

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

From: Barbara J. Saint André

Date: July 20, 2009

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 April, May and June of 2009. Some of the decisions were unpublished opinions issued pursuant to Rule 1:28, which have limited precedential value but are often reviewed by courts for their persuasive value when they are confronted with making decisions involving similar issues. Selected cases from the Land Court are also included; although these do not have precedential value, they are often useful guides to current land use issues. This memorandum does not include 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

Lobisser Building Corp. v. Planning Board of Bellingham, 454 Mass. 123 (2009)

The court addressed the issue of special permit lapses in this case. Plaintiffs obtained a special permit in 1985 to build 84 townhouse units in a phased development. Plans were to be submitted each year for four years for the phases of the development. The first building permit was issued in April of 1987, and the first occupancy permit in 1987. In 1988, an issue arose with respect to the town's sewer system, and the project was apparently put on hold. No further activity took place, even after the sewer system became available, for many years. In 2006, plaintiff applied for a modification of the special permit and for development plan approval, which the board denied, ruling that the special permit had lapsed.

General Laws c. 40A §9 provides that local ordinances and bylaws shall provide that special permits shall lapse within a specified period of time, not exceeding two years, unless a substantial use has commenced or construction has not begun. The town Zoning Bylaw provided that a special permit shall lapse if a substantial use thereof or construction has not begun within twelve months of special permit approval. The court noted that there was no question that

construction had begun within 12 months of the issuance of the special permit. The fact that construction started only on phase 1 was sufficient to prevent the special permit from lapsing. The court noted that there was not a one year lapse provision for each phase, only for the special permit itself. The board argued, however, that a substantial use had not begun. The court noted that the statute and bylaw do not require that both substantial use and construction have begun within one year. While the court noted that special permits should not be “warehoused” indefinitely, it noted that the board may prevent lengthy delays by imposing express time limits on phased construction.

Eastern Point, LLC v. Zoning Board of Appeals of Gloucester, 74 Mass. App. Ct. 481 (2009)

This case in which a nonconforming house was allowed to be reconstructed revolves around the interpretation of the Gloucester Zoning Ordinances. The single family home, which was destroyed by fire, was a large Victorian built in the 1800’s. It was nonconforming as to maximum height and front and side setbacks. The Gloucester ordinance provided that a single family home could be reconstructed “in substantially the same form” if destroyed by catastrophe. The owner applied to the board of appeals for a variance to construct a new house on the site, but the board determined that neither a variance or a special permit was needed. Plaintiff, who owns the property across the street on the landward side, appealed the decision. Among other issues, the new house, rather than a Victorian, was a contemporary design. It occupied substantially the same footprint as the old house, but with a deeper front setback. The new house was squarer, as a result of which it had about 14,469 square feet of space, compared to the 9,611 of the former house.

Nevertheless, the court upheld the board’s ruling that the new house was in substantially the same form as the destroyed one. It noted that the court must give some measure of deference to the local board’s interpretation of its ordinance. The board had noted the similarity in footprint, the fact that the house was less nonconforming than the old house, and had ruled that the ordinance does not require that a centuries-old house be duplicated identically, but that modern considerations should be taken into account. The court noted that the board’s interpretation was consistent with the court’s interpretation that the ordinance requires a degree of semblance between the outer shape or structure of the two homes, taking into account practical considerations.

In a rare concurring opinion, Justice Green agreed with the result but disagreed with the reasoning. He disagreed that the house was in substantially the same form as the previous structure. He noted, however, that the board of appeals had found that the new house did not increase the nonconforming nature of the prior house, and, that the new house is not substantially more detrimental to the neighborhood. Thus, Judge Green found that the new house was, indeed, allowed under the second except clause of G.L. c. 40A §6, which allows reconstruction of a single family house if the reconstruction does not increase the nonconforming nature of the structure, and further allows extensions of nonconforming structures if the resulting structure will not be substantially more detrimental to the neighborhood.

Marques v. Zoning Board of Appeals of Weymouth, 74 Mass. App. Ct. 1119 (unpub. 2009)

This case upheld the grant of a special permit for a large condominium project. The court reiterates the deferential standard of review accorded by the court to the board's decision, and notes that the court will give some deference to the local board of appeal's interpretation of the zoning bylaw. Of most interest was the fact that there apparently was a prior appeal in this case, which resulted in a remand to the board in 2004. The original application was filed with the board of appeals in 2001. Plaintiffs argued that when the application was remanded to the board, the board should have applied a zoning bylaw provision limiting the height of buildings located abutting a school. An addition to Weymouth High School had been constructed in 2003 on land abutting the applicant's. The court ruled that "there is no requirement that changes in the status of abutting land, occurring after the date a special permit application has been filed, must be considered by the board. We have not found...any authority for the proposition that a zoning board of appeals must consider changed circumstances when reviewing an application for a special permit on remand." This ruling from the court seems to leave open the possibility that a local board could consider changes in circumstances, but is not required to.

SUBDIVISIONS

Krafchuk v. Planning Board of Ipswich, 453 Mass. 517 (2009)

In this case, the court determined on a complicated set of facts that the land shown on a subdivision plan was entitled to the eight year zoning freeze. The Fagans submitted a preliminary subdivision plan in 2001, followed within 7 months by a definitive plan. The board voted to disapprove the plan but approved certain waivers. Plaintiff abutters appealed the grant of waivers, and the Fagans asserted that the subdivision had been constructively approved. The board voted to rescind the constructive approval and readopt its previous decision, plaintiffs appealed again, and the Fagans also filed a lawsuit. In 2003, the Fagans submitted a request to the board to revoke the disapproval and approve an amended plan. The board voted to rescind its disapproval and approve the amended plan with waivers. Plaintiffs filed a third appeal, and the cases were consolidated.

First the court addressed defendant's challenge to plaintiffs' standing. Plaintiffs enjoyed a rebuttable presumption of standing as abutters to the subdivision. Moreover, the court found that Krafchuk had established that her property would likely be harmed by runoff from the subdivision.

The court further ruled that the land shown on the plan was governed by the Zoning Bylaws in effect in 2001 when the preliminary subdivision plan was submitted, and that it was entitled to the eight year zoning freeze of G.L. c. 40A §6. The court stated that there are two distinct zoning freezes for subdivision plans, a "process freeze" while the plan is being processed under the Subdivision Control Law and the eight year zoning freeze. The court concluded that the process freeze was in place when the Board made its decision and continued to the date of the court's decision. It reasoned that the eight year freeze did not commence because the town clerk

never issued a certificate of constructive approval. It found that the board's actions in rescinding the constructive approval and disapproving the plan reinstated the process and therefore the process freeze. Moreover, it pointed to the provisions of G.L. c. 41 §81U that state that, if a subdivision plan is disapproved, the planning board shall revoke its disapproval and approve an amended plan which conforms to the board's rules and regulations.

The court held that, "where the deliberative process between a planning board and an applicant regarding a timely filed definitive plan results in a disapproval decision, but progresses in a continuous fashion, wherein the applicant (1) timely files an appeal from the board's decision; and (2) submits within a reasonable time an amended plan that addresses the reasons for disapproval; the process freeze provision of G.L. c. 40A §6 fifth par., continues to apply to the land that is the subject of the plan." Thus, even if a subdivision plan is disapproved, and the disapproval by the board was valid and upheld on appeal, the process freeze will still continue if there is an amended plan submitted within a "reasonable time", whatever that may be.

The court upheld the board's decision to grant certain waivers. The legal standard of review is whether the decision was unreasonable, arbitrary, capricious, or based on an untenable ground. The criteria to be applied by the planning board under the Subdivision Control Law is whether a waiver is in the public interest and not inconsistent with the intent of the Subdivision Control Law.

The final result, however, was that the matter had to be remanded to the planning board for further proceedings because some of the members who voted to approve the plan had not been present at all of the public hearings when the plan was considered.

Wine v. Planning Board of Newburyport, 74 Mass. App. Ct. 521 (2009)

Another subdivision case, another complicated set of facts. In summary, the planning board denied subdivision approval to a plan filed in 2002 due to the plan's failure to comply with the board's rules and regulations governing centerline offset. The 2002 plan proposed to subdivide land that was shown on a previous subdivision plan, in 1982, in which the applicant agreed to certain conditions, which were filed at the Registry of Deeds as a covenant. The conditions included that any future subdivision must be in compliance with the subdivision rules and regulations, and that two of the lots remain single-family dwellings and front on High Street, so that only one lot, Lot 2B, would derive access from the private way shown on the plan. The 2002 plan proposed to subdivide Lot 2B into three lots. The board denied the 2002 subdivision for failure to comply with the rules and regulations as to centerline offset, and based on its finding that a waiver of that requirement would not be in the public interest or consistent with the intent and purpose of the Subdivision Control Law.

Plaintiff argued that no waiver of the centerline offset was required because the private way had been approved on the 1982 plan. That waiver, granted in 1982, was subject, however, to the conditions imposed by the board, and the 2002 plan would violate the covenants recorded with the 1982 plan by allowing four lots, rather than one, to front on the private way.

In reviewing whether the board was justified in denying the waiver, the board noted the deferential review standard. The court noted that the plaintiff's burden in showing that the refusal to grant a waiver was not in the public interest was "nearly insupportable". The second factor in considering whether to grant a waiver is whether it would be inconsistent with the purpose and intent of the Subdivision Control Law. The court noted that, while this may be given more scrutiny by the court, "it is a rare occurrence for a court to disturb a board's discretionary decision to deny a waiver of compliance". The court noted that the private way would intersect High Street, a busy road, near its intersection with another busy road, Kent Street. The court on the facts upheld the board's denial.

Costello v. Town Clerk of Longmeadow, 74 Mass. App. Ct. 1118 (Unpublished 2009)

This is another case in which the court examined and upheld a planning board decision on waivers under the subdivision control law. In this case, the board declined to waive its dead-end street length limitation. The court noted that the board had discretion in determining if the waiver was in the public interest and not inconsistent with the intent and purpose of the subdivision control law. The court noted that, under the board's regulations, a dead-end street could not exceed 500 feet "unless, in the opinion of the planning board, a greater length is necessitated by topography or other local conditions." The court noted that plaintiff failed to offer any evidence that an extension was needed due to topography or other conditions, and this alone was a sufficient basis to deny the extension. Further, the court noted that the record supported the board's stated safety concerns regarding the steep pitch of the street. Finally, plaintiffs alleged bad faith on the part of the board, citing the contents of two emails between the board and its consultant. Although the court found that the statements, taken in context, were innocuous, this is a reminder that the contents of emails are not protected from discovery, and care should always be taken in all written communications related to public business.

Millbury v. Carlstrom, 2009 WL 1526922 (Land Court 2009)

In this case, the Town of Millbury obtained a judgment against the owner of a subdivision for consultant fees that had been incurred by the Town, through its planning board, in the review of a definitive subdivision plan. The outstanding fees were for services rendered by the Town's consulting engineer and town counsel to the planning board during the subdivision review process. The owner of the subdivision argued that it was not the "applicant", and therefore was not responsible for the consultant fees under the board's regulations. It also argued that it was not aware of the fees and that the fees should have been paid by the applicant. The court noted, however, that the application was signed by both the applicant and the owner. By signing the application, the owner agreed to comply with the board's rules and regulations. Further, the rules and regulations defined "applicant" as the person applying, including owner or assigns of owner. Thus, the court found that both the applicant and the owner were responsible for the fees incurred in the subdivision process. The Town, which had paid the consultants bills when the applicant and owner declined to do so, was awarded the full amount of the fees plus interest.

COMPREHENSIVE PERMITS

Zoning Board of Appeals of Mansfield v. Housing Appeals Committee, 74 Mass. App. Ct. 1117 (Unpublished, 2009)

The court in this case upheld a determination by the Housing Appeals Committee that a request for modification of a comprehensive permit was constructively approved by the board of appeals when it failed to determine within 20 days of the submittal that the proposed amendments were substantial. The outcome of this case hinged on a section of the state regulations, 760 CMR 31.03(3), which provides that, upon receipt of a request for an amendment to a comprehensive permit, the request will be deemed approved unless the board, within 20 days, determines and notifies the applicant that the changes are substantial, and schedules a public hearing. The court upheld the validity of the regulations, and further noted that the regulations further the statutory purpose of “minimizing litigation and streamlining the comprehensive permit process”. The court also rejected the board’s argument that the HAC lacked jurisdiction as the project was no longer fundable. The court stated that, although an applicant must show fundability at the start of the process, there is no requirement that the applicant show continuing fundability for an application to amend a comprehensive permit already granted.