

Law of the Land - Real Estate Litigation Newsletter

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CASES OF NOTE

SIMILAR PROJECTS, DIFFERENT DECISIONS

Brossi, et al. v. Town of Grafton Planning Board, et al., No. 19 MISC 000551 (MDV), 2021 WL 5833935 (Mass. Land Ct. Dec. 9, 2021)

The Massachusetts Land Court recently held that a planning board improperly failed to explain the basis underlying a denial of a special permit and site plan approval when it was inconsistent with the board's own prior decisions.

In *Brossi*, developers sought a special permit and site-plan approval for a multi-family residential condominium consisting of eleven buildings on a 9.1-acre site at 41 Church Street and 14 West Street in Grafton, MA (the "Project"). The Grafton Planning Board (the "Planning Board") issued a decision denying the requested approval (the "Denial Decision").

The Planning Board, a municipal board authorized to issue special permits pursuant to the Town of Grafton's Zoning Bylaw (the "Bylaw"), determined that the Project did not comply with five subdivision regulations. The Planning Board voted to waive four of the five regulations, but decided without an explanation not to waive compliance with a regulation outlined in 4.1.6.3 regarding length of dead-end streets (the "Dead-End Street Regulation"). It then denied the Project for failure to comply with the Dead-End Street Regulation.

The developers challenged the Denial Decision on two grounds. First, the developers argued that the drives found by the Board to violate the Dead-End Street Regulation were not subject to that regulation. Second, the developers contended that the Planning Board's refusal to grant a waiver from the Dead-End Street Regulation was arbitrary and capricious in that it marked an unreasonable departure from the Board's prior practices in similar cases. Although unconvinced by the developers' first argument, the Court based its decision, vacating the Denial Decision and remanding the case back to the Planning Board for further proceedings, on the second argument.

The Land Court found that in 2003, the Planning Board waived the Dead-End Street Regulation for a very similar project, a multi-family development known as Hill View Estates I ("Hill View"). In reviewing the developers' application, the Planning Board was aware of its waiver for Hill View, but did not explain why it chose to treat the Project differently than Hill View. Although a local board generally does not need to provide detailed findings when it denies a special permit, the Land Court held that the board must do so in circumstances where the board "has taken one action with

respect to one application, but is thinking of doing something substantially different with respect to a later application.” The Land Court held that the board must explain why it is issuing a different decision with respect to a project “or risk that a reviewing court will remand the case to the board for an explanation.”

CONDITIONS IMPOSED BY A PLANNING BOARD DEEMED UNCONSTITUTIONAL

Symes Dev. & Permitting LLC v. Town of Concord, No. CV 21-10556-NMG, 2022 WL 95945 (D. Mass. Jan. 10, 2022)

The U.S. District Court for the District of Massachusetts recently held that a temporary condition imposed by the Town of Concord Planning Board (the “Planning Board”) on the approval of the subdivision plan for Symes Development & Permitting LLC (“Symes”) may constitute an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

In June 2020, Symes applied to the Planning Board for final approval of an 18-lot subdivision plan. The Planning Board conditioned approval of the plan on Symes’ reservation of the building lots for three years for possible future uses by the Town as a public park and sites for affordable housing. The Planning Board’s decision meant that Symes could not use, disturb, or improve these lots in any manner for three years without further Planning Board approval. Symes sued, claiming that the Planning Board’s decision imposed an unconstitutional condition for which the Town failed to provide adequate compensation, seeking compensation for the taking. The Planning Board filed a motion to dismiss, arguing that the reservation condition imposed on Symes did not constitute a taking because it was temporary. The Court disagreed and denied dismissal of the suit.

The unconstitutional conditions doctrine prohibits the government from requiring a person to give up a constitutional right, including the right to receive just compensation when property is taken for a public use, in exchange for a discretionary benefit from the government, such as zoning relief, where the condition has little or no relationship to the benefit. While the government may condition land-use permit approvals on mitigation of the impacts of proposed developments, “it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” Municipalities, are therefore, required to conduct an individualized assessment of the relationship between the proposed project and the conditions imposed. The Court found that by alleging that the Planning Board regulations do not require, nor did the Board make, findings of any nexus between the condition and impacts of the project, Symes adequately stated an unconstitutional taking. Furthermore, the Court held that the temporary nature of the reservation period did not negate the takings claim asserted by Symes, given that temporary takings are no different in kind from permanent ones.

LIMITATIONS OF THE MASSACHUSETTS SECURITY DEPOSIT STATUTE

Flemming v. Greystar Mgmt. Servs., L.P., No. 20-P-1274, 2021 WL 4998680 (Mass. App. Ct. Oct. 28, 2021)

The Massachusetts Appeals Court recently sided with a landlord and vacated a decision of the Massachusetts Housing Court, which found that animal rent charged by the landlord violated M.G.L. c. 186, § 15B, the “Massachusetts Security Deposit Statute.”

Plaintiff Phoebe Fleming (“Fleming”) sued her former landlord, Greystar Management Services, L.P. (“Greystar”) claiming that Greystar violated the Massachusetts Security Deposit Statute and M.G.L. c. 93A by requiring her to pay an additional monthly “animal rent” for the right to keep dogs in her apartment. She also claimed that other provisions of her lease with Greystar, *i.e.* the authority for Greystar to charge late fees, reletting and buyout fees, and attorneys’ fees, also violated these statutes.

The Appeals Court held that the Massachusetts Security Deposit Statute does not prohibit landlords from charging animal rent because it was neither charged in advance of the current month’s rent nor constituted an additional security deposit intending to keep the apartment free from damage. Rather, it was additional rent, which the tenant agreed to pay, in exchange for the right to keep a dog in the apartment. Although Fleming provided a litany of reasons as to why it should be illegal for landlords to charge extra rent for pets, the Court stated that such arguments are best directed to the Massachusetts Legislature.

The Court also agreed with Greystar that Fleming lacked standing to challenge the lease provisions allowing the landlord to charge reletting and buyout fees because it was undisputed that Greystar did not charge Fleming these fees, and as such, Fleming sustained no injury. The Court noted that M.G.L. c. 186, 15B(1)(d) does not prohibit landlords from charging reletting or buyout fees as such fees do not constitute rent demanded in advance or an additional security deposit. The Court also noted, that the attorneys’ fee provision did not violate M.G.L. c. 186, 15B(1)(d) and was not otherwise unlawful.

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