

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

From: Barbara J. Saint André

Date: October 27, 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 July, August and September 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 Some of the decisions were unpublished opinions issued pursuant to Rule 1:28, which have limited precedential value but are often reviewed by courts for their persuasive value when they are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, Superior Court, and administrative agencies on land use topics 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 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**

### **Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica, 454 Mass. 374 (2009)**

This case illustrates the necessity for boards to make reasoned decisions supported by findings of fact and evidence. In this case, the Supreme Judicial Court upheld a somewhat unusual decision from the Superior Court ordering the board of appeal to modify a special permit and variance. The original special permit and variance provided that there would be only one entrance/exit to the site, and a second means of access proposed by Wendy's was required to become a green strip. Wendy's did not appeal the condition and constructed the restaurant. Some time later, the Town and Mass Highway made certain road improvements, including taking some of Wendy's land. This significantly changed the traffic configuration and patterns, prompting Wendy's to apply for a modification of the special permit and variance to provide for the second entrance. The Board denied the application and Wendy's appealed. The case was remanded once to the Board with the Board again denying the application.

The board argued that Wendy's was estopped from essentially appealing a condition of the original permit five years later. The board pointed out that the new design of the road was in progress when the original decision was rendered, and Wendy's could have appealed the denial of the second entrance then. The court was unpersuaded, finding that a denial of an application for a modification in light of changed circumstances is reviewable by the trial court. On the merits of the case, the court noted that the board's decisions were essentially conclusions with no facts to support them. The court found that the board could not rely on statements made at the board's public hearing by neighbors, where the comments were not referenced by the board in its decision. The court further found that the rationale advanced for the first time on appeal, an alleged increase in traffic on side streets, was not articulated by the board in its decision, and was put forward by the board without any reference to any traffic impact studies or other evidence. Moreover, the overwhelming evidence at trial contradicted such a finding. The court stated that, although generally the courts are reluctant to order a board to implement particular zoning relief, such an order was justified in this case.

**Hoffman v. Board of Zoning Appeal of Cambridge, 74 Mass. App. Ct. 804 (2009)**

This case contains yet another twist on the merger of lots doctrine. Two adjacent lots, the first containing a four-unit dwelling, and the second containing a parking lot, came into common ownership in 1950. Mr. Azzam entered into an agreement to purchase the two lots, contingent on receiving approval to construct a two-unit dwelling where the parking lot was located. The permits were issued, the two-unit building was constructed, and occupancy permits were issued. The Building Commissioner some time later revoked the occupancy permits, finding that the two lots had merged, and the permit for the additional two units therefore violated the zoning bylaw. Azzam appealed the determination, and also applied for a variance. The board denied the appeal, but granted the variance. Azzam appealed the denial, and the abutter across the street appealed the variance. The two cases were consolidated.

The court first ruled that Hoffman had standing to appeal the variance, since the additional units would affect the availability of on-street parking. On the merits, the court found that the decision granting the variance was insufficient as a matter of law, because it contained no finding with respect to two of the criteria for granting a variance (substantial detriment to the public good and substantially derogating from intent of ordinance). The board merely recited the statutory prerequisites. The variance application was remanded back to the board for further findings.

The court made short shrift of Azzam's argument that the two lots had not merged because they maintained "separate identities". The court noted that "separate identities" means simply that the lots have not merged, and the fact that the lots have been described separately did not save them from merging for purposes of zoning.

**Bay Farm Montessori Academy, Inc. v. Duxbury, 75 Mass. App. Ct. 1103 (Unpub. 2009)**

The Town of Duxbury required the Academy to obtain site plan approval from the Planning Board for a new academic building and a new athletic/multipurpose building on its

campus. The planning board denied the application, and the Academy appealed, claiming that the Duxbury Zoning Bylaw provision was invalid on its face when applied to its educational use. Under the so-called Dover Amendment, G.L. c. 40A §3, zoning bylaws may not prohibit or require a special permit for educational uses, and may only impose reasonable bulk, height, open space, lot size, parking, building coverage and yard requirements. The Land Court ruled the Bylaw provision invalid on its face, and the Appeals Court affirmed. The Appeals Court noted that the Dover Amendment does not contemplate the requirement of site plans for exempt uses. The Court further noted that the site plan provisions of the Zoning Bylaw invested considerable discretion in the planning board over educational uses, which it found antithetical to the Dover Amendment's provisions. Finally, the Court stated that it did not address the question of whether under the Dover Amendment, a site plan provision might pass muster in the context of a zoning bylaw scheme that is consistent with the Dover Amendment: i.e. limited to bulk and height of structures, yard areas, lot size, open space, parking, and building coverage.

### **COMPREHENSIVE PERMITS**

#### **In Re: Bourne Zoning Board of Appeals and Chase Developers, Inc., HAC No. 2008-11 (2009)**

In this case, the Housing Appeals Committee (HAC) interpreted one of the so-called "safe harbor" provisions. Under state regulations, a municipality that has an approved Affordable Housing Plan may deny an application for a comprehensive permit if the municipality adds at least .5% of its total housing units as affordable housing units in one year. The regulations provide that a municipality may apply to DHCD for a certification of compliance to confirm that the municipality has met the minimum requirements for the one-year safe harbor. In this case, the board of appeals notified the applicant at the commencement of the public hearing that it was invoking the safe harbor, based on a comprehensive permit granted by the board on April 28, 2008 to Canalside for 300 units. As of the date that Chase Developers filed its application with the board, June 3, 2008, the town had not yet requested certification of compliance from DHCD. The letter from DHCD certifying compliance with the safe harbor provision was issued July 8, 2008.

Chase Developers argued that it had filed its application for a comprehensive permit prior to the certification by DHCD, and therefore the board could not invoke the safe harbor provision against its application. The HAC, however, ruled that the effective date of the safe harbor protection was April 28, 2008, the date that the town granted the comprehensive permit that reached its .5% goal for one year. The HAC noted that the Canalside permit was counted on the town's subsidized housing inventory as of April 28, 2008, and that the regulations provide that the certification of compliance shall be deemed effective on the date upon which the municipality achieves its numerical goal.

**Zoning Board of Appeals of Amesbury v. Housing Appeals Committee, 75 Mass. App. Ct. 1103 (Unpub. 2009)**

The Appeals Court in this case upheld the decision of the HAC, which ordered the board of appeals to issue a comprehensive permit for 268 units of mixed-income housing. The Appeals Court found that the developer had sustained its burden of proving that the proposal complies with federal or state statutes or regulations, or generally recognized standards, as provided in the HAC regulations. Thus, the burden shifted to the board of appeals to prove a valid health, safety, environmental, design, open space, or other matter of local concern that outweighed the need for affordable housing.

The Appeals Court addressed a number of issues raised by the board, including with regard to the need for a second access to the development. Although the plan provided for a secondary emergency access, the board argued that this access was poor, traversing a road over a dam which frequently floods, rendering the road impassable. The Appeals Court affirmed that ruling that the secondary access was adequate. The most serious concern related to fire safety and firefighting capabilities. The Town Fire Chief testified that he would not approve the project because of concerns about the inability to position more than one truck in front of the end units in the buildings, creating a hazard to firefighters. The HAC found that the Chief's concerns were credible but general, and the board did not submit sufficient evidence that the fire safety concerns outweighed the need for affordable housing. The Appeals Court concluded that, while it was "a close issue", it upheld the HAC and Land Court determinations. Finally, the Appeals Court dismissed the board's argument that the project was no longer eligible for a comprehensive permit because its eligibility letter had lapsed. The Appeals Court accepted the HAC's interpretation of the state regulations that the applicant must be given time to correct the lapse of the eligibility letter.