Law of the Land - Real Estate Litigation Newsletter

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CASES OF NOTE

LIMITATIONS FACING PLAINTIFFS UNDER CHAPTER 40A

Doyle v. Zoning Board of Appeals of City of Attleboro, No. 20 MISC 000386 (DRR), 2021 WL 5037871 (Mass. Land Ct. Oct. 29, 2021)

In *Doyle v. Zoning Board of Appeals of City of Attleboro*, Plaintiff Kevin Doyle ("Doyle") appealed the City of Attleboro Zoning Board of Appeals' ("ZBA") decision to grant Defendant Bright Path Investment, LLC ("Bright Path") two variances and two special permits for construction of a proposed two-family home. The Land Court granted Bright Path's motion for summary judgment, finding that Doyle failed to meet his evidentiary burden to establish that he was a "person aggrieved" under Chapter 40A of the Zoning Act, and thus lacked standing to bring his claim.

The property at the center of this dispute is located at 14 Fisher Avenue, Attleboro (the "Subject Property"), in the general residence-B zoning district where single-family and two-family homes are permitted as of right. The Subject Property is currently a preexisting nonconforming lot with single-family structure. Bright Path proposed to raze the existing single-family structure and construct a two-family dwelling and parking lot with four off-street parking spaces. Doyle resides at 29 Fisher Avenue, across the street and at least 100 feet away from the Subject Property, and does not abut any abutter to the Subject Property.

Under Chapter 40A of the Zoning Act, only a "person aggrieved" has standing to challenge a decision of a zoning board of appeals. Certain categories of people, including (1) abutters, (2) owners of land directly across the street, and (3) abutters to the abutters within 300 feet of the property line, enjoy a "rebuttable presumption" that they are persons aggrieved. Otherwise, a plaintiff who does not benefit from this presumption must prove standing by putting forth sufficient evidence demonstrating a reasonable likelihood that the proposed project will harm his individual interests protected by zoning. The plaintiff must establish with evidence, and not by speculative personal opinion or mere conjecture, that his or her injury is special and different from the concerns of the rest of the community. The plaintiff must show more than minimal or slightly appreciable harm.

In *Doyle*, the court concluded that Doyle was not entitled to a rebuttable presumption of aggrievement because his property (1) does not abut the Subject Property, (2) is not located directly across the street from the Subject Property, and (3) does not abut an abutter within 300

feet of the Subject Property. The court further concluded that Doyle failed to meet his burden of demonstrating a reasonable likelihood that the proposed project would harm an interest of his that is among those the Zoning Act intends to protect. Although Doyle raised concerns about traffic and parking, diminution in the value of his own property, and increased density and congestion on Fisher Avenue, the court found these arguments unpersuasive.

As to Doyle's traffic and parking concerns, the court found his allegations to be too speculative and lacking evidentiary support. While traffic concerns and parking are generally considered protected interests under Chapter 40A, Doyle did not provide any evidence of traffic impacts, such as a traffic study or expert opinion in support of his theory, instead offering only theoretical musings and unsupported anecdotal evidence of a single incident of commercial vehicles using his driveway. The court further found that Doyle failed to show how theoretical traffic and parking harms to his property were distinct from harms to the community as a whole.

As to Doyle's diminution of property value claim, the court found that this interest is not protected by the Zoning Act, unless it is derivative of or related to a cognizable interest protected by the Act. Further, Doyle provided no evidence to support his non-expert personal opinion that there would be a decrease in his property value.

Finally, in response to Doyle's congestion and density claims, the court concluded that while density and overcrowding are protected interests under the Zoning Act, Doyle did not show why the slight deviations from as-of-right zoning would impact the overall density, how he would be directly and uniquely harmed, or why any such harm would be more than *de minimis*.

APPEALS COURT AFFIRMS DISMISSAL OF TENANT ESTOPPEL CLAIM

Yaro Enterprises, Inc. v. First Fin. Res., Inc., No. 20-P-1381, 2021 WL 5113802 (Mass. App. Ct. Nov. 1, 2021)

In *Yaro Enterprises, Inc. v. First Financial Resources, Inc*, the Appeals Court of Massachusetts reviewed a Superior Court judgment dismissing Plaintiff Yaro Enterprises' ("Landlord's") first amended complaint against Defendant First Financial Resources, Inc. ("Tenant") for breach of lease and tenancy by estoppel. The Appeals Court reversed the dismissal of the breach of lease claim and affirmed the dismissal of the tenancy by estoppel claim.

Tenant executed a five-year lease with Direct Invest, the former owner of a commercial property at the center of the dispute. Direct Invest lost the property through foreclosure of a mortgage that predated Tenant's lease. Tenant continued to pay rent for some period after the foreclosure, and eventually vacated the premises and stopped paying rent, arguing that the foreclosure terminated the leasehold tenancy and established a tenancy-at-will under which Tenant was free to vacate the premises and stop paying rent. Landlord, who is the current owner of the property, brought this action in Superior Court to recover damages resulting from Tenant's vacation of the premises.

The Superior Court dismissed Landlord's breach of lease claim, reasoning that because there was no recorded subordination of the mortgage to the lease (*i.e.,* an agreement granting the lease priority over the mortgage in the event of a foreclosure), the foreclosure of the mortgage extinguished the lease and Tenant was free to vacate the premises. The Appeals Court reversed the

lower court's dismissal, reasoning that no case law or statutory law provides that the recording of an instrument of subordination is essential to the validity of a subordination. The court noted that parties to a lease can, as between themselves, contract out of any recording requirement that might otherwise apply. Here, the lease in question allowed for subordination by either (1) notice to the tenant or (2) by recording an instrument of subordination. Accordingly, the lower court erred in dismissing the breach of lease claim based on the failure to record a subordination instrument.

The Appeals Court also affirmed the Super Court's dismissal of the tenancy by estoppel claim, holding that Landlord failed to allege adequate facts to survive dismissal. To state a claim of estoppel, a party must show that (1) defendant made a representation intended to induce reliance, (2) plaintiff acted in reasonable reliance on the representation, and (3) plaintiff suffered a detriment as a consequence of their actions. The Appeals Court found that Landlord's theory that Tenant's continued payment of rent after the foreclosure established a tenancy by estoppel was inherently flawed. The court reasoned that the payment of rent was consistent with Tenant's claim of a tenancy-at-will, as opposed to a leasehold tenancy, such that Landlord could not reasonably rely on this payment as a representation by Tenant that a leasehold tenancy continued to exist.

CITY OF BOSTON RESIDENTIAL EVICTION MORATORIUM STRUCK DOWN BY HOUSING COURT

Janet Avila and David Boudreau, Sr. v. Dr. Ojikutu, et al., No. 21-CV-0528 (Nov. 29, 2021)

On November 29, 2021, Massachusetts Housing Court Justice Irene Bagdoin issued a ruling that paragraph 1 of the "Temporary Order Establishing an Eviction Moratorium in the City of Boston" preventing enforcement of residential evictions is "invalid and unenforceable" constituting an "overreach of power" by the Boston Public Health Commission ("BPHC").

The BPHC issued the eviction moratorium on August 31, 2021, five days after the U.S. Supreme Court struck down the nationwide eviction moratorium issued by the CDC. The moratorium took the form of a Public Health Order applicable to the City of Boston and provided (in relevant part) as follows:

Notwithstanding G. L. c. 186, G. L. c. 239 or any general or special law to the contrary, no landlord and/or owner shall serve or cause the service of notice of levy upon an eviction, or otherwise enforce a residential eviction upon a resident of Boston while this order is in effect. This Order shall not apply to cases where a Court of competent jurisdiction has entered a judgment against a tenant which relates to serious violations of the terms of the tenancy that impair the health and safety of other building residents or immediately adjacent neighbors.

On October 29, 2021, two plaintiffs filed a lawsuit challenging Boston's eviction moratorium: a Mattapan woman who was owed $29,000 in back rent, but was unable to levy on an execution; and a Boston-based constable who had been blocked from conducting levies in the city. The plaintiffs asserted that the eviction moratorium directly conflicted with state law in violation of the Home Rule Act and that the BPHC lacked the statutory authority to promulgate and enforce the eviction moratorium.

Following briefing and oral argument from the parties on the question as to "whether the BPHC, citing to its interest in public health, possesses the power to act and enforce and Order which overrides the Massachusetts General Laws relative to evictions in the Commonwealth of Massachusetts," Justice Bagdoin ruled that there is "nothing in the BPHC's enabling statute. . . grant[ing] BPHC the unilateral power to opt out of any Massachusetts statute or regulation, much less the statutes which regulate landlord/tenant relations set forth in G.L. c. 239 or G.L. c. 186." Thus, there is no "implicit grant of power to the BPHC to override the Massachusetts General Laws pertaining to evictions." Justice Bagdoin concluded that the "Court perceives great mischief in allowing a municipality or one of its agencies to exceed its power, even for compelling reasons. . . such expansion of power by a governmental agency, even for compelling reasons, should be unthinkable in a democratic system of governance." Thus, although the Housing Court recognized the public policy considerations underlying the eviction moratorium, ultimately "the scope of protections available to Boston tenants is for the Legislature to decide- not the BPHC."

On November 30, 2021, Boston Mayor Michelle Wu stated that the City of Boston's Law department was closely reviewing the Housing Court's decision and will seek a stay of the order to keep the eviction moratorium in place.[1] Additional legal maneuvering on this issue can be expected in the coming months.

PLAYING BY THE RULES IN PHASED CONSTRUCTION PROJECTS

Kettle Brook Lofts LLC v. Specht, Nos. 20-P-738 & 20-P-739 (Mass. App. Ct. Oct. 12, 2021)

On October 12, 2021, the Massachusetts Appeals Court upheld a decision of the Land Court concerning the scope of a developer's reserved right to construct a condominium in phases over a period of time. More specifically, the issue before the Appeals Court in Kettle Brook Lofts LLC v. Specht, Appeals Court Docket No's. 20-P-738 & 20-P-739, was whether, consistent with the terms of the Massachusetts condominium statute, G.L. c. 183A (statute), and a master deed, the developer could unilaterally extend its time to complete the phased development of a condominium project. The developer could not, according to the Appeals Court, and its attempt to do so was invalid under both the statute and the master deed.

The Massachusetts condominium statute, General Laws c. 183A, provides the framework for the development of condominiums in the Commonwealth. While the statute requires certain baseline requirements, developers and unit owners have flexibility with respect to the master deed so long as they meet the minimum requirements of the statute. In other words, the master deed provides the "rules of the game" in terms of the nature of the property, the description of the land, and the purposes for and use of the appurtenant structures. The master deed also can provide the method by which it may be amended.

In this case, the master deed allowed the developer to construct up to 109 units in phases over a period of seven years. In a phased construction project such as this, each unit's undivided interest in the common areas is reduced as phases of units are added. Under the statute, unit owners must agree to such reduction by either express or constructive consent. Where, as here, consent is obtained constructively, the statute requires that the master deed fix the parties' expectations not

only as to the number of units that the developer can add, but also as to the duration of the phasing period.

During the first two months of this project, the developer completed construction of fifty-three units and sold forty-eight of them. Then, just one day before the developer's phasing rights were set to expire, the developer unilaterally recorded a series of instruments purporting to expand the number of units the developer could add and extend the duration of the phasing period. Litigation ensued and, following a hearing on cross-motions for summary judgment, the Land Court found that the developer's actions violated both the terms of the master deed and the statute. The Appeals court affirmed.

This case serves as an important reminder that while the rules of the game are up to a condominium developer to determine at the outset, a developer cannot unilaterally change those rules after units are sold to third parties.

[1] https://www.wbur.org/news/2021/11/30/judge-strikes-down-boston-eviction-moratorium