

# what's new

## SJC Issues Two Decisions of Interest to Real Estate Developers

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The Massachusetts Supreme Judicial Court (SJC) recently issued two decisions which are significant to real estate developers. In the first decision, *Town of Canton v. Commissioner of the Massachusetts Highway Department, et al.*, 455 Mass. 783 (2010), the SJC for the first time clarified the period within which an appeal under the Massachusetts Environmental Policy Act (MEPA) must be brought, holding that such appeals must be commenced "at the very least" within 30 days of issuance of the first permit of those permits listed in a developer's Final Environmental Impact Report. In the second decision, *Fustolo v. Hallander*, 455 Mass. 861 (2010), the SJC determined that the State's Anti-SLAPP Statute, which was designed and has been employed to dissuade developers from bringing lawsuits against project opponents, did not require dismissal of a developer's defamation lawsuit against a reporter who had written newspaper articles that the developer claimed were defamatory.

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### The Timing of MEPA Appeals

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In *Town of Canton v. Commissioner of the Massachusetts Highway Department*, the Town of Canton sought judicial review of a determination by the Secretary of the Executive Office of Environmental Affairs that a developer's Final Environmental Impact Report ("FEIR") complied with the provisions of MEPA. The developer had filed its FEIR in connection with a large mixed-use development proposed for property adjacent to the Westwood Station near the Canton town line. The Town sought review of the Secretary's certification that the developer's FEIR complied with MEPA because the Town

claimed that the FEIR failed adequately to address the development's traffic impacts.

The developer sought to dismiss the Town's lawsuit, arguing that the Town had not brought the case within 30 days of the issuance of the first permit for the project—the limitation period set forth by the MEPA statute at G.L. c. 30, § 62H. The Town argued that even though two permits had been issued several months prior to the date it had commenced the lawsuit, its case was filed in time because: (a) neither of the permits related to the Town's traffic concerns and the Town had appealed within 30 days of the issuance of the first permit that had anything to do with traffic; (b) the permits were relatively minor and obscure and the Town had no notice that they had been issued; and (c) neither of the permits gave the Town standing to sue. The trial court found for the developer and dismissed the Town's suit for the Town's failure to have brought its suit within the 30 day period. The Town appealed.

The SJC took the case for direct review because the SJC had never issued a definitive ruling on the issue presented. The SJC affirmed the trial court's judgment for the developer.

In affirming the trial court's decision, the SJC held that the 30 day clock begins to run "at the very least" when the first permit of those permits listed in an FEIR is issued. The Court left open the question of whether the issuance of a permit not listed in the FEIR could also trigger the 30 day period, because, under the facts of the Canton case, resolution of that issue was not necessary

inasmuch as one of the relevant permits had been listed in the FEIR and there was no dispute that the Town had not commenced its case within 30 days of the date that permit was issued.

As a result of the SJC's ruling, developers can now be confident that the 30 day period within which a party may appeal a MEPA certification begins to run on the issuance of the first permit that is listed in the FEIR. Accordingly, it will be important for developers to include in their FEIRs a full list of all permits and approvals a given project may require so that the developer can trigger the 30 clock by the issuance of any one of the listed permits.

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### **Latest Anti-SLAPP Case**

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In *Fustolo v. Hallander*, a real estate developer alleged that a reporter had defamed him in five newspaper articles she had written about him and a real estate project he was proposing for property located in Boston's North End. Specifically, the developer claimed that the reporter, by falsely reporting certain facts and statements by city officials and others, sought to paint him in an adverse light, and, thereby, defame him. The reporter countered by bringing a special motion to dismiss the developer's lawsuit pursuant to the State's Anti-SLAPP statute, G.L. c. 231, § 59H, arguing, among other things, that the articles were protected as "a statement reasonably likely to enlist public participation" in an effort "to encourage consideration or review of an issue by a legislative, executive or judicial body or any other governmental proceeding." Where applicable, the special motion to dismiss is a powerful tool for terminating a case at an early stage without going through discovery and the other steps typical in a civil lawsuit. The trial court, however, denied the reporter's motion to dismiss and she appealed.

The SJC affirmed the trial court's decision, holding that even if one assumed that the articles were statements which sought to enlist public participation in an effort to encourage consideration or review of an issue by the courts, executive or legislature, and therefore within the

protection of the statute, because the reporter had not engaged in petitioning activities *on her own behalf* but as a reporter, she could not avail herself of the protection afforded by the Anti-SLAPP statute. In short, the Court held that the reporter had failed to satisfy her threshold burden of showing that the articles constituted an "exercise of [her] right of petition under the constitution."

While the SJC's decision in *Fustolo* allowed the developer's claim to proceed, it stopped far short of indicating that the developer would prevail on the merits. In fact, the SJC strongly suggested that the developer might have a difficult time proving his defamation claim because of the protections afforded reporters in the common law of defamation. Nevertheless, *Fustolo* may be good news for developers to the extent it will temper coverage of the often contentious and emotion-laden context in which development projects exist.

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