MASSACHUSETTS ASSOCIATION OF PLANNING DIRECTORS
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LAND USE AND ZONING UPDATE

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MARIJUANA CASES

Mederi, Inc. v. Salem, 488 Mass. 60 (2021) (BJS)

Mederi sued the city of Salem in Superior Court when it was denied a host community agreement (HCA) by the city, effectively denying Mederi the opportunity to operate a retail marijuana business in Salem. To be eligible for a license from the Cannabis Control Commission (CCC) to operate a marijuana establishment, a prospective establishment must execute an HCA with the municipality in which it seeks to operate. By ordinance, Salem limited the number of retail marijuana establishments to five. It also published guidelines explaining the HCA process, including minimum requirements to apply, and the criteria that would be considered. A review committee was established to review applications and make a recommendation to the mayor, who made the final determination whether to enter into an HCA with an applicant. Of the eight applicants for four then-available slots, Mederi was not selected. Mederi's lawsuit against Salem was dismissed by the Superior Court, and the SJC transferred the case from the Appeals Court on its own motion.

Mederi's complaint set forth claims for relief in mandamus and certiorari, neither of which afforded it relief. With respect to mandamus, the SJC noted that mandamus is available only to require a government official to perform a clear cut duty. Mederi argued that, once it presented an application that met all the requirements in Salem's guidelines, and demonstrated its intention to accept the city's conditions, the city was required to execute an HCA. The SJC rejected this reasoning, ruling that G.L. c. 94G does not impose a duty on a municipality to enter into an HCA simply because the applicant meets the requirements. "Because a municipality may use its discretion in determining whether to enter into an HCA with a prospective retail establishment, mandamus relief is not available to Mederi."

With respect to the certiorari claim, because the decision being reviewed allowed for administrative discretion, the SJC determined that the standard of review is "arbitrary or capricious", requiring only that there be a rational basis for the decision. Mederi argued that the city failed to properly evaluate its application under the city guidelines, and that the application process itself was unlawful. The SJC reviewed the findings that were made by the review committee, which pointed out specific reasons for recommending four firms over Mederi (and

three others). For example, the review committee determined that the recommended four firms had stronger applications by virtue of experience in the industry, strong capitalization, and/or superior locations. The review committee expressed misgivings as to Mederi's lack of experience in the industry, and its financial strength. The SJC found that the city's decision was rational and was not arbitrary or capricious.

Mederi argued that the application process was an unlawful "pay to play" scheme, because the successful applicants promised the city additional financial and other benefits. The SJC found that this was not supported by the facts, since one of the unsuccessful applicants offered significant financial incentives, and two of the successful applicants did not offer any additional direct monetary benefits. Mederi also challenged the HCA fees as excessive under the statute, but the court ruled it did not have standing to make this claim as it never executed an HCA. The SJC affirmed the Superior Court.

In a somewhat unusual move, the SJC then went on the muse on the statutory and regulatory framework under c. 94G intended to make the marijuana industry more equitable. The statute requires the CCC to prioritize applicants that will benefit communities disproportionately affected by the enforcement of prior criminal laws prohibiting marijuana, but the SJC stated that the CCC may not be achieving this goal. Because municipalities are gatekeepers through the HCA process and are not required to consider whether an applicant is an economic empowerment priority applicant, such applicants may never make it to the CCC. Further, the SJC commented on the practice of some municipalities to require HCA partners to make payments in excess of the community impact fees provided for by statute, which may create a barrier for economic empowerment priority applicants. It concluded that there are gaps in the regulatory framework, and that "closing those gaps would provide much-needed clarity."

West Street Associates, LLC v. Planning Board of Mansfield, 488 Mass. 319 (2021) (IMQ)

Holding: The SJC held that 2017 legislation (which repealed 2012 legislation that allowed only for-profit entities to dispense medical marijuana and, instead, allowed both non-profits and for-profit entities to dispense) preempted the portion of a municipal by-law (enacted under repealed 2012 legislation) that limited eligibility to obtain special permit relief to dispense only to nonprofit entities.

Background:

In 2012, the Legislature enacted a law (St. 2012, c.369) that legalized marijuana for medical use and authorized the licensing of medical marijuana dispensaries – but limited the licensing to dispensaries that were non-profit entities. The Town of Mansfield enacted a bylaw that, consistent with the 2012 legislation, allowed only nonprofit entities to be eligible to apply for and obtain special permit relief to dispense medical marijuana.

Planning Board Action

In 2016, the Planning Board issued a special permit to a nonprofit medical marijuana dispensary (CommCan). An abutter (West Street Associates) appealed the special permit, arguing the Planning Board failed to consider the criteria required under the special permit bylaw.

Trial Court

In late 2016, while the action to challenge the special permit was pending before the superior court trial, the Legislature adopted new legislation (St. 2017, c.55, §72) which repealed the 2012 legislation and allowed medical marijuana dispensaries to be for-profit entities. In response, the special permit holder dispensary changed its corporate status from non-profit to for-profit.

Following a trial on the merits, the superior court held that the Planning Board had properly issued the special permit and held that the municipal bylaw that required all medical marijuana dispensaries to be nonprofits was preempted by the 2017 legislation. Under the 2017 legislation, a for-profit corporation may obtain a dispensary license and any entity that had a "provisional or final certificate of registration as of July 1, 2017 [,] to dispense medical use marijuana … shall be entitled to convert from a non-profit corporation … into a domestic business corporation."

The abutter appealed from the trial court judge's decision but did not challenge the determination that the special permit criteria had been satisfied and, instead, challenged only the preemption decision. The Supreme Judicial Court transferred the case to itself on its own motion.

Supreme Judicial Court

The SJC summarized the standard for determining when preemption of a municipal bylaw occurs. Under the 1966 Home Rule Amendment (Mass. Const. Amend. Art. 89, §6), a municipality has the authority to undertake any action that is "not inconsistent" within the Constitution or law of the Commonwealth. To determine whether local action is inconsistent with a State law, the "analysis is whether the State Legislature intended to preempt the [municipality's] … authority to act." The intention to preempt doesn't have to be expressly stated, but it must be clear and the intent to preempt even can be inferred if a "local regulation would somehow frustrate the purpose of the statute…."

Since the 2017 legislation allows for-profit corporations to dispense medical marijuana and allows non-profit corporations to convert to for-profit status, the SJC held that "retaining the requirement [set forth in the municipal bylaw] that medical marijuana dispensaries be restricted to non-profit corporations, the …bylaw "frustrate[s] one of the purpose[s]" of the 2017 act."

As a result, the SJC held that the Planning Board "cannot be forced to revoke the special permit at issue because CommCan [the special permit holder] appropriately exercised its right to convert to a for-profit entity."

Commcan, Inc. v. Mansfield, 488 Mass. 291 (2021) (BJS)

In 2016, Commcan was granted a provisional certificate by the state Department of Public Health (DPH) to operate a medical marijuana dispensary, and obtained a special permit to

construct the dispensary. The special permit was appealed by an abutter, and construction was put on hold. In November of 2016, voters approved legislation allowing adult non-medical use of marijuana. Commcan sought to convert the site to an adult use marijuana retail establishment, but the town took the position that such conversion was not allowed, as the location was not zoned for that use. Commcan then filed a complaint in Land Court under G.L. c. 240, §14A, seeking a determination that the town's zoning by-law did not prevent it from converting to a retail adult use marijuana establishment. The Land Court ruled in Commcan's favor, the town appealed, and the SJC transferred the case on its own motion.

General Laws c. 94G, §3(a) allows municipalities to limit the number and location of retail marijuana establishments, but G.L. c. 94G, §3(a)(1) provides the following exception: "zoning ordinances or by-laws shall not operate to…prevent the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana [retail facility]" The town argued that Commcan was not "engaged" in the sale of marijuana because the dispensary was not built or in operation.

In the absence of a definition of "engaged" in the statute, the court looked to dictionary sources defining engaged as being "involved in", "occupied" or "busy". The Court noted that Commcan had obtained a state license, entered into a host community agreement with the town, obtained a special permit, and was defending the abutter's appeal, concluding "it can hardly be said that plaintiffs were not 'involved in' and 'occupied' by the sale of marijuana". Further, the SJC found that the purpose of the statutory provision was to make it easier for medical marijuana facilities to convert to retail adult use marijuana sales. It noted that another provision of the act specifically refers to marijuana dispensaries "that are operational and dispensing to qualified patients", a requirement not found in section 3(a)(1). Judgment of the Land Court affirmed.

Valley Green Grow, Inc. v. Charlton, 99 Mass. App. Ct. 670 (2021) (BJS)

A rare Appeals Court case with a dissenting opinion. Plaintiff seeks to build a marijuana cultivation, processing, and manufacturing facility of more than one million square feet, consisting of 860,000 square feet of indoor growing facilities, (which would need to be leased to various growers due to a CCC limit of 100,000 s.f.. per entity), plus a post-harvest processing facility, and a cogeneration facility, on the site of an apple orchard. The buildings would cover almost 23 acres of the 94.6 acre parcel. The co-generation facility would use natural gas, and be located in a steel building, supported by a 100 foot long by 50 foot wide by 35 foot tall cooling tower, and three 27,000 gallon tanks for storage of compressed natural gas or propane, with a combined footprint of 100 feet by 60 feet by 8 feet tall. The board of selectmen entered into a development agreement, intended as an HCA, which, among other things, required the plaintiff to obtain site plan approval from the planning board. The zoning enforcement officer (ZEO) advised that the use is allowed by right in the agricultural zone as "indoor commercial horticultural/floricultural establishments (e.g. greenhouses)", and that the storage, processing, and other facilities were accessory uses. The planning board denied site plan approval, finding that the proposed use constituted "light manufacturing", a prohibited use in the district, and plaintiff appealed to the Superior Court.

Plaintiff had filed an earlier complaint in the Land Court under c. 240, §14A, challenging a town by-law that banned all non-medical marijuana establishments in the Town. Russell, the owner of land across the street, was allowed to intervene in that case, and filed a cross claim under §14A seeking a declaration that the proposed use is not allowed under the zoning by-law. The Superior Court case was transferred to the Land Court, and the Land Court on summary judgment ruled that the proposed use was properly categorized by the ZEO, and is allowed by right. On the planning board appeal, it annulled the decision and remanded to the board for further proceedings.

On appeal, Russell argued that the legislature amended c. 40A, §3 in 2016 to exclude the growing, cultivation and distribution of marijuana from the definition of agriculture under the "agricultural exemption", and therefore it did not constitute agriculture or horticulture under the town zoning by-law either. The Appeals Court, however, stated that the definition in chapter 40A, §3 is only for the purposes of that section, and only intended to insure that marijuana establishments are not automatically exempt from local zoning. The amendment to §3 therefore does not affect the interpretation of the town zoning by-law.

As to whether the proposed use is allowed as of right, Russell and the planning board apparently conceded that the growing of marijuana in enclosed buildings is allowed by right, but argued that the cogeneration facility, the process of drying and separating the plant parts and extracting oil, and the preparation of products are in fact principal uses that are not allowed in the zoning district. The Court, however, looked to the definition of agriculture in G.L. c. 128, §1A, which includes farm activities that are incidental, including preparation for market, and concluded that the cogeneration plant and "incidental" processing and manufacturing proposed are allowed by right.

The planning board supported its conclusion that the proposed use constituted "light manufacturing" by the overall size of the facility, water consumption, projected truck traffic, the large cogeneration facility, potential industrial-level noise, and similar factors. The Appeals Court rejected this reasoning, determining that the overwhelming majority of the improvements will be for growing marijuana, and the by-law imposes no limitations on the size of a commercial greenhouse or accessory structures. It found that there is a reasonable relationship between the growing of the marijuana and the "processing" steps that will occur onsite, likening it to harvesting apples, which requires separation from trees and stalks, and the manufacturing of apple cider. The Court stated that, even if a use is not an agricultural use, if it is directly related to the farming operations, it is regarded for zoning purposes as being used for farming. It found no error in the Land Court's conclusion that the cogeneration facility and proposed processing uses are "subordinate and incidental to the main horticultural use of cultivating marijuana". It ruled that no deference was due to the planning board's interpretation of the zoning by-law, particularly where the ZEO had issued three opinions that the use was allowed by right, and concluded that the planning board exceeded its authority by denying site plan review on the grounds that the proposed use was not allowed by right.

The dissenting justice (Justice Rubin) disagreed. The HCA provided that the project is subject to site plan review and approval by the planning board, and, under site plan approval, the planning board is to approve the plan only if it complies with the zoning by-law. He found that

the planning board's determination was reasonable, based on a number of factors. The dissent stressed the fact that the proposed growing facilities are not typical greenhouses; require a lot of water and power; create noise through 70 sources, including the power plant generating 89 decibels; the commercial leasing of the large growing facility; hundreds of truck trips per day; the fact that a large portion of the proposal is manufacture and processing of marijuana consumables; etc. He noted that no deference was due to the ZEO's informal rulings, and there was no ruling from the ZBA (which would be accorded deference). All these factors led the dissent to the conclusion that the planning board's determination that the proposed use is "light manufacturing" as defined by the by-law was reasonable, thus its denial of site plan approval should be affirmed. Further, he argued that, although the Court's ruling is limited to the interpretation of the Charlton zoning by-law, it has wider implications since it essentially rules that electric power plants may be deemed accessory to an agricultural use, and the agricultural exemption in c. 40A, §3 allows agriculture (except marijuana growing) in any zoning district anywhere in the Commonwealth.

In addition, he noted that the zoning by-law prohibits electric generating facilities of the proposed size as a primary use in agricultural districts, allowing them only in community business and industrial-general districts. He questioned the Court's determination that the generating facility is an accessory use. The zoning by-law defines an accessory use as subordinate and incidental to a predominant or main use, and has a listing of accessory uses for each zoning district, which includes emergency power back up facility with 30MW or less of power input, with planning board approval. He found it an incongruous interpretation of the by-law that a 24/7 power plant could be found to be an accessory use by right, where an emergency facility requires planning board approval. He made short shrift of plaintiff's assertion that cogeneration is a common and integral component of growing marijuana. "The need for electricity does not allow one to put an otherwise prohibited power station on one's property."

Brooks v. Haverhill, 100 Mass. App. Ct. 1105 (Unpub. 2021) (IMQ)

Holding: The Appeals Court upheld the validity of an overlay zoning district, which allows retail marijuana establishments by special permit and site plan review, despite the fact that a portion of the district did not have a buffer zone for public parks and schools.

The Zoning Ordinance

In 2018, the City of Haverhill amended its Zoning Ordinance to create an overlay district – the Licensed Marijuana Establishments Overlay Zone ("LMEOZ") – which established criteria to allow retail marijuana establishments through issuance of special permit and site plan review relief. The LMEOZ of was located in subzones of two other overlay zoning districts, including the Waterfront District. A number of Waterfront District business entities challenged the validity of the LMEOZ to the Land Court, asserting that a portion of the overlay district was invalid because it was arbitrary and unreasonable and substantially unrelated to the public health, safety, or general welfare, and constituted spot zoning because it allowed the marijuana use in the subzones without required buffer zones and without additional notice requirements to abutters

and the required that barred siting a new establishment within ½ mile of another licensed establishment constituted spot zoning.

Land Court

The Land Court found that the challengers had standing and entered summary judgment in favor of the City, holding that the LMEOZ was valid. The Land Court required the City to meet an initial burden to show that the ordinance has a rational reason and, after finding that to be the case, then shifted the burden and imposed a heavy burden on the challengers to show that the ordinance conflicted with applicable statutory and constitutional requirements and that it was not even fairly debatable that the amendment bears a substantial relation to a valid legislative purpose. The Land Court held that the challengers did not satisfy their burden and the decision was appealed to the Appeals Court.

Appeals Court

First, the Appeals Court summarized the elements involved when a court reviews a challenge to a zoning provision:

- The zoning provision must bear a rational relation to a legitimate zoning purpose.
- There is a strong presumption of validity afforded to a challenged zoning provision.
- The challenger has the heavy burden to prove that the zoning provision is arbitrary and unreasonable or substantially unrelated to the public health, safety or general welfare.
- If the reasonableness of the zoning provision is even "fairly debatable," then the judgment of the local legislative body in enacting it "must be sustained."
- Any possible permissible legislative goal which rationally be said to be furthered by the regulation will support a measure's validity.

Next, the Appeals Court reviewed the zoning provisions and the challengers' arguments.

i. Buffer Zone Argument.

The zoning provision created four different areas where the retail marijuana establishment use was allowed. For three of the four areas, the zoning provision included a buffer zone provision that prohibited the marijuana use within 500 feet of certain existing structures or uses (such as schools for children under 18, childcare facilities, municipal parks, churches and playgrounds). But, for the fourth area, the Waterfront District Area, the zoning provision did not include a buffer zone provision.

The challengers argued that not including the buffer zone in the Waterfront District Area was unreasonable.

The Appeals Court noted that there were only two small parks in the Waterfront District Area and the parks did not have playground equipment or other amenities to attract children and there were no preexisting schools nearby.

The Court found that the absence of a buffer zone was reasonable because the Waterfront District Area is the "heart" of the City's downtown area and pedestrian activity is encouraged in this area and the "elimination of the buffer zone … is rationally related to a legitimate zoning purpose" of the marijuana district - which was to generate foot traffic and promote retail development.

The Court found this despite the fact that City's ***medical*** marijuana dispensation zoning provision required a buffer zone in the Waterfront District and held that a provision can impose greater restrictions on one type of use when compared to another use and still be valid.

ii. Notice Argument

The challengers argued that the notice provisions in the zoning regulation were inadequate; however, the Court held that, because the regulation required notice to adjacent property owners, licensed childcare facilities, churches and youth centers within 300 feet of the proposed site, the notice requirements were fully reasonable and adequate.

iii. Minimizing Adverse Impacts

The challengers argued that the zoning provisions would not adequately protect them from adverse harms. The Appeals Court held that the special permit and site plan review requirements were more than adequate to allow the permit granting authority to identify and control or eliminate potential adverse results because the zoning provision allows the SPGA to impose multiple requirements including design requirements, licensing requirements, limits on hours of operation, odor control requirements, security requirements and allowed the SPGA to obtain and consider traffic studies as well as other requirements.

iv. Rule of Uniformity Argument

The challengers argued that the zoning provision violated the rule of uniformity requirement set forth under G.L. c.40A, §4, which requires that zoning districts "shall be uniform within the district for each class or kind of structures or uses permitted."

The Appeals Court found that. because every retail marijuana store in the overlay district would be subject to the same requirements, uniformity within the district was not an issue; and, importantly, the Court, emphasized that "extensive planning studies were conducted" by the City's Planning Department and supported the design of the provision.

v. Spot Zoning Argument

The challengers argued that the zoning provision constituted "spot zoning" because the provision requires that no establishment may be located within ½ mile of another establishment in the Waterfront District (although the City had the authority to modify or waive this provision).

Spot zoning occurs if one parcel is singled out from surrounding parcels "all for the benefit of the owner of that lot." The challenger has a heavy burden of proof to show that the provision conflicts with the enabling act. The Court noted that a legislative decision to adopt a zoning provision will not be invalidated "based upon the alleged motive the town had in enacting the legislation." Since the Court already had found that the zoning provision has a rational basis, the subjective purpose of the sponsors are no longer an issue.

The Appeals Court held that the zoning provision in no way singled out any particular parcel from similar surrounding parcels. The requirement applied to all zones and "restrictions on the number of establishments that may be in proximity are familiar and proper zoning tools."

vi. Judicial Notice Argument

The challengers argued that the Land Court erred in failing to take judicial notice of the federal and state controlled substance statutes, including provisions that have enhanced penalties for violating the statutes within 300 feet of a school.

As to state statutes, the Appeals Court noted that there was no evidence that there was a school or a playground within 300 feet of the proposed establishment and then held that, in any event, there is a Massachusetts statute that expressly allows a licensed establishment near a school.

As to federal statutes, the Appeals Court held that, in Massachusetts, "the entire [marijuana] licensing scheme reflects that compliance with Federal controlled substances law is not a requirement of marijuana establishment licensing or zoning."

ZONING

Styller v. Zoning Board of Appeals of Lynnfield, 487 Mass. 588 (2021) (BJS)

In a case related to a somewhat notorious short term rental, the SJC upheld the Land Court decision that plaintiff's use of his single family home for short-term rentals through various internet platforms was prohibited under the zoning by-law and was not a legally pre-existing nonconforming use. Plaintiff began renting out his spacious, 5-bedroom home in a single Residence C district in July of 2015 through these internet platforms. His practice was to

rent his home whenever possible, for a total of 65 days between July 2015 and May 2017. When the house was rented, renters had exclusive possession of the property while he and his family stayed at his parents' home or a nearby motel. In May of 2016, he rented the house to Woody Victor and "five guests". Those five guests turned out to be a large party with over 100 people that stayed into the morning hours. One of the guests was shot and killed by another attendee (unknown) at approximately 3:00 a.m.

This turn of events brought the plaintiff's habit of renting out the premises to the attention of the building commissioner, who served Mr. Styller with a cease and desist order, finding that the use was a hotel or a lodging or rooming house, in violation of the zoning by-law. The order was timely appealed to the ZBA, which upheld the order, and plaintiff then appealed to the Land Court. In the meantime, the town amended the zoning by-law on October 17, 2016 to explicitly govern short term rentals. The zoning by-law amendments prohibit short term rentals of single family homes in single family zoning districts, which includes plaintiff's property, thus effectively prohibiting further short-term rentals of the property.

Plaintiff argued that his use of the property for short term rentals was a protected nonconforming use, because he asserted that short term rentals of single family homes were allowed by right under the pre-amendment zoning by-law as an accessory use. The Land Court concluded that short-term rental use was an additional use, equivalent to a tourist home or lodging house, and violated the by-law when begun. Plaintiff's appeal was transferred to the SJC on its own initiative.

The SJC first ruled that, although plaintiff had since sold the property, he nevertheless has standing, because standing is determined as of the time the action is commenced. With respect to the related issue of whether the matter had become moot, the SJC did not rule on plaintiff's arguments as to why the matter was not moot, noting that the "viability of short-term rental use of the property in the context of existing zoning regulations is one of public importance", and that the Court felt it important to state its views on the matter.

The Court noted that the by-law prohibits any use other than one specifically permitted. In residential zones, single family homes are allowed, and certain "additional uses" such as "tourist home, boarding or lodging house" are allowed with ZBA approval. Plaintiff argued that his use of the property was not an "additional use" requiring prior ZBA approval, but was permitted as a single family home, and that the zoning by-law did not prohibit his occasional short-term rentals. The Court ruled, however, that because short-term rentals were not allowed by the by-law when plaintiff commenced that use, the use was prohibited. The SJC did not agree with the Land Court's analysis that plaintiff's use of the property could be termed a lodging house or tourist home, finding that these uses connoted the renting of <u>rooms</u>, not an entire house.

The SJC stated that the short-term rental of the property is inconsistent with the purpose of the zoning district to preserve the residential character of the neighborhood, and to foster stability and permanence that is lacking with short-term rentals. The Court also gave deference to the ZBA's reasonable interpretation of a single residence district being inconsistent with transient uses. "Both 'family' and "residence" imply a certain expectation of relative stability and permanence." The Court concluded that the short-term rental of the property without a

special permit was, and always had been, a violation of the zoning by-law, and affirmed the ZBA decision and Land Court judgment.

Plaintiff did not press on appeal his argument that the short-term rental was an allowed accessory use. Accessory uses are allowed in a residential district, but are defined as a subordinate use, customary in connection with the principal use, clearly incidental, and which does not constitute a conversion of the principal use to a use that is not permitted. In a footnote, the SJC noted that the short-term rental use appeared to fail three of the four criteria; for example, it was not "incidental" nor "customary", and therefore would not be permitted as an accessory use.

Fisher v. Presti Family Limited Partnership, 100 Mass. App. Ct. 234 (2021) (IMQ) (FAR application pending)

Background:

This matter concerns commercial activity on property abutting Plaintiff Fisher's property.

On April 7, 2017, Plaintiff Fisher requested zoning enforcement, asserting that defendant's uses had changed over time without obtaining the necessary relief to alter nonconforming uses.

On May 22, 2017, Plaintiff Fisher, without having received a response to her April 7th request, wrote and requested zoning enforcement again, adding new reasons for enforcement.

On May 26, 2017, the zoning enforcement officer responded and stated that he had inspected the property and observed trucks, cars, snowplowing equipment, trailers, building and construction materials, cord wood, wood chippers, dumpsters and school buses and that it was his determination that all of the uses were protected and noted that had reached that conclusion several years earlier in 2010 and attached his 2010 letter. The May 26, 2017 letter did not inform Plaintiff Fisher that the letter was an appealable event or what the process to appeal would be. Plaintiff Fisher did not appeal the May 26, 2017 response within 30 days to the ZBA.

On June 8, 2017, Plaintiff Fisher wrote again to the ZEO and requested enforcement regarding several new issues and requested information.

On June 30, 2017, the ZEO responded with his conclusions and provided some of the information requested by Plaintiff Fisher and noted that Plaintiff Fisher could file an appeal if she did not accept his conclusions.

On July 24, 2017, Plaintiff Fisher's counsel wrote to the ZEO and asked for his opinion as to all items specified in her correspondence, noting that the correspondence requests zoning enforcement "for all the current uses by all the tenant at the … property."

On June 30, 2017, the ZEO denied Plaintiff Fisher's July 24, 2017 request for enforcement.

On July 31, 2017, Plaintiff Fisher appealed the ZEO's June 30, 2017 denial.

On August 7, 2017, the ZEO responded to Plaintiff Fisher's counsel's request for reasons for his decision not is issue a cease and desist order. The ZEO cited his personal knowledge of the property since 1946 and other reasons.

On August 30, 2017, Plaintiff Fisher appealed the ZEO's August 7, 2017 response.

The Zoning Board of Appeals:

The ZBA consolidated Plaintiff Fisher's two appeals. The ZBA affirmed the ZEO's decisions in part and reversed them in part. As to the affirmed uses, the ZBA found them to be lawfully nonconforming and, as to the reversed portions, the ZBA determined that the defendant needed to apply for special permits to allow the uses or needed to cease and desist those activities.

Land Court and Superior Court:

Plaintiff Fisher appealed to the Land Court and Defendant Presti appealed to the Superior Court and the actions were consolidated and assigned to a Land Court judge.

Defendant Presti challenged Plaintiff Fisher's actions, asserting that they were untimely. The Land Court held that Plaintiff Fisher did not timely appeal the ZEO's May 26, 2017 letter and the later requests for enforcement could not revive or extent the appeal period and the latter appeals were untimely. Plaintiff Fisher appealed to the Appeals Court. (The result of Defendant Presti's appeal to the Superior Court (transferred to the Land Court) was not appealed to the Appeals Court and is not addressed in the Appeals Court decision.)

Appeals Court:

The Appeals noted that the main question for decision is whether the ZEO's May 26, 2017 response letter was an appealable decision for purposes of G.L.c.40A, §8, such that failure by Plaintiff Fisher to timely appeal from it barred her subsequent letters seeking similar zoning enforcement.

Plaintiff Fisher argued that her first two enforcement requests were limited to commercial traffic issues and she should not be barred from appealing the May 26, 2017 response more than 30 days after it issued because the response was not sufficiently definitive to constitute an appealable decision. Plaintiff Fisher also argued that her subsequent requests for enforcement were not foreclosed because they raised new issues.

The Appeals Court held that Plaintiff Fisher did not seek enforcement that was limited only to commercial traffic issues in her first two letters as her request expressly included references to commercial activity on the property, not just traffic.

The Appeals Court held that the ZEO's May 26, 2017 response letter indicated that he understood Fisher's challenge to the commercial uses involved, not simply traffic, and the scope of his response was consistent with the scope of her request.

The Appeals Court held that the ZEO May 26, 2017 response letter was an appealable decision because it adequately notified Plaintiff Fisher of the ZEO's adverse decision regarding her enforcement requests.

The Appeals Court then went on to consider whether the rule that, it is fatal if a person does not appeal within 30 days' notice of issuance of a building permit, should be extended to apply to successive requests for zoning enforcement to challenge ongoing uses of property, if a party seeking zoning enforcement failed to appeal within 30 days' notice of an earlier denial of zoning enforcement. The Appeals Court held that the rule should **not** apply.

The Appeals Court held that nothing forecloses multiple or successive zoning enforcement requests by different aggrieved persons and Plaintiff Fisher was entitled to appeal within thirty days of the ZEO's denial of the subsequent enforcement requests.

Cellco Partnership v. Peabody, 98 Mass. App. Ct. 496 (2021) (BJS)

The court in this case examined the need for a cell tower company to explore alternative sites when it seeks to site a cell tower in a spot where the municipality has denied a special permit. Under the federal Telecommunication Act (TCA), a state or local regulation cannot have the effect of prohibiting the provision of personal wireless services. Verizon identified a significant gap in its coverage in Peabody, and, after searching unsuccessfully for existing buildings or structures that would be a suitable site for a wireless facility to fill the gap, it applied for a special permit for a monopole, which was denied by the city council. Verizon appealed to the Land Court under G.L. c. 40A, §17 and under the TCA. The TCA claim was dismissed for lack of jurisdiction, but the Land Court considered the TCA requirements in its chapter 40A review of the special permit denial.

While the Land Court appeal was pending, the parties explored two other options: installing a number of small cell antennae on utility poles owned by Peabody Municipal Light Plant (PMLP) or building a wireless facility at another site. PMLP rejected the small cell proposal, and the city council denied a special permit application for the other site. (That denial was also appealed to Land Court, in a separate case.) The parties continued to discuss alternatives, such as a distributed antenna system; having Verizon install its own utility poles; and continued negotiations with PMLP; but none were successful. Verizon then filed a motion for summary judgment, more than four years after the special permit application had been denied. The Land Court entered judgment in favor of Verizon, ordering the city council to grant the permit.

The Appeals Court agreed with the Land Court's analysis of applying TCA requirements in the chapter 40A appeal. It also agreed that, contrary to "normal practice", it would consider events that took place during the over four years that the appeal was pending at the Land Court, applying the principle of the TCA to expedite resolution, rather than remanding back to the city council. The wireless service carrier has the burden under the TCA of demonstrating that it thoroughly investigated other viable alternatives to determine that there was no other feasible plan to close a significant gap in coverage. On appeal, the defendants only argued that the DAS

option was feasible, or that there was at least a material issue of fact that would preclude summary judgment. However, the Appeals Court found that PMLP did not respond to seven requests from Verizon for a price proposal, and defendants' affidavits offered only unsupported, conclusory statements. In addition, Verizon and PMLP could not reach agreement on who would provide communication services to the new antennae, pole rental fees, and safety concerns. The Court concluded that Verizon had made "diligent attempts, over the course of four and one-half years, to find another feasible option", and that the limit had been reached. The judgment of the Land Court was affirmed.

Porter v. Board of Appeal of Boston, 99 Mass. App. Ct. 240 (2021) (IMQ)

Holding: The Appeals Court reversed a trial court decision that held that a pro se plaintiff did not have standing (i.e., the necessary legal interest to bring and maintain a claim) to appeal a variance because the Appeals Court found that the plaintiff had demonstrated that he was a "party in interest" within the meaning of a portion of the Boston Zoning Act (which the Appeals Court found was identical to G.L. c.40A, §17) and that required that a party must be a "person aggrieved by a decision" which then turns (under G.L. c.40A) on the term "parties in interest" as defined under G.L. c.40A, §11. Under G.L. c.40A, §11, a party in interest includes both an "abutter" to the property at issue as well as an owner of land that is "directly opposite" the property at issue. Essentially, the Appeals Court imported portions of 40A into the Boston Zoning Act.

Background

The pro se plaintiff challenged variance relief issued for nearby property to convert a mixed-use commercial and residential property in Allston to six residential units. The plaintiff asserted the variance relief failed to make the specific required findings and that a sufficient factual basis to support the required findings didn't exist and, therefore, the variance decision was legally and factually erroneous.

The defendant variance holder moved to dismiss the plaintiff's complaint by asserting the plaintiff had no standing because he was not "an aggrieved party" because he was not a "party in interest." The trial judge allowed the defendant's motion to dismiss after finding that the plaintiff's property did not abut the defendant's property and that, while the plaintiff's property was located across the street from the defendant's property, it was not "directly across the street" from the defendant's property. As noted above, under G.L. c.40A, §11, a party in interest includes both an "abutter" to the property at issue as well as an owner of land that is "directly opposite" the property at issue. This ruling essentially imported definitions found in G.L. c.40A into the Boston Zoning Act.

The pro se plaintiff appealed, arguing he was entitled to a presumption of standing as an abutter. The Appeals Court, of course, found that the plaintiff was incorrect on this point because the plaintiff's property is not adjacent to the variance holder's property and, so, the plaintiff

definitely is not an abutter; however, the Court then held that the plaintiff ***did*** have presumptive standing because his property was "directly across the street" from the defendant's property.

To reach the conclusion that the pro se plaintiff's property was "directly across the street," the Court used the "Derelict Fee Statute"* and found that when the property lines shown on the relevant map included the fact that each party owned to the centerline of Cambridge Street, which ran between the parcels, and the extended lots lines demonstrated that at their opposite corners, resulted in small portions of the properties that are "directly opposite" each other on a street. This entitled the pro se plaintiff to a presumption of standing. The defendant argued that the small portions of property that were directly opposite the defendant's property were not significant enough to confer standing because they were so small; however, the Appeals Court held that the statutory criteria for being an owner of "land directly opposite" does not articulate any minimum portion of the properties at issue that must abut or be "directly opposite" one another, so even a small portion of property that is directly across the street is enough to confer status as a party in interest.

*G.L.c.183, §58, which provides (emphasis added) that:

Every instrument passing title to real estate abutting a way, whether public or private, watercourse, wall, fence or other similar linear monument, shall be construed to include any fee interest of the grantor in such way, watercourse or monument, unless (a) the grantor retains other real estate abutting such way, watercourse or monument, in which case, (i) if the retained real estate is on the same side, the division line between the land granted and the land retained shall be continued into such way, watercourse or monument as far as the grantor owns, or (ii) if the retained real estate is on the other side of such way, watercourse or monument between the division lines extended, the title conveyed shall be to the center line of such way, watercourse or monument as far as the grantor owns, or (b) the instrument evidences a different intent by an express exception or reservation and not alone by bounding by a side line.

Perry v. Zoning Board of Appeals of Hull, 100 Mass. App. Ct. 19 (2021) (BJS)

Another case where the courts deferred to the ZBA's reasonable interpretation of the town zoning by-law. The locus at 12 Maple Lane consists of two adjacent lots, lot 2 and lot 3A. A ten foot wide right of way (ROW 3) runs along the border of the two lots, five feet on each lot. Perry's property at 9B Maple Lane, is south of Lot 3A, and consists of two lots, 9B and 3B. ROW 2 runs east to west from ROW 3 to Maple Lane, along the boundary of lot 3B and 3A. Perry claims that the locus' frontage on ROW 2 does not satisfy the 75 foot frontage requirement of the zoning by-law. ROW 2 abuts the locus for 69 feet along the northern sideline of ROW, and twelve feet where it abuts the locus at ROW 3. (The locus and surrounding properties were the subject of a prior court decision that determined the parties' rights in certain private ways.) The building commissioner granted a building permit for 12 Maple Lane, which Perry appealed to the ZBA. The ZBA upheld the building commissioner, and, on appeal, the Land Court upheld the ZBA decision.

The matter turns on the definition of "frontage" in the zoning by-law: "that part of a lot…abutting on a street or way; except that the ends of incomplete streets, or streets without a turning circle, shall not be considered frontage" (emphasis added). The ZBA and Land Court distinguished between "private ways" and "streets," and concluded that the "incomplete streets" exception did not apply to ROW 2, which is a private way, based on the fact that "way" is not

included in the exception. Thus, the end of the private way could be included in calculating frontage. Perry argued that "way" and "street" are used interchangeably throughout the by-law, a view that the Appeals Court found plausible. The definition of frontage, however, included "street or way" in the first clause, but only "street" in the exception. It therefore concluded that it was not unreasonable for the ZBA to conclude that, in the definition of frontage, only streets were to be included in the exception. The Court therefore deferred to the ZBA interpretation.

Perry also argued that "frontage in linear feet" requires the frontage to be in a straight line. The Appeals Court disagreed, finding that "linear feet" merely means that it is measured without regard to other dimensions, such as height or width. Perry raised other arguments, including asserting that the locus did not satisfy the definition of a "lot" because it does not abut a street and consists of two lots bisected by ROW 3, that were given short shrift by the Court. Finally, Perry's allegation that the ZBA acted with gross negligence, bad faith, and malice was found to be unsupported. Similarly, the defendants' request for attorneys' fees and costs was denied, as the appeal was not deemed frivolous.

SUMMARY DECISIONS (note: Appeals Court summary decisions are not binding precedent, as they represent only the views of the three panelists)

Gordon v. Greenfield Investors Property Development, LLC, 98 Mass. App. Ct. 1113 (Unpub. 2020) (IMQ)

Holding: The Appeals Court affirmed the grant of special permit relief to allow a 135,000 s.f. box store on Route 2A in Greenfield, denying a challenge by abutters who argued the project did not strictly satisfy the traffic criteria set forth under the zoning ordinance and the Planning Board's rules.

Planning Board and Superior Court:

Plaintiffs asserted to the Planning Board that a proposed big box store project would reduce the level of service below what was required under the Zoning Ordinance and the Planning Board's Major Development Review Rules ("MDR").

As part of the public hearing process, the special permit applicant submitted a detailed traffic impact analysis and the Planning Board engaged a peer review traffic engineer consultant to review the analysis. The traffic engineer for the special permit applicant and the peer review traffic engineer worked together and a plan was proposed to improve pedestrian and traffic safety in the area and to provide for funds should additional mitigation be required. The Planning Board accepted that plan and granted the special permit relief after finding that the neighboring properties would not be adversely affected by the project and that the traffic standards under the zoning ordinance and the Board's rules were satisfied, even though one affected intersection fell below the deign goal of level "C" or better, missing the design parameter by one second.

Plaintiffs appealed and the Superior Court affirmed the Planning Board's special permit grant.

Appeals Court:

The Appeals Court reviewed the language in the MDR that provided that the Planning Board "**may** consider" certain standards and provided that "mitigation measures **shall** at a minimum, maintain the existing conditions or upgrade the LOS to C or better." (Emphasis Added.)

The Court summarized the review standard used when interpreting a zoning bylaw - which is that the provision at issue should be viewed "as a whole," thus giving effect "to all its provisions, so that no part will be inoperative or superfluous" and the review must be conducted by employing "common sense and sound reason" so as to effectuate the objective of the provision.

The Court noted that the Planning Board interpreted the term "shall" in its MDR as presenting a "permissive standard," rather than a mandatory standard. The Court found that this was reasonable and supported by a full reading of the provision which states that the applicable traffic design standard as a "design goal" and that the "may consider" the standards. The Court noted that case law supports this interpretation as: "The word 'shall' as used in statutes, although in its common meaning mandatory, is not of inflexible signification and not infrequently is construed as permissive or directory in order to effectuate a legislative purpose."

The Court found that, "whatever ambiguity may arise from the use of the term "shall" in the context of an enumerated list of standards may/shall "consider," the board's resolution – such that no one factor (here traffic standards) is dispositive – is supported."

The Court noted that the Planning Board and the Trial Court both found the project's lack of compliance with the MDR traffic design standard goal (by one second) to be de minimus and that, in any event, that standard was not mandatory. The Court also dismissed the argument that the Trial Court failed to property weigh the plaintiff's expert's testimony – because the "credibility of witnesses … is a preserve of the trial judge upon which an appellate court treads with great reluctance."

The Court also dismissed the plaintiffs' argument that the finding by the Trial Court had standing meant that plaintiffs had already proven that they would be adversely affected by the project – as the Court noted that the standing determination is distinct from the decision on the merits of the plaintiffs' claim and the fact that a trial court finds sufficient potential aggrievement to warrant finding that there is standing to proceed with the action does not require the trial court factfinder to find that the plaintiffs' allegation have merit.

Kelley v. Zoning Board of Appeals of Mashpee, 99 Mass. App. Ct. 1119 (Unpub. 2021) (BJS)

Is a carport a part of the house for purposes of the required setback? In this case, the answer is "yes". Homeowners obtained a special permit to raze and replace their nonconforming single family home, and abutters appealed to the Land Court, which upheld the ZBA decision. The zoning by-law allows such a" raze and replace" if no new nonconformities are created, and if the ZBA finds it is not substantially more detrimental to the neighborhood. The existing home

has a carport which extends further toward the front lot line than the rest of the existing dwelling. If the carport is considered part of the existing structure, then the proposed new structure would not create a new nonconformity or exceed the existing nonconformity. Plaintiffs argued that the carport was not part of the structure, but an accessory structure under the Mashpee zoning by-law.

The Appeals Court examined the zoning by-law definitions of "building" and "structure" and found that the by-law is ambiguous. On the one hand, plaintiff's argument that the carport is an accessory structure was somewhat supported by the by-law, because an accessory structure can be attached to a dwelling, and it is not a "three-dimensional enclosure". On the other hand, the definition of a building includes "all parts of any kind of structure aboveground except fences and field or garden walls or embankment retaining walls." The ZBA could reasonably interpret the by-law that a carport is part of the dwelling where they share a roofline and are attached. Given two possible plausible interpretations, the court deferred to the ZBA's rational interpretation of the by-law that the carport is part of the dwelling structure. As a result, the proposed new home did not create a new nonconformity, and the ZBA decision was upheld.

Pingiaro v. 654 Mystic, LLC, 98 Mass. App. Ct. 1110 (Unpub. 2020) (IMQ)

Holding: The Appeals Court held that a redevelopment plan (to allow a 9,322 s.f. parcel to be divided into three new parcels and allow the existing commercial structure to be razed and allow a two-unit townhouse use on each of the three new parcels as of right) was properly allowed by the Planning Board under site plan review only and the project did not require special permit relief.

Background:

The owner of 654 Mystic Avenue sought to redevelop a 9,322 s.f. parcel located in a BB Zoning District as of right, with only site plan and design review, in order to allow the parcel to be divided into three separate parcels, with the existing commercial structure to be razed and with each of the new three parcels to have a two-unit townhouse located on them as of right. Under the Somerville Zoning Ordinance, a two-unit townhouse use is allowed as of right on a parcel located in a BB District; however, a six-unit townhouse use in the BB District requires special permit relief.

The Subdivision Control Law does not apply in Somerville (St. 1993, c.288) and the Planning Board may approve "lot splits" using design and site plan approval, provided the new parcels conform to the Zoning Ordinance.

Planning Board and Building Department:

The owner of 654 Mystic sought and obtained design and site plan approval from the Planning Board to allow the division of the original parcel into three new parcels, which then allowed the development of each of the three parcels with a two-unit town house use as of right. The Planning Board did impose a condition that on its site plan approval that the property owner

provide certain additional plans to the building department regarding how much fill would be added to the site.

Building permits issued for the townhouses, without a physical sign off from the Planning Board that the additional plans required under the site plan decision had been provided. The building permits were appealed to the ZBA and the ZBA affirmed the building permits over the abutters' objection that a site plan decision required that a fill plan was required to be submitted before building permits issued - with the ZBA determining that the condition to submit plans was satisfied.

Land Court:

Abutters to the rear of the property appealed the Planning Board's decision under G.L. c.40A, §17 to the Land Court, arguing that the division of the land into three parcels was not permitted because "successive" lot splits are not permissible and, as a result, the use being undertaken is a six-unit town house use that requires special permit relief, not a three two-unit townhouse use, a use that is allowed as of right. The abutters also argued that uses are not individual townhouses and that the structures exceed the height and story limitations set forth under the Zoning Ordinance because the garages are not "basements" and that triggers a grade calculation that renders the structure in violation of height and story restrictions.

The Land Court held that the split of the property into three parcels properly occurred and, because the BB District has no dimensional side yard requirements, a townhouse may touch another structure located at the property line and an arrangement where three two-unit townhouses touch one other at their property lines creates party walls at the common property lines and does not mean that the resulting structure is a six-unit townhouse structure rather than three two-units townhouse structures. The Land Court held that the Planning Board correctly determined that the three two-unit town house uses are allowed as of right and correctly interpreted the Zoning Ordinance's height and story requirements and that the project satisfied those requirements.

The appeal from the ZBA's decision to uphold the building permits also was appealed to the Land Court and the Court upheld the ZBA's decision.

Appeals Court:

A consolidation of the appeals was presented to the Appeals Court.

The Appeals Court agreed with the Planning Board and the Land Court that the Board used the correct division procedure in splitting the original parcel as the Subdivision Control Law is not in effect in Somerville and the Somerville Zoning Ordinance authorizes the Planning Board to "split" lots and there is no prohibition against multiple or "successive" splits to an existing lot, provided that the existing lot has sufficient frontage for the number of new parcels, which the property had.

The Appeals Court agreed with the Planning Board and Land Court that, once the three new parcels were properly created through the site plan and design procedure, each new lot was eligible under the applicable zoning to have a two-unit townhouse use on it as of right – and, under the appliable zoning, there was no side setback requirement – which allowed common or party walls at the common property boundary lines. So the Appeals Court concluded that the use of each of the three lots for a two-unit townhouse, even though the units were connected by party walls, did not create a six-unit townhouse structure that required a special permit.

The Appeals Court also agreed with the Planning Board and the Land Court that the project satisfied the height and story requirements because the garages are basements under the applicable zoning and a basement is defined as not being a story (provided that the ceiling of the basement is not five feet or more above the average finished grade) and then the average finished grade requirements had to be applied and plaintiffs had already admitted that the project satisfied the average finished grade requirements.

The Appeals Court agreed with the ZBA and the Land Court that the building permits properly issued because, while there was no physical evidence of sign offs regarding submission of the necessary plans, to raise an issue of fact in that regard, the abutters needed to prevent affirmative evidence that the sign offs did not occur.

Windrock Trust Co., LLC v. Zoning Board of Appeals of Lincoln, 99 Mass. App. Ct. 1109 (Unpub. 2021) (BJS)

The Trust appealed the grant of a special permit for the construction of a tree house on the abutting Hedlunds' property. The Hedlunds' property is nonconforming as to lot area, width, and sideline setback, and the tree house, which is considered an accessory structure, was to be constructed within the side yard. A twenty-foot side setback is required for accessory structures, but an accessory structure may be placed closer to the side lot line with a special permit from the ZBA under Section 13.4. Section 20.2 of the by-law provides criteria for special permits, which requires that the use is in harmony with the general purposes of the by-law and is not detrimental or injurious to persons or property. The Trust appealed the special permit to the Superior Court, which upheld the ZBA, and then appealed to the Appeals Court.

The Trust argued that a variance is required because the tree house introduced a new nonconformity of an accessory structure in the setback. It contended that the side setback special permit waiver provision did not apply, because Section 13.4 requires compliance with both Section 20.2 and Section 6.2(f). The latter section addresses private, noncommercial radio and television towers, and requires that the special permit be granted unless it would endanger public safety. Thus, the Trust argued that the side setback waiver applied only to private, noncommercial radio and television towers. The Appeals Court gave substantial deference to the ZBA interpretation that the tree house could be allowed by the waiver provision. It noted that the Trust's interpretation would nullify the definition of accessory structure incorporated into Section 13.4. It concluded that there is no new nonconformity created because the special permit allows the tree house to be located closer to the side lot line than 20 feet. Judgment affirmed.

Defronzo v. Zoning Board of Appeals of Salisbury, 99 Mass. App. Ct. 1103 (Unpub. 2020) (IMQ)

Background:

This action concerns property in a commercial district that originally was used for a single-family dwelling and for a lawful commercial use, that of a motel, and that received a building permit for the motel in 1984. At some point, the three-unit motel use was changed into a three-unit apartment building use; however, the conversion from a lawfully permitted and allowed motel use to a three-unit apartment building use was never authorized by permit. And, at some point, a fourth apartment was added. In 2002, special permit relief issued to allow the five units at the property to be reduced to four units. In 2012, building permits issued to allow secondary means of egress to be provided for two of the apartments.

Zoning Board of Appeals:

In 2017, the owners filed an application with the Zoning Board of Appeals requesting special permit relief to extend and alter the apartment building under G.L. c.40A, §6, asserting that the apartment use was a lawfully preexisting nonconforming situation and asked for relief to allow the apartment use to converted to "four up to date residential living units." The owners asserted that the 2002 special permit relief, which allowed the five units to be reduced to four units, provided lawful "preexisting, nonconforming use" status for the apartment building.

The ZBA denied the property owners' special permit request, concluding that because the current apartment building use at the property is not a lawful preexisting nonconforming use, it is not eligible for the special permit relief provided for under G.L.c.40A, §6. The ZBA concluded that the residential use was unpermitted and the 2002 special permit did not authorize a transformation from a commercial motel use to a residential use and that transformation would have required a use variance and use variances were not (and are not now) available. The ZBA found that the only building permit issued for the apartment building was for the construction of the "3-units motel" use and, so the multi-unit residential apartment use was not protected under G.L. c.40A, §7 which can provide use protection based upon a use reflected on an original building even if the building permit reflected a zoning violation.

Appeals Court:

The Appeals Court affirmed and noted that it was not disputed that the proposed multi-family townhouse use is not a use that is allowed in the commercial district, either by right or by special permit, or that use variances are not available.

The property owners argued that the issuance of multiple and various permits over the years and the fact that the tax assessments treated the property as residential apartments was enough to entitle the property to protection either under G.L. c.40A, §6 as a prior nonconforming use or under G.L. c.40A, §7 due to the building permits that issued and the fact that no zoning action to enjoin the zoning violation was commenced for six years. The owners argued that the existing

use is immune from enforcement under G.L.c.40A, §7 and that immunity translates to lawful preexisting nonconforming status.

The Appeals Court held that protection under G.L. c.40A, §6 as a lawful nonconforming use is not available.

The Appeals Court held that the protection under G.L. c.40A, §7 to improvements made in accordance with the original building permit is not available here as the original building permit was for a motel use and the 2012 building permit relief was to allow new means of egress and was not issued to allow the residential use of the structure. References in the 2012 building permits to the existing residential use was not enough to trigger G.L. c.40A, §7 protection. The fact that the zoning violations that were in place resulted in building code and health safety violations that the owners were forced to cured, could not raise the underling violative use to the status of a lawful use. And even if the current uses are immune from enforcement, due to the six year statute of limitations, that does not confer lawfully preexisting nonconforming status in this situation.

The Appeals Court noted that the Town may have known about the violation for some time; however, the Court repeated the legal maxim that estoppel (i.e., delay that prevents legal action) will not bar a municipality from enforcing its zoning.

Mancuso v. Zoning Board of Appeals of Marblehead, 99 Mass. App. Ct. 1107 (Unpub. 2021) (BJS)

This case affirms that procedures required when a case is remanded by the court does not include compliance with G.L. c. 40A, §16 unless required by the remand order. Pleasant Street, LLC applied for special permits to construct an assisted living facility, which were denied, and it appealed to the Land Court. Pleasant Street and the ZBA filed a joint motion for a remand, which was granted, with instructions from the Land Court to hold a new public hearing, and, if the ZBA denied the application again, the matter would return to the Land Court. If granted, the pending appeal would be dismissed. The ZBA granted the special permits on remand, and plaintiffs appealed to the Superior Court, claiming that the ZBA's reconsideration of the applications violated G.L. c. 40A, §16. The Superior Court affirmed the ZBA decision, and this appeal followed.

General Laws chapter 40A, §16 provides that no special permit application which has been finally and unfavorably acted upon shall be acted favorably upon within two years of the final unfavorable action, unless the special permit granting authority finds specific and material changes in conditions and describes those changes in its decision. It was undisputed that the favorable action by the ZBA took place within two years of the initial unfavorable vote, and that it did not comply with the requirements of §16. The court found, however, that the ZBA did not need to comply with §16 where it was acting pursuant to an order of remand. It noted that the trial court has the authority to remand a matter to the local ZBA, and to set the terms of the remand. Here, the remand order did not require compliance with §16 and requiring the ZBA to find specific and material changes would be contrary to the purpose of the remand, to resolve the

dispute. Further, in a footnote, it agreed with Pleasant Street's argument that, even if §16 were to be considered, the decision was no longer "final" once remanded to the ZBA.

Finally, the Appeals Court rejected plaintiffs' claim that the Superior Court should have allowed them to offer testimony from ZBA members. The court reiterated its general rule that inquiry into the mental processes of administrative decision makers is not permitted unless there is "a strong showing of improper behavior or bad faith" on his or her part. Here, the Court found that plaintiffs failed to make an offer of proof to the Superior Court as to any alleged improper behavior, and their arguments on appeal were purely speculative. Judgment affirmed.

SUBDIVISION

Conway v. Planning Board of Westford, 98 Mass. App. Ct. 1110 (Unpub. 2020) (IMQ)

Background:

This case concerns land that, until 1969, was one large parcel with frontage on Main Street in Westford. Under a 1969 subdivision plan, the original lot was divided into two lots. Lot A contained all of the Main Street frontage and Lot B (6.8 acres) was located to the rear of Lot A and was landlocked except for a 30-foot right of way shown on the 1969 Plan that ran along the western side of Lot A and ended in a cul-de-sac on Lot B. The 1969 Plan contained a note that Lot B could not be used for more than one dwelling without further approval by the Planning Board. A little later in 1969, the owner of both lots conveyed out Lot A with a specific reservation in the deed that the 30-foot right of way over Lot A, as shown on the 1969 Plan, could be used for Lot B (which the owner retained) "for all purposes for which streets and ways are used." Not long after that, a dwelling was built on Lot B. In 1994, plaintiffs purchased Lot A. In 2015, Lot B was purchased by the defendant developers who razed the existing house on Lot B and replaced it with a new, large house (known as the "Finneral Residence") and used the 30-foot ROW to bring in fill and for access for construction vehicles and equipment. In 2016, the defendant developers sought permission to further divide Lot B, using the 30-foot right of way, to create a second lot on which a new dwelling would be placed approximately 1000 feet from plaintiffs' dwelling.

Planning Board:

The Planning Board granted subdivision approval to allow the creation of the second parcel on Lot B. Plaintiffs appealed to the Land Court.

Land Court:

The Land Court remanded the matter to the Planning Board for a determination as to whether the Board would waive the requirement that a subdivision applicant must 'own" all of the property shown on the subdivision plan and that all owners sign the subdivision application. On remand, the Board waived the ownership requirement, determining that the subdivision applicant had the

legal right to make the proposed improvements, and also waived certain road width requirements.

Standing: After a trial, the Land Court ruled that three of the six harms asserted by plaintiffs related to construction impacts and those types of impacts are not among the harms that the Subdivision Control Law or the Planning Board's Rules and Regulations protect. As to the other three asserted harms (post-construction noise, traffic and ROW safety), the Land Court held that the developer successfully had rebutted the existence of any such harms and plaintiffs had failed to produce any proof of injury and, so, they lacked standing.

Merits. The Land Court held that, even if the plaintiffs did have standing, the Planning Board did not abuse its discretion in waiving the ownership requirement because the Court agreed with the Planning Board that the defendant developers had the full authority necessary to undertake all of the proposed improvements and waiver of the ownership requirement did not derogate from the intent of the Subdivision Control Law.

Waivers. The Land Court summarized the standard for reviewing subdivision waivers granted by a planning board and recited the well-known maxim that "A planning board's decision to grant or deny a waiver will be upheld unless premised upon 'a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." A planning board has a "large measure of discretion" and if "reasonable minds might in good faith differ," the conclusion of a planning board "should be sustained on judicial review" because the statute grants the discretion to the board, not the court and the role of the court is "merely to ascertain whether the board exceeded its authority."

Ownership Waiver:

The Appeals Court agreed that in this instance there was no viable ownership dispute as the defendant developers have an express easement over the 30-foot right of way located on Lot A (plaintiffs' property) and an uncontested right to improve and maintain the ROW consistent with the proposed plan. So, the Appeals Court upheld the ownership waiver. The plaintiffs argued that the developer did not have sufficient control over the way to satisfy all conditions (that the way remain private and that surety be posted) and the Court agreed with the defendant developers had the authority needed to comply with these conditions.

Roadway Width and Sidewalk Waivers:

The Planning Board waived the requirement that the ROW width be 50 feet and that there shall be on site sidewalks (on both sides of the street) in exchange for payment by the developers of money into a sidewalk fund. The plaintiffs argued that this was a "purchase" of the waivers granted.

Width Waiver. The Appeals Court agreed with the Planning Board's finding that reducing the required width of the way would benefit the environment by reducing impervious areas and by preserve more of the existing vegetative cover and meant a smaller stormwater management

system was needed, with less grading and clearing and created a larger natural buffer for adjacent properties. The Appeals Court found this was reasonable and upheld the waiver.

Sidewalk Waiver. The Appeals Court also agreed with the Planning Board and the Land Court that a sidewalk elsewhere in the community that would benefit the public significantly, rather than a sidewalk that would benefit a single additional lot, was reasonable.

COMPREHENSIVE PERMITS

Zoning Board of Appeals of Norwell v. Housing Appeals Committee, 99 Mass. App. Ct. 1123 (Unpub. 2021) (BJS)

This case, as with many appeals involving the Housing Appeals Committee, raises issues relating to the shifting burdens of proof when a comprehensive permit is granted with conditions that the applicant claims render the project uneconomic. The applicant, White Barn, applied under chapter 40B to construct a 40-unit residential development, with 25% of the units to be low or moderate income. The ZBA granted the permit but denied a requested waiver of a local board of health regulation limiting the amount of nitrogen that may be released into the wastewater system. White Barn appealed to the HAC, claiming that the denial of the waiver, and other conditions imposed by the board, would reduce the number of units to nineteen, and render the project uneconomic. The HAC ruled in the applicant's favor, ordering the board to waive the nitrogen regulation. The board appealed, and the only issue before the Appeals Court was whether White Barn proved that the project as approved is uneconomic.

Because the permit was granted with conditions, White Barn had the initial burden of proving that the board's decision render the project uneconomic. It presented evidence that the nitrogen requirement would require a reduction to nineteen units, and that the project would be constructed at a loss of $512,000 under those conditions, thus meeting its initial burden of evidence, and shifting the burden to the board per DHCD regulations. The board argued that a recirculating sand filter or other treatment option could allow for a greater density than nineteen units. White Barn's witnesses agreed that treatment could raise the number of units to as high as 26, but also asserted that the project would still be uneconomic. The fatal flaw in the board's argument was that it failed to present evidence that the alternative design would prevent the project from being uneconomical. The Appeals Court upheld the HAC ruling.

THE PRESENTERS

Barbara J. Saint Andre, Esq., represented cities and towns across the Commonwealth for over 35 years as counsel and special counsel, serving as primary town counsel to more towns than she can remember, and providing legal advice in all areas of municipal law including Town Meeting, licensing, Open Meeting Law, public records, contracts, 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. 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. 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. Her new list of hobbies includes interpretive dance, motocross racing, and drumming in a punk rock band.

Ilana M. Quirk, Esq., has represented both developers and municipalities in land use matters during her 30 plus years of practice and spent seven years working for the State Senate on land use and other issues and she has also worked as a municipal planner and is presently the Interim Director of Planning for the Town of Norwell and has her own law practice: IMQ LAW, LLC and teaches affordable housing law at BU Law School. Unlike Attorney Saint Andre, Ilana has no time for hobbies, at least none that she will share with you today; but, like Attorney Saint Andre, Ilana also is a glutton for punishment.