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CASE HIGHLIGHT

PLAINTIFFS MAKE WAVES FOR HARBOR PLAN

Foundation, et al. v. Theoharides, et al., 1884 CV02144-BLS1 (April 1, 2021)

In a recent decision, the Massachusetts Superior Court granted partial summary judgment to Plaintiffs in two companion cases, challenging the validity of certain Waterways Regulations and the City of Boston's Downtown Waterfront District Municipal Harbor Plan (the "MHP"). The Superior Court determined that the sections of the Waterways Regulations, which required the Massachusetts Department of Environmental Protection ("DEP") to follow the parameters approved by the Secretary of Energy and Environmental Affairs (the "Secretary") in a municipal harbor plan when making licensing determinations for projects built on tidelands, are an improper delegation of DEP's authority and thus invalid and *ultra vires*.

Plaintiffs who are Members of the Harbor Towers condominium community in Boston and the Conservation Law Foundation brought their respective lawsuits to challenge the MHP and the plans of RHDC 70 East India, LLC, an affiliate of the Chiofaro Company, to build a 600-foot-tall tower on the waterfront at the current site of the Harbor Garage. The MHP, which was approved by the Boston Planning and Development Agency in May 2017 and by the Secretary on April 30, 2018, encompasses approximately 42 acres of tidelands on the Boston waterfront running along Atlantic Avenue and near the Rose Kennedy Greenway. The MHP allowed the Harbor Garage parcel a height limitation of 600 feet, approximately eleven times the standard foot height limit permitted by the applicable regulations absent a municipal harbor plan. Plaintiffs claimed, in part, that the decisions of the Secretary and the Commissioner of DEP to approve the MHP were *ultra vires* and beyond their authority. They also sought a declaratory judgment that certain Waterways Regulations are invalid and *ultra vires*.

At issue for the declaratory judgment claims asserted by Plaintiffs and decided by the Court was the validity of Sections 9.34(2)(b) and 9.51(3)(e) of the Waterways Regulations, requiring DEP to exempt projects subject to an approved municipal harbor plan from certain requirements otherwise imposed by the regulations (the "Municipal Harbor Regulations") such as height limitations, use restrictions, and open space requirements. Specifically, Section 9.51(3)(e) requires DEP to waive the height limitations applicable to nonwater-dependent buildings on tidelands "if the project conforms to a municipal harbor plan, which, as determined by the Secretary in the approval of said plan, specifies alternative height limits and other requirements which ensure that, in general, such

buildings for nonwater-dependent use will be relatively modest in size...” Similarly, Section 9.34(2)(b) of the Waterways Regulations provides that DEP, making a licensing determination for a project located within an area covered by a municipal harbor plan and conforming to that plan, must “apply the use limitations or numerical standards specified in the municipal plan as a substitute for the respective limitations or standards” contained in certain sections of the Waterways Regulations.

The Court held that the Municipal Harbor Regulations “unlawfully cede to the Secretary part of DEP’s exclusive authority over tidelands that DEP, acting on its own, lacks the power to relinquish.” Reviewing the provisions of the Massachusetts Public Waterfront Act (G.L. c. 91) as the encapsulation of the state’s authority and obligations with respect to the tidelands and the enabling legislation for the Waterways Regulations, the Court stated that the Legislature expressly delegated to and charged DEP with the responsibility for protecting public trust rights in the tidelands. Namely, the Waterfront Act requires DEP in licensing non-water dependent use of tidelands to make a written determination that the proposed project “serve[s] a proper public purpose and that said purpose shall provide a greater public benefit than public detriment to the rights of the public in said lands and that the determination is consistent with the policies of the Massachusetts coastal zone management program.” The Court stated that DEP may not delegate or relinquish to the Secretary any of the oversight responsibilities given to it by the Waterfront Act, unless expressly authorized by the Legislature. The Waterfront Act, however, lacks the express authorization for DEP to delegate the authority in licensing non-water dependent use of tidelands to the Secretary. As a consequence, the Court held that the Municipal Harbor Regulations, conferring upon the Secretary – not the DEP- the authority to decide, for example, what building height is appropriate for projects on tidelands under a proposed municipal harbor plan, are irreconcilable with the legislative mandate given to DEP by the Waterfront Act and, are therefore, invalid.

The Court’s decision invalidated a longstanding regulatory process established to grow the waterfront areas in an environmentally sound and economically prosperous manner that is consistent with the needs and objectives of local communities. It also sent shock waves through the development community and created substantial uncertainty for the waterfront development projects proceeding through the design and permitting process under an approved municipal harbor plan. As recently stated in an article by the Boston Globe, the Baker administration is considering an appeal (although the decision is not immediately appealable as a matter of right), but stated that in the meantime, “in order to address uncertainty about the status of municipal harbor plans” environmental regulators aim to affirm the existing municipal harbor plans through DEP. Although this means a new round of public review for the plans by state environmental agencies, it may be faster than resolving the uncertainty stemming from this case through legislative action or any future appeal by the defendants.

CASES OF NOTE

NEW SCHOOL INSIDE SCOPE OF EASEMENT

FOD, LLC, et al. v. White, et al., No. 20-P-698 (Mass. App. Ct. 2021)

In a recent decision by the Massachusetts Appeals Court, the court upheld a Land Court decision that a proposed school to be located on a mainly undeveloped parcel of land in Mansfield, MA did not overburden the right of way easement that benefitted the land.

The easement, a 50-foot wide roadway, was created in 1989 over property to give the then-owners of the abutting property access to a public roadway. No restrictions were placed on the use of the easement at the time of its creation. At trial, Plaintiffs FOD, LLC and Brenda White ("Plaintiffs") sought a declaration against the Defendants Amy C. White, James N. White, Jr., Kirsten R. Murawski, and Stephen J. Murawski, III ("Defendants") establishing that the proposed school was consistent with the easement and would not overburden it. The Defendants took the position that the school would not be consistent with the easement as the school would create extensive traffic and was also beyond the contemplation of the original parties to the easement.

The Plaintiffs presented a proposed plan for the site that showed the school, proposed pick-up and drop-off procedures, and expert testimony on likely traffic impacts. The Defendants presented their own expert's testimony on traffic impacts. The Defendants' expert opined that the school could ultimately lead to increased congestion in the neighborhood. In allowing the easement to be used for purposes of accessing the school, the Land Court found that the creators of the easement had "certainly anticipated further development," and, while the Land Court acknowledged that the school would increase traffic flow, it would not increase it in a material and burdensome way and therefore was not an overburdening or a nuisance.

On appeal, the Defendants challenged the Land Court's findings that (1) there are no limitations on the easement, (2) the roadway easement used for purposes of access to the school is a normal development and not outside the scope of the easement, and (3) the school will not overburden the easement and is not a nuisance. On the first issue, the Appeals Court relied on testimony from Nicholas Harris, the original grantor, who had testified as to his understanding of the easement – which was that the easement did not include any limits or restrictions. As such, the Appeals Court affirmed the Land Court's ruling in favor of the Plaintiffs. On the second issue, the Appeals Court pointed out the Land Court's reliance on factors used to determine what a normal development is as articulated in the Restatement (First) of Property. All the factors favored the Plaintiffs.[1] On the final issue, the Appeals Court reasoned that, since the school was within the scope of the easement, it is illogical for it to amount to a nuisance.

This case highlights the importance of explicitly restricting easements upon their creation to a clear intended use, as courts likely will interpret the lack of such a clear restriction to allow for any reasonable use of the easement in the future. The case also provides a handy summary and restatement of the factors a court will apply in determining when an easement is being overburdened.

RISKY BUSINESS PAID OFF FOR DEVELOPER, THIS TIME

Committee for Environmentally Sound Development, et al. v. Amsterdam Avenue Redevelopment Associates LLC, et al., 2021 WL 786423 (N.Y. App. Div. March 2, 2021)

In a recent highly publicized matter, the New York Supreme Court, Appellate Division, First Department, overturned a New York Supreme Court decision that revoked the issuance of a permit

by the New York City Department of Buildings ("DOB") and ordered Amsterdam Avenue Redevelopment Associates LLC, et al. ("Amsterdam") to remove 20 floors from a building Amsterdam had built "at risk" during the pendency of litigation.

The case has a noteworthy and somewhat unique factual and procedural background.

Amsterdam purchased 200 Amsterdam Avenue in October 2015 and planned to construct a 55-story condominium building on the Upper West Side of Manhattan. The building exceeded the height limit of zoning. However, due to a long-standing building commissioner interpretation of the zoning law, the developer believed it could obtain a building permit for additional height by jerrymandering distinct tax parcels into a so-called "development parcel." Using this approach, the developer "assembled" a 38-sided lot, comprised of various tax parcels, into a single development parcel. The developer applied for a building permit for the "development parcel" in September 2016. Following some unsuccessful challenges to the permit, approval was granted and construction of the building began in October 2017. That same month, the Committee for Environmentally Sound Development, et al. (the "Petitioners") brought an administrative challenge of the building permit in the New York Board of Standards and Appeals ("BSA"), arguing that the prior policy of the building commissioner to allow jerrymandered lots was a misinterpretation and misapplication of the zoning laws ("2017 Appeal").

Following a hearing in 2018, and while a decision was pending on the 2017 Appeal, the Petitioners filed an action in the New York Supreme Court requesting (i) a declaration that the property was improperly zoned, and (ii) an injunction to halt construction. The action was placed on hold until either (i) a decision from the 2017 Appeal was rendered, or (ii) the building's foundation was completed, whichever occurred first. In the meantime, construction of the building continued. In July 2018, the BSA denied Petitioners' appeal, upholding the issuance of the permit and construction continued. The BSA issued a decision upholding the building permit and the Petitioner's court challenge proceeded.

In March 2019, the trial court vacated the BSA decision and remanded the matter to the BSA. With construction continuing, the Petitioners sought an injunction pending the remand. The New York Supreme Court denied that request. On remand, the BSA upheld the issuance of the permit, concluding that the building permit was consistent with applicable zoning law as interpreted and applied pursuant to a long-standing interpretation of the building commissioner. By this time, the building was virtually complete. The case went back to the New York Supreme Court which had retained jurisdiction over any decision after remand. The New York Supreme Court overturned the BSA's denial of the Petitioners' challenge and ordered 20 floors to be removed from the structure. Amsterdam appealed that ruling to the Appellate Division.

On appeal, the primary issues were (1) whether or not the BSA properly interpreted the zoning laws and (2) whether the case was moot in light of the building being substantially complete. The Appellate Division ultimately ruled in favor of Amsterdam on both. On the first issue, the Appellate Division reasoned that the Supreme Court failed to defer to the BSA's interpretation which was rational in light of prior BSA policy and interpretations. The holding was grounded in the well-settled principle that a court should defer to an administrative agency's or official's interpretation of zoning laws provided the interpretation is rational. As to the second issue, the Appellate Division

held that the case was indeed moot because the building was substantially complete having been constructed under a valid building permit. In so ruling, the Appellate Division faulted the Petitioners for not renewing the request for an injunction or otherwise seeking to have the trial court reconsider the request after it had overturned the BSA ruling on remand.

Due to the unique and somewhat complicated factual and procedural background of this case, it is difficult to draw too many conclusions from it. One thing is clear: proceeding at risk in the face of a pending permit appeal can be a dangerous game for developers. While in this case the Appellate Division reversed a ruling that could have been a financial disaster for the developer, depending on such an outcome is risky business indeed. On the other hand, the case can also be seen as an invitation for developers to continue to plow ahead where opponents have failed to seek or obtain an injunction.

UNPAID HOLDOVER RENT DUE TO LANDLORD IN MA APPEALS CASE

154 Turnpike Road LLC v. A Beautiful You, Inc., 99 Mass. App. Ct. 1116 (2021)

The Massachusetts Appeals Court recently issued an important ruling involving holdover provisions in commercial leases. In September 2006, Plaintiff 154 Turnpike Road LLC ("154 Turnpike") and Defendants A Beautiful You, Inc. and Elliot Lach (collectively, "ABY") entered into a lease. Following the lease's expiration in 2013, the parties tried to negotiate new terms but were unsuccessful. Until 2017, though, ABY remained on the leased property and in possession of the leased premises.

The lease contained a standard holdover rent provision providing for the tenant to pay 1 ½ times normal rent for each month the tenant failed to vacate following the lease's expiration. After the lease expired in 2013, 154 Turnpike sent ABY a monthly invoice at the lease's regular monthly rate, which ABY initially paid. However, in October 2014, ABY failed to pay. For its part, 154 Turnpike notified ABY of its failure via letter, which referred to the holdover rent provision and noted that the landlord was not waiving its rights under it. However, the landlord did not demand the holdover rent at that time. Following cure by ABY, 154 Turnpike continued to bill ABY monthly, at the regular rent amount. Eventually, ABY vacated. Then, in 2017, 154 Turnpike, for the first time, billed ABY for the holdover rent, which amounted to $113,979. ABY refused to pay and 154 Turnpike sued, alleging breach of contract.

The trial judge ruled in favor of 154 Turnpike despite ABY taking the position that they did not know about the holdover rent and that 154 Turnpike's conduct was contrary to the terms of the lease. The trial judge reasoned that there was no evidence to show 154 Turnpike intended to waive the holdover rent lease provision.

On appeal, ABY argued that a new oral agreement was reached as a result of 154 Turnpike's conduct. The argument was rejected because ABY offered insufficient evidence of a new oral agreement – in fact, there was ample evidence to the contrary, including the October 1, 2014 letter notifying ABY of its default that referenced the holdover rent provision. Furthermore, no modification of the lease could be found since ABY offered no consideration or anything else of value to 154 Turnpike.

This decision serves as a reminder that, in the face of a solid non-waiver clause, courts will enforce the holdover provisions in commercial lease agreements even if the parties' conduct might be inconsistent with the written terms of the lease.

[1] "(a) did the original parties to the easement anticipate further development of [the dominant] parcel; (b) at the time of its creation, was the easement the parcel's sole means of access; (c) was anyone already using the way described in the easement (and if so, what was the nature and frequency of that use); (d) did the size of the dominant parcel make its later development reasonably foreseeable; (e) at the time of creation of the easement, were the dominant and servient parcels zoned for the later-proposed use; (f) are there any express restrictions on use of the easement; and (g) at the time of creation of the easement, did the dominant parcel have any natural features that would limit its development."

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.