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Law of the Land - Real Estate Litigation Newsletter

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FEATURED ARTICLE

Efforts clauses are common in commercial agreements, including those involving real estate. Where one or both parties cannot guarantee a particular outcome, efforts clauses attempt to qualify obligations. Typically, efforts clauses require a party to expend some level of effort to achieve a desired result. But how much effort is a party required to expend in achieving a result, how do the common efforts clause standards differ, and what can drafters do to avoid uncertainty? **Read more here.**

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CASES OF NOTE

CONSTITUTIONAL CHALLENGE OF ORDINANCE TRUMPED BY COURT OF APPEALS

McCoy v. Town of Pittsfield, NH, 59 F.4th 497 (1st Cir. 2023)

In *McCoy v. Town of Pittsfield*, plaintiff Joseph McCoy ("McCoy"), a resident of the Town of Pittsfield, NH ("Town"), sued the Town after it declined to extend a previously-granted permit to keep a trailer on his property, lodging a constitutionality challenge to a zoning ordinance ("Ordinance") and the Town's application thereof.

The Ordinance, adopted by the Town in 1988, regulates the use of "storage containers" (*i.e.*, truck trailers, box trailers, school buses, manufactured housing units, or similar mobile containers parked continuously for 31 days or more and used principally for storage and not for any person's residential occupancy or transient lodging) to protect the aesthetics of the Town. The Ordinance restricts the number and placement of storage containers in various zoning districts, requires permits for storage containers, and provides that storage containers cannot remain on any one lot for more than 12 months in any 15-month period.

In 2014, McCoy purchased a 52-foot trailer to store his belongings and tools as he completed home repairs. In 2015, the Town's building inspector informed McCoy that he needed a storage container permit to keep the trailer on his property. McCoy applied for and received a one-year permit in September 2015. In January 2016, McCoy allowed his son to paint the words "TRUMP! USA" and "2016" on the trailer, which faced New Hampshire Route 107. Following the expiration of the permit in September 2016, McCoy requested two extensions from the Town's Board of Selectmen ("Board") to complete emergency repairs, promising to remove the trailer after the repairs were

completed. Although at least one of the Board members was aware of the painted words on McCoy's trailer, the Board unanimously granted McCoy's requested extensions.

In July 2017, McCoy allowed his son to repaint the trailer with an image of the Pittsfield hot air balloons rally where the previously painted pro-Trump language had been. In May 2018, the Board reminded McCoy that his permit was set to expire in June and that he would need to remove the trailer from his property by that time. McCoy then requested a third extension, which the Board unanimously denied stating that it needed to balance the terms of the Ordinance with McCoy's requests. During the same meeting, the Board considered complaints regarding three other unpermitted storage containers and agreed to send a notice of violation to their owners. At no point during the Board's meetings about McCoy's requests did the Board discuss or mention the words or images painted on McCoy's trailer.

On March 20, 2020, McCoy sued the Town in the U.S. District Court for the District of New Hampshire. Invoking 42 U.S.C. § 1983, McCoy claimed that the Ordinance as applied by the Town violated the First Amendment because it imposed a restriction on expressive activity that was unconstitutionally overbroad or vague, and content/viewpoint-based. Additionally, McCoy claimed that the Ordinance as applied by the Town violated the Equal Protection Clause of the Fourteenth Amendment because the Town selectively enforced the Ordinance against owners of storage containers that displayed political speech. Following a motion by the Town for judgment on the pleadings, the District Court dismissed McCoy's First Amendment overbreadth claim, but allowed his other claims to proceed. Following discovery, the Town moved for summary judgment on McCoy's remaining claims, which the District Court allowed, dismissing McCoy's First Amendment and Equal Protection claims.

The First Circuit Court of Appeals affirmed the District Court's decision. The Court of Appeals held that the Ordinance was not a content-based restriction as applied to McCoy's trailer because there was no evidence that the application of the Ordinance to his trailer could not be justified without reference to the pro-Trump words painted by his son or that the Ordinance was adopted as a pretext to regulate political or Republican views. The Court noted that the Board granted him two extensions while the political message remained and denied a third extension after the message had been painted over with a nonpolitical depiction of a balloon rally. The Court of Appeals also affirmed the dismissal of the Equal Protection claims because McCoy failed to identify any similarly situated trailer owners that were treated differently from him by the Town or any intent by the Town to discriminate against him based on his speech. Similarly, the Court of Appeals held that the Ordinance was not impermissibly vague, finding that McCoy had ample notice that the Ordinance would apply to him and that the Ordinance set forth standards that were enforced by the Board with respect to McCoy as well as various other storage trailer owners.

BOARD'S FAILURE TO MAKE FINDINGS IN BYLAW SUBJECTS DECISION TO ANNULMENT

Andrew, Tr. of Ross Andrew Jr. Fam. Tr. v. Furbush, et al., 2023 WL 107418 (January 5, 2023)

In *Andrew v. Furbush*, plaintiff-abutter Dana J. Andrew as Trustee of the Ross Andrew Jr. Family Trust ("Plaintiff") appealed a decision of the Town of Mashpee Zoning Board of Appeals ("Board) to

approve a demolition of a dimensionally nonconforming house and construction of a new house in its place that was proposed by defendant Eprem Epremian ("Epremian"). The Trust claimed that the Board's decision was based on legally untenable grounds and should be annulled. The Massachusetts Land Court agreed with Plaintiff and remanded the matter back to the Board for further proceedings.

On January 13, 2021, Epremian filed an application with the Board to raze and replace the house on his property in Mashpee ("Project"). The structure set to be razed was pre-existing and non-conforming with respect to the required side and front yard setbacks under the zoning bylaw (the "Bylaw"), then 15 feet and 25 feet respectively. The new structure proposed by Epremian would be larger than the existing structure, have a side yard setback of 15.5 feet and a front yard setback of 24.4 feet. According to the plans submitted by Epremian, the lot coverage of the new house would be larger than that of the existing house. The plans also showed the presence of wetland resource areas on the property, including coastal beach, coastal bank, coastal dune, and land subject to coastal storm flowage ("LSCSF").

The Bylaw addresses "Nonconforming Buildings and Uses" and generally allows lawfully created structures to be continued, changed, extended, or altered upon approval by the Board. Section 174-17.1 of the Bylaw addresses the replacement of pre-existing, non-conforming dwellings and provides that a special permit for such replacement may only be issued if the Board finds that "any changes, extensions, alterations or reconstruction of the pre-existing non-conformities are not substantially more detrimental than exists prior to removal of the existing structure and that there is adequate land area to provide sufficient parking." Additionally, Bylaw Section 174-31 provides that "[a]ny water or wetland, as defined under M.G.L. c. 131, § 40… may not be counted toward lot size for the purpose of calculating maximum lot coverage," and Section 174-33 provides that "[a]ny building or structure, exclusive of fixed or floating piers, wharves, docks, bridges or boardwalks, shall be set back at least fifty (50) feet from any water or wetland as defined in under M.G.L. c. 131, § 40."

The Court held that the Board failed to properly apply Section 174-17.1 of the Bylaw because it did not find that Epremian's new structure was "not substantially more detrimental than exists" or point to any facts to support such a finding. The Court held that the Board merely issued a decision with conclusory findings consistent with the statements made by Epremian's counsel and others in support of the Project. The Court noted that the Board failed to properly determine if the size of Epremian's oceanfront lot and his lot average calculation accounted for the presence of wetlands, which Section 174-31 requires. The Court was unpersuaded by the Board's argument that it historically did not deduct wetland areas, in particular LSCSF, in determining lot coverage calculations. Instead, the Court held that the Board applied a legally untenable standard to the Project in disregarding the definition in the Ordinance and accepting Epremian's representations about the property's lot size and expected lot coverage. The Court also held that the Board further failed to address whether the Project met the proposed setback from wetlands prescribed in Section 174-33 in its Decision. Finally, the Court disagreed with the Board's argument that its interpretation of the language of Section 174-17.1—"not substantially more detrimental than exists prior to removal of the existing structure"—was not designed to include the phrase "to the

neighborhood." The Court held that the Board's interpretation of Section 174-17.1 was inconsistent with other sections of the Bylaw and G.L. c. 40A, § 6.

BE COGNIZANT OF SECTION 17 REQUIREMENTS WHEN FILING NOTICE OF APPEAL

Moraski v. Whatbarn, LLC, 2023 WL 166318 (January 12, 2023)

Plaintiff Denise Moraski ("Plaintiff") appealed a decision issued by the Town of Pembroke Zoning Board of Appeals ("ZBA") granting variances and approvals to defendant Whatbarn, LLC. Although Plaintiff, representing herself *pro se*, timely filed the appeal of decision with the Massachusetts Land Court, she failed to provide notice of her appeal to the Town Clerk within twenty days of the filing of the ZBA's decision as required by G.L. c. 40A, § 17.

The Massachusetts Land Court dismissed the case, reiterating that the notice requirement of Section 17 is a jurisdictional prerequisite to the Court's ability to hear an appeal of a decision by a local zoning board of appeals and cannot be waived. The principal purpose of the statutory requirement of notice to the clerk is to ensure that municipal clerks accurately certify the absence of an appeal and allow the permit recipient, lenders, and others interested to rely on the permit when it is recorded and exercised. Although the Court acknowledged that the notice requirement may be satisfied in certain cases through means other than by filing a written notice and copy of the complaint in the office of the clerk, no other form of notice was provided by Plaintiff. In fact, the Pembroke Town Clerk did not know about the appeal and had already, upon request of the defendant, issued a certificate pursuant to G.L. c. 40A, § 17 that no appeal had been lodged. The issuance of this certificate permitted the recording of the ZBA decision and the certificate with the Plymouth County Registry of Deeds.

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.