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Law of the Land - Real Estate Litigation Newsletter

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Trending Now:

Massachusetts SJC Ruling: Good News for Owners and Developers

The Supreme Judicial Court of Massachusetts issued a written decision in *Murchison v. Zoning Board of Appeals of Sherborn, et al.* (SJC-12867) on July 16, 2020, overturning the Appeals Court and reinstating a Land Court decision that rejected a challenge to the construction of a home in Sherborn by abutting property owners. The full written decision came four months after the SJC took the highly unusual step of issuing an immediate, terse decision on March 6, just one day after oral arguments in the case.

The Murchinsons, who own a 13-acre lot in a wooded section of Sherborn directly abutting Farm Pond, challenged the right of their neighbors to build a house on an undeveloped lot across the street because, they argued, the lot did not meet the minimum lot width requirement under Sherborn zoning. However, the undeveloped lot inarguably met other requirements – including the 3-acre minimum lot size, the 250-foot frontage requirement, and other setback requirements; the lot is simply smaller in width in the center than it is at its front or rear. After trial, Land Court Judge Karyn F. Scheier dismissed the abutters' complaint for lack of standing, noting that there was insufficient evidence of any particularized injury or harm of the type required under Section 17 of G.L. c. 40A. Judge Scheier rejected the plaintiffs' argument that they were clearly harmed by the technical violation of a zoning by-law requiring minimum lot-width and held that the plaintiffs had not offered evidence that they will suffer any actual injury based on density, overcrowding, diminution in property value, or storm water runoff.

In reversing the Land Court ruling, the Appeals Court accepted the plaintiffs' argument that Sherborn's zoning provisions were intended to protect against any "density-related harm" affecting their privacy rights. In slip opinion no. 18-P-1092, Justice Peter J. Rubin wrote that both the zoning act and Sherborn's bylaws "protect the interest against overcrowding, and its invasion may suffice to give the plaintiffs standing." He went on to say that "the harm to a property owner from having a house across the street closer to his or her own than is permitted by the density-protective bylaws is different in kind from that suffered in an undifferentiated fashion by all the residents of the neighborhood."

The *Murchison* case has drawn significant attention from real estate industry groups because local boards regularly grant zoning permits, waivers, variances, and special permits that could have some impact on abutting property owners. These industry groups were concerned that the Appeals

Court decision could have opened the litigation floodgates, recognizing the standing of abutters to challenge any project that they allege does not comply with any local zoning requirement relating to density, and dispensing with the need to prove some distinctive harm from the project. Goulston & Storrs attorneys wrote an amicus brief filed on behalf of NAIOP Massachusetts, Inc., arguing that that the Appeals Court's decision should be struck down because it departed from well-established principles requiring all zoning plaintiffs to offer credible evidence of a particularized, non-trivial harm that is special and different from the concerns of the rest of the community.

Thankfully, the SJC reversed the Appeals Court, rejecting the Murchisons' argument that Sherborn's minimum lot width bylaw itself "protected their interest in preventing the overcrowding of their neighborhood." The SJC held in pertinent part as follows: (1) "there is nothing to demonstrate that the purpose of Sherborn's dimensional lot width zoning requirement is to control density or overcrowding generally, or to protect an abutter's interests in particular"; and (2) that "establishing standing requires a plaintiff to do more than merely allege a zoning violation." The SJC's decision in *Murchison* reaffirmed Massachusetts' long-standing rule that plaintiffs in land use cases cannot rely on a mere bylaw violation to establish standing, and must instead prove through sufficient qualitative and quantitative evidence how they particularly will be harmed by a proposed development.

Real Estate Litigation Cases of Note:

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

In a recent decision, the Massachusetts Appeals Court held that an opponent of an affordable housing project under G.L. c. 40B cannot pursue a new appeal of the project proponent's comprehensive permit based upon alleged defects in the proponent's site control each time the proponent obtains an extension of his or her comprehensive permit. The decision is significant because it protects affordable housing developers against serial appeals by project opponents based upon site control arguments when developers seek permit extensions.

Bruce, LLC ("Bruce") was granted a comprehensive permit for property located in Dighton, MA in 2003. Dr. Robert Cserr ("Cserr") timely appealed the permit, claiming that Bruce intended to run water and sewer lines to serve the development through part of a "paper street" that Cserr asserted was part of his property, but he dismissed his initial appeal "without prejudice" in 2007.

Bruce requested extensions of its comprehensive permit in 2010, 2011, and 2012, which were granted. Cserr appealed each extension, arguing before the Housing Appeals Committee and Bristol Superior Court that Bruce did not meet the eligibility requirements for a special permit. Cserr argued that Bruce must "re-earn" the permit by reestablishing satisfaction of the project eligibility requirements each time he requests an extension.

The Appeals Court rejected Cserr's position, observing that allowing abutters to challenge the underlying permit each time an extension is obtained would force developers to litigate claims regarding comprehensive permits many years after their issuance – a proposition the Court believed was contrary to the Legislature's intent in adopting the short, twenty-day appeal period for such permits. The Court acknowledged that Cserr could bring a common law action for trespass if

Bruce's placement of sewer and water lines violated his property rights, but rejected his attempt to use Bruce's extensions as an opportunity to relitigate issues that were properly asserted only in his initial 2003 appeal.

***Commercial Wharf East Condominium Ass'n v. Dep't of Environmental Protection*, 2020 WL 4379853 (Mass. App. Ct. July 31, 2020)**

The Massachusetts Appeals Court held in this recent decision that all landowners, easement holders, and abutters—including individual condominium owners—are entitled to notice of a proposed change in the use of a structure subject to G.L. c. 91, also known as the "Waterways Act," and its regulations. The decision expressly rejects the notion that notice to a condominium association is sufficient in place of actual notice to the individual unit owners. The Waterways Act governs development in tidelands and the public's right to use those lands.

In 2011, Boston Basin, LLC ("Boston Boat"), the owner and operator of a marina abutting the condominium at the water's end of Commercial Wharf, filed a request for determination of applicability ("RDA") pursuant to the Waterways Act and its regulations, alleging that thirty-six (36) condominium units changed from commercial to residential use. The RDA named Commercial Wharf East Condominium Association ("CWECA") as the owner of the property, but notice was not given to owners of the individual units within the condominium. The Department of Environmental Protection ("Department") contended that it was its practice not to notify the individual unit owners, only the condominium association. The presiding officer to the administrative proceeding eventually did send notice to all unit owners, but despite CWECA's request that the Department identify the units it alleged had changed in use, the Department failed to provide that information. The presiding officer granted Boston Boat's motion for summary decision, and CWECA appealed to Superior Court, which concluded that the Department erred by proceeding without all unit owners affected by the RDA; the Department appealed leading to this Appeals Court decision.

The Court held that the Waterways Act and 310 Code Mass. Regs. § 9 require notice to be sent to all landowners and easement holders of the project site in question and its abutters, and therefore the individual condominium unit owners were entitled to notice of Boston Boat's RDA. Moreover, the Court was bothered by the presiding officer's denial of CWECA's request that the Department be required to identify the units alleged to have changed in use, because the absence of that information made it impossible for individual unit owners to determine how their rights would be affected.

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

Tresca Brothers Sand and Gravel, Inc. v. Board of Appeals of Wilmington illustrates that a local zoning board, although it enjoys broad discretion, cannot deny special permits to an applicant without valid reason based upon the facts. The case provides ammunition for developers and land owners faced with a local board determined to deny them permits without good reason.

Plaintiff Tresca Brothers Sand and Gravel, Inc. ("Tresca") intended to convert its existing warehouse, located in the industrial district of Wilmington, MA, into a concrete manufacturing facility. The project required two special permits pertaining to the intended use and the amount of

impervious surfaces. The zoning board denied both permits without providing any rationale for its decisions.

Tresca appealed the board's special permit denials to Superior Court. The trial judge acknowledged that zoning boards are entitled to deference, but also noted that where a board's conclusions simply repeat regulatory phrases and are unsupported by any facts in the record, its decisions are "unreasonable, whimsical, capricious, and arbitrary, and therefore invalid." Based upon Tresca's expert testimony in support of its position, and the board's failure to offer its own experts, the court found that the permits should have been granted.

On appeal, the Appeals Court held that the Superior Court correctly held that the board had failed to provide any credible evidence to support its contention that Tresca's intended use violates the purpose of the town's bylaws. As a result, the board had no discretion to deny the permits. The Court also held that because the zoning board failed to articulate any conditions beyond those already imposed by the planning board under the site plan review, the case should not be remanded to the zoning board, but rather the special permits should issue.

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

In contrast to the Tresca Brothers decision described above, this case is an example of the deference courts typically provide to local boards when it comes to interpreting local zoning ordinances. In it, the Appeals Court upheld the Uxbridge Zoning Board of Appeals' determination that soil importation activity was not an incidental use to the allowed farming use being made of the property.

In 2017, the Uxbridge Zoning Board of Appeals issued a cease-and-desist letter to Richardson-North Corp. ("Richardson") claiming that Richardson's soil importation operation violated the town's bylaws. Richardson's property is located in the town's agricultural zoning district, and portions of the property are used for farming and agricultural purposes. However, Richardson also had a gravel pit located on the property into which he imported tons of fill each year from a soil broker. Richardson appealed the zoning board's cease-and-desist letter to the Land Court, claiming that the soil importation activity was an incidental use of the property. The Land Court judge reversed the zoning board's decision.

The Appeals Court, however, in reversing the Land Court's holding, found that the Land Court judge had improperly substituted his judgment for that of the board. The court observed that determining whether an activity is an incidental use is a fact-dependent inquiry, and it found that the zoning board, in its discretion, had a rational basis for its determination that the soil operation was not "subordinate and minor in significance" to the property's primary use.

News Alerts:

Eviction Moratorium Extensions Update – MA

On July 21, 2020, the Baker administration announced that it was exercising its emergency powers to extend certain residential and small business eviction and foreclosure restrictions contained in

Chapter 65 of the Acts of 2020 for an additional 60 days beyond July 21, 2020. Absent further action, these restrictions will expire at 11:59 p.m. on October 17, 2020. Of note, the restrictions do not relieve tenants and homeowners of their obligations to pay rent and make mortgage payments.

The administration's announcement coincided with the filing of House Docket 5166/Senate Bill 2831 (An Act to Guarantee Housing Stability During the COVID-19 Emergency and Recovery), which seeks to institute a blanket eviction moratorium for 12-months beyond the end of the state of emergency that is currently in effect. There will undoubtedly be more to report on this subject in the coming months.

Legislative Update – Economic Development Bill

On July 29, 2020, the Massachusetts Senate passed its version of An Act Enabling Partnerships for Growth, which includes a Permit Extension Act that provides a one-year extension to permits, licenses, and approvals in effect between March 2020 and March 2021.

The Senate version includes an Amendment describing Housing Choice and other provisions that would withhold certain state funds from cities and towns served by the MBTA, but that do not have at least one zone for multifamily housing. The Amendment would also allow cities and towns to adopt zoning ordinances and bylaws mandating inclusionary zoning by a simple majority vote. This Senate bill is headed to conference committee.

If you have a real estate litigation question or business concern, we invite you to reach out directly to any member of our Real Estate Litigation Group.