SUMMARY OF 2018 ZONING, SUBDIVISION, AND CHAPTER 40B CASES[1]

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NO LEGISLATIVE INTENT TO PREEMPT LOCAL ZONING WITH RESPECT TO NONCOMMERCIAL PRIVATE LANDING AREAS.

Roma, III, Ltd. v. Bd. of Appeals of Rockport, 478 Mass. 580 (2018).

Landowner was a licensed helicopter pilot, had a heliport on his property, and did not use his helicopter for any commercial purpose. He sought review of the local board of appeals' decision to uphold town building inspector's enforcement order that stated that a heliport was not permitting in any of the town's zoning districts. The Land Court entered summary judgment for landowner and barred the town of Rockport from enforcing a zoning bylaw that prohibited the use of land for a private heliport without some form of approval, variance, or special permit because the bylaw had not been approved by the division of aeronautics of the Department of Transportation. The Board of Appeals applied for direct appellate review.

The issue on appeal is whether cities and towns may exercise their zoning authority to determine whether land in their communities may be used as a noncommercial private restricted landing area, here a heliport, or whether they may do so only with the approval of the division because the exercise of such zoning authority is preempted by the State's aeronautics statutes, G. L. c. 90, §§ 35–52.

The Supreme Judicial Court held that local zoning regarding noncommercial private restricted landing areas is not preempted by state law, reversing the result in *Hanlon v. Sheffield*, 89 Mass. App. Ct. 392 (2016).

ACTIONS BY ZONING BOARDS TAKEN TO DEFEAT STATE REGULATIONS OF THE SAME MATTER ARE IMPERMISSIBLE.

Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury, 94 Mass. App. Ct. 594 (2018).

At issue here are two abutters competing to erect digital billboards in Salisbury. No two digital billboards may be erected within 1,000 feet of each other pursuant to 700 CMR 3.17(5)(g) and (h) (2012). The ultimate approval rests with the Department of Transportation Office of Outdoor Advertising (OOA). However, an applicant must first receive local zoning board approval before applying to the OOA. See 700 CMR 3.06(1)(i) (2012).

[1] Thanks to my New England Law research assistant, Sean Regan, for his help in preparing these materials.

Unhappy with this two-step regulatory framework, two members of the Salisbury zoning board of appeals (board) decided to defeat it by approving only one of the two competing applications for a special permit that were simultaneously before the board for decision.

Board members each testified when deposed that they believed that the choice between the two competing billboards should be up to the local authority, not the State entity. In order to accomplish this end, they voted against Clear Channel, choosing Northvision because its application was filed first. The board thus conceded that they considered factors that were irrelevant to zoning and that would not withstand judicial scrutiny. Given the admissions made by the board, Clear Channel should have been allowed to explore the board members' reasons for granting Northvision's application in order to meet its burden to demonstrate that the board's decision was arbitrary, capricious, or legally untenable.

The judgment of the Superior Court was vacated. A new judgment was entered (a) annulling the decision of the board allowing Northvision's special permit application, (b) annulling the decision of the board denying Clear Channel's special permit application, and (c) directing the board to hold such further proceedings as may be necessary on the two applications, conducted in such manner as not to defeat the two-step, municipal-State process contemplated by the Legislature

AN UNTIMELY APPEAL REGARDING THE ISSUANCE OF A BUILDING PERMIT CANNOT BE CONSTRUCTIVELY APPROVED.

McIntyre v. Zoning Bd. of Appeals of Braintree, 94 Mass. App. Ct. 204 (2018).

On August 13, 2013, the building inspector and code compliance officer of Braintree (Town) issued a building permit to Mento Enterprises, Inc. (Mento), for construction of a single family dwelling at 38 Myrtle Street in Braintree.[5] The plaintiffs, owners of residential land abutting or in close proximity to the property, learned that a building permit had issued when construction activity began on August 14, 2013. On September 27, 2013, forty-four days after becoming aware of the construction, the plaintiffs filed an appeal with the zoning board of appeals (board). The board took no action on the untimely appeal. Plaintiffs claimed constructive approval of the appeal.

The Appeals Court ruled that the late filing rendered Plaintiffs ineligible for any approval, constructive or otherwise. The town is not obligated to bring a § 17 appeal to challenge a purported constructive approval of an untimely appeal. The judge properly declined to provide the requested relief.

SPOT ZONING DOES NOT EXTEND TO VARIANCES BY ZONING BOARDS OF APPEAL.

Ricker v. 3353 Washington LLC, 93 Mass. App. Ct. 1121 (unpublished disposition 2018).

The Plaintiffs appeal from a Superior Court judgment dismissing, for lack of standing, their challenge to a decision of the Boston board of appeal (the board) granting certain zoning variances to the defendant 3353 Washington LLC (the developer). The complaint sought judicial review under the Boston zoning enabling act (the act), St. 1956, c. 665, § 11, and also asserted that the board's decision constituted "spot zoning" in violation of the plaintiffs' equal protection rights.

The plaintiffs did not distinguished their claimed injuries from those that would be suffered by others in the neighborhood; indeed, they expressly alleged that some of their injuries would be shared by others generally. Their claimed injuries are not "special and different from the concerns of the rest of the community," even if the plaintiffs might experience them to a greater degree than community members who live or work further from the locus.

Nor do they have standing to assert their spot zoning claim. The allegation of spot zoning is a challenge to legislative action, not adjudicatory decision making. When a board of appeal grants a variance or a special permit, it is not reclassifying a parcel; it is exercising quasi-judicial, not legislative power, and its decision cannot be challenged as spot zoning.

STANDING REQUIRES PARTICULARIZED INJURY AND LACK IOF STANDING MAY BE FOUND SU SPONTE.

Talmo v. Zoning Bd. of Appeals of Framingham, 93 Mass. App. Ct. 626 (2018).

Abutting neighbor brought zoning enforcement action, requesting that landowner be ordered to cease using converted barn as a residence. Building commissioner denied his request for relief, taking the position that the converted barn could no longer be considered dwelling unit, for purposes of zoning by-law, because cooking facilities had been removed, making building a permissible accessory use. Neighbor appealed. The zoning board of appeals denied relief, and neighbor appealed. The Land Court found that neighbor lacked standing, entered a judgment dismissing the case, and allowed in part neighbor's motion for new trial, reopening trial on the issue of standing and declining to alter prior judgment. Neighbor appealed.

Talmo's standing was a "jurisdictional" prerequisite to proceeding with the case in the sense that his status as an aggrieved person is an essential prerequisite to judicial review. As such, it was properly reached by the judge sua sponte.

The evidence was sufficient to rebut the presumption that abutting neighbor was aggrieved, so as to have standing to challenge decision of zoning board of appeals, and neighbor's evidence of particularized injury, namely alleged contamination of his drinking water well, fell short of the credible evidence standard needed to show that he was aggrieved.

ABUTTER'S SPECULATIVE HARM FROM GRANTED PERMIT IS INSUFFICIENT FOR STANDING.

Murrow v. Emery, 93 Mass. App. Ct. 1119 (unpublished disposition 2018).

Murrow appeals from a judgment entered by a Judge of the Land Court dismissing her complaint on the ground that Murrow lacks standing to contest the special permit issued by the defendant zoning board of appeals of Somerville to the defendant Emery.

Although Murrow and other neighbors testified that a fire engine would not be able to traverse Allen Court, the Judge heard testimony from the deputy chief of the Somerville fire department, who testified that he had no concerns from a fire safety standpoint. The judge found the deputy fire chief's testimony to be substantiated and persuasive and, in contrast, found Murrow's concerns to be speculative.

The Judge made extensive findings on the testimony on the issue of traffic, reviewing at length the testimony of Emery's expert, Murrow, and neighbors who testified on Murrow's behalf. The judge found that "[t]here is no dispute that there is heavy traffic in this area of Park Street leading up to Somerville Avenue, and in the opposite direction towards the [Massachusetts Bay Transportation Authority] MBTA train tracks and Beacon Street, during weekday peak rush hours." The judge credited expert testimony, however, that the proposed project would add only one car in the morning and evening rush hours as compared to the existing conditions. While Murrow contends that the addition of one car is enough to be problematic, the judge noted that she offered no expert or other evidence suggesting that existing conditions simply cannot tolerate even one additional car. Murrow's concerns about traffic impacts are too speculative to grant her standing.

IT IS THE STATE OF THE CLERK'S KNOWLEDGE, NOT THE PHYSICAL LOCATION OF THE APPEAL PAPERS, THAT CONTROLS NOTICE.

Hickey v. Zoning Bd. of Appeals of Dennis, 93 Mass. App. Ct. 390 (2018).

The Hickeys own land abutting the location of a proposed stairway leading to Cape Cod Bay. The Dennis building commissioner determined that the stairway would be a landscape feature not subject to the setback requirements set forth in the local zoning bylaws, and not requiring a building permit. Hickeys unsuccessfully appealed that decision to the defendant zoning board of appeals. After voting unanimously to uphold the determination, the board filed its decision with the town clerk on April 14, 2016.

On April 20, 2016, the Hickeys timely filed their complaint appealing the board's decision in the Land Court under G. L. c. 40A, § 17. On April 21, 2016, the Hickeys' counsel sent copies of the complaint by certified mail to each of the individual members of the board, addressed to their respective homes. On the same day, the Hickeys' counsel sent a package by certified mail addressed to "Chairman,

Zoning Board of Appeals" at the Dennis town hall. Hickeys' counsel did not mail a copy of the complaint to the Dennis town clerk. Moreover, neither the town clerk nor the assistant clerk saw a copy of the Hickeys' complaint before May 5, 2016. The only direct communication the Hickeys had with the town clerk's office providing notice of the appeal occurred by e-mail dated May 5, 2016—which he sent after the town clerk certified that she had not received any notice of an appeal within the required timeframe.

Nevertheless, it was established that the clerk did know sometime before May 4, 2016, that the plaintiffs had filed a complaint in the Land Court. Since it is the state of the clerk's knowledge that controls, the requirements of G. L. c. 40A, § 17, were satisfied, and the order allowing the defendant's summary judgment motion was error.

NON-ABUTTER DOES NOT HAVE PRESUMPTION OF AGGRIEVEMENT.

Murrow v. Esh Circus Arts, LLC, 93 Mass. App. Ct. 233 (2018)

Esh operates a "for-profit circus school for instruction in arts, skills, or vocational training" in Somerville. Esh held a special permit that the zoning board of appeals (ZBA) previously granted in an earlier case. On September 30, 2015, Esh applied for what appears to be a modification of that special permit from the ZBA, seeking to increase the floor area and alter the site plan. Notice of the application and the public hearing "was given to persons affected and was published and posted, all as required by G. L. c. 40A, § 11, and the Somerville Zoning Ordinance," as noted in the ZBA decision. After a public hearing, on November 4, 2015, the ZBA unanimously voted to approve Esh's application. The decision was filed with the city clerk on November 13, 2015.

Murrow received notice of the ZBA decision and filed a complaint in the Land Court. She alleged, among other things, that Esh's proposed changes would cause a detriment to health, safety, and welfare on Murrow and Esh's surrounding neighbors. Following a hearing, the judge allowed a motion to dismiss, finding that Murrow was not a party in interest as defined by G.L. c. 40A, s. 11 entitled to a rebuttable presumption of aggrievement, and that her complaint failed to state facts that would otherwise establish her standing to appeal the ZBA's decision.

The Appeals Court held that: landowner was not a party in interest as an abutter to the abutters within 300 feet of school's property line, and thus was not entitled to the rebuttable presumption of aggrievement. Furthermore, mere notice of the public hearing and the board's decision to landowner did not create presumptive standing. Without a showing of particularized injury, the matter was dismissed.

WHEN A VARIANCE APPLICATION WAS NOT CONSTRUCTIVELY APPROVED THE TOWN CLERK HAD NO DUTY TO ISSUE APPROVAL CERTIFICATE.

Neli Ridge, LLC v. Town Clerk of Wilmington, 93 Mass. App. Ct. 1109 (unpublished disposition 2018).

Sixth Realty Trust appeals from a Land Court summary judgment dismissing with prejudice the trust's complaint for mandamus and declaratory relief. The sole issue on appeal is whether the Trust was entitled to a certificate of constructive approval, under G. L. c. 40A, § 15, of its 2016 request that the zoning board of appeals of Wilmington modify what the trust characterizes as a "variance" issued in 2008.

Because the application was not constructively approved, the town clerk had no duty to execute any constructive approval certificate; therefore, the judgment dismissing the Trust's mandamus claim was correct. Judgment included a declaration that no constructive approval had occurred of the trust's application to remove the provision regarding G. L. c. 41, § 81G, from the ZBA's 2008 grant of relief under c. 41, § 81Y, and that the Trust is not entitled to any certificate of such constructive approval. As so modified, the judgment was affirmed.

CONTINUED WORK AFTER DENIEL OF STOP WORK ORDER DOES NOT PROVE ADMINISTRATIVE REMEDIES FUTILE.

Lafond v. Renewable Energy Dev. Partners, LLC, 93 Mass. App. Ct. 1106 (unpublished disposition 2018).

This case arises from the Plymouth planning board's approval of three zoning permits issued to defendant Renewable Energy Development Partners, LLC (REDP), to build a fround-mounted solar photovoltaic project. Pursuant to the zoning by-law of the town of Plymouth the building inspector reviewed the site plan to determine whether the project constituted a permissible use, pursuant to § 205–38.C of the by-law.

When Lafond, an abutter to the site, learned about the project, he hired counsel. Lafond, through counsel, sent a letter to the building inspector and the board, among others, requesting the issuance of a stop work order. More than thirty days after the building inspector's denial of the enforcement and stop work request, Lafond filed a two-count complaint in the Land Court, alleging that the zoning permits and site plan review of the project were invalid. He asked the court to declare that (1) G. L. c. 40A, § 3, does not preempt § 205–40 of the by-law, and (2) the project is a prohibited use.

The judge allowed REDP's motion for summary judgment and dismissed the complaint, finding that the Land Court lacked jurisdiction because Lafond failed to appeal the building inspector's denial to the zoning board of appeals and cannot "sidestep that choice by repackaging it pursuant to G. L. c. 231A." This appeal followed.

The Appeals Court ruled that Lafond had the opportunity to appeal the building inspector's decision. As the Land Court judge stated, "He was not denied an administrative appeal, but instead simply chose not to pursue one."

STATUTE OF LIMITATIONS UNDER G. L. C. 40A, § 7 COMMENCES AT THE TIME OF CONVEYANCE.

Bruno v. Zoning Bd. of Appeals of Tisbury, 93 Mass. App. Ct. 48 (2018).

Landowners filed an action seeking to annul a decision of the zoning board of appeals denying enforcement of zoning laws against neighbors after neighbors subdivided their beachfront property into two lots turning one into an undersized lot that retained an easement over the second lot and which they used as rental property during the summer. The Land Court granted summary judgment for neighbors. Landowners appealed.

The ten-year statute of limitations under G. L. c. 40A, § 7—which governs actions to compel the removal of a structure because of alleged zoning violations—commenced at the time that the lot containing the primary house was conveyed, rather than at the endorsement of the approval not required (ANR) subdivision plan. The Appeals Court held that: ten-year statute of limitations for zoning enforcement actions seeking to compel the removal of a structure applied; the merger doctrine applied to the "approval not required" subdivided lots; and the limitations period commenced when neighbors conveyed conforming lot to landowners, rather than at time of town planning board's endorsement of the "approval not required" subdivision plan. Affirmed in part, reversed in part, and remanded

THE DOCTRINE OF INFECTIOUS INVALIDITY PRECLUDED PLAINTIFFS FROM OBTAINING BUILDING PERMIT.

Cronin v. Town of Lunenburg, 92 Mass. App. Ct. 1130 (unpublished disposition 2018).

Plaintiffs purchased real property at 27 Oak Avenue in the town of Lunenburg. At the time of purchase, they owned an adjacent parcel, 31 Turkey Hill Road. While 31 Turkey Hill complied with zoning by-law, 27 Oak did not. However, 27 Oak predated the relevant zoning by-law and therefore qualified as a preexisting nonconforming lot. The plaintiffs sought to create a third buildable lot using land from both 27 Oak and 31 Turkey Hill. The plaintiffs filed an approval not required plan (ANR plan) with the town, and subsequently sold 27 Oak.

In 2008, the plaintiffs applied for a permit to build a single-family home on the new lot which was denied because the transfer of the spur from 27 Oak to the new parcel caused 27 Oak to lose its status as a lawful preexisting nonconforming lot. The doctrine of infectious invalidity rendered the new lot unbuildable, as its formation created a zoning violation at 27 Oak.

The Superior Court granted summary judgment to the board, reasoning that the doctrine of infectious invalidity precluded the plaintiffs from obtaining the building permit. On appeal, the plaintiffs

claim that the judge erred because they had cured any infectious invalidity prior to the permit application. However, the Appeals Court affirmed.

LOT HELD IN REVOCABLE TRUST DOES NOT MERGE WHERE TRUSTEE HAS FIDUCIARY DUTY TO BENEFICIARIES.

Kneer v. Zoning Bd. of Appeals of Norfolk, 93 Mass. App. Ct. 548 (2018).

At the center of this case is an undeveloped parcel of land (Parcel) in the town of Norfolk (Town). Because the parcel measures only 7,650 square feet, it does not meet the minimum lot size requirement set forth in the town zoning by-law for the district. The relevant town officials concluded that the Parcel did not enjoy "grandfathered" status, because it was held in common ownership with adjacent lots when the town first adopted a minimum lot size requirement in 1953. Therefore, the lots had to be treated as one under the doctrine of merger. On cross motions for summary judgment, a judge of the Land Court rejected that position, ruling that the Parcel was not rendered unbuildable based on its being held in common ownership or control with adjacent land in 1953.

Nevertheless, after trial, the judge ruled that the Parcel was rendered unbuildable under the doctrine of merger based on a more recent event, namely, the acquisition of the Parcel on September 14, 2012, by the Kneer Family Revocable Trust (Trust). The sole beneficiary of the Trust was Mildred Kneer, who also served as cotrustee. The other cotrustee was Deirdre Mead, one of Mildred's three daughters. Mead owned the land adjacent to the Parcel (Mead Parcel). Because Mead, as cotrustee, possessed broad powers to manage – even terminate – the Trust, the Land Court ruled that the Parcel was in common control with the Mead Parcel. Judge Long concluded that the properties must be treated as one for zoning purposes under the doctrine of merger, explaining his ruling in a carefully reasoned memorandum of decision. Kneer appealed.

The Appeals Court held that even though Mead had broad authority over the Parcel, her fiduciary duties as cotrustee limited her power to merge the two parcels. "Mead was not in a position in which she lawfully could have appropriated the Parcel as her own; indeed, such conduct would have amounted to an obvious breach of her fiduciary responsibilities." Thus, the Parel did not lose grandfathering protection upon the initial adoption of the zoning by-law, and remand was required to determine whether both parcels merged on other grounds.

A PROPOSED USE OF A PROPERTY WHICH IS PRIMARILY "THERAPEUTIC" IS NOT PROTECTED BY THE DOVER AMENDMENT.

McLean Hosp. Corp. v. Town of Lincoln, 16 MISC 000694 (Mass. Land Ct. Oct. 22, 2018)

The McLean Hospital Corporation (McLean) initiated this action on November 15, 2016, seeking a determination pursuant to G. L. c. 240, § 14A, that McLean's proposed use of property it owns

in Lincoln (Property) is “educational within the meaning of [General Laws] c. 40A, § 3, second par. (Dover Amendment.)” Such a determination would allow the proposed use as a matter-of-right in the residential zoning district in which the Property is located. Plaintiff describes the proposal as “a residential program implementing a highly structured model of learning behavior through a specialized curriculum known as Dialectical Behavior Therapy (DBT).” The program is currently one of two residential programs located on the grounds of McLean Hospital in Belmont and is referred to as the “3East Boys Program.” This program was offered at McLean’s Belmont facility. The proposal to relocated to Lincoln would serve boys, ages 15 to 21, whose principal diagnosis is Borderline Personality Disorder (BPD), characterized by “emotional dysregulation.” The maximum number of residents at any one time would be twelve and the average length of enrollment in the program is expected to be 60 to 120 days. The Land Court described the activities on the premises as follows:

> There are no medical interventions that are part of the DBT training curriculum, but there is "psychosocial intervention." The program proposed for the Property is specifically tailored for a subset of boys with the proper diagnosis who require significant assistance to develop behavioral and cognitive skills, have demonstrated the readiness and willingness to devote themselves to learning those skills, and do not require inpatient treatment in the form of hospitalization. McLean has developed an admissions process to ensure that applicants to the program fall within this subset.
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> The 3East Program will adhere to a Dialectical Behavior Therapy (DBT) approach. DBT is a behavioral skills development model, originally developed by Marsha Linehan, Ph.D. (Dr. Linehan), to assist individuals diagnosed with BPD. The program involves group sessions; worksheets to be completed by the participants as homework; examples and demonstrations of behavior conducted by qualified professionals and participants alike; and interaction between the participants and qualified professionals and staff.
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> The 3East curriculum is highly structured and is designed to teach skills that will allow the residents, all of whom have skills deficits related to "emotional dysregulation", to lead productive lives and return to their families and communities. Coping skills are at the "core" of a DBT treatment program. Individual therapy in the 3East program is designed to help each resident practice these skills and coach him in the skills that he has learned.
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> The DBT curriculum involves the teaching and development of the following behavioral and cognitive skills:
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> a. Mindfulness (defined as "being able to pay attention on purpose in the present moment and without being judgmental"), increases cognitive awareness, cognitive control, and non-judgmental awareness. Residents learn the ability to maintain attention and block out distractions.
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> b. Emotional regulation (so as to: better understand one's emotions; increase facilitation and recognition of positive emotions; and accept negative emotions).
>
> c. Development and maintenance of interpersonal relationships (focused on the improvement, development, and maintenance of adaptive self-esteem and pro-social skills).

d. Distress tolerance (so as to better cope with and tolerate distressful experiences and situations).

e. Validation (so as to validate others and empathize with them, and to self-validate so as to avoid prevalent feelings of shame).

The sole issue for trial was "whether the proposed use of [the Property] is educational as that term is used in G. L. c. 40A, § 3, Lincoln By-law § 6.1(g), and case law interpreting the so-called Dover Amendment." The case was tried over four days in October 2017. The Land Court ruled that McLean's proposed use of the Property is primarily therapeutic and curative, not education in nature:

> The fact that the program follows a well-developed curriculum does not automatically make it 'educational' within the meaning of the Dover Amendment. The Regis College court cautioned "the term 'educational purposes' should be construed as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance." Regis College, 462 Mass. at 289-290. In this case, the evidence at trial established that the 3East Boys Program is a structured, skills-based curriculum with formal classroom-based sessions in addition to individual therapy sessions aimed at providing residents with critical coping skills to mitigate the effects of BPD. But to conclude that the structure of the program essentially transforms a therapeutic program into an educational one for the purposes of Dover Amendment protection would, in fact, elevate form over substance.
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> Accordingly, The Land Court affirmed the decision of the local zoning board of appeal.

LED SIGN IS ILLEGAL "FLASHING" SIGN UNDER LOCAL BY-LAW.

92 Montvale, LLC v. Zoning Bd. of Appeals of Stoneham, 93 Mass. app. Ct. 1104 (unpublished disposition (2018).

The plaintiff, 92 Montvale, LLC appealed from the entry of summary judgment of the Land Court that affirmed a decision of the zoning board of appeals of Stoneham. The board had upheld the denial of Montvale's application for a building permit to construct a light emitting diode monument sign on its property. At issue is whether the LED sign, which has the ability to display images or messages at eight to ten second intervals, is an on-premises flashing sign that is prohibited under the Town's zoning by-law. The plaintiff argued that under the regulations of the federal Highway Traffic Safety administration, a flashing sign is one that flashes more frequently than once every eight seconds.

The Land Court concluded that the LED sign is a prohibited flashing sign and that the board did not act arbitrarily or capriciously by affirming the denial of Montvale's application for a building permit. The Appeals Court affirmed.

Practice tip: The definitions used by Stoneham are very typical and did not anticipate LED signs. Here is the Court's summary:

"Flashing sign" is defined in the Bylaw in Section 6.7.4.16 as "[a] sign that contains an intermittent or sequential flashing light source." "Intermittent" is not defined in the Bylaw but is defined in the American Heritage Dictionary as "stopping or starting at intervals." Am. Heritage Dictionary of the English Language (5th Ed. 2015). "Flashing" is not defined in the Bylaw but is defined in the American Heritage Dictionary as "[t]o give off light or be lighted in sudden or bursts." Id. The Town may want to consider amending the Bylaw to make it clear that an overnight change in a digital sign is acceptable.

NO ACTUAL CONTROVERSY EXISTS WHERE A PERMIT GRANTING AUTHORITY HAS NOT HAD THE OPPORTUNITY TO DENY THE PERMIT.

Burke v. Bldg. Inspector of Town of Dennis, 94 Mass. App. Ct. 1109 (unpublished disposition 2018).

Burke filed the original action on October 5, 2012. He was permitted to amend his complaint to add the town and its building inspector as defendants (town defendants), and to add a claim seeking a declaratory judgment, under G. L. c. 231A, § 1, that a cease and desist order dated June 7, 2001, prohibiting construction on the lot known as 23 Uncle Bill's Way (property), was unlawful. In October of 2015, Burke filed another motion to amend his complaint which sought to add a claim for declaratory judgment that the property was buildable, and to add constitutional claims against the town defendants. The judge denied the October 2015 motion to amend. On October 13, 2016, the judge granted the town defendants' motion for summary judgment. At the time Burke added the town defendants, Burke did not have title to the property. Burke did not apply for a building permit at any point before or during the litigation. Burke did not gain title until October, 2016, just prior to the summary judgment hearing.

On appeal Burke challenged orders (1) denying his third motion to amend his complaint, and (2) granting summary judgment in favor of the town of Dennis and its building inspector[4] on the ground that Burke had not demonstrated the existence of an actual controversy and, thus, that the Superior Court lacked subject matter jurisdiction under G. L. c. 231A, § 1.

Within the zoning context, no actual controversy exists where a permit granting authority "has not had the opportunity either to deny the permit, or even to threaten to deny it." Pursuant to G. L. c. 40A, an there is a clear administrative process that an individual must utilize before seeking declaratory judgment. A person unable to obtain a building permit may appeal to the permit granting authority and then a "person aggrieved" by the permit granting authority may seek judicial review in the Land Court or the Superior Court. G. L. c. 40A, §§ 8, 17.

A FINDING OF NO HARDSHIP IS SUFFICIENT REASON TO DENY VARIANCE.

Fanning v. Bd. of Zoning App. of Cambridge, 92 Mass. App. Ct. 1127 (unpublished disposition 2018).

Fanning owns and occupies one side of an attached, duplex-style townhouse located on Cornelius Way in Cambridge. In 2011, the board granted Fanning a variance. The board conditioned approval on compliance with the plans submitted and initialed by the chairman. There was no appeal

from any aspect of the decision. In March of 2013, Fanning sought a variance and special permit for a second driveway cut and off-street parking space. Although there were no objections and one neighbor spoke in favor, the board denied relief. Fanning did not appeal from the board's decision.

In 2014, Fanning sought a variance to create a second dwelling unit and to add an exterior open staircase. He also sought a special permit to dispense with the requirement that each unit have an off-street parking space. With regard to the variance, the board found that Fanning had not demonstrated any hardship.

Fanning appealed the denial of his 2014 special permit/variance application to the Land Court. The judge found that Fanning had not needed a variance for his 2011 addition; his lot and structure are conforming; and he did not need a variance for the addition of the proposed staircase or, apparently, to convert the townhouse to two dwelling units. The judge concluded that Fanning could reapply for a building permit for the second dwelling and exterior stairs and ordered the city building inspector to grant the building permit without requiring additional zoning relief. In addition, the judge concluded that Fanning had met the criteria for a special permit eliminating the off-street parking requirement; the board's denial of the special permit was arbitrary and capricious; and no reasonable board could have concluded as they did.

There was no error in the board's conclusion that Fanning had not shown hardship. It is well-settled that hardship stemming from an owner's personal financial and even health difficulties, rather than factors which affect the land itself, are not valid bases for a variance. A finding of no hardship is sufficient reason to deny a variance. The judgment was reversed; remanded for entry of a new judgment affirming the decision of the board and such other orders as may be necessary, consistent with this memorandum and order.

TAKINGS CLAIM FAILS.

Beach v. Town of Norfolk, 93 Mass. App. Ct. 1104 (unpublished disposition 2018).

Since one of your clients this year is likely to ask whether his or her property has been "taken" by government action, this is a good case to share with them.

Beach proposed development of a 38 acre tract in Norfolk. Along the way, his project hit a snag with the local conservation commission. The commission imposed several conditions including (1) a delay in the start of construction of two seasons after replication of wetlands; (2) commission approval of any transfer; and (3) no certificate of compoliance would be issued until 5 years after the completion of work. Beach sued and claimed that the delays and unfair conditions amounted to a taking.

The Superior Court reviewed these claims under the framework set forth in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978). The Appeals Court addressed the economic impact on the developers, the developers' distinct investment-backed expectations, and the character of the governmental action. The plaintiff's claim was denied.

HOW TO CALCULATE THE SIZE OF NEW STRUCTURES IN PROVINCETOWN.

Sinaiko v. ZBA of Provincetown, 93 Mass. App. Ct. 274 (2018).

Defendant Sikorski wanted to build a four-bedroom, two-and-one-half story single-family residence on a vacant lot in Provincetown. At issue was the application of § 2640 of the town zoning by-law. Despite the fact that § 2640 expressly states that it "is applicable to all new buildings and all additions in all zoning districts in Provincetown," the building commissioner and zoning board of appeals concluded that the by-law's provisions were inapplicable to the proposed building here. Section 2640 limits the size of new construction, or expanded construction, to be no greater than 25% than the average size of existing buildings that lie within 250 feet of the measuring point. Sikorski proposed a new structure on a vacant lot with a volume of 33,810 cubic feet. Only two existing structures lie within 250 feet of the measuring point. One has 8,200 feet, the other has 4,560 cubit feet. In calculating the limit, the bylaw also called for elimination of cubic the largest and smallest nearby structures, thus resulting in a "trimmed mean."

Accordingly, the question here was twofold. Did Section 2640 apply? If so, how does it apply? The Court had little trouble deciding that Section 2640 applied. As to how it applied, Sikorski argued that without a limit derived from the by-law's formula, the board was correct in allowing him to build any structure. The neighbors argued that the correct interpretation was that zero construction was allowed as of right. The by-law did allow for greater volume by special permit. The Appeals Court ruled that the board's interpretation was wrong, and chose the abutters' solution as the better result.
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CHAPTER 40B CASES

TO SUCCESSFULLY CHALLENGE PLAINTIFFS' STANDING, DEFENDANT MUST SHOW EVERY CLAIM OF INJURY IS UNFOUNDED.

Trustees of Winchester House Condo. Tr. v. Geller, 17 MISC 000097 (Land Ct. 2018).

Plaintiffs seek to overturn a decision of the Brookline Zoning Board of Appeals to grant a comprehensive permit pursuant to G.L. c. 40B to Roth Family, LLC and 40 Centre Street, LLC for a 40-unit mixed income apartment building.

Here, the Private Defendants challenge Plaintiffs' standing on several categories of issues: (1) parking and traffic, (2) stormwater management, (3) waste and recycling management, (4) public fire safety, (5) noise levels, (6) trees, and (7) design and density, including increased shadows. These challenges to the presumption of standing are based on the Plaintiffs' pleadings and answers to interrogatories. Notably, the Private Defendants' motion for summary judgment relies solely on the Plaintiffs' pleadings and answers to interrogatories as their source of aggrievement. The Private

Defendants did not conduct depositions to probe the Plaintiffs' factual bases for any of their claimed harms—unlike the defendants in *Standerwick*, who showed, through deposition testimony that the plaintiffs merely were relying on "gut feel" and "personal experience" as grounds for aggrievement. Nor did the Private Defendants file any motions to compel answers when the Neighbor Plaintiffs failed to respond to any interrogatory requests.

The Private Defendants do not show categorically an absence of harms that the Plaintiffs plausibly may sustain as a result of the issuance of the comprehensive permit now under review by the court. To have had any prospect of doing so, they would have to have done more through discovery, and put the fruits of that discovery, if useful to them, into the summary judgment record. They would have to press the Plaintiffs, likely through depositions, in an effort to show that the Plaintiffs' claims indeed are unfounded and that they can have no reasonable expectation of proving a legally cognizable injury. Whether that expanded discovery would have yielded that result cannot be said on the limited record the parties have submitted to the court.

DEVELOPER DOES NOT HAVE THE RIGHT TO PASS OVER THE LAND OF PLAINTIFFS TO ACCESS PROPOSED DEVELOPMENT.

Mullen v. Viking Lane, LLC, 18 MISC 000107 (HPS)(Land Ct. 2018).

Developer of a proposed affordable housing development with thirty-two dwelling units, seeking to demonstrate to the Hingham Zoning Board of Appeals that it has sufficient access to the proposed development, added to its proposed plan an additional access road from Autumn Circle, a public way, to the proposed development. The problem, and thus the issue in this case, is that the proposed roadway leading to the development from Autumn Circle (the "Way") must utilize a right of way on the land of the two plaintiffs, and they argue that the developer has no rights to cross their land to access the proposed development from Autumn Circle.

The plaintiffs posit that the undisputed facts in the record require a finding that the owner of the Viking Land does not have any rights over the Way, and that they are entitled to a judgment that would preclude the use of the Way for access to or from the affordable housing development proposed on the Viking Land. The defendants seek a determination that they have rights over the Way, or, at a minimum, a ruling that there are material facts in dispute and that they are entitled to prove the existence of rights in the Way. The defendants argue first that they have the benefit of a direct grant of rights in the Way by virtue of its appearance on the Subdivision Plan. Failing that, the defendants argue that they are entitled to a determination that the Viking Land has the benefit of access over the Way by estoppel, by implication, or by eminent domain as a result of the town of Hingham's taking of certain rights in Autumn Circle.

The court agreed with the plaintiffs, declaring that the developer does not have the right to pass over the land of the plaintiffs to access the proposed development

ATTORNEY FEES AWARDED FOR FRIVILOUS AND BAD FAITH CLAIMS BY TOWN.

Town of Sudbury v. Bartlett, 16 MISC 000734 (HPS), 2017 WL 6458599 (Mass. Land Ct. Dec. 18, 2017).

The defendants, trustees of JOC Trust and Sudbury Station, LLC moved for an award of attorneys' fees pursuant to G. L. c. 231, § 6F following decision granting summary judgment in their favor. On summary judgment, the Town argued that (1) the deed of "Parcel 3B" from the town of Sudbury to JOC Trust was not subject to a covenant restricting Parcel 3B to use as an access road to only one house on a single lot on JOC Trust's adjacent land; in the alternative (2) the Town argued that if Parcel 3B was not subject to a restrictive covenant, then it should be subject to an equitable servitude; Finally, (3) the Town sought rescission of its deed to JOC Trust on the ground that the deed consequently failed to limit the scope of the conveyance to the restricted use authorized by Town Meeting.

The issue in this second matter is whether the Town's pursuit of these claims should lead to a conclusion that the Town's claims "were wholly insubstantial, frivolous and not advanced in good faith" under G. L. c. 231, § 6F. Specifically, the defendants argue that the Town advanced claims that it knew or should have known were without merit, and that it did so in an attempt, properly characterized as exhibiting an absence of good faith, to use any means available to stop the G. L. c. 40B development proposed by the defendants to be built on JOC Trust's land.

The Land Court found that the Town's claims were not within the "novel legal theory" variety. Rather, the Land Court found the Town's claims to have been advanced with a lack of any substantial legal or evidentiary support. Further the claims by the Town were not advanced in good faith. The Town filed the present action with knowledge that it was without legal or evidentiary support, and for the purpose of blocking the proposed G. L. c. 40B development on the back of its frivolous claims; this constituted an absence of good faith in the filing of the present action. The record contained uncontradicted evidence that Town officials understood prior to the conveyance of the parcel that there was no restrictive covenant limiting JOC's property to one house.

As to attorneys' fees, the Land Court had some interesting things to say about allowable hourly rates, finding that a rate of $325 / hour was acceptable in Boston's western suburbs, while a rate of $565 / hour was not.

CONSTRUCTION-RELATED NOISE NOT AN OBSTACLE TO COMPREHENSIVE PERMIT ISSUANCE.

Zoning Bd. of Appeals of Woburn v. Housing Appeals Comm., 92 Mass. App. Ct. 1115 (unpublished disposition 2018).

The project at issue has a long history and was the subject of a 2006 decision pursuant to Rule 1:28 which upheld the HAC's decision to vacate the board's denial of the original application for a comprehensive permit. *Board of Appeals of Woburn v. Housing Appeals Comm., 66 Mass. App. Ct. 1109 (2006)*. Thereafter, the local board of appeals issued the original comprehensive permit to the developer's predecessor in interest on September 26, 2006, and has twice extended it. In 2011–2012, a new owner, the developer, sought a modification of the comprehensive permit. It requires nearly double the amount of blasting and ledge removal and extends the duration of the site preparation and construction phase of development from six months to at least a year. Even accepting that the modified project will comply with applicable noise regulations, the HAC noted that construction will be loud and unusually lengthy.

Following a public hearing, the board denied the modification application, finding, among other things, that the twelve months of blasting and gravel removal would interfere with the abutters' "quiet enjoyment of their property," cause unacceptable noise pollution, and adversely affect the public health, welfare, and safety of the direct abutters, as well as the surrounding residential neighborhood. The board concluded that "[a]lthough the design of the modified Project may be more aesthetically pleasing, where the number of affordable units will remain the same, the Board finds that the more extensive construction period associated with the modified Project and the attendant disruptions to abutters and the surrounding residential neighborhood are not mere inconveniences, but create local concerns which outweigh the need for such affordable housing."

The HAC vacated the board's decision, finding that it was not consistent with local needs, and directed the board to permit the requested modification, subject to certain conditions, including that construction comply with all noise and vibration regulations. Land Court affirmed. The board of appeals, arguing that the HAC (i) improperly shifted the burden of proof to the board and (ii) failed to recognize the board's concerns regarding the duration of the construction project and associated noise as a "local concern" sought review at the Appeals Court.

The regulations provide a list of "factual areas of Local Concern," which, although expressly not intended to be "all inclusive," casts some doubt as to whether concerns regarding construction-related noise that does not violate local noise regulations may constitute a "local concern" that outweighs the need for low income housing. None of the enumerated concerns touch on issues surrounding noise or disruption during the construction phase of the development. Where the board points to no durational limitation on construction projects or the noise produced by them, particularly noise that does not violate the local by-law's limits, the board has not identified an interest of local concern over which local boards would have jurisdiction. Even if it had, given "the rebuttable presumption that there exists a substantial regional housing need that outweighs local concerns where, as here, the town has not achieved the ten percent minimum stock of affordable housing," The Appeals Court affirmed the judgment of the Land Court.

HD/MW Randolph Avenue, LLC v. Milton Board of Appeals, Housing Appeals Comm. (December 20, 2018).

Developer sought comprehensive permit for 90 rental units in two buildings in Milton on a site with 7.81 acres. After public hearing, the board of appeals granted a permit for 35 units, subject to numerous conditions.

On appeal to the Committee, interveners were allowed to claim injury from specific issues related to site development, including noise, adequacy of buffers, lights, and excavation.

First, the Committee examined whether the board's conditions rendered the project uneconomic. In a rental project, the *Guidelines* prescribe the Return on Total Cost (ROTC) analysis. There is a definition for "reasonable return" contained in the Chapter 40B regulations at 760 CMR 56.02, which states that a rental project achieves a reasonable return if "the payment of development fees from the initial construction of the Project is not more than a reasonable fee as determined by the Subsidizing Agency's program limitations and not less than 10% of the total development costs." However, the HAC does not follow this approach, and instead uses a Return on Total Cost ("ROTC") approach. See, *Cirsan Realty Trust v. Board of Appeals of Woburn*, slip op. at 5 (Mass. Housing Appeals Comm., April 23, 2015). This approach was upheld by the Land Court in *Woburn Zoning Bd. of Appeals v. Housing Appeals Comm.*, Land Court Permit Session Case No. 000288 (June 3, 2016) (Speicher, J.).

In the Woburn litigation, the HAC applied an uneconomic threshold of 250 to 350 basis points above the 10-year Treasury Rate as the threshold for "uneconomic" pursuant to the Return on Total Cost method. Subsequent to the ruling in the Woburn case, the Department of Housing and Community Development revised its "Guidelines - c. 40B Comprehensive Permit Projects" to include a definition of "Return on Total Cost" that states "a Return on Total Cost that is less than the sum of the ROTC Threshold Increment and the Applicable Ten-Year Treasury Rate . . . shall be the minimum return necessary to realize a reasonable return…" The ROTC Threshold Increment is defined in the Guidelines as "a percentage determined by the Department and confirmed or modified annually based upon an analysis of current real estate market data." As of the December, 2014 Guidelines, the Threshold Increment has been set at 450 basis points above the Ten-Year Treasury Rate. This rate has not changed since 2014. Therefore, the applicable threshold remains 450 basis points above the Ten-Year Treasury Rate.

In the instant matter, the "economic threshold" was 6.84%. However, the developer proceeded with an ROTC of 5.93%. The board's reduction in the number of units resulted in an ROTC of 4.10%. After considering the board's arguments, the Committee adjusted the ROTC to $.26% and ruled that the ROTC was uneconomic.

The Committee than considered a host of local concerns raised by the board, including density, emergency access and fire safety, access to buildings, traffic safety, stormwater management, and project design. The Committee ruled that the board's decision was not consistent with local needs, and ordered the issuance of a comprehensive permit.