Superior Court. The SJC stated that the letter from DHCD setting forth its calculation of the Town’s SHI was a nonfinal administrative ruling that was not binding on the HAC. The SJC determined that, if the Town wanted to contest the DHCD ruling, it must wait until such time (if any) that its board of appeals denies a comprehensive permit on the grounds that the town has reached its 10% goal, and that ruling is appealed to the HAC.

It should be noted that the revised regulations issued by DHCD on February 22, 2008, set forth a new procedure to be followed by a board of appeals if the board intends to deny an application or impose conditions based on having met any of the statutory criteria for meeting its housing goal. 760 CMR Section 56.03(8). The steps of the procedure are as follows:

1. ZBA must provide written notice to the applicant and DHCD within 15 days of the opening of its public hearing on a comprehensive permit application that it considers a denial of the permit or imposition of conditions would be consistent with local needs, the grounds that it believes has been met, and the factual basis for its position, including any documentation.
2. Comprehensive permit applicants that wish to contest the Board’s finding must provide written notice to DHCD, with a copy to the Board, within 15 days of receipt of the ZBA notice, providing any supporting documentation.
3. DHCD will review materials from ZBA and applicant within 30 days of receipt of appeal and issue a binding decision. If DHCD fails to issue a decision within 30 days, it will be deemed a constructive approval of the ZBA position.
4. Either the ZBA or Applicant can appeal the DHCD decision to the HAC within 20 days.

The requirement imposed by the revised regulations that the Board’s public hearing terminate within 180 days of the date of the opening of the public hearing is tolled during this process. If the ZBA does not follow this procedure, it waives its right to deny a permit on any of the

grounds set forth in Section 56.03(a). The ZBA has the burden of proving they have the met requirements 56.03(1) for denying or conditioning permit.

Wrentham v. West Wrentham Village, LLC, 451 Mass. 511 (2008)

This case sets forth essentially the same ruling as the Hingham case. This SJC decision is a further appeal of the Appeals Court decision in Wrentham v. Housing Appeals Committee, 69 Mass. App. Ct. 449 (2007). In this case, the board of appeals denied an application for a comprehensive permit, and the developer appealed to the HAC. The Town filed a motion to dismiss the HAC appeal, claiming that it had met the 10% minimum affordable housing goal. The HAC determined that the Town had miscalculated the number of affordable units, that the Town was not at 10%, denied the motion to dismiss, and remanded the matter back to the board for a hearing on the merits. The Town filed a complaint seeking judicial review and a declaratory judgment. The Superior Court decided that the remand order was not a final decision, and that the town must exhaust its administrative remedies, dismissing the complaint. The town appealed, and the Appeals Court upheld the Superior Court. The SJC affirmed the Appeals Court, agreeing that a remand to the board of appeals for consideration on the merits is not a final decision, noting that the board of appeals has a range of options on remand in making its decision.

OPEN MEETING LAW

McCrea v. Flaherty, 71 Mass. App. Ct. 637 (2008)

The Boston City Council was found to have violated the Open Meeting Law when it held meetings, closed to the public, at which a “rotating quorum” considered matters of public policy. The Council posted a guard at the door of a private meeting room who kept a head count to ensure that only a minority of councilors were in the room at any time, although the members in the private room changed in a rotation. The court characterized this as an “evasive strategy”, which defeated the fundamental purpose of the Open Meeting Law. Further, the court found that a subsequent public meeting at which the same subject was discussed did not “cure” the violation.