MASSACHUSETTS ASSOCIATION OF PLANNING DIRECTORS
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LAND USE AND ZONING UPDATE

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ZONING

The McLean Hospital Corp. v. Zoning Board of Appeals of Lincoln, 483 Mass. 215 (2019) (IMQ)

This Supreme Judicial Court ("SJC") decision deals with the so-called "Dover Amendment" (G.L. c.40A, §3), which is a set of special protections for specific types of uses, including, as in this case, an educational use undertaken by a nonprofit educational corporation. Eligibility for the protection depends on satisfying the reasonable requirements as to height, bulk, yard size, lot area, setbacks, open space, parking and building coverage under the applicable zoning and satisfying a two-prong test to make sure that the use is educational and that the educational use is the primary use.

In this case, a nonprofit hospital, before purchasing 5.5 acres of land, sought and obtained a favorable zoning determination from the Town's Building Official that a "residential life skills program," one designed for males aged 15 to 21 years old who have extreme "emotional dysregulation" so they can "develop the emotional and social skills necessary… to lead useful, productive lives," would be an educational use protected under the Dover Amendment.

After the determination was made that the use was eligible for the protection, residents appealed the determination to the Zoning Board of Appeals ("ZBA"), asserting the determination was incorrect because the proposed use would be primarily medical or therapeutic in nature, not educational. The ZBA agreed with the residents and reversed the Building Official's determination. The hospital appealed and the SJC took the matter on direct appellate review.

The parties did not dispute the facts. They agreed that a typical day in the proposed program would involve classroom instruction from 9 a.m. to 4 p.m., with a series of 45-minute classroom sessions and additional formal training and practice sessions for individuals and with evening homework required of the participants. A part-time registered nurse was available to treat medical issues – for staff or students; but it was undisputed that "no medical interventions are included as part of the program." The satisfaction of the reasonable dimensional requirements

under the applicable zoning was not disputed, so the only issue was whether the proposed use satisfies the two-prong test for determining that a use is educational and that it is a primary use.

The SJC explained and then applied the familiar two-prong test to the undisputed facts. The first prong of the test requires that a determination be made as to whether the proposed use has, as its "bona fide goal, something that can reasonably be described as 'educationally significant;' and the second prong of the test requires that a determination be made that "the educationally significant goal must be the 'primary or dominant purpose' for which the land or structures will be used." The SJC noted, as it has many times, that the definition of education under the Dover Amendment is to be broadly construed and is not limited to traditional schooling and it includes "the process of preparing persons for activity and usefulness in life."

As to prong one, based upon the undisputed facts, the SJC held that the proposed program was designed to instill in program participants "a basic understanding of how to cope with everyday problems and maintain oneself in society." The SJC held that this type of program is "incontestably an educational process;" so, prong one of the test was satisfied.

As to prong two, the SJC rejected the approach taken by the ZBA and the area residents, who argued that the program was more therapeutic or medical than educational. The SJC determined, based upon the undisputed facts, that the program was not medical in nature. The SJC then held that it is a 'futile exercise' to try to distinguish between educational and therapeutic purposes that both teach a person how to live in society and cope with daily tasks and interact with other people. The SJC found that the program was a "specialized form of education, with therapeutic aspects, one that ultimately teaches its participants the skills necessary for their success… in life." The SJC emphasized that the analysis must focus on the primary purpose of the program, which was to teach life skills, and was not to designed to provide medical interventions, even though there was a therapeutic aspect to the program.

TAKE AWAY: A program that teaches "a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process;" and, at least in this instance, it was "impossible to exclude the acquisition of these skills from serving a 'therapeutic' purpose" from the educational purpose" and the mere presence of a therapeutic aspect does not necessarily render an educational use ineligible for Dover Amendment.

Murchison v. Zoning Board of Appeals of Sherborn, 96 Mass. App Ct. 158 (2019); 485 Mass. 209 (2020) (BJS)

These cases involve the breadth of what constitutes "aggrievement" sufficient to grant standing in a zoning appeal. Plaintiffs own a single family home across the street from a vacant three-acre parcel owned by Panarella. After Panarella was granted a foundation permit for a single family home, plaintiffs appealed to the ZBA, which upheld the permit, and plaintiffs appealed to the Land Court. The substantive issue was whether the permit satisfied the lot width requirement of 250 feet "measured both at the front setback line and at building line". The Land Court did not reach the merits, dismissing the case after finding that plaintiffs lacked standing.

Only "persons aggrieved" have standing to appeal under G.L. c. 40A, §17. As owners of land directly opposite on a public or private way, plaintiffs are "parties in interest" under G.L. c. 40A, §11, and therefore enjoy a rebuttable presumption that they are aggrieved by the decision. In challenging plaintiffs' standing, Panarella was required to rebut that presumption of standing before the ultimate burden of persuasion rested with plaintiffs. The Appeals Court looked at whether plaintiffs had put forward sufficient evidence of aggrievement to satisfy their burden of proof.

To establish standing, plaintiffs need to show that the purported harm to them is an interest protected by the zoning by-law, and that they will suffer a particularized harm not shared by the public at large. Plaintiffs claimed that the lot width requirement protects their interests by preventing overcrowding in the neighborhood, which the Appeals Court found is an interest protected by the Zoning Act. The Appeals Court further agreed with plaintiffs' claim that they would be particularly harmed by the proposed home because it would be located closer to the road, and thus to their house, than is permitted by the zoning by-law (as plaintiffs claimed the by-law should be interpreted). The Appeals Court decision generated some interest among legal commentators, however, as it seemed to some that the Appeals Court decision granted standing to an abutter in the case of an alleged density violation, without having to show a particularized injury.

The SJC granted further appellate review, and, in an unusual step, issued a reversal of the Appeals Court the day after the case was argued before the Court, with the full decision to be released at a later date.

The SJC framed the issue as "whether abutting property owners have standing to challenge a dimensional zoning requirement without establishing particularized injury." It first reviewed the findings of the Land Court judge, that the alleged harms to plaintiffs were generalized, or amounted to speculation, and found that the findings were not clearly erroneous. With respect to plaintiffs' argument on density, the SJC ruled that the purpose of the lot width requirement was not to control density or overcrowding generally, or to protect an abutter's interest in general. It noted that the lot met the minimum lot size and frontage requirements. Importantly, the SJC stated that a plaintiff needs to do more than "merely allege a zoning violation." The language of the by-law itself does not confer standing; there must be particular injury to the individual, as opposed to the neighborhood in general, caused by the alleged zoning violation. Further, the injury needs to be more than minimal. The SJC agreed with the Land Court judge that plaintiff's testimony of increases in noise, lighting, and traffic from construction of a single family home on a three-acre lot was speculative personal opinion.

The SJC further ruled that a claim of diminution of value of plaintiffs' property by itself was not sufficient, absent proof that the diminution is related to an interest protected by the zoning by-law. Zoning is generally not intended to preserve the economic value of property, and is not an interest protected by the lot width requirement. Finally, plaintiffs' argument that the construction of the house would increase storm water runoff and the potential for flooding was rejected as not an interest protected by the zoning by-law. In any event, the Land Court judge

found that plaintiffs did not establish their property would be harmed from increased runoff or flooding.

Barkan v. Zoning Board of Appeals of Truro, 95 Mass. App Ct. 378 (2019) (IMQ)

This is a zoning enforcement case concerning the now famous "Kline House" in Truro, which has been the subject of heated battles, dating back to 2008 when a building permit issued to allow: (1) a modest cottage (which was agreed to be a lawfully nonconforming structure) on 9.11 acres of land to be converted into a studio; and (2) a second, new, large (6,800 sf) structure to be built about 200 feet away from the original cottage. The Building Official approved the construction of the new house as an "alteration" to the lawfully nonconforming cottage, an alteration that the Official found would "not increase the nonconforming nature of the structure."

In 2008, a group of residents appealed the 2008 building permit to the ZBA and the ZBA upheld the building permit. Four members of the original group of residents (which did not include the plaintiffs in the instant, subsequent action) appealed the ZBA's decision to the Land Court; and, in the meantime, the owner of the land built the proposed new large house on an "at risk" basis.

In 2010, the Land Court upheld the ZBA's determination that the new house could be considered an alteration of the lawfully nonconforming cottage, but the Land Court reversed the ZBA's determination that the new house would not increase the nonconforming nature of the original cottage and the Land Court remanded the matter to the ZBA to determine whether the new house would be "substantially more detrimental to the neighborhood than the existing nonconforming use or structure." An appeal from the Land Court's decision was taken by the owner of the Kline House and, in the meantime, the new house was finished and occupied.

In 2011, the Appeals Court upheld the Land Court's decision to reverse the ZBA, but on much broader grounds, holding that construction of an entirely new building in an entirely different location and one that would be completely different in appearance and four times the size of its predecessor "cannot correctly be deemed an 'alteration' of the original" and the Appeals Court annulled the 2008 building permit and issued a new order of remand.

At this point in 2011, the original owner of the Kline House and the four residents who brought the appeal from the 2008 building permit entered into a settlement agreement and they requested the Appeals Court to allow a rehearing and to vacate its order of remand. The Appeals Court refused the requests and the matter was remanded to the Land Court which, in 2011, remanded the matter to the ZBA and the ZBA ordered the Building Official to revoke the 2008 building permit for the Kline House. The owner of the Kline House appealed the ZBA's order to the Land Court and the Appeals Court; however, that appeal was dismissed.

In accordance with the Appeals Court's decision and the ZBA's orders, the Building Official revoked the 2008 building permit and the occupancy permit for the Kline House and issued an order requiring that it be torn down. The original owner of the Kline House appealed

the orders to the ZBA; the ZBA upheld the Building Official's orders; and then the new owners of the Kline House appealed to the Land Court and the Town defended the suit.

In 2016, however, the Town and the new owners of the Kline House reached a settlement agreement in the pending Land Court litigation – an agreement that the Kline House would remain and the Town would forego any future enforcement - in return for two cash payments to the Town. One payment was a 'mitigation fee' of $468,000 (which represented a daily fine of $300 multiplied by 1560 days) and a "charitable gift" of $2.532 million under a 'pledge agreement.' A judgment that incorporated the settlement agreement was approved and entered on the Land Court docket.

The Plaintiffs in the present action objected to the settlement and asserted that it was "a case of private money being used to buy zoning nonconformity." The Plaintiffs requested the Building Official to deny a use and occupancy permit for the Kline House to the new owners. As required under the settlement agreement, the Building Official refused and issued the use and occupancy permit. The Plaintiffs appealed to the ZBA and the ZBA affirmed the Building Official's decision and the Plaintiffs appealed that decision to the Superior Court and that appeal was transferred to the Land Court, to the same judge who had approved the agreement for judgment that arose out of the settlement agreement.

The Land Court dismissed the Plaintiffs' appeal on the grounds that their appeal was untimely, both because their 2017 appeal was taken more than six years after the issuance of the 2008 building permit (beyond the time allowed for such an appeal under G.L. c.40A, §7) and because of Plaintiffs' failure to appeal from the ZBA's original 2008 decision regarding the 2008 building permit constituted a waiver of their right to appeal.

The Appeals Court noted that there are two potential avenues to seek enforcement against a structure not allowed under zoning. One path is under G.L. c.40A, §8 and §15 - an appeal to the ZBA within 30 days of issuance of the building permit and then from the ZBA's decision under G.L. c.40A, §17. A second path is available, in "appropriate circumstances," to request enforcement regarding an illegal structure under G.L. c.40A, §7 and then to timely appeal a denial of the requested enforcement relief.

As to the first avenue to seek enforcement, the Appeals Court held that the Plaintiffs were time barred in 2017 from using the first avenue for enforcement – (i.e., to appeal the 2008 building permit within 30 days of its issuance). The Appeals Court noted that, based upon the adjudication that occurred regarding the 2008 building permit, the 2008 building permit no longer existed as it had been annulled and, so, there was no building permit to be appealed from in any event.

As to the second avenue to seek enforcement, the Appeals Court held that the Plaintiffs *could* challenge the decision of the Town to not to take enforcement action against a structure built under a building permit that had been adjudicated as invalid, *but* the Appeals Court held that Plaintiffs' failure to take that action within the six year limitation set forth under G.L. c.40A, §7 (for enforcing against a structure built under a building permit, with the six year limitation expiring in 2014) was fatal. The Appeals Court noted that the Plaintiffs could have argued that

the ten year statute of limitation set forth under G.L. c.40A, applied (when a structure is built without a building permit) because the 2008 building permit was annulled, but the Appeals Court noted that that argument had not been made and was waived. So, Plaintiffs were outside of the six-year statute of limitation and, while they were within ten-year statute of limitation, they waived any right to seek that relief.

Stevens v. Zoning Board of Appeals of Bourne, 97 Mass. App. Ct. 713 (2020) (BJS)

Plaintiff Lighthouse Realty owns property in a residential zoning district that it rents out for weddings and other events. Following complaints from neighbors, the building commissioner issued a cease and desist order, followed by filing a complaint for injunctive relief in Land Court. Lighthouse then entered into a settlement agreement with the board of selectmen, and the Land Court case was dismissed. The building commissioner issued a revised cease and desist in conformance with the settlement agreement, allowing up to four functions of more than 25 guests, with a maximum of 100 guests, per year. Molloy, a neighbor who had been denied intervention in the Land Court action, appealed that order to the ZBA, which overturned the revised order and ordered the reinstatement of the original cease and desist order. Lighthouse appealed to the Superior Court, which affirmed the ZBA.

Lighthouse argued to the Appeals Court that Molloy was bound by the settlement agreement in the Land Court action, citing Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475 (1979), in which the court ruled that abutters could not challenge a building permit issued after a final adjudication of a zoning appeal. The court reasoned in Morganelli that the building inspector, who had declined to issue a building permit and then defended the court action, had already sought enforcement of the zoning by-law. In this case, however, the Land Court action was resolved by an agreement, not a final adjudication on the merits. The Appeals Court ruled that the decision of the building commissioner to issue a revised order was subject to an appeal to the ZBA; otherwise, a building official could settle enforcement litigation without participation of parties in interest or review by the ZBA as provided in chapter 40A. Further, the settlement agreement did not deprive the ZBA of jurisdiction over the appeal, or determine the applicability of the zoning by-law to Lighthouse's property. The Appeals Court noted that the board of selectmen "were without authority to settle any litigation purporting to determine the proper enforcement of the zoning bylaw regarding a particular use of property." n. 6.

On the merits of the appeal, the Appeals Court upheld the ZBA's conclusion that the use of the property as a wedding and function venue is a commercial use, and is not accessory to its permitted residential use. The Superior Court judgment was affirmed.

Green v. Zoning Board of Appeals of Southborough, 96 Mass. App. Ct. 126 (2019) (IMQ)

In this case, a developer proposed two projects, one with an affordable component under G.L. c.40B and one a market rate development. The two projects were controversial, but a general settlement was reached and a use variance issued on May 27, 2015 for the market rate project. The use variance was recorded on July 27, 2015. One of the conditions of the use

variance for the market rate project was that the variance relief would not 'take effect' until the comprehensive permit for the other project issued. The comprehensive permit did not issue until August 24, 2016, more than a year after the use variance for the market rate project issued, and an abutter asserted that the 2015 use variance lapsed, under G.L. c.40A, §10, which requires a variance to be exercised within one year of its issuance (unless extended), because the variance was not exercised within one year as it did not "take effect" within that time period because the comprehensive permit did not issue during the one year exercise period.

The Appeals Court disagreed, holding that the use variance both 'took effect' and was exercised within the required one year period – because it was duly recorded in 2015, within the one year period, and because the developer then sufficiently exercised the use variance by taking multiple steps in reliance upon the use variance, including expenditure of substantial funds ($800,000) and undertaking a diligent pursuit of the conditions set forth within the use variance - which required a redesign of the project and pursuit of the comprehensive permit itself - all of which the developer timely and diligently pursued. The Court noted that a "variance need not be fully carried out for its rights to be "exercised" within the meaning of G.L. c.40A, §10" and "evidence of 'use' within one year of issuance of the variance may be sufficient to exercise such a variance."

TAKE AWAY: Look for actions that exercise a use variance.

Penn v. Barnstable, 96 Mass. App. Ct. 205 (2019) (BJS)

This case involves the statutory process for reconsidering a zoning amendment that was defeated by a prior vote. The town of Barnstable's legislative body is a town council. A subcommittee of the council recommended a proposed zoning ordinance amendment to create the Hyannis Parking Overlay District (HPOD), but the planning board voted not to recommend it. On March 24, 2016, the council voted 7 in favor and 4 opposed to the amendment, and the proposed zoning amendment was defeated for lack of a two-thirds vote. Two weeks later, the council voted to reconsider, but then in June voted to withdraw that amendment and propose a new HPOD, which contained some differences from the amendment that had been defeated. The council and the planning board held a joint public hearing on the new proposal, after which the planning board voted to recommend the amendment. The council then voted by more than two-thirds that the amendment was not the same as the one that had previously been acted upon unfavorably, and to adopt the zoning amendment. Plaintiffs, owners of homes adjacent to some of the parking lots in the HPOD, filed a complaint for declaratory relief, alleging that the council's vote was invalid under G.L. c. 40A, §5 because it came within two years of the council's rejection of the original HPOD amendment. The Land Court entered judgment in favor of plaintiffs, annulling the vote, and the town appealed.

The Appeals Court affirmed the Land Court decision under G.L. c. 40A, §5:

> No proposed zoning ordinance or by-law which has been unfavorably acted upon by a city council or town meeting shall be considered by the city council or town meeting

within two years after the date of such unfavorable action unless the adoption of such proposed ordinance or by-law is recommended in the final report of the planning board.

The Appeals Court noted that §5 bars "any new action of the same character", although there were no cases addressing what constitutes the "same character". It reviewed analogous cases under §5 that considered whether a new notice and public hearing was required due to changes made in a proposed zoning by-law after the initial public hearing. Under these cases, a new notice and hearing are needed if the changes are of a fundamental character. It also reviewed the provisions in the Massachusetts Constitution prohibiting the certification of initiative petitions that are substantially the same as a measure submitted to the people in either of the two preceding state elections. Based on these analogous statutes and case law, the Court determined that the two-year bar under §5 applies if the two ordinances share the same fundamental or essential character, with little substantive difference. Applying that standard, it had "little trouble" concluding that the two amendments were the same. The small differences between the two versions did not change the fundamental and essential character of the amendment, to create as-of-right operation of commercial parking lots in the HPOD. Thus, the Appeals Court ruled that the council was barred from considering the amendment until two years had passed from the initial vote of rejection, and affirmed the Land Court judgment, annulling the vote.

The Appeals Court did not address the town's argument that the applicable "final report of the planning board" was its report on the second proposed amendment, which the planning board recommended favorably, stating the issue had not been adequately briefed. Footnote 9. The Land Court judge concluded that c. 40A, §5 refers to the final report on the initial, defeated proposal, and therefore the two-year bar applied even though the planning board recommended the second proposed amendment. Interestingly, the plaintiffs apparently agreed with the town on this, but argued that the council "considered" the amendment prior to the planning board's favorable recommendation. Since the Appeals Court did not address this issue, it appears that this may be an open question.

Leonard v. Zoning Board of Appeals of Hanover, 96 Mass. App. Ct. 490 (2019) (IMQ)

In this case, the Appeals Court considered whether outdoor displays by a flower shop were a lawfully nonconforming use that precluded zoning enforcement action to enjoin it.

The Leonard flower shop began operating in 1993 and it was agreed by all parties that the shop always included the outdoor display of flowers and other goods; however, it also was agreed that, in 1993, the zoning bylaw allowed only uses that occurred "primarily" within a structure and expressly prohibited outdoor displays of goods unless the outdoor use was allowed under a different provision of the zoning by-law. In 2011, the zoning bylaw was amended to allow a business to display goods for sale outdoors only upon issuance of special permit relief.

On December 3, 2013, the Building Official notified the flower shop owner that any outdoor display of goods required special permit relief and issued a cease and desist order regarding the outdoor displays. Also, the Fire Chief had determined that placement by the shop owner of barriers on the property lines (to control an issue with patrons of an adjacent restaurant

use) was a fire safety issue. As a result, the Building Official notified the shop owner that the barriers constituted an alteration of the shop's lawfully nonconforming lot. An appeal was taken to the ZBA and the ZBA upheld the Building Official's orders and determinations.

The flower shop owner appealed further, asserting that the outdoor display of goods was a lawfully nonconforming use and that the barriers did not alter the lawfully nonconforming lot.

The Superior Court upheld the ZBA's determination that the outdoor displays were not a lawful nonconforming use and that they required special permit relief but reversed the ZBA's decision as to the barriers, holding they did not require special permit relief. The flower shop owner appealed further.

The Appeals Court held that, while the outdoor display use began when the shop use started in 1993, the outdoor display use was not lawful when it began, so its longstanding use provided it with no protection and it was subject to the 2011 zoning provision that required special permit relief. In other words, the display use was not lawfully nonconforming. One member of the three member Appeals Court panel dissented from this holding, noting that the 1993 zoning bylaw allowed a use to take place "primarily" inside a structure and the flower shop owner stated that its principal use was within its building and the town had not disputed that fact. As a result, the dissenting judge would have held that the outdoor use was not primary and, therefore, it was allowed when it began in 1993 and, therefore, it was protected from the 2013 zoning amendment. But the majority view prevailed on this point.

The shop owner also argued that the ten-year statute of limitation set forth under G.L. c.40A, §7 (which prohibits zoning enforcement against a structure that violates zoning if it is in existence for ten years or more) protected the outdoor displays because they are structures that had been in place for more than ten years. The Appeals Court unanimously rejected that argument, holding that the ten-year limitation under G.L.c.40A, §7 for existing structures provided no protection at all for the outdoor displays because the ten-year protection provision provides no use protection at all. So, even to the extent that the outdoor display arrangements were structures (which was questionable), there was no use protection that would be available, so no use of the displays could occur without special permit relief.

The Appeals Court held that the barriers along the property lines did not alter the nonconforming lot as the barriers did not alter the lot or its use and they were not structures under the applicable zoning provisions, but, instead, were a form of fencing which was specifically exempted from needing special permit relief. The Appeals Court also held that any effort to enforce the state fire code using the zoning enforcement procedure under G.L. c.40A, §7 was not appropriate and any such effort had to proceed using the correct parties and procedures.

Fish v. Accidental Auto Body, Inc., 95 Mass. App Ct. 355 (2019) (BJS)

In this case, the Appeals Court overturned the grant of a special permit for an auto body shop, where it found that the applicant failed to establish the use met the performance standards of the zoning by-law. Residential abutters of the site appealed the grant of the special permit to

the Superior Court. The body shop uses isocyanates, a harmful chemical, as a top coat when painting the vehicles. The Superior Court found that 2% of the isocyanates would escape the enclosed building in the exhaust, but further that the isocyanates are rendered harmless within minutes after becoming airborne. The defendant did not offer expert testimony as to whether the isocyanates would reach plaintiff's property, and if so, if they would be rendered harmless prior to reaching the property. The trial judge took judicial notice of state and federal regulations, and upheld the special permit after determining that the isocyanates are widely used in the industry; are not detrimental if regulations are followed; there are no regulations regarding the distance between a paint booth exhaust pipe and a residential structure; and regulations do not require an air modeling analysis as requested by plaintiffs.

The Appeals Court first noted that the applicant for the special permit has the burden of proof that the prerequisites for issuance of the special permit have been met, and that the special permit was properly issued. The zoning by-law provided that a special permit may be granted only if the proposed use is consistent with state and town regulations, will not adversely affect public health or safety, and will not significantly decrease air quality. "Because the judge found as a fact that the operation of Auto Body's paint shop would result in the release into the atmosphere of harmful molecules that for up to five minutes following their release pose a danger to people who are exposed to them, Auto Body had the burden to produce evidence and to persuade the judge that those molecules...will not adversely affect public health or safety or significantly decrease air quality." The trial judge did not make such a finding, nor was there evidence in the record that would support such a finding. The Appeals Court found that the trial court judge impermissibly shifted the burden to plaintiff to prove that the isocyanates would be a health risk, when it was Auto Body's burden to prove they would not. Further, the Appeals Court ruled that there was no showing that compliance with state and federal regulations alone was sufficient to ensure an absence of airborne health risks to plaintiffs. The Appeals Court vacated the Superior Court judgment and ordered entry of judgment annulling the special permit.

Maroney v. Planning Board of Haverhill, 97 Mass. App. Ct. 678 (2020) (IMQ)

In 2011, a developer obtained cluster special permit and subdivision relief to build a 50-lot residential subdivision on land that needed a water pressure booster station to be installed to provide adequate water pressure to certain lots as the land was steep in certain places. The Appeals Court noted that special permit and subdivision approvals "incorporated by reference documents that required construction of a water booster station;" however, the approvals apparently did not contain specific conditions regarding the timing of the construction of the water pressure booster station. As a result, the developer was allowed to develop "many of the lots" in the project without first constructing the water pressure booster station.

In 2015, the water department, which was a separate entity, objected to any further building within the development until the water pressure booster station was in place and six building permit applications were denied.

The developer filed litigation to obtain a declaration that neither the cluster special permit nor the subdivision approval required the water pressure booster station to be installed prior to

construction of the six lots in question and that the station only needed to be in place before occupancy of the lots that needed them began. In the meantime, the developer continued building on the six lots – *without building permits*. The Building Official issued cease and desist orders and began issuing fines in the amount of $1,000 per day, per structure for each day that the building continued without the booster station and without building permits.

While pursuing the action to seek a determination that the special permit and subdivision approvals allowed the dwellings to be built without first installing the water pressure booster station, the developer lost the property through foreclosure. As a result, the developer's action was deemed moot because he no longer had the necessary legal interest to pursue the action; however, the litigation continued because the city had counterclaimed – seeking almost $1 million in zoning and state building code fines due to construction that occurred without the booster station and without building permits.

The Appeals Court dismissed the City's counterclaim for fines, holding that that zoning fines must be pursued through either the G.L. c.40, §21D non-criminal disposition process or through a criminal proceeding and such fines cannot be pursued through a counterclaim in a zoning determination action. Similarly, the Appeals Court held that any State Building Code fines must be pursued through G.L. c.148, §2, not through a counterclaim to a developer's zoning determination action. The Appeals Court held that the fines were not properly noticed and pursued and could not be awarded in this action and left to "another day" whether and how retrospective zoning and building code fines might be imposed on a daily basis.

TAKE AWAY: Make sure that conditions of approval in special permit and subdivision decisions are clearly stated in the body of the decisions and that the conditions specifically detail the timing of when particular actions are to take place.

Comstock v. Zoning Board of Appeals of Gloucester, 98 Mass. App. Ct. 168 (August 3, 2020) (IMQ)

In this action, the Appeals Court reviewed how a lawfully nonconforming structure, in this case a detached garage that serves a single-family home, may be altered.

The garage's lawful nonconformities were that it was located on an undersized lot and was setback only 5 feet from the nearest property line (a 10-foot setback currently is required). The garage owners sought zoning relief to allow them to raze the garage and reconstruct a new garage in the same footprint, but with the height of the garage increased from the existing height of 12 feet (and 12 feet of height was allowed as of right under the existing zoning) to 15 feet. Under the zoning bylaw, an increase in the height of a nonconforming structure was allowed if special permit relief were granted. The ZBA then granted two special permits for the new garage, one to allow a modification to the lawfully nonconforming structure and one to allow the increase in height from 12 feet to 15 feet. The ZBA also granted two setback variances, even though it was not clear that variance relief had been requested by the garage owners and the ZBA noted that it questioned whether variance relief was needed.

The direct abutter closest to the garage (who spoke at the ZBA hearing in favor of the project) appealed the relief and the Superior Court granted summary judgment in the abutter's favor, holding that the 3-foot increase in height of the garage created a new nonconformity that required a dimensional variance, relief that had not been sought or granted. The garage owners appealed further.

On review, the Appeals Court noted that the zoning bylaw in question expressly provides that the height of a lawfully nonconforming structure may be increased through special permit relief and that precise type of special permit relief was duly sought and granted. As a result, the Appeals Court held that no new height nonconformity would be created and, so, no variance relief was required. The Appeals Court noted that anyone who secures permission to increase the height of a lawfully nonconforming structure by obtaining special permit relief, "would not be creating a new nonconformity; they would be proceeding in full compliance with provisions governing maximum building height."

The abutter also argued that the new garage required side setback variance relief (which had been granted), in order to allow a further 10-inch intrusion into the already nonconforming side setback that the garage's eaves would create and that summary judgment could not be awarded regarding the grant of that variance relief. The Appeals Court held that no setback variance relief was required for that alteration – holding that "zoning boards are empowered to issue special permits allowing the reconstruction of preexisting nonconforming residences that would increase existing nonconformities so long as they find that the reconstruction would not be substantially more detrimental to the neighborhood" as was case here.

It is important to note that the Appeals Court indicated (at Footnote 11) that this case concerns what has been commonly known and referred to in the past as "grandfathering" rights, but the panel of judges who decided this case stated they would not use that term because the term has racist origins. The Appeals Court noted that the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring them to pass literacy tests or other significant qualifications, while exempting descendants of men who were eligible to vote prior to 1867.

Murphy v. Board of Appeal of Billerica, 97 Mass. App. Ct. 901 (2020) (rescript) (BJS)

This case applies the well-established doctrine of merger to determine that plaintiff's lot is not buildable. Plaintiff bought the lot at 8 Yale Street from Joseph and Mary DeMinico in 2000. The lot has 5,000 square feet and was rendered nonconforming in 1945. The DeMinico's owned the lot in common with the adjacent lot at 10 Yale Street from 1972 to 1992. Although the two lots would have merged under chapter 40A, §5, the Billerica zoning by-law had a more generous protection for pre-existing nonconforming lots. In 1992, the DeMinico's conveyed 10 Yale Street to the Joseph and Mary as trustees of their respective, revocable trusts. In 1999, the town amended its zoning by-law to eliminate the more generous protection for pre-existing lots. Plaintiff's application for a building permit was denied on the grounds that the two lots merged for zoning purposes in 1999. The ZBA upheld the denial, and plaintiff appealed.

The Appeals Court upheld the board's ruling that the lots merged in 1999, because at that time, the DeMinico's owned 8 Yale Street, and their revocable trusts owned 10 Yale Street. As sole trustees, life beneficiaries and settlors of their respective trusts, Joseph and Mary held complete control over both lots, and had the ability to use 10 Yale Street to avoid or diminish the nonconformity of 8 Yale Street.

Plaintiff relied on the recent case of Kneer v. Zoning Board of Appeals of Norfolk, 93 Mass. App. Ct. 548 (2018), in which the court had found that merger did not occur. In that case, however, one of the adjacent lots was held by Mead, and one was held by a trust established by Mead's mother (Kneer). Although Mead was a co-trustee of the trust, Kneer had the power to terminate Mead as co-trustee, or to revoke the trust, and Mead had a fiduciary duty toward Kneer which precluded her from using the lot to address the nonconformity of the lot she held individually.

SUBDIVISION

Barry v. Planning Board of Belchertown, 96 Mass. App. Ct. 314 (2019) (BJS)

The Appeals Court ruled that a 1987 judgment requiring endorsement of a plan as not requiring endorsement (ANR) under the Subdivision Control Law (SCL) did not require endorsement of an ANR plan in this case, where the land in question has frontage on a different portion of the same street (Munsell Street). In 1990, the town accepted the first 2,730 feet of Munsell Street. Beyond that point, it becomes a gravel road, which narrows and eventually becomes a trail that is impassable to most vehicles. Barry filed an ANR plan showing two lots, Lot A with frontage on the accepted portion of Munsell Street, and Lot B with frontage on the unaccepted portion. The board denied endorsement because it found that plan showed a subdivision as defined in G.L. c. 41, §81L. Specifically, the board determined that the unaccepted portion of the street did not meet any of the three criteria of c. 41, §81L to qualify as frontage, and also that this portion of Munsell Street was required to be dedicated as open space as a condition of approval of the neighboring Oasis Drive subdivision. The Superior Court overruled the planning board, determining that the 1987 judgment established Munsell Street as a public way, thereby providing frontage under §81L for both lots shown on the ANR, and further that the portion of the street could not be transformed into open space under the Oasis Drive subdivision approval because it is a public way.

The Appeals Court closely reviewed the 1987 judgment, which was based on a special master's report. The special master found that the board had endorsed several ANR plans on Munsell Street, and that the street was identified as a "public way" on a plan confirmed in the Land Court in 1975. He concluded that Munsell Street satisfied the provision of G.L. c. 41, §81L of a way shown on plans heretofore approved and endorsed by the planning board under the Subdivision Control Law; but he did not conclude that Munsell Street was a public way. The Superior Court in 1987 confirmed the special master's decision to order the ANR endorsement.

The Appeals Court then noted that the special master's conclusion in 1987 was faulty, because ANR endorsement is not an "approval" under the SCL. Even though faulty, the Appeals

Court then needed to consider if the 1987 judgment was nevertheless binding on this appeal under the doctrine of collateral estoppel, which fosters finality of issues that have already been decided. Plaintiffs argued that the town should be precluded from asserting the defense that Munsell Street is not a public way or an approved subdivision road. The Appeals Court, however, found that the town was not precluded from raising the defense, because the issue in this case is not the same as in the 1987 case due to material changes since the 1987 decision. These included the fact that the town accepted only a portion of Munsell Street in 1990, and that the Oasis Drive subdivision incorporated the portion of Munsell Street fronting Lot B and changed its use to open space. The Appeals Court also cited the public policy in ensuring that new lots have adequate access to a way, rather than enforcing issue preclusion based upon a 30-year old case between different litigants. Since the Superior Court erroneously applied collateral estoppel to find that Munsell Street is a public way, and the plaintiffs did not otherwise prove that Munsell Street satisfied any of the three criteria of G.L. c. 41, §81L, the Appeals Court vacated the judgment.

UNPUBLISHED ZONING DECISIONS

Charkoudian v. Zoning Board of Appeals of Wilbraham, 96 Mass. App. Ct. 1104 (Unpub. 2019) (IMQ)

In 2001, a nonconforming cottage was destroyed by a tornado and the family members who controlled the property disagreed about whether to reconstruct it. In 2016, the Town's Building Official issued a determination to one family member that the cottage could be rebuilt under a provision of the Town's zoning bylaw that allowed reconstruction of certain "existing structures." A different family member appealed that decision to the ZBA and the ZBA upheld the Building Official. On appeal to the Land Court, the Land Court reversed the decision, finding that the term "existing structure" did not include a structure that had been destroyed and no longer existed. The Appeals Court reversed the Land Court, holding that the wording in the zoning bylaw encompassed not only existing buildings "but also structures that once existed at a particular point in time" and included residences that existed in a residential zone at the time the relevant bylaw provision rendered them nonconforming.

Browne v. Zoning Board of Appeals of Rockport, 97 Mass. App. Ct. 1108 (Unpub. 2020) (IMQ)

This case concerns a hotel/inn use that dates back to 1888 and was the subject of the 1973 Berliner v. Feldman case, a well-known decision which concerns abandonment of uses.

In 2014, the inn came into new ownership, and the new owner undertook some renovations and changes that combined some of the inn's rooms, converted them into suites, and provided some of the suites with kitchens and some of the suites were occupied for 90 days at a time.

In 2016, the Plaintiffs requested zoning enforcement from the Building Official, asserting that the property was being operated as a multiple dwelling use, not as inn use. The Building

Official and then the ZBA disagreed with the Plaintiffs and denied enforcement and the Superior Court upheld the denial of the enforcement request. The Plaintiffs appealed further.

The Appeals Court, after reviewing the standard for how to interpret a zoning provision and the three-prong test, under Powers v. Building Inspector of Barnstable, 363 Mass.648, 653 (1973), for determining whether a lawfully nonconforming use has changed, affirmed the prior decisions as follows:

- The Appeals Court upheld the ZBA's interpretation of the term "inn" as including long-term occupancies because the occupants were guests rather than tenants in a multi-family dwelling. This was because the guests could be asked to leave or could themselves choose to leave at any time and they had no formal tenancy of any kind. Also, the amenities provided were more like the amenities typically provided to a guest in an inn rather than to a tenant (i.e., furnished rooms and cable television and ala carte services such as housekeeping and laundry services and, while some rooms had kitchen facilities, not all of them did).

- Under the Powers test, the inquiry is to ask:

    1. Whether the current use reflects the nature and purpose of the prior use;
    2. Whether there is a difference in the quality or character, as well as the degree, of use; and
    3. Whether the current use is different in kind in its effect on the neighborhood than the prior use.

The Appeals Court held that all three prongs were satisfied as the current use is still for guests and the changes were each a reasonable adaptation of the lawfully nonconforming use, and the only effect on the neighborhood was a reduction in traffic.

Attleboro Sand & Gravel Corp. v. Attleboro, 96 Mass. App. Ct. 1112 (Unpub. 2019) (BJS)

Plaintiff sought a declaratory judgment that an asphalt plant is a permitted use in the Industrial Business Park zoning district. The Land Court ruled that an asphalt plant is not a permitted use, and plaintiff appealed. The zoning ordinance allows by right "Processing and Treating of Raw Materials", and "Light Manufacturing, Assembling and/or Processing of Manufactured Products". On the other hand, "Heavy Manufacturing, Assembling and/or Processing of Manufactured Products" is prohibited. The ordinance does not define "processing and treating", so the court looked to the dictionary definition of "processing", which defines "processing" as a component of "manufacturing". Applying plaintiff's definition of "processing" would merge the two categories under "manufacturing", rendering the "processing" term superfluous. "Processing and treating" is a distinct use from "manufacturing" under the ordinance. Because an asphalt plant involves the creation of a new product, it constitutes "manufacturing", and therefore not a "processing and treating" use that is allowed by right.

The next question: is it light or heavy manufacturing? The ordinance defined "light manufacturing" as "employing only electric or other inoffensive motor power, utilizing hand labor or quest machinery and processes, and limited the manufacturing to materials that are "free from neighborhood disturbing agents." Plaintiff's proposed use would not rely on hand power, electric, or other inoffensive power sources. It would also generate both noise and odors. Plaintiff's argument that it could mitigate noise and odors did not prevail, since the ordinance required the activities to be "free from" neighborhood disturbing agents.

In addition, plaintiff argued that it had received earlier special permit approvals. The court, however, found that the city was entitled to change its interpretation of its own ordinance.

Tresca Brothers Sand & Gravel, Inc. v. Board of Appeals of Wilmington, 97 Mass. App. Ct. 1128 (Unpub. 2020) (BJS)

Another case, becoming less rare, of a court ordering the issuance of special permits. The board of appeals denied Tresca's special permit applications to convert an existing warehouse into a concrete manufacturing facility. Tresca required two special permits: one for the use of "general manufacturing", and one for rendering impervious more than 15% of the lot in the groundwater protection district. (The planning board had approved a site plan application with 33 conditions.) On appeal, the Superior Court found that the board of appeals' denials were arbitrary and capricious, and ordered the board to issue the special permits. Although the Superior Court recognized that special permits are discretionary, and the board may deny a special permit even if the facts found by the court would support one, the board's decision provided only conclusory statements, unsupported by factual findings.

The board argued ground water protection, excess noise, and traffic to justify the denials. The judge concluded that the board's failure to cite facts to support its conclusion that the application did not satisfy storm water standards indicated that the board's decision was arbitrary and capricious. Moreover, at trial, Tresca's ground water engineer provided detailed evidence, credited by the judge, that there would be no net increase in storm water runoff, and that there would be proper treatment for reducing total suspended solids. The board argued that the fact that 59% of the site would be impervious, far exceeding the 15% by-right limit, was sufficient, but the court ruled that there is no limit on the percentage of lot coverage, so long as the by-law standards for the special permit are met. With respect to noise, the judge found that the proposed use would not violate the DEP noise policy. Although the board argued that it is not required to find noise increases are acceptable merely because the noise projections meet the DEP standard, the board had used the DEP noise policy in its decision and the case was tried with respect to that standard. Finally, with respect to traffic, the trial court found that the sight lines would be acceptable

Since the board relied only on noise, traffic, and ground water to support its conclusion that the proposed manufacturing use is not in harmony with the by-law, the Appeals Court upheld the finding that the board's denial was beyond its discretionary powers. Finally, the Appeals Court rejected that board's argument that the matter should be remanded to the board to impose conditions, and upheld the judgment requiring issuance of the special permits.

Nimchick v. City Council of Chicopee, 96 Mass. App. Ct. 1110 (Unpub. 2019) (IMQ)

In this case, the City Council voted to amend the City's zoning map to rezone a one acre parcel of land from Residence A to Residence B. The one acre parcel was located in a residential district but was located on the "border of a decidedly mixed use district." It was not disputed that the rezoning effort would allow an existing business located on adjacent land to expand. An appeal followed that asserted that the rezoning was invalid as "spot zoning."

The Appeals Court provided a short and effective review of spot zoning law as follows:

- Spot zoning occurs where there is "a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character, all for the economic benefit of the owner of that lot" because that treatment violates the rule of uniformity set forth under G.L. c.40A, §4 which requires zoning to "promote uniformity within the districts they create."

- When a zoning provision is challenged as spot zoning, the challenger bears the burden of proof and it is a "formidable burden," one that requires the challenger to prove that the zoning provision is "arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare" and does not bear "a rational relation to any permissible public object which the legislative body may plausibly be said to have been pursuing."

- Since the City Council was dealing with a parcel that was located on the border of two zoning districts, the case law expressly provides that such a parcel "could be properly zoned in either district."

- The fact that the rezoning would primarily benefit the petitioner seeking the zoning change "does not render it invalid" if there is a rational relation to any permissible public object and permissible public objects include, as was the case here, creating a scenario where:

  - Vacant land could become productive
  - Vacant land could create new tax revenue
  - A valued employer would be able to remain
  - The new project proposed would alleviate existing issues (in this case the construction of a garage would reduce noise and pollution)

IMPORTANT TAKE AWAY: Make sure that the legislative body (town meeting or city council) formally places all available reports, documentation and opinions regarding the benefits from the proposed rezoning provision into the legislative record so that, if there is a challenge, the legislative record is clear as to what the legislative body considered when making its decision.

Arena v. Nantucket, 96 Mass. App. Ct. 1116 (Unpub. 2020) (IMQ)

Workforce housing special permits were granted to allow a workforce project on two lots, with the project having the density allowed for two projects but with the project satisfying all of the dimensional requirements for two workforce projects. Abutters objected to the density of the project and argued that the project had to be treated as one project because the units were being developed as one cohesive project and a single project could not exceed the maximum density for one project even though all of the dimensional requirements for two projects were satisfied.

The Land Court and Appeals Court both held that the zoning provision under which the project obtained special permit relief explicitly allowed for "aggregation of buildings" and, so, one project that has the density of two projects was allowed as the dimensional criteria for two projects was satisfied and "the project's design reflects the flexibility that the bylaw promotes."

Indianhead Realty, Inc. v. Zoning Board of Appeals of Plymouth, 97 Mass. App. Ct. 1108 (Unpub. 2020) (BJS)

Plaintiff was denied a zoning permit to construct an outdoor recreation facility, consisting of a multi-purpose field, baseball field, BMX park, and walking trail, which would include the removal of 475,000 cubic yards of gravel over a two to three-year period, creating a bowl-shaped area. The ZBA upheld the denial on appeal, finding that the proposed excavation was not reasonably necessary or incidental to the proposed recreation use, but rather was a sand and gravel quarry which required a special permit. The Land Court affirmed the ZBA decision, finding that the amount of material to be removed could be reduced by up to 375,000 cubic yards by eliminating an unnecessary second arrival point and using other construction methods. The removal of the gravel would also provide up to nearly $1million in revenue to the plaintiff.

The Appeals Court affirmed, finding that the decision of the ZBA was not legally untenable, unreasonable, whimsical, capricious or arbitrary. The zoning by-law allows removal of more than ten cubic yards of soil only if "incidental and required" in connection with an approved use or structure on the site, which is defined as only the "amount of material reasonably necessary to allow a use to be conducted". The Court cited Old Colony Council-Boy Scouts of America v. Zoning Board of Appeals of Plymouth, 31 Mass. App. Ct. 46 (1991), where the court had ruled that the removal of 460,000 cubic yards of fill over 2 ½ years, which would provide substantial funds, was not incidental to the creation of a cranberry bog. In determining if a proposed use is "incidental", the court compares the net effect of the proposed use to the primary use, and evaluates the reasonableness of the relationship between the two. Under the zoning by-law, an unlimited amount of material may not be removed simply because the excavation can be connected to an approved use. Plaintiff failed to carry its burden of showing that the proposed excavation was only the amount of material reasonably necessary to carry out the allowed recreational use. The Court also cited the fact that plaintiff's engineer was not asked to minimize the amount of fill to be removed in designing the project.

Richardson-North Corp. v. Zoning Board of Appeals of Uxbridge, 97 Mass. App. Ct. 1128 (Unpub. 2020) (BJS)

This case involves the agricultural exemption under G.L. c. 40A, §3, and the extent to which a use is "incidental" to the agricultural use and thus allowed under the exemption. The agricultural exemption provides that a town may not "prohibit, unreasonably regulate, or require s special permit for the use of land for the primary purpose of commercial agriculture", provided certain minimum thresholds are met. Richardson owns a 202-acre property, a portion of which is farmed. For a number of years, Richardson sold gravel from the site, resulting in a gravel pit of approximately 45 acres which is about 40 feet deep. In 2015, Richardson entered into an agreement to allow a soil broker to import 200,000 tons of fill to the gravel pit each year for ten years. The zoning enforcement officer (ZEO) issued a cease and desist, which was upheld by the ZBA on appeal. The ZBA found that the filling operation was a principal use of the property, not a customary and incidental accessory use. The Land Court overturned the ZBA, finding that the filling operation was incidental to the agricultural use, and noting that the filling operation would return the gravel pit to a level condition that could be used for agricultural purposes.

The Appeals Court reversed. Although the agricultural exemption includes uses related to or incidental to the primary agricultural use, the ZBA finding that the filling operation was not incidental was not legally untenable or unreasonable. The Court cited the truism that, if reasonable minds may differ, the ZBA judgment is controlling. The Court noted that an incidental use must be minor in significance and subordinate to the primary use. In this case, the scale of the operation (delivery of two million tons of fill over ten years), resulting in payments of three million dollars to Richardson, dwarfed the modest amount of farming activity on the property, which produces little income. In addition, there was evidence at trial that the gravel pit could be returned to agricultural use with a small amount of fill, and thus the proposed filling operation was not necessary to support the primary agricultural use. The Court cited to the Old Colony case, as well as Henry v. Board of Appeals of Dunstable, 418 Mass. 841 (1994).

Bylinski v. Building Commissioner of Douglas, 97 Mass. App. Ct. 1113 (Unpub. 2020) (IMQ)

In this procedurally complicated case, the Appeals Court reviewed the statutory requirements for zoning enforcement and held, as it has before, that a private citizen has no standing to directly seek injunctive relief from a court to enforce a local zoning provision and must first properly use the administrative appeal process outlined in G.L. c.40A, §§7, 8 and 17.

The Plaintiff in this case brought multiple zoning enforcement actions to attempt to have a lakeside cottage that was built under a 2008 building permit demolished due to zoning violations – it was not disputed that the property where the cottage was built lacked sufficient frontage and area and was not protected from current zoning requirements.

In 2009, the Plaintiff made his first zoning enforcement request to the Building Official to revoke the 2008 building permit but the Building Official refused. The Plaintiff appealed to the ZBA and the ZBA failed to timely act on the appeal and constructively allowed the Plaintiff's

appeal and the request to revoke the 2008 building permit. The cottage owner unsuccessfully appealed the constructive grant determination to Superior Court. Following that result, the cottage was not removed.

In 2009, the Plaintiff filed an action in the Land Court against the Building Official to require him to take zoning enforcement action, an action known as mandamus. In 2014, the Land Court dismissed the Plaintiff's mandamus action and held the Plaintiff had to exhaust administrative remedies by seeking relief again from the Building Official and appeal as necessary to the ZBA.

In 2014, the Plaintiff appealed the Land Court's dismissal of the mandamus action but requested zoning enforcement from the Building Official a second time. The Building Official refused the second enforcement request, without stating a reason and, by this time, the cottage was finished and occupied. The Plaintiff appealed again to the ZBA and the ZBA issued a demolition order. The property owner appealed the ZBA's demolition order to the District Court and the District Court affirmed the ZBA's decision. The property owner appealed the District Court's decision to the Appeals Court.

In 2016, the Appeals Court dismissed the property owner's appeal from the District Court's decision – because the property appealed to the wrong appellate court (the appeal should have gone to the Appellate Division of the District Court) and, at the same time, dismissed the Plaintiff's appeal from the Land Court's dismissal of the mandamus action.

In 2017, the Plaintiff asked the Land Court to revive his mandamus action that had been dismissed and the Land Court agreed to do so, and the Plaintiff filed a revised complaint that requested direct injunctive relief to compel the property owner and the Building Official to comply with the ZBA's demolition order. In December 2017, the Land Court declined to act on the Plaintiff's mandamus action and, instead, held that the Plaintiff had standing to seek direct injunctive relief and entered judgment and direct injunctive relief, ordering the owner of the property and the Building Official to "within 120 days complete" the required demolition and removal. A further appeal was taken.

In April of 2020, the Appeals Court held that the Land Court's determination that the Plaintiff had standing to pursue direct injunctive relief was incorrect and that either mandamus or a third zoning enforcement request was the proper procedure. The Appeals Court also noted that the mandamus action in the Land Court remained "live" and could be pursued by Plaintiff on remand but no injunctive relief between the Plaintiff and the landowner could issue unless taken under the administrative procedure set forth under G.L. c.40A, §§7, 8 and 17, The Appeals Court remanded the matter to the Land Court for dismissal of the direct injunctive relief claim and for a final adjudication of Plaintiff's mandamus claim and possibly to seek revival of the District Court action and without prejudice for Plaintiff to seek a third request for zoning enforcement, provided that the Plaintiff's effort is timely.

Dusti v. Shirley, 96 Mass. App. Ct. 1109 (Unpub. 2019) (BJS)

Plaintiff owned property in Shirley, and received an offer to buy the property, contingent on the property being "buildable". The building inspector in a brief conversation allegedly told the buyer the property was not buildable, apparently in error. The buyer then revoked his offer and plaintiff returned his deposit. Plaintiff then sued the town for negligent misrepresentation and intentional interference with business relations. The court granted summary judgment to the town, and an appeal followed. The Appeals Court upheld the judgment. The misrepresentation claim failed because plaintiff did not rely upon the building inspector's statement, which was made to the buyer, who did not suffer any damages. With respect to the claim for interference with business relations, G.L. c. 258 §10(c) provides immunity to the town for any claim arising out of an intentional tort. This immunity does not extend to instances where the municipality knew or should have known of the public employee's tortious conduct. Plaintiff, however, did not establish that the town knew or should have known of the building inspector's conduct, and so the immunity of §10(c) applied.

Comendul v. Norfolk, 95 Mass. App. Ct. 1115 (Unpub. 2019) (IMQ)

A Superior Court judge entered an order annulling all entertainment licenses issued by the Norfolk Board of Selectmen to conduct barrel races and shooting events at the Run and Gun Ranch in Norfolk, but with any renewed application for entertainment licenses to be considered if the use proposed conformed with zoning. The Norfolk Building Official issued a cease and desist order to the Ranch. The Ranch appealed that order to the ZBA and the ZBA reversed the Building Official, holding the proposed events, on a limited scale, would comply with zoning as incidental to the agricultural uses at the Ranch. The Plaintiffs appealed the ZBA's decision and filed a complaint for contempt against the Town Administrator and Select Board for violating the Superior Court's order and the Superior Court held them both in contempt.

The Appeals Court reversed the contempt ruling, finding that the ZBA and its members were not parties to the action in which the Superior Court issued the order and so the ZBA could not violate the order; and, in addition, the municipal defendants who were subject to the order (the Town Administrator and the Select Board) took no action themselves that violated the order, so no contumacious act occurred by any party who was subject to the order.

Pecyna v. Dudley, 96 Mass. App. Ct. 1109 (Unpub. 2019) (BJS)

The ZBA approved Verizon's special permit application for a personal wireless service facility, and plaintiffs filed an appeal in the Superior Court, but did not file notice of the complaint with the town clerk. The town clerk issued a notice of no appeal, and Verizon commenced construction. Plaintiffs then filed emergency motions to add Verizon as a party and to enjoin further construction. The Court dismissed the action for failure to file notice with the town clerk within 20 days after the ZBA decision was filed with the clerk, as required by G.L. c. 40A, §17. The court found that, even if plaintiffs told the town clerk of their intent to file an appeal, and attempted to file the appeal directly with the clerk's office, this did not satisfy the

statutory requirement. The Appeals Court did not reach plaintiff's argument that they should have had an opportunity for discovery.

Lewandowski v. Zoning Board of Appeals of Chelsea, 97 Mass. App. Ct. 1115 (Unpub. 2020) (BJS)

Another case where the plaintiff failed to file notice with the clerk, this time from the grant of a variance and special permit. The complaint was filed in Superior Court within the 20-day appeal period, and plaintiff's counsel requested that a constable serve the clerk, but service was not made until 25 days after the board filed its decision. The Superior Court granted defendants summary judgment. Plaintiff argued that he and his attorney told the clerk of the intention to appeal, but this was deemed insufficient by the court as the clerk did not have notice of the complaint within 20 days.

COMPREHENSIVE PERMITS

Cserr v. Zoning Board of Appeals of Dighton, 98 Mass. App. Ct. 1104 (Unpub. 2020) (IMQ)

In this case, Plaintiff Cserr appealed a comprehensive permit and three extensions of the comprehensive permit, arguing that the project as approved would run water and sewer lines under a paper street that the Plaintiff held the fee to and the permit holder had no permission to use the paper street for that purpose and, so, the developer lacked site control to obtain and maintain the comprehensive permit. Plaintiff Cserr then voluntarily dismissed his appeal of the comprehensive permit itself but continued with his appeals from the grant by the ZBA of three extensions of the comprehensive permit. For a time, the Plaintiff's litigation was stayed because a fourth extension of time for the comprehensive permit was denied by the ZBA and an appeal to the Housing Appeals Committee resulted – which determined that the ZBA should have granted the fourth extension. Once the HAC appeal finished, Plaintiff's appeals from the grant of the first three extensions of the comprehensive permit moved forward.

Plaintiff Cserr argued that the ZBA could not grant extensions of the comprehensive permit without determining the issue of whether the developer had site control – including the right to use the paper street for the proposed water and sewer lines. The Superior Court held that Plaintiff Cserr's assertion of ownership of the paper street did not fall within the scope of the interests protected under G.L. c.40B. The Plaintiff appealed further.

The Appeals Court affirmed the Superior Court's decision and held that "all that is raised by an order of extension are the issues litigated (or … perhaps issues that could have been litigated) before the board in the extension proceeding." The Appeals Court went on to hold that "the interest in protecting one's property from trespass by the water and sewer lines that will serve a development is not an interest protected against infringement in a zoning appeal." The Appeals Court noted that, certainly, an individual who is concerned about a trespass issue may bring a common law action for trespass, once the trespass takes place, or may seek declaratory and injunctive relief even before the potential trespass occurs.

THE AUTHORS

Barbara J. Saint Andre, esq., represented cities and towns across the Commonwealth for over 35 years. During her legal sojourn, she served as primary town counsel to more towns than she can remember, providing legal advice in all areas of municipal law including Town Meeting, licensing, Open Meeting Law, and municipal finance. Her special emphasis, however, was land use, including zoning, subdivisions, affordable housing, historic districts, planning, board of health, enforcement, and wetlands. She started her legal career as a law clerk to the Justices of the Superior Court, then worked as an associate at Murphy, Lamere, and Murphy, P.C. in her then hometown of Braintree. She switched to Kopelman and Paige, P.C. for 20 years, where she became a principal, after which she moved to Petrini & Associates, P.C. in Framingham, where she was also a principal. No doubt missing life in the Big City, she returned to Kopelman and Paige as a member, and left the active practice of law as a member of KP Law, P.C. in 2018. No doubt exhausted from trying to keep track of these various stops in her legal career, she has now found true bliss working for the Town of Medway as the Director of Community and Economic Development. In her spare time, she was an elected Town Meeting Member for 20 years, a member of the Housing Authority for nine years (two stints as chairman), served on her local Finance Committee for nine years (two years as chairman), and, a glutton for punishment, is now on her local Capital Planning Committee. For those who have read this far, she lists her hobbies as including skydiving, synchronized swimming, and drumming in a punk rock band.

Ilana M. Quirk, Esq. has practiced land use law since graduating from Suffolk Law School in 1983, first representing developers while at Barron and Stadfeld, P.C. in Boston, then serving as counsel to the State Senate (and the joint legislative committee with jurisdiction over G.L. c.40A and G.L. c.41), then as an attorney (an associate, principal and shareholder) with KP law, PC (formerly Kopelman and Paige, PC) for many years, representing municipalities, and she now represents developers, acting of counsel with Freeman Law Group LLC. She also teaches Affordable Housing Law at BU Law School. Importantly, she advises Attorney Saint Andre regarding her skydiving and swimming efforts (mainly by advising against these activities as either unsafe or unseemly) and regarding her punk rock band effort (mainly by advising that this effort be pursued as her true calling – using remote performance methods during times of pandemic, of course).