MASSACHUSETTS ASSOCIATION OF PLANNING DIRECTORS MAY 2016 ANNUAL CONFERENCE

LAND USE CASE LAW UPDATE

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SIGNS

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (BJS)

This U.S. Supreme Court case invalidated certain provisions of the town of Gilbert, Arizona sign code, based on the Court's finding that the sign code provisions constituted a regulation of speech that was not strictly content-neutral. The sign code included a number of categories of signs, including "Ideological Signs", "Political Signs", and "Temporary Directional Signs", the latter of which included signs directing the public to a church or other qualifying event. Temporary directional signs were subject to stricter conditions than the ideological or political signs. The plaintiff in the case was a local church and its pastor, which held Sunday services at various temporary locations in town, and therefore posted temporary directional signs each Saturday for its services. The church was cited by the town for exceeding the time limits for temporary directional signs and failing to include an event date. After trying unsuccessfully to obtain an accommodation from the town, the church and pastor sued for infringement of First Amendment rights. A motion for a preliminary injunction was denied, and affirmed by the Court of Appeals, which concluded that the sign categories were content neutral, and that the town's regulations satisfied the intermediate scrutiny for regulation of content neutral speech.

The Supreme Court, however, ruled that the categories of signs in the ordinance were not content neutral. Regulation of speech based on the content is presumptively unconstitutional and will be upheld only if the government proves that the regulations are narrowly tailored to serve a compelling state interest. The Supreme Court analyzed the definitions in the sign code and determined they were content based. Thus, the sign code defines "Temporary Directional Signs" on the basis of its message directing persons to a church or some other qualifying event; defines "Political Signs" based on a message intended to influence the outcome of an election; and defines "Ideological Signs" on the basis of whether a sign communicates a message or idea. The sign code then regulates each category differently, thus singling out specific subject matter for different treatment. The fact that the sign code did not single out specific viewpoints within those subject matters for different treatment did not matter. The Supreme Court rejected the Court of Appeals reasoning that the distinctions were justified without reference to the content of the speech, and noted that the benign motives of the legislative body were irrelevant. Thus,

whether a regulation is content neutral must be determined before reviewing the justifications for the regulations.

Once the Court determined that the regulations were content based, the town was required to prove that the regulations were narrowly tailored to advance a compelling state interest. The interests of the Town in preserving aesthetics and traffic safety were deemed not to be compelling state interests. Further, the Court found that the regulations were underinclusive, because other signs were allowed by the sign code which affected aesthetics and traffic safety. The Court noted that the town could adopt content neutral regulations governing size, building materials, lighting, moving parts, and portability. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion.

GENERAL BY-LAWS

Showtime Entertainment, LLC v. Mendon, 472 Mass. 102 (2015) (IMQ)

In this case, the Supreme Judicial Court (SJC) responded to certified questions from the U.S. First Circuit Court of Appeals regarding a Mendon by-law. The plaintiff, Showtime, applied for a license to operate an adult entertainment business featuring live nude dancing. Town meeting passed a by-law regulating adult entertainment businesses as defined by G.L. c.40A, §9, including establishments which display live nudity. The by-law limited operating hours, prohibited the sale or presence of alcoholic beverages, and imposed other restrictions. Showtime obtained a license, then filed suit in Federal District Court seeking a declaratory judgment that the by-law placed unconstitutional limitations on expressive conduct. The District Court ruled in favor of the Town. On appeal, the First Circuit invalidated as unconstitutional the limitations placed on the physical plant and operating hours. It referred the challenge to the restrictions on alcoholic beverages to the SJC because it determined that the outcome centered on unresolved issues of Massachusetts law.

The SJC reviewed the by-law as if it were content neutral, thus needing to meet an intermediate level of scrutiny. The SJC noted that the Supreme Court has ruled that nude dancing is not protected under the U.S. Constitution in an establishment licensed to serve alcoholic beverages because the states have the authority to regulate alcoholic beverages. Under Article 16 of the state constitution, however, the regulation of alcoholic beverages at an adult entertainment establishment raises issues of the right of free speech. A municipality does have an interest in addressing the secondary effects of adult entertainment, such as crime prevention, protection of retail trade and property values, and protection and preservation of the community, which must be demonstrated by evidence that the by-law was aimed at addressing those secondary effects. The SJC found that in this case, the presentation to the town meeting included information from studies sufficient to conclude that increased crime is a secondary effect when adult entertainment and alcoholic beverages are in physical proximity.

Although the town established a legitimate public interest, the by-law must also be narrowly tailored to focus on the source of the legitimate public concern, without at the same time banning or significantly restricting substantial speech that does not contribute to the same public concerns. This by-law was found to be invalid as overly broad, by banning the service of

alcoholic beverages at any establishment that displays live nudity to its patrons and that is located within the adult entertainment district. The SJC cited a number of examples of how this regulation was overly broad, such as banning a theater located in the district from staging the musical "Hair". A theater showing a production such as "Hair" would not be considered an adult entertainment establishment as defined in G.L. c.40A, §9A, and therefore would not have the problematic secondary effects of an adult entertainment venue, yet would still be subject to the ban on alcoholic beverages. The SJC determined that the town must find a narrower means of pursuing its goal of crime prevention.

Doe v. Lynn, 472 Mass. 521 (2015) (BJS)

This case involved an ordinance prohibiting Level 2 and 3 sex offenders from living within 1,000 feet of a school or park (with limited exceptions), effectively excluding Level 2 and 3 sex offenders from living in 95% of the city. It also prohibited Level 2 and 3 offenders from entering a school, park, or recreational facility except in certain circumstances, and from "loitering" within 1,000 feet of such facilities. The city defended the ordinance as a means to reduce the potential risk of harm to children by reducing the likelihood of Level 2 and 3 sex offenders being in contact with children. The SJC noted that 40 municipalities have similar by-laws or ordinances. Plaintiffs, representing a certified class of sex offenders, challenged the constitutionality of the ordinance after receiving notices from the city to move. The Superior Court invalidated the ordinance as beyond the city's authority under the Home Rule Amendment, and the SJC affirmed on direct review.

A city or town is granted authority by the Home Rule Amendment to enact ordinances or by-laws to exercise any power or function that the legislature has power to confer on it, which is not inconsistent with state law or constitution (with certain restrictions). In determining whether an ordinance is inconsistent with state law, the court analyzes whether the legislature intended to preempt municipalities from enacting regulations with respect to a certain matter. The legislative intent can be inferred where the legislation on a subject is so comprehensive that it evinces a legislative intent to preempt the field, or by an explicit statement by the legislature. In this case, state laws governing sex offenders do not explicitly forbid local enactments; however, the SJC found that there is a comprehensive scheme of legislation intended to protect the public from convicted sex offenders, from which it is inferred that the legislature intended to preclude municipalities from enacting regulations limiting where sex offenders can live.

The SJC reviewed the comprehensive statutory provisions governing the identification, treatment and post-release management of convicted sex offenders. These include the Sex Offender Registry Law (G.L. c.6, §§178C-178Q) and the Sexually Dangerous Person (SDP) law (G.L. c.123A). The registry law provides a classification system for assessing the risk to the public; requires sex offenders to register with the Sex Offender Registry Board and local police department; and authorizes the release of certain information to the public. It prohibits Level 3 offenders from living in rest homes or similar long-term care facilities. The SJC found the ordinance inconsistent with this statute, in particular the relatively narrow residency restriction in the statute, as well as undermining the classification system which considers the offenders' living and work situation.

Under the SDP law, sex offenders deemed most likely to commit further crimes may be civilly committed. The SJC interpreted the SDP law as further demonstrating the legislature's intent on maintaining the registry information as sufficient to protect public safety for those offenders not deemed dangerous enough to confine. Finally, the SJC cited the community parole supervision law, which allows the state to control sex offenders' post-incarceration by placing conditions on offenders, including wearing of a GPS device; prohibiting an offender from being in and around the victim's residence, place of employment and school; and prohibiting an offender from other defined areas to minimize contact with children. The SJC found that this approach demonstrated the intent to allow targeted monitoring of sex offenders when deemed necessary by the state, without disruption to the stability of the broad population of offenders. The Court also noted a number of other state laws placing restrictions on sex offenders, including restrictions on working in certain jobs such as child care provider or school bus operator. It concluded that the "totality of the statutory scheme, incorporating as it does a series of interdependent policies and practices specifically designed to protect the public from level two and level three sex offenders by monitoring and notification to the public, evinces the Legislature's intent to have the first and final word on the subject of residency of sex offenders." The SJC therefore invalidated the entire ordinance, including the child safety zone provisions and residency provisions.

ZONING

Buccaneer Development, Inc. v. Zoning Board of Appeals of Lenox, 87 Mass. App. Ct. 871 (2015)(IMQ)

This case, in a split decision from the Appeals Court, upheld the broad discretion accorded to a local board in denying a special permit application. The ZBA denied a special permit for a residential retirement community of 23 single-family townhouses on 23 acres of land, on the grounds it was unduly dense, detrimental to the established "small town" character of the neighborhood, not essential or desirable to the public welfare, not in harmony with the intent or purpose of the by-law, would exacerbate existing traffic congestion and would be detrimental to the established character of the neighborhood.

The developer appealed to the Land Court, and the ZBA filed a notice of transfer to the Housing Court, which affirmed the ZBA decision. The Appeals Court found that the Housing Court lacked jurisdiction and vacated the judgment, sending the case to the Land Court permit session. On remand, the Chief Justice of the Trial Court designated the same Housing Court judge as a justice of the Land Court permit session for purposes of this case; the Housing Court judge adopted the prior findings and decision and reentered judgment upholding the decision, and Buccaneer appealed again.

In this second appeal, the Appeals Court agreed with the trial court that the density of the proposed project was well within the requirements of the by-law. Nevertheless, the Court cited the well established maxim that, even if a special permit could have been lawfully granted, the board retains discretionary authority to deny the permit, and the decision will be disturbed only if based on a legally untenable ground or is unreasonable, arbitrary or capricious. The Court reviewed the five criteria in the by-law for the grant of the special permit, and ruled that the

board's decision was "firmly grounded" in its assessment that the proposal did not meet three of the criteria (not in harmony with the intent or purpose of the by-law, not essential or desirable to the public welfare or convenience, detrimental to adjacent uses or the established or future character of the neighborhood). The trial judge found that the proposal would significantly alter the area in the immediate vicinity, and the Appeals Court ruled that this was not one of the "exceptional cases" where a board could be ordered to grant a special permit.

The dissenting justice argued that the board's decision was "fatally vague and cursory", merely reciting the criteria of the by-law without any supporting facts, findings, or analysis. The justice found an "anti-development flavor" in the board's decision, and that the decision could be read as simply indicating that the Board preferred the land not be developed. The dissenter also criticized the vague, standardless nature of the by-law. Finally, the dissenter faulted the trial judge's findings that the development would alter the "feel" of the neighborhood and that the development reached a "tipping point", as being wholly subjective.

<u>Skawski</u> v. <u>Greenfield Investors Property Development, LLC</u>, 473 Mass. 580 (2016) (BJS)

This case affirms the reasoning of the <u>Buccaneer</u> case, that the Housing Court does not have jurisdiction over an appeal of the grant or denial of permits for the "use or development of real property" where the project involves 25 or more dwelling units or the construction or alteration of 25,000 square feet or more of gross floor area (major development). Jurisdiction over such appeals lies either in the Land Court permitting session or the Superior Court. In this case, the developer in 2011 obtained a special permit for a retail development of not more than 135,000 square feet. The notice of decision from the planning board contained boilerplate language that an appeal could be made by an aggrieved person pursuant to G.L. c. 40A, §17. The plaintiffs, abutters to the site, filed a timely appeal in the Housing Court. Defendant asked the Chief Justice of the Trial Court to transfer the appeal to the Land Court permit session, but the request was denied. Following the <u>Buccaneer</u> decision, the developer moved to dismiss for lack of subject matter jurisdiction. The motion was conditionally denied, but the judge wrote to the Chief Justice of the Housing Court, requesting that the case be transferred to the Superior Court and that she be designated to handle it. The request was not acted on, and the judge withdrew it. The judge then denied the motion to dismiss, and granted a joint motion to report her ruling to the Appeals Court, which reversed the order denying the motion to dismiss, and the SJC granted further appellate review.

General Laws c. 185, §3A established the Land Court permit session, granting it "original jurisdiction, concurrently with the Superior Court" over major development permit appeals. It also provides that any appeal within the jurisdiction of the permit session, but commenced elsewhere, may be transferred to the permit session on motion to the Chief Justice of the Trial Court. General Laws c. 40A, §17, provides that permit appeals may be commenced in the Superior, Housing, Land, or District Court, thus creating a potential conflict between the two statutes. The SJC first found that §3A does not explicitly divest the Housing Court of jurisdiction over major development permit appeals, but it did so by clear implication. Section 3A was part of a larger legislative enactment to streamline and expedite the permitting process in the Commonwealth. By specifying the concurrent original jurisdiction of the Superior Court with the permit session, the legislature impliedly reflected its intent that major developments be

adjudicated only in those two courts. Having reached this conclusion, the SJC determined that the proper remedy in this case was to transfer the case to a court with jurisdiction, rather than dismiss it. The case was remanded to the Housing Court, with the parties granted 30 days to request transfer to the permit session or the Superior Court.

Chiaraluce v. Zoning Board of Appeals of Wareham, 89 Mass. App. Ct. 290 (2016) (IMQ)

The Chiaracluce case follows the 1996 Dial Away case (Dial Away Co. v. ZBA of Auburn, 41 Mass. App. Ct. 165 (1996)), in which the Appeals Court ruled that an undersized lot did not retain its protection as a buildable lot 23 years after a nonconforming dwelling was razed and that the right to reconstruct the nonconforming dwelling had been abandoned as a matter of law because the lapse of time following the demolition was so significant that abandonment was properly inferred as a matter of law.

Chairaluce involved a parcel of land that has no frontage and is accessible only over a twelve foot right of way and that has only 7,000 s.f. of area when 30,000 s.f. is now required. The parcel of land has been vacant since 1991 when Hurricane Bob damaged the cottage then located on the parcel, which consisted of 600 s.f. (20' x 30') of gross living area, and the owners dismantled and removed the remains of the cottage. In March of 1992, the owner of the parcel obtained special permit relief under a blanket special permit issued to assist owners who suffered damage during the 1991 hurricane. While the 1992 special permit allowed the cottage to be rebuilt, the rebuilding did not go forward; and, instead, the owners sold the parcel in 1993 for $5,000 to the Plaintiff, who owned an abutting lot which was improved already with a single-family dwelling. The Plaintiff testified that the initial plan for the parcel was to use it for parking to support the dwelling on the abutting lot and perhaps later to build on it; but the Land Court found that there was no intention to build a house on the parcel. In 1998, the Plaintiff sold the abutting lot and did not seek a building permit to build on the parcel until 2001, almost ten years after the cottage had been damaged and removed. The 2001 effort failed and no appeal was taken.

In 2003, a special permit from the ZBA issued to allow construction of a new residential structure based upon the grandfathering provision for separate lots under G.L. c.40A, §6, but the special permit was reversed on appeal because the parcel lacks the required fifty feet of frontage. That litigation left open the potential argument that the Town's zoning by-law might be more generous than G.L. c.40A, §6.

In 2010, the Plaintiff obtained a building permit for a 2,500 s.f. dwelling, but the Building Inspector revoked the permit. Later in 2010, the Plaintiff sought a building permit for a dwelling with the same footprint as the original cottage, but with fifteen feet of additional height. The building permit was denied and the denial was upheld, but the ZBA issued a special permit under the Town's zoning by-law and an appeal was taken by abutters. The Land Court found that the parcel satisfied the requirements of the relevant by-law, but remanded the case to the ZBA. The ZBA issued a special permit and found that the proposed dwelling would not be substantially more detrimental and was allowed under the Town's zoning by-law. The abutters appealed and the issues before the Land Court were whether the nonconforming structure had been abandoned

as a matter of law and whether the ZBA exceeded its authority. The Land Court found that the nonconforming structure had been abandoned and could not be rebuilt.

The Appeals Court ruled that the person seeking a permit has the burden of proof and persuasion on the question of abandonment. The Land Court found that there was no effort by the Plaintiff to obtain a building permit to rebuild the cottage for seven and a half years after taking ownership and nine and a half years after the cottage was razed.

The Appeals Court upheld the Land Court's determination that the right to rebuild the nonconforming structure had been abandoned and held that, "Although the time period is not as extreme as the twenty-three years present in Dial-Away, given the availability of a blanket special permit here, its unexplained lapse, the failure to attempt to build for over nine and one-half years following the razing of the nonconforming structure, and the judge's finding that the Chiraluce intended to use the locus as a parking lot, the structure and the right to reconstruct it have been abandoned as a matter of law."

Commonwealth v. Murrell, 87 Mass. App. Ct. 1123 (Unpub. 2015) (BJS)

In this case, the defendants appealed their convictions for violating the city of Lynn's noise ordinance, and argued that the ordinance was void for vagueness and violated their first amendment rights. The challenged ordinance made it unlawful "to willfully make or continue, or cause to be made or continued, any loud, unnecessary or unusual noise which disturbs the peace or quiet of any neighborhood or which causes discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area." The ordinance further provided standards to be considered in determining whether a violation of the ordinance exists, including: "[t]he level of the noise," "[t]he intensity of the noise," "[t]he nature and zoning of the area," "[t]he density of the inhabitation of the area," "[t]he time of day or night the noise occurs," "[t]he duration of the noise," as well as "[w]hether the noise is recurrent, intermittent or constant" and "[w]hether the noise is produced by commercial or non-commercial activity".

Since the plaintiffs did not properly preserve their claim that the ordinance was void for vagueness, the Court limited its consideration of this claim to ensure there was no miscarriage of justice, and found that no miscarriage of justice occurred. In dicta, the Court stated that, even if plaintiffs had properly raised a facial void for vagueness claim, "it would not change the outcome…A law is not vague if it requires a person to conform his conduct to an imprecise but comprehensible normative standard so that men of common intelligence will know its meaning." Id. at n.4. As applied, the Court viewed the evidence in the light most favorable to the Commonwealth. The testimony indicated that the noise was so loud that it was difficult to sleep or carry on a conversation between 60 and 200 yards away, and that the noise plaintiffs created was constant throughout the afternoon in a mixed use, densely populated area with residential and commercial uses. The court also noted that the ordinance limited it application to willful acts, and that the police had first warned plaintiffs that the noise was too loud before issuing citations.

After determining the ordinance to be "content neutral" with respect to the First Amendment challenge, the Court next needed to determine is it was narrowly tailored to serve a

significant governmental interest, and if it left open ample alternative channels for communication of the information. The Court held that (1) the city had a substantial interest in protecting its citizens from unwelcomed noise; (2) the ordinance at issue was narrowly tailored by its terms because it only applied to noise that is "loud, unnecessary or unusual" and that "disturbs the peace or quiet of any neighborhood or . . . causes discomfort or annoyance to any reasonable person of normal sensitiveness residing in the area"; and (3) that the ordinance left open ample alternative channels for communication of the information that do not create noise that violates the ordinance.

Almedia v. Arruda and Zoning Board of Appeals of Westport,
89 Mass. App. Ct. 241 (2016) (IMQ)

The Appeals Court affirmed the Westport ZBA's decision to find that the proposed sale of beer and wine as an expansion in the use of a lawfully nonconforming convenience store use would not be substantially more detrimental to the neighborhood, affirming the decision of the Bristol Superior Court. The Appeals Court carefully reviewed the requirements for allowing expansion of a lawfully nonconforming commercial use (as opposed to the special and greater protections afforded to single and two-family uses) and noted, again, that there are three inquiries that must be made.

The first inquiry is whether the proposal would create a change or substantial extension of the nonconforming use; and, if not, then the proposed use is permitted.

The second inquiry, if the answer to the first inquiry is yes, is to determine whether change or extension is allowed under the local zoning by-law, if the prosed use would not be substantially more detrimental. A community has the right to regulate or even to forbid changes and substantial extension of nonconforming uses (that are not protected as single and two-family uses).

The third inquiry, if the answer to the second inquiry is yes, is to apply the three-prong test set forth under the Powers v. Building Inspector of Barnstable, 363 Mass. 648, 653 (1973) and Bridgewater v. Chuckran, 351 Mass. 20, 23 (1966) cases, to determine whether the change or extension would or would not be substantially more detrimental. The three prong test is: (1) whether the proposed use reflects the nature and purpose of the protected use; (2) whether there would be a difference in the quality or character as well as the degree of the protected use; and (3) whether the proposed use would be different in kind in its effect on the neighborhood.

The Appeals Court noted that the 1968 case of Jasper v. Michael A. Dolan, Inc. 355 Mass. 17, held that the proposed addition of the sale of hard liquor at a self-service market, which was already licensed to sell beer and wine, constituted a "new use" because the proposed extension of the use would not reflect the nature and purpose of the lawfully pre-existing nonconforming use. The Appeals Court noted that, in Jasper, the proposal was to partition the existing building into two separate stores, each with separate entrances and the "operation of a separately conducted all-alcoholic package store is substantially different from the sale of beer and wine in connection with a food store." In the Westport case, the sale of alcohol would be integrated into and be part of the convenience store and did not involve separate stores. As to the

quality and character, the proposed use would only make up 12% of the store's inventory and "would not change the fundamental nature of the original enterprise" and would not predominate. The different in kind analysis focused on increased traffic and litter and safety concerns relating to inebriated customers. The Appeals Court noted that increased traffic could be a legitimate concern, but those concerns related to the nature of the road, which was determined as lending "itself to speeding drivers" and the recent population growth and those concerns were not created by the proposed expansion in use and would exist regardless. Similarly, the Appeals Court agreed that littering was already a concern and that concern would not change as a result of new alcohol product being sold (and that it was unlikely the alcohol sold would be consumed in the parking lot and thrown out car windows in the parking lot) and agreed that there was no evidence to support a concern that inebriated individuals would be allowed to buy the alcohol.

Hanlon v. Sheffield, Mass. App. Ct. (2016) (IMQ)

The facts of this case indicate that the Plaintiff owns a large parcel of land (approximately 38 acres); and, as early as 2006, began using a portion of the property for a private airstrip to operate plans from the land as a hobby. In 2001, the Building Commissioner/Zoning Enforcement Officer issued a cease and desist order as the Town's zoning provisions do not allow private airfields. The ZBA upheld the cease and desist order. The Plaintiff appealed that decision to the Land Court and asked for a determination under G.L. c.240, §14A that the Town's zoning provision was invalid because it was not approved by Massachusetts Department of Transportation Aeronautics Division under G.L. c.90, §39B.

The Appeals Court overruled the Land Court and invalidated the Town's prohibition on airfields as it had not been approved by the DOT Aeronautics Division and reconciled conflicting language in G.L. c.90 to reach that conclusion.

Lingerman v. 6 Mill Road, LLC, 88 Mass. App. Ct. 1108 (Unpub. 2015) (BJS)

In this case, the Gosselins owned property containing a single family home, barn, and indoor riding facility in Ipswich. They obtained a building permit to operate a commercial horse farm, put an addition on the barn, and enlarge the riding arena. The plaintiffs appealed the building permit, and the ZBA overturned the permit because the property lacked frontage and was in violation of a 1973 variance limiting the property to single family use. When an abutting property was subdivided into two lots, the Gosselins purchased one of the lots and combined it with their existing property, curing the frontage deficiency. Plaintiffs sought zoning enforcement, claiming that the combining of the lots violated the zoning by-law's Inclusionary Housing Requirements. The building commissioner denied the request, and the ZBA upheld the commissioner, determining that the subdivision was exempt from the Inclusionary Housing Requirements. Plaintiffs appealed to Land Court, which granted the Gosselins summary judgment. The Appeals Court upheld the Land Court decision, giving deference to the ZBA interpretation of the zoning by-law as exempting the division of a two acre lot into two separate one acre lots from the Requirements. Further, the 1973 variance no longer governed, since the combined lots had adequate frontage.

Lingerman v. 6 Mill Road, LLC, 88 Mass. App. Ct. 1108 (Unpub. 2015)(BJS)

In a companion case, the Lingermans appealed from a Land Court judgment upholding the grant of a special permit by the Ipswich planning board for construction of a barn manager's apartment in an existing barn on the Gosselin's abutting property, which is used as a commercial horse stabling and training operation. The appeal was based on the contentions that (1) that the Planning Board failed to find that there were "specific and material" changes, as required by G.L. c.40A, §16, to support its decision to grant the special permit, within the two year moratorium period after the planning board had previously voted to deny the special permit; and (2) errors in the planning board hearing process. The Court found that there were specific material changes, namely an acquisition of land which rendered a previously issued variance no longer controlling, to allow the planning board to reconsider an application for special permit within the two-year moratorium imposed by G.L. c.40A, §16. Further, the Court rejected the plaintiff's claim of error in the fact that the planning board voted to deny the special permit but then reconsidered the matter and voted unanimously to approve the special permit. The Court held this did not constitute an error in the proceedings since the initial vote was never filed with the town clerk, and therefore no "final action" had taken place.

Brother v. ZBA of Brookline, 87 Mass. App. Ct. 1131 (Unpub. 2015) (IMQ)

An applicant was refused a building permit to construct a ramp for a daycare use and appealed the denial to the ZBA and requested special permit relief. The ZBA reversed the Building Official's denial of the building permit for zoning reasons and issued a special permit to build the ramp. The plaintiff/abutting land owner appealed, but provided notice to the Town Clerk after the twenty-day notice period under G.L. c.40A, §17 terminated.

The Appeals Court noted that the notice requirement under G.L. c.40A, §17 has been treated less rigidly over time but the "key element of statutory compliance is 'that within the mandatory twenty-day period the clerk is actually notified that an appeal – i.e., a complaint has in fact been timely filed.'" The plaintiff did serve a letter on the Town Clerk that would have been timely but that letter was about a different appeal and while it noted that the relevant ZBA decision was "currently the subject of a zoning appeal … in the Norfolk Superior Court pursuant to G.L. c.40A, §17," the Appeals Court found that the reference to the appeal was in a letter about a different matter and its information was only "fleeting, and cannot be said to serve as sufficient notice of it to the town clerk."

Moriarty v. Zoning Board of Appeals of Holyoke,
87 Mass. App. Ct. 1129 (Unpub. 2015) (BJS)

This case concerns the construction of a garage which was located eight feet from the lot line in violation of the city's zoning ordinance which required a minimum setback of ten feet. Despite the fact that the plans showed the garage would be built seven feet from the lot line, a building permit was issued for the construction of the garage. The abutters complained to the building inspector generally about the size and location of the garage but did not appeal the issuance of the building permit. Over a year after the building permit was issued, plaintiffs filed an appeal with the ZBA alleging lack of enforcement of the zoning ordinance by the building

commissioner. The ZBA denied the appeal. The Superior Court judge ruled that the plaintiffs' appeal to the ZBA was untimely; therefore, the ZBA lacked jurisdiction to consider the enforcement action, and accordingly that the Superior Court also lacked jurisdiction over the case.

The Appeals Court affirmed the Superior Court's finding that the plaintiffs had sufficient notice of the issuance of the building permit and failed to bring their appeal within 30 days as required by G.L. c.40A, §15. The Court stated that plaintiffs "closely observed" the progress of the construction, were concerned with its size and location, and asked the building inspector for a copy of the plans. When the building inspector could not find the plans, plaintiffs did not inquire further. The Court observed that, had the plaintiffs visited the building department and examined the building permit application and plans, they would have seen that the garage was shown only seven feet from the lot line, and that the zoning ordinance requires two story accessory buildings to be at least ten feet from the lot line. The Court rejected plaintiffs' argument that a zoning analysis is more suited to an attorney, stating "we have little doubt that the plaintiffs would have obtained any assistance necessary had they visited the building department in person." The Court also held that where there is adequate notice of a decision that violates a zoning provision, a person may not lawfully bypass that remedy and subsequently litigate the question by means of a request for enforcement under G.L. c.40A, §7.

Rheault v. McNamara, (Land Court 2016) (IMQ)

This case involves the interpretation of the Permit Extension Act. Plaintiffs own a vacant lot on which a two family home stood until it was destroyed by fire in 2010, and demolished in 2011. Plaintiffs claim that they can build a new two-family home, even though such use is not allowed in the zoning district, because the zoning ordinance allows reconstruction of a structure destroyed by catastrophe within two years of date of demolition. Although plaintiffs were beyond the two year time period, they claimed that the Permit Extension Act extended the two year period by another four years. The Permit Extension Act (as amended) extended for four years any "approval in effect or existence" during August 15, 2008 through August 15, 2014. The building commissioner disagreed, issuing a determination that the two year period had expired, and that decision was upheld by the ZBA. It is notable that the owner bought the lot for about $37,000, knowing that the two year period had already expired. It is also notable that the plaintiffs could build a single family home by right.

The Land Court agreed with the building commissioner and ZBA that an "approval" requires an affirmative act, such as the issuance of a building permit, not just an unexercised right to one. The Court examined the definition of the word "approval" under the Permit Extension Act. The plaintiffs argued that the definition of "approval" includes the word "exemption", and therefore the two year "exemption" for reconstructing the two family house was an "approval" that was extended by the Act. The Land Court disagreed, determining that the word "exemption" could not be read in isolation. The Court further noted that nonconformities are not favored, and plaintiffs' interpretation would run counter to the well settled principles of zoning. Summary judgment was granted to the City dismissing the complaint.

COMPREHENSIVE PERMITS

Reynolds v. Zoning Board of Appeals of Stow, 88 Mass. App. Ct. 339 (2015) (BJS)

The Appeals Court in this case overturned the grant of a comprehensive permit, finding that the potential impacts to wells on neighboring property outweighed the need for affordable housing. By way of background, in 1983, Stow Elderly Housing Corp. (SEHC) obtained a comprehensive permit to construct Plantation I, a 50 unit low-income senior apartment complex served by private well and septic on a lot adjacent to the property at issue in this case. This case involves SEHC's application for a comprehensive permit for Plantation II, a 3-story building with 37 one-bedroom units of elderly housing, a function hall and offices, on 2 acres of land. The site is located in a residential district and also in the water resource protection district (WRPD), an overlay district. The proposed site would not have frontage, relying on an undersized driveway for access, and would use a private septic system. SEHC did not identify the source for the water supply, despite regulations requiring it to do so. Instead, SEHC suggested several possibilities to supply water to the project, including private wells from other nearby developments or a private water company. There is no public water or sewer serving the area.

Local sewage disposal regulations for the WRPD are more protective than state standards. They prohibit on-site septic exceeding 110 gallons per day (gpd) per 10,000 square feet of lot area. SEHC obtained a waiver of this regulation for a septic system that will discharge approximately 700 gpd per 10,000 sq. ft. Plaintiff, an abutter, appealed the comprehensive permit to the Superior Court. The Superior Court found that the proposed development would result in elevated nitrate levels in another abutter's well (not plaintiff's well), exceeding state standards and thereby posing a public health threat. Nevertheless, the Superior Court found that the septic system would meet all state standards, and therefore SEHC was not required to prove that adjacent wells would not be impacted, and affirmed the ZBA decision. Plaintiff then appealed to the Appeals Court.

The Appeals Court found that the town and the region have a need for elderly affordable housing, which must be balanced against the local concerns raised by plaintiff. Generally, the need for affordable housing is given substantial weight in the balancing by the court. The first issue was the ZBA's waiver of the local limitation on the amount of sewage that can be introduced into a waste disposal system in the WRPD. The Appeals Court seemed skeptical that SEHC's failure to identify the source for potable water was a minor omission as SEHC claimed, since the septic system requirements turn, in part, on the source of the project's water supply. DEP does not generally limit discharge into private waste disposal systems of less than 10,000 gpd, unless located in a nitrogen sensitive area. SEHC argued that the site is not in a nitrogen sensitive area because it is not proposing both an on-site well and an on-site septic system. The Appeals Court again expressed skepticism, noting that SEHC had not identified its water source, and it owns an abutting property with 50 apartments with on-site well and septic. Although DEP had not ruled on the matter, one of the board's consultants, and plaintiff's expert, both opined that the more restrictive nitrogen sensitive standard would apply. Importantly, the trial court had found that it is more likely than not that the waste disposal system will cause excessive nitrogen level in an abutter's well. Thus, plaintiff demonstrated that compliance with state standards is

insufficient to protect the groundwater from contamination. The Appeals Court also found that maintaining clean groundwater for local private wells is an important public health issue. The Appeals Court concluded that the need for affordable housing in this case did not outweigh the health concerns of existing abutters. It therefore ruled that it was unreasonable for the ZBA to waive the local requirement limiting the flow into waste disposal systems in the WRPD. The case was remanded for entry of judgment revoking the comprehensive permit. The SJC denied a request for further appellate review.

Brookline v. MassDevelopment Finance Agency,
88 Mass. App. Ct. 1106 (Unpub. 2015) (IMQ)

Plaintiff brought a complaint for declaratory judgment and in the nature of certiorari to review the issuance of a project eligibility letter. The Superior Court dismissed the case, and the Appeals Court affirmed that judgment, finding that the issuance of a project eligibility letter (PEL) is not appealable. The Appeals Court relied on its prior decision in Marion v. Massachusetts Housing Finance Agency, 68 Mass. App. Ct. 208 (2007), which had reached the same conclusion under a prior regulation. The Appeals Court was not persuaded by the town's argument that changes in the state regulations regarding PEL's required a different result. It ruled that the PEL is a precondition to consideration of a comprehensive permit application, but it is not a final action on the permit. Any judicial review of the PEL may be obtained incident to review of any comprehensive permit that may be issued.

WETLANDS

Plasse v. Conservation Commission of Bridgewater, 88 Mass. App. Ct. 1107 (2015) (BJS)

The commission denied plaintiff's notice of intent (NOI) under the town's wetlands by-law to build a single family home, based on prior filling of the site, potential violations in the future if the backyard was expanded, and potential failure of the septic system or upgrade to it which "would stress" the bordering vegetated wetlands (BVW). Plasse appealed to the Superior Court. The Court remanded the matter to the commission, finding that the commission had not made any findings that supported the denial. Specifically, the Superior Court found that DEP had approved a waiver of the septic system setback, and that issue had been resolved in the superseding order of conditions; prior filling was not attributable to Plasse; and there was no finding that the BVW had been harmed. After a further hearing, the commission voted again to deny the application, stating that in light of the historical wetlands filling, and additional filling by Plasse, it could not determine with any degree of certainty the whether the filling and alteration would prove "catastrophic", and that it could not adequately condition the project to meet the by-law standards. Plasse again asked the Superior Court to overturn the denial. The Superior Court upheld the commission, and Plasse appealed. The Appeals Court reversed, and ordered that the matter be remanded to the commission to issue an order of conditions.

The Appeals Court acknowledged that the standard of review is whether the commission's decision was arbitrary and capricious, meaning there is no ground which reasonable persons might deem proper to support it. The Court found that the commission failed to address either the specific work proposed in the notice of intent or its impact on the BVW.

Instead, the commission rested its decision on an activity that was not part of the project, and did not address those that were. Further, the Appeals Court noted that the existence of past violations, without more, is not a legally tenable ground for denying an application. Finally, since the commission had twice failed to engage in the fact finding and analysis required by the by-law, the Appeals Court ordered it to issue an order of conditions.

Schimmel v. Conservation Commission of Andover,
88 Mass. App. Ct. 1104 (Unpub. 2015) (BJS)

This case involved two related appeals, one of an enforcement order, and the other of a related order of conditions. Plaintiff altered areas subject to protection under the Wetlands Protection Act without obtaining an order of conditions ("OOC"). The commission issued an enforcement order requiring remediation. It issued a second enforcement order based on a site plan prepared by plaintiff's expert, with certain modifications outlined in the special conditions and findings attached to the enforcement order. Plaintiff filed an appeal of the order. Meanwhile, plaintiff filed a notice of intent for the work required under the enforcement order. The commission issued an OOC and plaintiff filed an appeal. The Superior Court upheld the commission orders.

Plaintiff argued that the commission could not issue an enforcement order with special conditions and findings, since that amounts to an OOC. The Appeals Court rejected this argument, stating that the commission is authorized to issue enforcement orders, including orders to restore the property. The court also rejected that argument the commission did not provide scientific evidence for its planting requirements, finding that it was plaintiff's burden to show that the Commission's order was arbitrary and capricious. The court rejected the final argument from plaintiff, that other neighbors had violated that Act without the commission taking action. The Appeals Court ruled that even if the commission's history or practice in enforcing the Act may be considered in determining if the commission was arbitrary or capricious, plaintiff failed to demonstrate that the other instances were substantially similar.

With respect to the appeal of the OOC, the court ruled that the complaint was not filed within 60 days as required, and therefore judgment correctly entered for the commission. It was not persuaded that the time period could be extended by request for reconsideration or modification, nor that it could be waived by the commission. Finally, the Appeals Court ruled that an appeal from an order that the plaintiff pay the fee for a consultant to monitor the work was timely filed. It ruled that the record was insufficient for the court to rule the fee unreasonable, where it was supported by the scope of work and fee agreement. The Appeals Court did note that the "more difficult question whether the commission exceeded its authority by imposing an undefined monitoring fee is not before us because the plaintiff failed to file a timely appeal of the order of conditions…."

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