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CASES OF NOTE

GRAVE MATTERS: THE PROTECTION OF PROPERTIES CONTAINING BURIAL SITES

Church of the Holy Spirit of Wayland v. Heinrich, 2022 WL 1419702, 101 Mass. App. Ct. 32 (2022)

In *Church of the Holy Spirit of Wayland v. Heinrich*, an Episcopalian diocese, Episcopalian parish, and a Coptic church (collectively, the "Churches") sought a court order to allow disinterment of cremated remains against the wishes of the families of the deceased. The Appeals Court held that the cremains could not be disinterred and moved without the families' consent.

The Episcopal parish of the Church of the Holy Spirit of Wayland was formed in 1961. Six years later, it purchased an additional piece of land and designated part of the land to be used as a burial ground for cremated remains. This burial ground contained burial lots that were sold to parishioners. Each sale had a corresponding Certificate of Purchase promising the right to bury two cremains in each purchased lot, subject to certain regulations. These regulations listed rules about internment and visitation, promised "perpetual care" for each lot, and stated a prohibition on disinterment without the consent of the parish's vestry.

In 2015, the parish voted to cease operations and close. The Episcopal Diocese of Massachusetts, which had formed the parish in 1961, consented to the sale of the property on the condition that "all efforts be made to preserve the [burial ground] on the property." A Coptic church agreed to buy the property for more than the asking price. Since cremation is against Coptic religious beliefs and the church wanted to develop the property, the parish agreed to remove the cremains. Of the families of the 51 deceased persons whose cremains were buried on the property, 36 agreed to have the cremains disinterred and moved elsewhere. 15 families declined to have their loved ones' cremains removed, and 2 of those 15 claimed the right to be buried there, as well. The rest of the families could not be found. In 2016, the parish edited the burial ground's regulations to allow for the cremains to be disinterred and moved if the parish ceased operations.

The Churches filed an equity action in the Probate Court to obtain judicial permission to disinter the cremains. After cross motions for summary judgment, the Probate Court allowed the Episcopal diocese and parish to disinter and relocate the remaining cremains. The families appealed.

The Appeals Court found that the family members opposing disinterment have standing based "on a recognition of principles of ethics, propriety, and common decency" and not on any property

interest. It then went on to address how contract law, common law, and free exercise of religion all weighed in favor of not allowing the Churches to disinter the cremains. First, the Court found that the contract between the parties (the Certificate of Purchase) did not allow the parish to unilaterally disinter the cremains. Having promised perpetual care in the Certificate of Purchase, the Court found that the parties intended to have the burial ground be the deceased's final resting place. Second, the Court held that in the absence of a statute, common law trust principles apply to the disinterment of human remains from a dedicated burial ground until the families of the deceased have abandoned the remains or the burial ground is no longer recognizable as such. Third, because the Churches precipitated the sale, the Court was unpersuaded by their argument that the change in circumstance prevented the fulfillment of the trust purposes at issue or rendered it impossible to fulfill the families' interest in having their loved ones' remains stay in the location agreed upon by the parties. Finally, the Court found that disallowing disinterment did not violate the Coptic church's right of the free exercise of religion. Having freely taken title to the property with the cremated remains already in the ground, the Court reasoned the Coptic church would not have to actively do anything in violation of its religious rights.

The Court reversed the judgment and remanded the case, noting that its decision leaves many issues unresolved including the parties' specific rights and obligations with respect to the maintenance of the burial lots and the families' access to them.

REVIEW ZONING BYLAWS BEFORE PLANNING A PROJECT ON A SPLIT LOT

Pinecroft Development, Inc. Zoning Board of Appeals of West Boylston, 2022 WL 1815753, 101 Mass. App. Ct. 122 (2022)

In *Pinecroft Development, Inc. v. Zoning Board of Appeals of West Boylston*, the Zoning Board of Appeals (the "Board") denied Pinecroft Development, Inc.'s (the "Developer") application for a building permit to construct a four-unit dwelling on a lot that was split between two zoning districts (a "split lot") in West Boylston. The Developer's lot was split between a business zoning district, which allowed multi-unit dwellings, and a single residence zoning district, which did not. Although the Developer sought to construct the building on a portion of the lot where it was allowed as a matter of right, that portion of the property alone did not satisfy the minimum "lot area" requirement of 10,000 square feet per unit for multi-unit dwellings under the town's zoning bylaw. In denying the permit, the Board reasoned that Section 2.4 of the town's bylaw prohibited the Developer from using the area of the property located in a single residence zoning district to meet the lot area requirement for multi-unit dwellings in the business zoning district. The Developer appealed the Board's denial to the Land Court, but the Land Court deferred to the Board's application of the bylaw and affirmed the denial of the permit. The Appeals Court reversed concluding that the Board unreasonably interpreted the bylaw to displace the well-established rules governing split lots.

The Appeals Court reiterated two general rules that apply to split lots. First, municipalities may strictly enforce zoning laws governing "active" uses that are allowed within each district, thereby prohibiting entirely the portion of a lot in one district from being used even for an accessory use to

serve a principal use not allowed in that district. Second, where a proposed active use is permitted on the portion of a split lot located in a less restrictive district, the owner may count the area and boundaries of the part of the split lot located in a more restrictive zone to fulfill dimensional requirements, such as lot size, frontage, setback, and density. The use of land in the more restrictive district solely to satisfy the dimensional requirements for an active use in the less restrictive district constitutes a permissible "passive" use even if the active use is prohibited in the more restrictive district. The Appeals Court held that municipalities may displace these general rules with specific provisions for split lots in their zoning districts, but their interpretation of such provisions must be consistent with the purpose of the provisions and the bylaw as a whole.

The Appeals Court held that the Board's reliance on Section 2.4 of the bylaw to displace the general rules governing split lots rests "on a shaky foundation," being inconsistent with the purpose of Section 2.4 and the bylaw as a whole. Section 2.4 provides that where a zoning district boundary line was superimposed over a preexisting lot, the bylaw regulations governing the less restrictive district extend thirty feet into the more restrictive district. The Board construed Section 2.4 to prohibit owners of preexisting split lots from making any use of land more than thirty feet into the more restrictive portions of their lots to support a use permitted in the less restrictive portion. The Appeals Court found that Section 2.4 intended to allow owners of preexisting lots to receive special treatment whereas, contrary to that purpose, the Board's interpretation actually subjected owners of preexisting split lots to more stringent standards than those of newly created split lots. Furthermore, the Appeals Court found that the Board's interpretation of Section 2.4 was inconsistent with another section of the bylaw. As a consequence, the Appeals Court determined that the Developer may rely on the area of its entire lot to satisfy the dimensional requirements for the building located in the business district portion of its property and directed the Board to grant the Developer's building permit application.

LESS RED TAPE FOR SOLAR ENERGY PROJECTS

Tracer Lane II Realty LLC v. City of Waltham, 489 Mass. 775 (2022)

Recently, the Massachusetts Supreme Judicial Court had occasion to interpret a relatively new addition to M.G.L. c. 40A, § 3 (the "Dover Amendment") that protects solar energy projects from local zoning regulation.

In *Tracer Lane II Realty, LLC v. City of Waltham*, a developer (Tracer Lane) planned to construct a solar energy system in Lexington, but needed to build an access road to the facility through Waltham. 489 Mass. 775 (2022). Although the Lexington site would be situated on property zoned for commercial use, the access road would be on property zoned for residential use. The City of Waltham took the position that the access road was prohibited under Waltham's zoning regulations. The Land Court disagreed, finding that Waltham's position violated the Dover Amendment's Renewable Energy Protection provision, which provides that "[n]o zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare."

Waltham appealed to the SJC arguing that the Waltham zoning code permits solar projects on 2% of its land, and as such, it cannot offend the Dover Amendment. Tracer Lane argued that under Waltham's code, solar projects are *de facto* banned, thus violating the Dover Amendment. The Court ultimately found that Waltham was indeed placing an unreasonable restriction on the installation of solar energy systems.

First, the SJC determined that 40A, § 3 applied not just to the Lexington facility, but to the access road as well. This is because Massachusetts law has long observed that for the purposes of 40A, § 3, "ancillary structures [are] part of the protected use at issue." Next, the Court analyzed whether 40A, § 3 prohibits Waltham's decision. The Court suggested that large-scale solar generation systems clearly fall under the protection of the Dover Amendment, as they are "crucial to promoting solar energy in the Commonwealth." Further, the holding observes that in the absence of a basis clearly grounded in either public health, safety, or general community welfare, the prohibition of these solar systems is impermissible under the provision. In this case, that standard was not met where Waltham failed to demonstrate any health or safety basis to prohibit solar developments from 98% of its land.

Tracer Lane II Realty is the first case to interpret the Dover Amendment's Renewable Energy Protection provision. It takes a broad view of the protections that the Dover Amendment confers on not only solar facilities, but also support structures. It may have an impact on how cities and towns regulate solar energy systems in the future. This case is clearly a win for the solar industry in Massachusetts and may encourage the development of solar energy projects in the state.

RELIGIOUS ACTIVITY UNDER DOVER AMENDMENT

Hume Lake Christian Camps, Inc. v. Planning Board of Monterey, No. 19 MISC 000386 (DRR), 2022 WL 1256666 (Mass. Land Ct. Apr. 27, 2022)

In *Hume Lake Christian Camps, Inc. v. Sawyer*, the Land Court analyzed the religious use protections of M.G.L. 40A, § 3 (the "Dover Amendment"). No. 19 MISC 000386 (DRR), 2022 WL 1256666 (Mass. Land Ct. Apr. 27, 2022). The Plaintiff, Hume Lake Christian Camps, Inc. ("Hume"), challenged a decision by the Planning Board of Monterey, denying Hume's application for site plan approval to construct a recreational vehicle ("RV") area on Hume's campground. According to Hume, the RV area was intended to serve three purposes: an "RV Family Camp" for families to park their RVs and participate in Hume's religious ministry; temporary housing for Hume's paid staff; and temporary housing for Hume's volunteers.

The Board found that Hume's proposed use of the RV area failed to qualify for Dover Amendment protection because it was not a "customary religious use" of the property. Specifically, the Board found that the RV Family Camp was more "recreational than religious" since it offered non-religious activities. Further the Board concluded that the use of the RV area for volunteer and staff housing were uses *ancillary* to any religious use of the property, and therefore were not themselves religious in nature.

On appeal, the Land Court first determined that Hume was a religious organization with sincerely held religious beliefs and active programming. Next, the Court examined each of the three uses of

the proposed RV area. First, the Court concluded that the "RV Family Camp" was intended for use by families participating in Hume's religious programming. This, the Court determined, was a bona fide religious use, even if some activities were not per se religious. However, the Court went on to conclude that "the use of the RV Camp to house volunteers is not a religious use." This is because "[v]olunteers who hold no religious beliefs would be welcome to park their RV's at the RV Camp." Similarly, housing for temporary staff was not a religious use because Hume's primary motivation was "financial rather than religious."

The Court remanded the case back down to the Zoning commission to permit Hume to re-submit an application for site plan approval consistent with the Court's decision and for the Board to review that application. *Hume* should serve as a reminder that Courts may interpret the religious use prong of the Dover Amendment narrowly, such that uses that *merely support* a religious use, or are mixed with a non-religious use, are not protected (such as staff housing). However, when evaluating a religious use itself, courts are willing to take a broader approach and consider non-traditional settings (such as an RV park) as protected where there is a clear religious purpose.

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.