

# Law of the Land - Real Estate Litigation Newsletter

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## **CASES OF NOTE**

### **CONVEYANCE OF PROPERTY RESULT OF MUTUAL MISTAKE**

*Thomas v. Medeiros*, 100 Mass. App. Ct. 1106 (2021)

The Massachusetts Appeals Court recently affirmed a determination by the Land Court that a conveyance of certain property on Martha's Vineyard was not intended by the parties and was a result of a mutual mistake.

In 1955, Carrie Luce conveyed by deed to Plaintiffs' parents "all of my right, title and interest in and to any and all land situated in ... West Tisbury which I own or have any interest in." Plaintiffs claimed that the conveyance included a certain parcel separately conveyed by Ms. Luce's mother to Defendants' grandparents (the "Subject Property"). Defendant contended that neither Ms. Luce nor Plaintiffs' parents intended the 1955 deed to include the Subject Property, and that there was a mutual mistake concerning the conveyance. Alternatively, Defendant claimed adverse possession to the Subject Property. The Land Court allowed extrinsic evidence concerning the intentions of Ms. Luce and the conduct of the parties to determine whether there was a mutual mistake between Ms. Luce and Plaintiffs' parents concerning the Subject Property. The evidence showed that Ms. Luce did not believe she owned the Subject Property at the time it was conveyed, and therefore did not intend for it to be included in the 1955 deed. Furthermore, Defendant's family used and paid taxes for the Subject Property for decades without objections from Plaintiffs' parents, demonstrating that Plaintiffs' family likewise did not believe they were deeded the Subject Property. The Land Court concluded that a mutual mistake was made and ruled that the Subject Property is held in constructive trust for the benefit of Ms. Luce's heirs, subject to a later determination as to the extent of that interest and whether it has been lost through adverse possession by Defendant. The Appeals Court determined that the evidence supported the Land Court's finding of mutual mistake.

### **THE FINE LINE BETWEEN ANTI-SLAPP PETITIONING ACTIVITY AND EXTORTION**

*Haverhill Stem LLC v. Jennings*, 99 Mass. App. Ct. 626 (2021)

The Massachusetts Appeals Court affirmed a judgment of the Superior Court denying a special motion to dismiss under the Massachusetts anti-SLAPP statute, G.L. c. 231, § 59H, of an action alleging extortion of money in exchange for agreement to withdraw opposition to a marijuana

dispensary in Haverhill. The Court held that the alleged extortionary activities were not protected as lawful, constitutionally protected petitioning activity.

In 2018, Plaintiff sought to establish a marijuana dispensary in downtown Haverhill and advocated for zoning ordinance changes that would allow such establishments in that area. In October 2018, Plaintiff's father purchased the eventual site of the marijuana business, located next door to Defendants' property. Defendants objected to Plaintiff's proposed use of Plaintiff's building unless Plaintiff first paid them \$30,000. Defendants then threatened Plaintiff with legal action regarding her unwillingness to pay and even raised their asking price several times, at one point demanding \$75,000. After Haverhill approved a zoning ordinance allowing marijuana establishments, Defendants filed suit in the Land Court against Plaintiff and others, seeking to invalidate the recreational marijuana zoning bylaw. Plaintiff countered by filing a lawsuit in Superior Court asserting claims for violation of G.L. c. 93A, Massachusetts Civil Rights Act, and defamation based on the Defendants' extortionate campaign for money and threats to Plaintiff's business and financial wellbeing.

Defendants moved to dismiss the Superior Court action under the anti-SLAPP statute, but the judge denied the motion and concluded that Defendants failed to show that Plaintiff's claims were based solely on Defendants' exercise of their constitutional right to petition – the threshold element of anti-SLAPP analysis under Massachusetts law. The Appeals Court agreed.

The anti-SLAPP statute provides a mechanism for early dismissal of civil claims where those claims are "based solely on [a defendant's] exercise of the right of petition" to the government. The Appeals Court held that Defendants' demands for payment and threats could not constitute protected petitioning activity in connection with their Land Court case because they were directed at Plaintiff rather than the governmental bodies responsible for the Haverhill marijuana zoning bylaw challenged by Defendants in the Land Court. The Defendants' focus was to obtain money from Plaintiff that Defendants knew she did not owe to them and compensation they could not obtain through the Land Court litigation. The Appeals Court held that Defendants did not have the right to threaten and coerce at will simply because they were contemporaneously involved in legitimate petitioning activity.

The Appeals Court also rejected the Defendants' argument that their extortionate demands were protected by the litigation privilege. The litigation privilege generally precludes civil liability based on "statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding" as well as statements "preliminary to litigation" that relate to the contemplated judicial proceeding." The purpose of the privilege is to protect parties, counsel, and witnesses so that they may speak freely while asserting their legal rights or participating in judicial proceedings. The Appeals Court held that Defendants' extortions and threats cannot be considered "as in connection with litigation" because the demanded payments could not be obtained in the Land Court litigation. The Appeals Court also held that the privilege does not attach where the statements are being used as evidence of the defendants' misconduct.

## **ZONING AMENDMENT WIN FOR CANNABIS PROPERTY OWNERS**

*Brooks v. City of Haverhill*, 100 Mass. App. Ct. 1105 (2021)

The Massachusetts Appeals Court upheld the City of Haverhill's zoning ordinance which permitted a retail marijuana store in the Waterfront District, regardless of its proximity to public parks and schools.

In 2018, Haverhill amended its zoning ordinance to create the Licensed Marijuana Establishments Overlay Zone (the "Overlay Zone"). The Overlay Zone created four different zoning areas, designating various permissible locations for retail and medical marijuana establishments. One of these zones, called the "Licensed Marijuana Establishments – Retail Sales Only" ("Retail Zone"), includes the store at issue in the dispute. Further, although Haverhill created a buffer zone that disallowed licensed marijuana establishments within 500 feet of schools, parks, churches and other similar uses outside of the Waterfront District Area, the store was located in the Waterfront District Area, and thus the buffer zone provision did not apply to it. Plaintiffs challenged the zoning ordinance and the absence of a buffer zone in the Waterfront District Area as arbitrary, capricious, and unreasonable.

The Appeals Court reiterated that a strong presumption of validity is afforded to a challenged bylaw or ordinance, and the presumption will not be eroded unless a plaintiff can demonstrate that "the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety... or general welfare." Reviewing Haverhill's marijuana ordinance under this lens, the Appeals Court held that the Retail Zone, along with the absence of a buffer zone in the Waterfront District Area, were substantially related to several purposes of the adoption of the marijuana zoning ordinance. For example, as the Retail Zone allows for the placement of adult use marijuana establishments in appropriate places and under specific conditions, Haverhill could reasonably conclude that the Waterfront District is a well-suited location for such a store. Further based on its zoning ordinance, Haverhill permits the Waterfront District to allow "as of right" retail, business and consumer service establishments. The Waterfront District's main objective is to create a retail and restaurant base that downtown residents can utilize and to encourage pedestrian activity. The Appeals Court, therefore, held that the elimination of a buffer zone in this area was rationally related to a legitimate zoning purpose of generating foot traffic and promoting retail development.

Plaintiffs also challenged the zoning ordinance as spot zoning of the parcel on which a Defendant's marijuana store would be located. The ordinance provides that no marijuana establishments can be located within ½ mile of another marijuana establishment. Plaintiffs claimed the restriction would effectively prohibit any other store from operating in the Waterfront District. The Court rejected this contention for three reasons. First, the ordinance allows the City Council of Haverhill to modify or waive the restriction. Second, the restriction was not unique to the Waterfront District and was equally applicable to all zones permitting licensed marijuana establishments. Finally, the court held that restrictions on the number of establishments that may be in proximity to be a familiar and proper zoning tools.

## **RESISTANCE REMAINS UNDER DOVER AMENDMENT**

*Town of Sharon Board of Library Trustees v. Brahmachari*, 2021 WL 4059907 (Mass. Land Ct. Sept. 2, 2021)

The Massachusetts Land Court granted partial summary judgment in a zoning appeal brought by the Town of Sharon Board of Trustees ("Plaintiff") after the Town of Sharon Zoning Board of Appeals ("ZBA") denied certain variances and special permits for a new library in Sharon. Despite the project's overwhelming public support, the ZBA denied Plaintiff's application for zoning relief due to concerns it had regarding the size of the library and its impact on the surrounding area.

The Town of Sharon, with involvement from Plaintiff, underwent an extensive review and planning process regarding the creation and development of a new public library. After a nearly six-year review process, the proposed public library was slated to be a two-story building with a footprint of 11,971 square feet and gross building area 29,462 square feet. In April 2020, Plaintiff filed an application with the ZBA, seeking variances from the minimum front yard and percentage of building coverage requirements, and special permits for deviations from the minimum lot area, impervious coverage, and natural vegetation coverage requirements. The ZBA denied the requested zoning relief in July 2020.

A library qualifies under exemptions from certain zoning requirements under the Dover Amendment as an educational use. The Dover Amendment bars the adoption of a zoning ordinance or bylaw that seeks to prohibit or restrict the use of land for educational purposes. Nonetheless, the amendment allows a municipality to adopt and apply "reasonable regulations" concerning bulk, dimensions, open space and parking, to land and structures for which an educational use is proposed. Therefore, reasonable dimensional requirements still apply to an educational use so long as, on balance, they serve to fulfill legitimate municipal concerns. Local dimensional requirements are unreasonable where compliance would substantially diminish or detract from the usefulness of the project without appreciably advancing the municipality's legitimate concerns.

The Court held that the ZBA failed to conduct a balancing test required under the Dover Amendment and to provide any details or specificity for its determination that the project would adversely affect the neighborhood. As a consequence, the ZBA used a legally untenable basis on which to deny the project. The Court remanded the decision to the ZBA, instructing Plaintiff "to present all the evidence in their possession that supports their assertion that the project, as designed, is necessary to accomplish the goals set out in the building program and that any changes to the design will not appreciably benefit any compelling municipal concerns raised by the [ZBA]." The ZBA, on the other hand, must conduct a balancing test and make a decision on the merits of the project as proposed. The Court stated that if the ZBA "chooses to approve the project with any dimensional limitations, it must identify with particularity the municipal concerns which those limitations are intended to protect."

*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](#).*

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