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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: October 14, 2008

Re: Quarterly Update on Land Use Law

This memorandum sets forth a brief overview of relevant land use and zoning decisions issued by the Appeals Court and the Supreme Judicial Court (SJC) in the months of July, August and September 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 Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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.

STATUTORY AMENDMENT

Chapter 239 of the Acts of 2008 amended General Laws chapter 40A section 11, and chapter 41 section 81T, to allow a planning board which is also a special permit granting authority to consolidate the special permit and subdivision public hearings for projects that are within its jurisdiction. The law allows the planning board, where a project needs both subdivision approval and a special permit from the planning board, to publish a single advertisement for a consolidated public hearing. The statute was signed by the Governor on August 4, 2008, and is effective November 3, 2008.

ZONING

81 Spooner Road, LLC v. Brookline, 452 Mass. 109 (2008)

In this important case from the Supreme Judicial Court (SJC), the court determined that the Brookline floor-area ratio (FAR) provision in its zoning bylaw was a valid exercise of

the Town's zoning authority. Plaintiff challenged the FAR as violating the provision in G.L. c. 40A §3 which provides that no zoning ordinance or by-law may regulate or restrict the interior area of a single family residential building. The SJC interpreted this provision in light of another provision in G.L. c. 40A §3, which allows a city or town to regulate the bulk and height of structures, as well as yards, lot area, setbacks, and building coverage. The SJC reasoned that the types of dimensional requirements allowed by c. 40A §3, although regulating the exterior dimensions of a dwelling, will necessarily have an indirect effect on the interior area of single family homes. The Court concluded that FAR's are a generally recognized and accepted principle of zoning, and that it was within the town's authority as a regulation governing the "bulk" of a structure. It further noted that the prohibition against regulating the interior of single family homes was originally enacted to avert snob zoning by prohibiting houses of a minimum size. Thus, the Court concluded that the FAR was a proper exercise of the zoning power, where the effect on the interior of the single family home was incidental to the regulation.

Muldoon v. Planning Board of Marshfield, 72 Mass. App. Ct. 372 (2008)

The Appeals Court in this case upheld a condition imposed in a site plan approval that required a greater set-back than required by the Zoning By-law. The applicant appealed the condition, arguing that requiring a setback that exceeded the required setback under zoning violated the uniformity requirement of G.L. c. 40A §4. The Land Court agreed with the plaintiff, but the Appeals Court reversed. The Appeals Court ruled that the Land Court should review the reasonableness of the condition under the zoning by-law's criteria for site plan review.

SUBDIVISION

Mathews v. Planning Board of Brewster, 72 Mass. App. Ct. 456 (2008)

The Appeals Court upheld a ruling of the Land Court, which upheld the denial of a subdivision plan where the access road would be constructed across a lot in an abutting subdivision, which the Court ruled would require modification of that abutting subdivision. Mathews owned land abutting an approved subdivision known as Wood Duck. Mathews purchased Lot 5 in the Wood Duck subdivision, and also obtained an easement from the developer for use of the subdivision roads. Mathews sought approval of a six lot subdivision, called Stonewood, that would be accessed by a road that would be built over Lot 5. Unfortunately for plaintiffs, the covenant for the Wood Duck subdivision referred to a declaration of restrictions, recorded at the Registry of Deeds, that prohibited any lot in the subdivision from being used as access to any adjoining land except another lot. There was also a note on the recorded subdivision plan to the same effect. A number of the other lots in the Wood Duck subdivision were sold prior to Mathews obtaining Lot 5. The developer of Wood Duck, Ruddy Duck, tried to circumvent the declaration of restrictions by filing an amendment to allow lots to be used as access to any adjoining land. In reading the various subdivision documents in conjunction with each other, the Court concluded that planning board decision limited the

use of the roads in the Wood Duck subdivision to the nine lots shown on the subdivision plan. The Court also found that Ruddy Duck could not grant an easement over the subdivision roads to Mathews because the other lot owners in Wood Duck, who purchased their lots prior to Mathews, were entitled to rely on the documents on record at the time they purchased their lots.

CIVIL RIGHTS

Kennie v. Natural Resource Department of Dennis, 451 Mass. 754 (2008)

This case involved plaintiffs' claims that the Town of Dennis' shellfish constable violated their rights under the state civil rights act by threatening or coercing plaintiffs in connection with an application to the Dennis conservation commission for a permit to construct a pier and dock off the waterfront edge of their property. The Supreme Judicial Court (SJC) determined that, when reviewing the facts in the light most favorable to the plaintiffs, there was sufficient evidence for plaintiff's claim of a violation of the state's civil rights act to defeat defendant's motion for summary judgment.

In order to state a claim for a violation of the state civil rights act, G.L. c. 12 §11I, a plaintiff must show that the exercise of their rights secured by the constitution or laws of the United States or the Commonwealth were interfered with, or threatened to be interfered with, by threats, intimidation, or coercion. The plaintiffs alleged that the shellfish constable made statements that he would do whatever he could to prevent the approval of the dock, that despite the low shellfish count in the area he "could take care of that". They further alleged that the shellfish constable purchased shellfish from a local vendor and planted them in the water prior to a second shellfish count being made by the division of marine fisheries, thus resulting in a higher shellfish count. The Court found that, construing the allegations most favorably to plaintiffs as required by defendant's motion for summary judgment, the shellfish constable interfered or tried to interfere with plaintiff's right to use and enjoy their property, subject of course to reasonable government regulation. The shellfish constable interfered with the permit application process, thereby causing plaintiffs to have to withdraw the application and apply for a different location. Moreover, the SJC found that the words and conduct of the constable were sufficient to constitute coercion, although it was careful to note that a certain amount of "posturing" and "huffing and puffing" is not uncommon in town hall disputes, and not every intemperate remark rises to the level of "threats, intimidation, or coercion." Nevertheless, the case is a reminder that town officials must be careful not to cross the line in dealing with citizens' property rights.