

Law of the Land - Real Estate Litigation Newsletter

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CASES OF NOTE

NONCONFORMING USE CLAIMS "ROCKED OUT" BY APPEALS COURT

Butler v. Zoning Bd. of Appeals of Mattapoisett, 22-P-463 (Mass. App. Ct. Apr. 19, 2023)

In *Butler*, Maureen and George Butler (the "Butlers") asked the Mattapoisett Board of Zoning Appeals (the "Board") to enforce the town's zoning bylaws against the Inn on the Shipyard. According to the Butlers, the Inn's original use (public lodging, food, drink, and musical entertainment with instruments that were not electronically amplified), which pre-dated the 1967 enactment of Mattapoisett's zoning bylaw, had since changed to a nightclub use. When the town's bylaws were enacted, they designated the Inn's district as residential but provided that preexisting nonconforming uses (such as the Inn's uses) may continue, except that a special permit would be required for "any *change* of a nonconforming use or *substantial extension* of a nonconforming use" (emphasis added). According to the Butlers, the alleged nightclub use was either a change or substantial extension of the Inn's nonconforming use, thereby requiring a special permit.

The Butlers had patronized the Inn since the 1960s. They also purchased properties next to the Inn in 1995 and 2000. They ultimately moved in next door in 2005. Over the decades, the Inn's ownership changed several times and with it changed the featured musical genres and performances, eventually graduating from piano and vocals to electronically amplified rock and roll.

In 2016, the Butlers unsuccessfully requested the town's zoning enforcement officer to enforce the zoning bylaws against the Inn, and when their enforcement request was denied, petitioned the Board. The Board found that the use of the Inn has not changed and was not extended as compared to its use in 1967. The Butlers then appealed from the Board's decision to the Superior Court and also asserted a nuisance claim. After the Superior Court found for the Inn in 2021, the Butlers appealed the Superior Court's decision, arguing that the trial judge's conclusion was "clearly erroneous." They also argued that the trial judge made factual errors regarding the noise levels emitted from the Inn and legal errors in declining to apply the DEP noise pollution regulation.

On appeal, the Court considered (1) whether the Inn's current use reflects the nature and purpose of the use prevailing when the zoning bylaw took effect; (2) whether there is a difference in the quality, character, and degree of use; and (3) whether the current use is different in kind in its effect on the neighborhood. The Appeals Court upheld the trial judge's determinations as to all three factors.

First, the Court credited the trial judge's conclusion that the current use of the Inn reflected the same nature and purpose as the use in 1967 — namely, offering lodging, food, drink, and musical entertainment — and that the character and degree of its use had not meaningfully changed.

Second, the Court agreed with the trial judge's assessment that the "quality or character" of the use had not changed. Rather, "the Inn was still primarily a restaurant and bar with musical entertainment."

Finally, the Court upheld the trial judge's finding that the Inn's use was not different in kind in its effect on the neighborhood than it was in 1967 because "the music was not significantly louder or more of a disturbance to the neighborhood than in 1967." Even though the music was now electronically amplified and had higher decibels on occasion, those effects were mitigated by the soundproofing measures undertaken by the Inn's owners including installing a soundproof vestibule at the Inn's rear door, installing sound insulation in the wall closest to the Butlers, and replacing windows on that wall with porthole-style windows to minimize noise leakage.

The Court further upheld the trial judge's conclusion that the noise did not constitute a nuisance. The Butlers argued that the sound coming from the Inn was a nuisance because it met the definition of noise pollution in the Department of Environmental Protection's ("DEP") noise regulation. The Court cautioned that plaintiffs bore a "heavy burden" to prove their nuisance claim, which requires evidence of "a substantial and unreasonable interference with the use and enjoyment" of their property. Explaining that a fact finder has considerable discretion in determining whether an annoyance constitutes a nuisance, the Court concluded that the judge below was not required to find that brief and intermittent increases in noise above the decibel levels articulated in the noise regulation constituted a nuisance.

Finally, the Court found that the trial judge had correctly applied the doctrine of "coming to the nuisance," whereby the Butlers' nuisance claim was undermined by the fact that as patrons of the Inn since the 1960s, they were aware of the effect of living near the Inn when they bought their properties and later moved in. The Court aptly reminded the Butlers that "[n]o one can move into a quarter given over to foundries and boiler shops and demand the quiet of a farm."

Butler offers something of a reassuring reminder that courts will employ skepticism against claims that contemporary uses have exceeded original nonconforming uses absent clear evidence that the overall character or extent of the use has changed.

"SHAM" LITIGATION NOT ENTITLED TO ANTI-SLAPP PROTECTIONS

Bristol Asphalt Co. v. Rochester Bituminous Products, Inc., No. 21-P-1135, 2023 WL 3134396 (Mass. App. Ct. Apr. 28, 2023)

In *Bristol*, the Appeals Court considered whether a group of defendants (a concrete company and trust) improperly participated in a "sham" opposition to a competitor's effort to build a competing concrete plant.

Bristol Asphalt Co., Inc. and Edgewood Development Company, LLC's (collectively, "Bristol") began their efforts to build a concrete plant in an industrial zoning district in Rochester in 2010. The plant

was to be located adjacent to a competing plant belonging to Rochester Bituminous Products, Inc. and Todesca Realty Trust (collectively, "Rochester").

Bristol contended that between 2010 and 2020, Rochester frivolously opposed its development before local and state boards, administrative agencies, and courts in an improper attempt to foreclose competition. This included opposing site plan approval before the town zoning board, appealing to the town's Board of Zoning Appeal, filing suit in the Land Court (resulting in a trial), and appealing to the Appeals Court. Rochester also opposed Bristol's efforts before the town conservation commission, filing suit in the Superior Court and an appeal in the Appeals Court. Finally, Rochester attempted to spur regulatory action against Bristol by obtaining town residents' signatures and filing a citizen "fail-safe" petition under the Massachusetts Environmental Policy Act.

In September 2020, Bristol filed suit in the Superior Court, alleging unfair and deceptive acts and practices in the conduct of trade or commerce in violation of G.L. c. 93A, § 11, conspiracy in restraint of trade or commerce in violation of G.L. c. 93, § 4, and abuse of process. Rochester responded that the action constituted Bristol's improper attempt to chill their rights to engage in legitimate petitioning activity and filed a special motion to dismiss under the anti-SLAPP statute. The Superior Court denied the motion to dismiss, concluding that the Bristol parties had met their burden of demonstrating that the petitioning activities of Rochester were a "sham" and were not entitled to anti-SLAPP protections. Rochester then appealed that decision to the Appeals Court.

As explained by the Appeals Court in *Bristol*, to be considered a prohibited "SLAPP suit," the legal action generally must be meritless and brought primarily to chill the valid exercise of freedom of speech and petitioning. SLAPP suits frequently involve attempts by "large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." The anti-SLAPP statute, G. L. c. 231, § 59H, provides a procedural remedy against such suits by allowing a special motion for their early dismissal. However, "sham" litigation — such as that lacking any objectively reasonable basis in law or fact — is not entitled to anti-SLAPP protections.

In its decision, the Appeals Court laid out a complex framework for evaluating the requirements for prevailing on a special motion to dismiss under § 59H. First, the special movants (here, Rochester) must demonstrate that the claims against it are based on its "petitioning" activities alone (e.g., Rochester's invocation of legal rights and remedies before the town's regulatory bodies or Massachusetts courts). The burden then shifts to the nonmoving party (Bristol) to defeat the special motion by making one of two showings: (1) that the petitioning activity was a sham (meaning, it lacked any reasonable factual support or any arguable basis in law), and that the activity caused actual injury to the nonmovants; or (2) that Bristol's claim is not a meritless SLAPP suit brought primarily to chill legitimate petitioning activity.^[1]

Here, the Appeals Court affirmed that Rochester met its initial burden of showing that the claims against it were based solely on its petitioning activities, thereby shifting the burden to Bristol to establish that all of Rochester's challenges to the plant were a sham, or that Bristol's lawsuit was not meritless. The Appeals Court considered each instance of petitioning activity to evaluate whether the challenges amounted to sham petitioning that precluded dismissal of Bristol's claims under the anti-SLAPP statute.

First, the Court found Rochester's challenges to the town zoning board's approval of the site plan based on noise levels and a decrease in property values amounted to sham petitioning. Rochester ignored the fact that approval was conditioned on *compliance* with the same noise regulations that formed the basis for Rochester's challenge. Furthermore, Rochester's allegations regarding reduced property values were inconsistent with the town's zoning bylaw – which only prohibited uses that would decrease property values district-wide. Finally, there was no evidence that the plant would increase truck traffic any more than any other use permitted in the industrial zoning district.

Second, the Court determined that Rochester's opposition to the conservation commission's extension of its order of conditions for the plant regarding wetlands was in bad faith where Rochester's challenge was based merely on the passage of time from the issuance of the original order. Defendants failed to introduce evidence that the order was not adequate to protect the local wetlands, especially where they were unchanged since the original order. Finally, Rochester's efforts to obtain review of the plant under the Massachusetts Environmental Policy Act ("MEPA") amounted to sham petitioning where neither petition satisfied more than one of three required criteria necessary to invoke such a review.

Because such "sham" petitioning is not entitled to the protections of § 59H, the Appeals Court affirmed the motion judge's order denying Rochester's special motion to dismiss the complaint and remanded the case for further proceedings.

REMINDER: FUNDAMENTAL CONTRACT RULES CAN SINK COMMERCIAL LEASE

Hood Park LLC v. Piaggio Fast Forward, Inc., 2284CV02233-BLS2 (Mass. Super. Ct. May 2, 2023)

In *Hood Park LLC*, the Superior Court provided a helpful reminder of how fundamental contract rules, often taken for granted, can sink a commercial lease. Plaintiff Hood Park LLC ("Hood") brought suit against Piaggio Fast Forward, Inc. ("PFF") to enforce a commercial lease. However, the Court found that the parties never entered into an enforceable lease because PFF's acceptance was conditional, and the lease contained a provision stating that it was effective only upon "execution and unconditional delivery."

In 2022, Hood and PFF undertook negotiations of a lease of commercial space. After the parties had substantially agreed on the final terms, PFF informed Hood that the termination clause had to be rewritten to grant PFF the right to terminate the lease after four years, and in the event of such a termination, PFF would immediately pay the remaining rent to Hood in a lump sum payment. Hood expressed openness to this proposal, but requested the parties first sign the lease and subsequently revise the termination clause in a lease amendment, to which PFF agreed. PFF's CEO signed the lease and emailed it to Hood, reminding Hood in writing that the lease was "contingent on agreement on [the] termination clause." On July 13, 2022, Hood's counsel wrote to PFF that Hood was willing to agree in substance to the termination terms previously proposed by PFF, subject to review and approval by Hood's lender. The following month, PFF informed Hood that it was withdrawing from lease negotiations. In its response to PFF's withdrawal, Hood took the position that the lease was enforceable.

Hood brought an action in the Superior Court seeking declaratory judgment that the lease was enforceable. Hood's other claims against PFF included breach of contract, fraud, and unfair and deceptive practices in violation of G.L. c. 93A. PFF moved to dismiss the action.

The Superior Court ruled that on the facts alleged in the complaint, the parties never entered into a binding contract (based on lack of offer and acceptance). Specifically, the lease provided that "this Lease becomes effective as a lease only upon execution and unconditional delivery thereof by both Landlord and Tenant." The Court noted that although this language allows either party to impose a unilateral condition, that condition must be agreed to before the lease became enforceable. PFF imposed precisely such a condition, putting Hood on notice that the agreement was conditional upon the resolution of the termination clause issue previously discussed by the parties. The Court further reasoned that PFF's execution of the original lease did not constitute an acceptance due to the clearly articulated contingency. Because there was no contract, there could be no breach.

The Court went on to strike down several other arguments advanced by Hood. For example, Hood argued that PFF accepted the contract through partial performance. The Court rejected this argument on two grounds. First, the terms of the lease, which required "execution and unconditional delivery," rendered acceptance by performance invalid. Second, although PFF visited the premises and negotiated a letter of credit for the security deposit, PFF never began making tenant improvements and did not pay the security deposit. Preparation for performance under a lease does not constitute acceptance.

Similarly, the Court did not accept Hood's argument that PFF breached the implied covenant of good faith and fair dealing. As there was no contract, there could be no breach of the covenant of good faith and fair dealing. Indeed, as the Court observed, the covenant pertains to bad faith in the *performance* of a contract, not in its execution. Here, the parties were merely negotiating, and absent a binding agreement, there is no duty to negotiate in good faith.

Finally, the Court concluded that PFF's fraud and Chapter 93A claims were inviable. Fraud requires a showing that defendant promised to perform an act while having no intention of performing the act. Here, PFF never promised to perform under the lease. As the Court stated, "[t]here can be no false promise in the absence of a promise." As for 93A, Hood had to show unfair and deceptive practices by PFF. The Court noted that there was nothing unfair or deceptive about PFF declining to be bound by an unenforceable commercial lease.

Hood should serve as a reminder that courts will interpret commercial leases by their express terms. Where provisions concerning execution provide a specific manner of execution or disclaim unconditional acceptance, parties are unlikely to convince the courts to ignore them.

[1] The Court only considers the second prong if the first is not satisfied.

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