

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

From: Barbara J. Saint André

Date: January 8, 2009

Re: Quarterly Update on Land Use Law

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 Some of the decisions were unpublished slip opinions issued pursuant to Rule 1:28, which do not have precedential value but are often reviewed by courts for their persuasive value when they are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

### **Wall Street Development Corp. v. Planning Board of Westwood, 72 Mass. App. Ct. 844 (2008)**

This case invalidated Westwood's Major Residential Development By-law. It arose out of a complicated set of facts. Plaintiff owns Morgan Farm Estates subdivision, which abuts the Powissett Estates subdivision. Powissett subdivision has frontage on Woodland Road, a public way. Morgan Farm has frontage on Morgan Farm Road, a 500 foot dead end public way. When Powissett was approved, the plan showed two cul-de-sacs, one coming in from Morgan Farm Road and one from Woodland Road. Because the cul-de-sacs were more than 500 feet in length, the maximum allowed by Planning Board regulations, the plan called for a right of way between the cul-de-sacs for use by emergency vehicles. Plaintiff granted Powissett an easement to connect to Morgan Farm Road, and Powissett granted plaintiff an easement to connect the anticipated Morgan Farm Estates to the Powissett roads. Subsequent proceedings before the town conservation commission, however, resulted in some significant changes to the Powissett plan, such that the easement that had been granted to plaintiffs no longer connected to a

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subdivision road, but only to the emergency right of way. These changes were incorporated into a modified subdivision plan that was approved by the planning board, and agreed to by the Powissett developers, one of whom was plaintiff.

When Morgan Farm Estates came before the planning board for a special permit as a major residential development, the planning board denied the special permit on the ground that the conventional subdivision plan did not comply with the subdivision regulations (the cul-de-sac exceeded the 500 foot maximum length). The plaintiff appealed this denial, then filed two subdivision plans in quick succession, both of which were denied, and also appealed.

The Appeals Court found that the easement granted to the plaintiff for Morgan Farm was subject to the condition in the Powissett approval that the right of way it proposed to connect to could be used only for emergency vehicles. The purpose of this limitation was to avoid the creation of a through road. Thus, the Planning Board denials of the special permit and subdivisions were upheld.

Of more interest, however, was the Court's determination that Section 8.5 of the Zoning Bylaw, which required that all subdivisions of four or more lots obtain a special permit as a major residential development. The Appeals Court found that the power granted to the planning board to reject so-called conventional plans that comply with the subdivision control law and regulations was in conflict with the subdivision control law. The Appeals Court noted the long-standing proposition that a subdivision plan that conforms to the Subdivision Control Law, the regulations of the planning board, and the recommendation of the board of health, must be approved. This ruling could impact similar zoning by-laws regulating major residential developments, which have been enacted by many municipalities.

**Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266 (2008)**

This case puts a curious twist on the so-called lot merger doctrine. The somewhat complicated facts of this case involved two abutting lots in two adjoining subdivisions. Lot 22 of the Lookout Bluff Subdivision, approved in 1967, had 23,000 square feet, and became nonconforming in 1972 when the town increased the lot size to 33,750 square feet. Lot 3 of the Clear View Acres subdivision abutted Lot 22 and had 33,800 square feet. In 1977 a single family house was constructed on Lot 22. The two lots came into common ownership in February of 1984. Lot 3 was transferred to plaintiffs in 2002, and they applied for a building permit. The town denied the application, ruling that Lots 3 and 22 are merged for zoning purposes, and the Carabettas appealed. While the appeal was pending, the Carabettas were able to carve out a portion of Lot 3 and a portion of adjacent Lot 4, which they also owned, which, if added to Lot 22, would make that Lot conforming. The new Lot 3A created by this plan was still a conforming lot.

The Land Court ruled that the lots did not merge, finding that the town's zoning by-law had a more liberal grandfather protection for nonconforming lots that did not require lots to be

held in separate ownership in order to be kept as separate lots. The Appeals Court, however, determined that the section of the zoning by-law cited by the Land Court did not apply to lots, such as these, created after 1960. The Appeals Court also rejected the Land Court's alternative rationale, that the lots never merged because they were from separate subdivisions, never conveyed in the same deed, and described as separate lots. The Appeals Court noted that the construction of the word "lot" in the zoning context generally ignores the manner in which the components of a total area are assembled. Finally, the Appeals Court was not persuaded by the Land Court's finding that it would be inequitable to allow the owners of Lot 22, the O'Briens, to have permanent protection from zoning after building on a nonconforming lot, while the plaintiffs, who purchased a conforming lot with no notice that it had once been held in common ownership, were precluded from building.

Nevertheless, justice was done in the end as the Appeals Court determined that Lot 3A, (the lot created by the Carabetas from Lot 3 after carving out parcel B that, added to Lot 22, would make Lot 22 conforming), was a buildable lot. The Appeals Court based this conclusion on prior case law that, in essence, states that if the adjoining "merged" lot (Lot 3A) is no longer needed by the nonconforming lot (Lot 22) in order to make Lot 22 conforming, the two are no longer subject to the merger doctrine. Thus, even though the O'Briens had refused to accept conveyance of parcel B to make Lot 22 conforming, the Appeals Court determined that the O'Briens could not thwart the Carabetas' building permit. Lot 3A was a buildable lot as no part of it was needed by Lot 22 to make Lot 22 conforming.

**Dwyer v. Gallo, 73 Mass. App. Ct. 292 (2008)**

When the Town of Walpole Board of Appeals granted a special permit for Gallo to build two houses on two adjacent, nonconforming lots, the abutters appealed. One of the lots had an existing single-family home, which Gallo intended to raze in order to build a new house, and the second lot had always been vacant. The Superior Court overturned the Board's decision, determining that the two lots had merged for zoning purposes. Gallo appealed, claiming first that the abutters lacked standing to bring the appeal. The Appeals Court made short work of this argument, finding that an abutter has an interest in preventing further construction in a district in which the existing development is already more dense than allowed by the applicable zoning. The Court also noted the impact on the Dwyers in terms of increased noise, artificial light, and decreased privacy caused by the close quarters.

With regard to the special permit, the Appeals Court re-stated the long-standing rule that adjacent lots in common ownership will normally be treated as one lot for zoning purposes so as to minimize nonconformities. It further ruled that a municipality that desires to change this rule via its zoning by-law must do so in clear language. The Court found no such language in the Walpole Zoning By-law, and thus the lots had merged, and could not support two single-family homes. Further, the existing home could not be reconstructed without including all of the land in both lots.

## **BOARD OF HEALTH**

### **Walpole Country Club v. Board of Health of Sharon, 72 Mass. App. Ct. 913 (2008)**

The board of health granted a disposal works construction permit for the installation of a septic system for a 66 unit condominium. The plaintiffs, immediate abutters, appealed by bringing an action in the nature of certiorari. One of the items of contention was the fact that the primary and reserve soil absorption areas for the two septic systems would be located under impervious surfaces. Plaintiffs argued that the lack of pervious surface for the soil absorption systems was due not to the wetlands or other physical characteristics of the site, but the developer's decision to maximize the build-out of the upland area. The court found, however, that plaintiffs failed to establish that they had standing to appeal the decision. The court ruled that the WCC's claim that the septic system is hydrologically connected to the streams that WCC used for irrigation was speculative. The other plaintiff, Lee, wrote to the board that he was concerned of "possible" contamination to his well, located 150 feet away. Again, the court found that this was not enough to establish standing. As a result, the complaint was dismissed.

### **Macero v. MacDonald, 73 Mass. App. Ct. 360 (2008)**

This is an abutter appeal of variances granted by the board of health for the installation of a septic system to serve a proposed enlarged home in a coastal dune, and illustrates the importance of a local board making adequate findings to support its decision. MacDonald, the land owner, proposed to reconstruct the existing single family house on the lot as a larger single family home. Title 5 prohibits the installation of a soil absorption system in a coastal dune unless the applicant complies with seven criteria, and also complies with the criteria for a variance. Under Title 5, a variance can be granted only when the person requesting the variance is able to establish that enforcement of the provision for which a variance is sought would be unjust, and a level of environmental protection at least equivalent to that provided by Title 5 can be achieved. In addition, in the case of new construction, the applicant must show that the lack of a variance would deprive him of all beneficial use of the property. MacDonald also needed a variance from the local board of health's regulation prohibiting a leaching facility in a coastal dune.

The Appeals Court determined the board's decision did not permit competent judicial review, and therefore remanded the matter to the board for further proceedings. The Court found that the board failed to determine, as a matter of fact, whether MacDonald proposed a remodeling or a demolition and new construction, a crucial fact in light of the Title 5 variance standard for new construction. The Court also found that the resource areas on the lot were not clearly defined, and the board failed to determine if the system could be sited elsewhere on the lot. The Court noted a number of other failings in the board's decision, including the board's

failure to address the seven siting criteria under Title 5, the failure to address the variance criteria under Title 5, and the failure to address its own regulations in the decision.

## **WETLANDS**

### **Pollard v. Conservation Commission of Norfolk, 73 Mass. App. Ct. 340 (2008)**

This appeal under a local wetland protection by-law involved the conservation commission's denial of Pollard's application to build a three-bedroom home, septic system, and well on an undeveloped lot. The Superior Court reversed the commission's decision on the grounds that it was unsupported by substantial evidence, and the Appeals Court affirmed. The work would result in the disturbance of 191 square feet of the fifty foot "no disturb" zone set forth in the commission's regulations for the excavation of the well and installation of the water line. Further, the construction of the project would create a "disturbance" within the 100 foot buffer zone. Under the regulations, the plaintiff had the burden of showing that the work would not harm the wetlands. Plaintiff introduced detailed evidence from an expert consultant at the commission's public hearing that the proposal would have no impact on the ability of the buffer zone to protect the interests protected by the by-law, and that it complied fully with the requirements of the by-law and the commission's regulations. Further, plaintiff proposed a conservation easement and other actions to mitigate the impact.

As with all appeals under local wetlands by-laws, the appeal was in the nature of certiorari, which means that the court reviews the record of what took place before the commission to determine if there was substantial evidence to support the commission's findings. In this case, there was no evidence in the record which contradicted the expert testimony submitted by Pollard. The commission argued that it had the right to determine the probative value of Pollard's evidence, including discrediting his expert even though there was no contradictory evidence in the record. While the court agreed that the commission had the right to do this, it further ruled that the commission could not reject the evidence of the party with the burden of proof without an "explicit and objectively adequate reason." Thus, there must be some basis in the record for the rejection of the uncontradicted expert opinion. The commission in this case offered no particular grounds for denying the order of conditions, nor did it explain the perceived deficiencies in the expert testimony offered by plaintiff. Accordingly, the Appeals Court stated that the commission's decision left it "unable to determine with any reasonable degree of certainty that its decision was arrived at with fairness and without predisposition." The Appeals Court thus affirmed the Superior Court decision to reverse the commission's denial.

## **HISTORIC DISTRICTS**

### **Collins v. Historic District Commission of Carver, 73 Mass. App. Ct. 388 (2008)**

The Historic District Commission denied plaintiff's application for a certificate of appropriateness to build a single family house on a lot in the historic district, and plaintiff

appealed. After the Superior Court upheld the Commission's decision, the Town took the property by eminent domain. Plaintiff then brought this action, claiming that the Commission's decision constituted a taking of his property without just compensation in violation of the Fifth Amendment, for the period of time from the decision of the Commission to the taking of the land by the Town. The Appeals Court, however, found no taking. It noted that an unlawful taking can occur when the government action authorizes a permanent physical occupation of private property, or a government regulatory scheme deprives an owner of all economically beneficial or productive use of the property. In addition to finding no physical invasion of the property, the Appeals Court found that the Commission's decision was within its authority under the town by-law. Further, the Court noted that the decision did not deprive plaintiff of all economically viable use of the property, as the decision denied only the specific proposal for the house that was submitted to the Commission. The Commission found that the proposed siting of the house on the lot would be highly visible from the public way and other public areas in the historic district. The Commission determined that the plaintiff made little or no effort to recognize the cultural or historical significance of the district, or to demonstrate why the home could not be set back a greater distance to minimize the impact on the historic district.

### **COMMUNITY PRESERVATION ACT**

#### **Seideman v. Newton, 452 Mass. 472 (2008)**

This is the first case from the SJC interpreting the Community Preservation Act (CPA) funding provisions. The City of Newton appropriated funds from its CPA monies for various projects at Stearns Park and Pellegrini Park. Ten taxpayers brought suit challenging the appropriation. The trial court ruled that the appropriation exceeded the city's authority, and the city appealed. The SJC affirmed the judgment. The Court noted that the CPA limits the purposes for which funds collected under the CPA may be expended. The proper purposes for expenditures include the "acquisition, creation and preservation of land for recreational use" and the "rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created as provided in this section." The parks in question had been owned and operated by the city since prior to enactment of the CPA. The SJC ruled that CPA funds could be used for the creation of land for recreational use, but not the creation of new recreational uses on existing land already devoted for that purpose. Since Newton appropriated money for the latter, it was not a permissible use of CPA funds. Further, the Court interpreted "preservation" under the Act to mean the protection of parks from decay and destruction. Newton, however, rather than preserving the parks, sought to substantially improve them. Finally, use of CPA funds to rehabilitate parks is permitted only for parks acquired or created with CPA funds, not pre-existing parks. Thus, the use of CPA funds for the improvements to the long-existing parks was not allowed.

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