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CASES OF NOTE

FINALIZE BUILDING PLANS EARLY ON TO AVOID DELAYS

St. Paul's Foundation v. Ives, 29F.4th 32, 33 (1st Cir. 2022)

A recent decision out of the First Circuit Court of Appeals emphasizes the importance of a clear and consistent building plan early on in the permitting process. The Court's decision leaves little doubt that if a project changes course after its original building permit is issued, there is minimal legal recourse to prevent a building commissioner from requiring the applicant to start the permit application process all over again – in this case, not even a crafty argument invoking religious liberty and the right to brew beer could save an applicant the trouble.

In *St. Paul's Foundation v. Ives*, Plaintiff St. Paul's – an Orthodox Christian monastic organization – brought suit against the Town of Marblehead and the Town's building commissioner, claiming that the Town had violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by declining to reissue a suspended building permit for the development of a monastic complex. According to St. Paul's, the refusal to reissue the permit constituted a "substantial burden" on religious exercise. The Court disagreed.

St. Paul's originally planned to convert the property into a monastic complex with three different areas, including a brewery and a "fellowship hall" to serve the monks' home-brewed beer to the public. At the time of their original building permit application, St. Paul's requested that the fellowship hall be designated as "A-2 use" under the local code, which would include uses intended for food and drink consumption. The Marblehead building commissioner approved the plans and issued a building permit based on this intended use.

The following year, St. Paul's architects withdrew from the project, and the Marblehead building commissioner suspended the building permit until St. Paul's retained a new architect. After retaining a new architect, St. Paul's changed the description of the project to a monastery rather than a fellowship hall, and requested an "R-2 use" (which implicated different limitations on occupancy and plumbing requirements). The Marblehead building commissioner declined to reinstate the building permit since the scope of work had changed from that upon which the original permit was based. According to the commissioner, St. Paul's had two options: stick to the original scope of work, or submit a new application.

Declining both options, St. Paul's brought an action in federal court alleging that the building commissioner substantially burdened its exercise of religion by refusing to reinstate the building permit (despite the change in the scope of work). The trial court ruled in favor of the Town of Marblehead and the building commissioner.

The First Circuit upheld the lower court's ruling, reasoning the building commissioner's decision not to reinstate the building permit was not "arbitrary and capricious." As the court pointed out, it was St. Paul's who sought to change the actual scope and use designation of the project mid-stream. Because the building commissioner was motivated by his desire to prevent such a "bait-and-switch" rather than to "jerk around" a religious organization, St. Paul's claims were rightfully dismissed.

AS-OF-RIGHT USES NOT SUBJECT TO SPECIAL PERMIT PROCESS

Epstein v. Planning Bd. of Marblehead, 21-P-296, 2022 WL 839054, 100 Mass. App. Ct. 1128 (2022)

The Massachusetts Appeals Court has provided an important clarification as to the nature of so-called site plan special permits for purely as-of-right projects. Under *Epstein v. Planning Board of Marblehead*, a Rule 23 decision, the Appeals Court held that despite the words "special permit," site plan review for as-of-right uses are not subject to special permit process or criteria.

Plaintiff Epstein lived in a property abutting a single-family home owned by Jacobs. Jacobs sought the Planning Board of Marblehead's approval of an application for a "special permit for site plan approval" under the Marblehead zoning bylaw. Jacobs sought this approval to bring his non-conforming house into conformity with zoning requirements for height and setbacks. Epstein believed that the proposed changes would reduce ocean views of the Epstein property. After the Planning Board approved the application, Epstein challenged the Planning Board's decision in the Land Court, arguing that the Planning Board decision was erroneous for failing to apply the special permit process and criteria to Jacobs' application.

The Land Court ruled for the Planning Board, finding that Jacobs' application was for a use allowed "as of right" (*i.e.* to bring the house in conformity with applicable zoning requirements). As a result, the Land Court reasoned that the process of the special permitting statute (§ 9) and the special permit criteria in the Marblehead zoning bylaw were inapplicable. The Planning Board was therefore only required to consider whether the proposed project's design was in harmony with the prevailing character of the neighborhood, and the extent to which the project would have any adverse effects on the abutting lots.

The Appeals Court upheld the Land Court's ruling, finding that the Planning Board applied the proper criteria and adequately considered the evidence presented in approving the site plan under standards applicable to as-of-right uses as opposed to special permit uses.

REGULATORY TAKINGS CLAIMS WITH GOVERNMENTAL ACTIONS

Haney as Tr. of Gooseberry Island Tr. v. Mashpee, No. CV 21-10718-JGD, 2022 WL 847203 (D. Mass. Mar. 22, 2022)

In this case, the United States District Court for the District of Massachusetts dismissed a complaint against the Town of Mashpee that alleged that the Town had made a regulatory taking of the plaintiffs' private property. The court dismissed the case because the Town's actions with respect to the property did not constitute a "final governmental decision" that definitively determined what development might be allowed on the plaintiff's property.

In 2011, Plaintiff Haney acquired Gooseberry Island – a four-acre island in Popponesset Bay in Mashpee. The island is only accessible to those willing to wade across a narrow channel of water, and is home to no structures other than the remnants of an old cottage. Haney has endeavored to construct a home Gooseberry Island since 2013, to no avail.

With limited access to the island, Haney applied for a variance to construct a bridge and driveway in 2013. This request was denied for failure to comply with both the Wetlands Protect Action and local Mashpee equivalent. After an appeal and adjudicatory hearing, the Department of Environmental Protection (DEP) proposed that Haney construct a steel bridge instead of a timber bridge, but, because the steel bridge alternative was substantially different than the proposed timber bridge, Haney was required to submit a new application. He declined to do so, and instead unsuccessfully appealed the DEP's order in court.

In 2018, Haney filed three different applications for variances from the Mashpee zoning bylaws for the construction of a single-family home on the island. The applications were denied because of the absence of a wetlands permit, which Haney would need to construct a bridge that would provide access to the island. Haney appealed the denials and also moved to consolidate the 2018 denials with the 2013 denial of the initial variance requests. Haney argued that the government's denial of the 2013 and 2018 variances constituted a taking in violation of the Fifth Amendment because it deprived him of all economically beneficial use of his property.

The Court dismissed Haney's case reasoning that his claims were "not ripe," or in other words, that Haney had not pursued all potential avenues through the administrative process and therefore had not received a "final" decision on his special variance applications, such that there had been no "taking" of his property. With regard to the 2013 variances, the Court observed that the DEP's offer of a steel bridge was still on the table. It was Haney who had failed to submit a new application for a steel bridge. Similarly, since the 2018 variance directly stemmed from the 2013 variances, it can hardly be said that denial of the 2018 variance would deny Haney the economic benefit of his property. To the contrary, Haney holds the ability to apply for the steel bridge as a predicate to securing variance approval for the house. As such, the government has not taken final action depriving Haney from all possible beneficial economic use of his property.

DOVER AMENDMENT IN FAVOR OF SOLAR FACILITIES

Summit Farm Solar, LLC vs. Planning Bd. for New Braintree, No. 18 MISC 000367 (HPS), 2022 WL 522438 (Mass. Land Ct., Feb. 18, 2022)

In *Summit Farm Solar*, the Massachusetts Land Court sent a friendly message to solar power developers by overturning the New Braintree Planning Board's denial of a special permit to build an

eight-acre solar farm near the center of town. Notably, the Court held that local regulation of solar energy facilities may not extend to prohibition except under the most extraordinary circumstances.

Plaintiff Summit Farm Solar LLC leased eight acres of a forty-three-acre farm near prominent roadways and intersections at the center of the rural, bucolic town of New Braintree. Summit applied for a special permit to construct a solar energy facility pursuant to the New Braintree Zoning Bylaws, which the Planning Board denied because of the visual impact of the proposed facility. Summit Farm appealed the denial to the Land Court.

The New Braintree Zoning Bylaw provides that large, ground-mounted solar energy facilities must obtain a special permit from the Planning Board. A special permit will be granted when one of the following conditions are met: (1) the location of the facility cannot reasonably be seen from a residence or public way during all seasons of the year, or (2) the location of the facility is so distant from a residence or public way, or so obscured by tree lines and/or vegetation that the visual impact of the facility is negligible.

To satisfy these requirements, Summit proposed an extensive plan to add trees and vegetation around the entire facility such that there would be virtually no view of the panels from public ways and/or nearby residences within five years. The Planning Board nevertheless denied Summit's application (twice), reasoning that the proposed screening did not meet the requirements under the Zoning Bylaw.

On appeal, the Land Court held that the Planning Board's denial was untenable for two reasons. First, it did not comply with Chapter 40A, § 3 of the Massachusetts General Laws zoning providing exemptions to solar energy facilities. Under this provision, a zoning ordinance cannot prohibit or unreasonably regulate the installation of a solar energy facility except when necessary to protect the public health or welfare. Because the Planning Board's denial of Summit's special permit application was based solely on aesthetic reasons, the Land Court found the prohibition to be inconsistent with 40A, § 3. Second, even though the board's discretionary power of denial is broad and its decisions are typically entitled to deference, where at trial the court concludes that no rational view of the facts could support the denial, the case presents that seldomly encountered situation where a court will reverse the denial of a special permit.

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.