Zoning and Development Newsletter

January 2024

Sullivan

SULLIVAN & WORCESTER

sullivanlaw.com

Introduction

Welcome to the Third Issue of Sullivan's Zoning and Development Newsletter

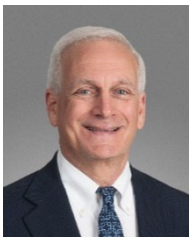
This newsletter is a collaboration between members of our Permitting & Land Use Practice Group and the Litigation Department, in order to provide our firm's clients and others interested in land use and permitting with a summary of notable legal developments that might be relevant to their projects. This edition summarizes the following:

- A Superior Court decision entering summary judgment in favor of our client and against plaintiffs' challenge to the adoption of a PDA zoning amendment in Boston;
- Three Land Court decisions construing protections afforded by the Dover Amendment (namely, protections for solar energy, educational, and childcare facilities);
- An Appeals Court decision construing the Mechanic's Lien Statute to prohibit courts from deducting costs attributable to the non-use of equipment from mechanic's liens;
- An Appeals Court decision underscoring that courts may reach different findings from special permit granting authorities, even where the evidence presented in both proceedings is the same;
- A Land Court decision ruling that a special permit for a multi-family housing project required a supermajority (rather than bare majority) vote of the special permit granting authority because the project did not provide affordable housing on-site;
- An Appeals Court decision underscoring the bright line rule against overloading easements; and
- Two decisions construing and applying the Derelict Fee Statute.

Meet Our Team

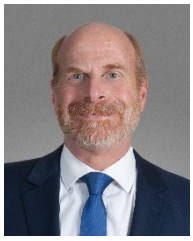
Jennifer Schultz
Partner, Real Estate

Ashley Brooks
Partner, Real Estate



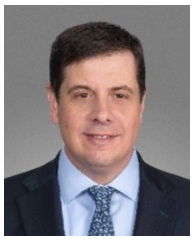
Patrick Dinardo
Partner, Litigation

Nicholas O'Donnell
Partner, Litigation



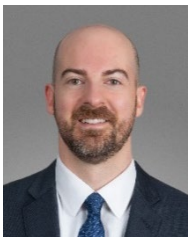
Adam Weisenberg
Partner, Real Estate

Victor Baltera
Partner, Real Estate



Gregory Sampson
Partner, Real Estate

Michael Murray
Counsel, Real Estate

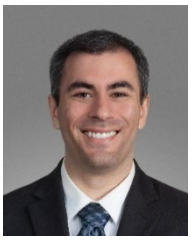


Jordan Smith
Counsel, Real Estate

Leigh Gilligan
Counsel, Real Estate

Ashley Tan
Associate, Real Estate

Eugene O'Flaherty
Of Counsel, Real Estate



Ryan Rosenblatt
Associate, Litigation

Caitlin Hemdal
Paralegal, Real Estate

Annette Dimillio
Paralegal, Real Estate

Noteworthy Recent Cases

Superior Court Enters Summary Judgment Against Challenge to PDA Amendment

We represent Skanska USA Commercial Development in defending against a challenge by several abutters to the Boston Zoning Commission's ("BZC") adoption of an amended Planned Development Area ("PDA") development plan ("2022 PDA"), retaining all use, dimensional, and parking requirements and limitations of the original 2015 PDA (with the exception of eliminating one loading dock). The 2022 PDA authorizes the construction of a 625,000 square foot, multi-use project at 380 Stuart Street. A PDA is a type of zoning amendment that is available in Boston for large, qualifying projects that are expected to result in a variety of public benefits. PDAs loosen the zoning restrictions that would otherwise apply as the base zoning, thereby eliminating the need to obtain variances and conditional use permits. As part of the PDA approval process, the Boston Redevelopment Authority d/b/a Boston Planning and Development Agency ("BPDA") reviews the developer's proposed development plan and, after a rigorous public review and comment process, votes on whether to recommend that the BZC adopt the PDA as the zoning for the site ("Adequacy Determination").

Plaintiffs' central theory was that the BZC, in adopting the 2022 PDA, effectively delegated its legislative authority to the BPDA by accepting what plaintiffs claimed was a faulty Adequacy Determination. At the motion to dismiss stage, the Superior Court judge dismissed three of the original complaint's four counts, leaving only a claim pursuant to Section 10A of the Boston Zoning Enabling Act, which applies to zoning amendment challenges. Shortly after receiving the decision on the motion to dismiss, we jointly moved with the BZC for the entry of summary judgment on the Section 10A claim. Plaintiffs submitted a motion arguing that they should not have to file an opposition until they obtain additional discovery ("Rule 56(f) Motion"). We immediately requested and received an emergency hearing on plaintiffs' Rule 56(f) motion, after which the court ordered plaintiffs to respond to the bulk of our summary judgment arguments without further discovery. Upon completion of the briefing, the Superior Court judge held another hearing and, shortly thereafter, granted our summary judgment motion, ruling in our favor on all arguments presented. First, the Court held that plaintiffs lacked standing to pursue their PDA challenge because plaintiffs' alleged harm was attributable solely to the project's height and density, which had already been authorized by the original 2015 PDA and were not altered by the 2022 PDA. Second, the Court, in the interest of completeness, ruled that plaintiffs' claim failed on the merits and rejected plaintiffs' argument that the BZC improperly delegated zoning authority to the BPDA. The decision is one of only a few that resolve a PDA challenge. It can be found as docket number 45 in Suffolk Superior Case No. 2284CV00777 (Nov. 14, 2023). The plaintiffs have since filed a notice of appeal, and that matter is pending.

Dover Amendment Protections

G.L. c. 40A, § 3 ("Section 3") -- sometimes referred to as the "Dover Amendment" – limits the way in which municipalities other than Boston may regulate particular uses through zoning. The Land Court addressed three of these limitations in noteworthy decisions this past quarter.

Solar Energy Facility Protection.

Section 3 provides the following protection for solar energy facilities ("Solar Energy Protection"): "No zoning ordinance or by-law 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." We have covered decisions applying this protection in each of our prior two quarterly updates, and this continues to be a rapidly evolving area.

In *Sunpin Energy Servs LLC v. O'Neil*, 31 LCR 485 (2023) (Roberts, J.), notice of appeal filed, a Land Court judge, resolving cross-motions for summary judgment, upheld the Town of Petersham's zoning board of appeal's ("ZBA's") decision to deny a special permit application for a large-scale ground-mounted solar energy system ("Large Scale Facility"). Although the ZBA's vote had been 2-1 in favor of issuing the permit, that fell short of the unanimous vote that is required for approval by a 3-member board. The

town's zoning bylaws allowed Large Scale Facilities by right in a portion of the town (and the town had issued 60 building permits for such systems), but the project was proposed on land that was within a zoning district that required a special permit, and plaintiff's application was the first that the town had received for a Large Scale Facility.

The ZBA member who opposed the special permit drafted the ZBA's decision and stated that her objections were based on the project's (1) adverse impact on natural and working lands; (2) placement in a residential area; and (3) negative impact on property values. The Land Court judge stated that, while some of the "objections [were] more compelling than others based on the record before this court," it was undisputed that the project "would require cutting a significant number of trees," which would, in turn, contravene the "Commonwealth's energy policy goal" of avoiding tree removal that "would adversely affect habitat for wildlife, recreational opportunities and sense of place for people." The Court rejected plaintiff's contention that the special permit denial violated the Solar Energy Protection, noting that municipalities retain authority to decide where solar energy facilities may be sited and may regulate solar energy facilities for the purpose of protecting the "public welfare," which includes minimizing tree removal.

Religious and Educational Protection

One of Section 3's better known provisions precludes municipalities from prohibiting or restricting the *use* of land for religious and educational purposes, but provides that "such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, *open space*, parking and building coverage requirements" ("Religious and Educational Protection"; emphasis added.) In *Martha's Vineyard Regional School District v. Town of Oak Bluffs Planning Board*, 31 LCR 557 (2023 WL 5704480) (2023) (Smith, J.), a Land Court judge ruled that the Planning Board ("Board") for the Town of Oak Bluffs violated the Religious and Educational Protection by denying plaintiff educational institution's application for a special permit to build an athletic field for the plaintiff's high school. The bylaw in question provided that, in the Water Resources Protection Overlay District (within which the plaintiff's property was located), a special permit was required for a project that "involves the generation, use of [*sic*] storage of any toxic or hazardous materials in greater quantities than that associated with a normal household use." The Board had determined that plaintiff's project did not satisfy the bylaw because the athletic field would be made with toxic or hazardous materials that could eventually seep into and adversely impact the groundwater. The Board further stated that the Religious and Educational Protection allowed municipalities to reasonably regulate open space, and therefore that the Board's application of the bylaw to deny the special permit did not violate the protection.

The Land Court disagreed, holding that the Religious and Educational Protection allows municipalities only to impose dimensional regulations on open space. The Court reasoned that the items that the Religious and Educational Protection states may reasonably be regulated are all forms of dimensional regulations, and that the reference to "open space" must be construed to be of the same type. The Court also ruled that the bylaw's regulation of groundwater impacts was not a type of dimensional regulation. The ZBA, therefore, could not use the zoning bylaws' so-called open space bylaw to regulate groundwater impacts (such impacts, however, may be regulated through non-zoning regulations, pursuant to the Wetlands Protection Act).

Child Care Facilities.

The third paragraph of Section 3 includes the following protection for child care facilities ("Child Care Protection"):

> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

In *Needham Enterprises, LLC v. Needham Planning Board*, 35 LCR 507 (2023) (Roberts, J.), plaintiff appealed conditions that the Needham Planning

Board had imposed on a special permit/site plan approval that authorized plaintiff's proposed child care facility. The special permit was issued after a lengthy "major site plan review special permit process," which included a hearing that extended over multiple days, peer review, and numerous revisions to the proposed plans to accommodate a peer reviewer's comments. The Land Court judge ruled that the Child Care Protection's express prohibition against "requir[ing] a special permit for a childcare facility" precluded the town from requiring a special permit for the project. The Court further ruled that, while municipalities may impose reasonable dimensional regulations on child care facilities, local permitting authorities may not impose conditions that "exceed the dimensional criteria" set forth in the zoning bylaw or ordinance.

The Appeals Court Rules that the Mechanics Lien Statute Does Not Allow the Court to Reduce the Value of a Mechanic's Lien for Equipment Rental Costs Attributable to Non-Use, but, Where the Facts Support It, a Landowner May Sue a Contractor for Colluding with the Subcontractor to Fraudulently Increase the Lien's Value.

Massachusetts' Mechanics Lien Statute, G.L. c. 254, §§ 1-33, sets forth the requirements for creating and enforcing mechanics liens. Section 4 of the Mechanics Lien Statute ("Section 4") provides that, where a subcontractor "furnishes" labor, services, or rental equipment for the "improvement of real property," the subcontractor may file a lien on the improved property for the value of such labor, services, and rental equipment that is reflected in a written contract between the subcontractor and the contractor. *Bruno v. Alliance Rental Group, LLC*, 103 Mass. App. Ct. 170 (2023) involved a dispute between a property owner and subcontractor concerning a mechanic's lien that included the rental value of an excavator and loader that the subcontractor had provided to the contractor for a construction project on the owner's property. The property owner filed a complaint seeking to discharge the subcontractor's lien and later added a claim under Massachusetts Unfair Trade Practices Act, G.L. c. 93A ("93A"). The property owner claimed that the subcontractor colluded with the contractor to inflate the value of the lien by including, in the contract price for the heavy equipment rental, long periods of time for which the equipment was not actually used on the project.

After a trial, the trial judge reduced the amount of the mechanics liens based on the period of the equipment's nonuse and also awarded the property owner damages, including attorneys' fees, on the 93A claim. The Appeals Court reversed the decision to reduce the lien, ruling that Section 4 does not authorize the court to reduce the amount of a mechanics lien based on the nonuse of equipment furnished by a subcontractor, so long as the equipment was used on the construction project.

The Appeals Court also ruled, however, that (i) the mechanic's lien must be reduced by the amount of equipment repair costs that are not caused by the property owner; and (ii) the property owner was entitled to damages against the defendant contractor for violating the Massachusetts Consumer Protection Act, G.L. c. 93A. The Court further ruled that, as part of property owner's remedy for the 93A violation, (i) the owner could recover the attorneys' fees he incurred in defending against the mechanics lien; and (ii) the trial court should consider whether the owner may recover the amounts by which the liens were unduly inflated.

Zoning Bylaw Interpretation Found to Hinge on an Assessment of Expert Testimony.

As a general rule, the trial judge, in resolving the merits of an appeal from special permit and variance decisions, (i) construes the applicable zoning bylaw or ordinance as a matter of law; (ii) determines the facts based on a de novo record, and (iii) determines whether a reasonable board, in applying the bylaw/ordinance to the facts found by the court, could have reached the same decision as did the board whose decision is being reviewed.

McLaughlin v. Zoning Board of Appeals of Duxbury, 102 Mass. App. Ct. 802 (2023), involved an unusual situation in which the court's construction of a bylaw was intertwined with a subsidiary question of fact. In the case, plaintiffs appealed a Land Court judge's decision finding the Duxbury zoning board of appeals ("ZBA") erroneously denied plaintiffs' application for a special permit to extend a residential pier over a salt marsh. The bylaw provision at issue required that piers must extend over salt marshes and to the

"water's edge." The central issue in the case was whether the proposed end point of the pier was at the "water's edge" – the plaintiff contended that the end point was a tidal pond that constituted the "water's edge," but the town, citing the supporting testimony of its peer reviewer, contended that the tidal pond was also a "tidal creek" that constituted part of the salt marsh (meaning that the proposed pier did not end at the "water's edge" and instead ended in the marsh, in violation of the bylaw). In both the ZBA proceeding and the Land Court de novo review of the special permit denial, competing testimony was provided concerning the meaning of the terms "tidal pond" and "tidal creek," neither of which was defined in the bylaws (though "tidal flat" was defined in 310 CMR § 10.27(2)). The ZBA had rejected the opinion of its peer reviewer, and was persuaded by the testimony of a wetlands scientist and the recommendation of the conservation commission The Land Court judge, however, was persuaded by the plaintiffs' experts, finding them to be more credible. Although Courts must give deference to a local board's construction of municipal zoning regulations, the Appeals Court affirmed, holding that it was within the Land Court judge's discretion to make different findings than the ZBA had made based on the de novo presentation of the expert testimony at trial.

Additionally, the Court rejected the ZBA's argument that it was entitled to deny the special permit application even though all the bylaw's standards were met, explaining that the ZBA could not claim, in the G.L. c. 40A zoning challenge, to have exercised any discretionary authority that the ZBA had not purported to apply in its written decision. The Court, however, found that the Land Court should not have directed the ZBA to issue the special permit, and should instead have remanded the case with instructions that the ZBA "expeditiously" issue the special permit after considering whether to impose reasonable conditions.

The Land Court Rules that a Housing Project that Does not Provide On-Site Affordable Housing Is Not Eligible for Relaxation of the Special Permit Supermajority Vote Requirement

Pursuant to the Massachusetts Zoning Act, most special permits may be adopted only by the favorable vote of a supermajority of the special permit granting authority (a unanimous vote with a 3-member board, at least 4 votes in a 5-member board, and a two-thirds vote in boards with more than 5 members). In 2021, Section 9 of the Massachusetts Zoning Act ("Section 9") was amended to, among other things, require only a bare majority of votes for special permits pertaining to "multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income."(Multifamily Vote Provision").

In *50-56 Market Street LLC v. Ipswich*, 31 LCR 638 (2023) (Speicher, J.), plaintiff had applied for a special permit for a proposed multifamily residential development project ("Project"). In accordance with the town's zoning bylaw, the project proponent offered to make a payment towards affordable housing in lieu of providing such housing on-site. The town planning board voted 3-2 in favor of issuing a special permit, but vote motion was file with the clerk as a denial of the application because it did not satisfy the standard supermajority requirement set forth in Section 9. The building commissioner subsequently denied the plaintiff's application for a building permit, and plaintiff filed an appeal from the denial with the Zoning Board of Appeals ("ZBA"), claiming that Multifamily Vote Provision applied and had been satisfied by the planning board's 3-2 vote. The ZBA upheld the building commissioner's denial, and the plaintiff filed an appeal from the ZBA's decision in Land Court.

Acting on defendants' motion for judgment on the pleadings, a Land Court judge ruled that, while the plaintiff had a right to follow the town by-law and offer payment in lieu of building affordable housing on site, the plain language of the Multifamily Vote Provision states that, to trigger the lower vote threshold, the requisite number of affordable units must be provided on site. Accordingly, the special permit could be approved only by a supermajority of the planning board.

Bright Line Rule Against Overloading Easements

It is black letter law that a person with rights in a way does not have a right to use the easement to access property that is not part of the land that was intended to benefit from the easement – using the easement for such additional access would be "overloading" the

easement. In *Maguire v. Planning Board of Hamilton*, 102 Mass. App. Ct. 1113 (2023) (unreported decision; text available at 2023 WL 2505857), the Appeals Court affirmed a Land Court judge's decision, resolving cross-motions for summary judgment, that the planning board of Hamilton exceeded its authority in approving a subdivision plan that used a private way to demonstrate sufficient access to new lots that lacked easement rights to the way. Although plaintiffs contended that they would not allow the private way to actually be used for access to the new lots (i.e., that the new lots would make only "passive," and not active, use of the way), the Court stated that the rule against overloading easements is a "bright line rule" that is "meant to avoid otherwise difficult litigation over the question whether increased use unreasonablY increases the burden on the servient estate."

Two Cases Construe and Apply the Derelict Fee Statute

Fairly simplified, the Derelict Fee Statute, G.L. c. 183, § 58, provides that, where property that is shown on a recorded plan as abutting a road is conveyed by a grantor who also owns the road, the conveyed property is deemed to include the grantor's ownership rights in the road unless the conveying instrument "evidences a different intent by an express exception or reservation." A key purpose behind the statute is to remedy situations in which the grantor unknowingly fails to convey his or her interest in the way.

In *Trustees of Boston College v. Boston Academy of the Sacred Heart, Inc.*, 103 Mass. App. Ct. 83 (2023), the Appeals Court affirmed a Land Court judge's summary judgment decision in favor of Boston College ("BC") concerning the applicability of the Derelict Fee Statute to conveyances that Newton College of the Sacred Heart ("Newton College") had made in 1974 to BC and the Boston Academy of the Sacred Heart, Inc., better known as Newton Country Day School ("NCDS"). Prior to the 1974 conveyances, the property in question included a private road, Colby Street, running down the middle. After the conveyances, Newton College owned no property abutting Colby Street.

The deed to NCDS stated that the southern edge of NCDS's property "r[an] along the northerly side of said Colby Street"; the deed to BC described BC's property (which is now being used as BC's law school campus) as "running along the northerly side of Colby Street," and states that such land was conveyed together "with all of the Grantor's right, title, and interest, if any, in . . . Colby Street." The deeds were conveyed simultaneously at a joint closing involving Newton College, BC, and NCDS, and were reflected in a single closing binder. The deeds were stamped with the exact same time marking from the registry of deeds, showing that they were filed within the same minute, but NCDS's deed was assigned a lower book and page number, indicating it was recorded first.

NCDS argued that its deed was meant to be conveyed first and that, because its deed, read in isolation from the BC deed, did not expressly exclude rights in Colby Street, NCDS was deemed to have acquired rights in Colby Street by application of the Derelict Fee Statute.

In resolving cross-motions for summary judgment, the Land Court judge ruled that, because the deeds were conveyed at the same time, they had to be read together and that, when read together, it was clear that the parties intended for Colby Street to be part of the land conveyed to BC, leaving NCDS without any deeded interest in Colby Street. The Appeals Court affirmed, noting that Massachusetts has long recognized that simultaneously conveyed deeds should be viewed as part of a single transaction, without one deed being given priority over the other. Noting that filing and recording are not necessary to transfer title, the Appeals Court rejected NCDS's claim that the order in which the deeds were filed and recorded at the registry bore any relevance to the application of the Derelict Fee Statute. The Court also rejected plaintiffs' contention that an intent for the NCDS conveyance to occur first could be inferred through, among other things, the minutes of Newton College's board of trustees prior to the sale, an interlocutory decree by the Supreme Judicial Court that authorized Newton College to close its affairs and dissolve, and a statement BC's counsel made in 1988, as part of an application for subdivision approval, to the effect that NCDS had a right to use Colby Street.

In *Conway v. Caragliano*, 102 Mass. App. Ct. 773, *rev. denied*, 2023 WL 7475828 (2023), the Appeals Court, overruling a Land Court decision, ruled that the Derelict Fee Statute applied to a seaside lot that had been conveyed through a deed containing the following language: "There is appurtenant to the described premises a right of way in common with others entitled thereto in and over the provided ways shown on plans in registration case No. 11518." The Appeals Court held that, by application of the Derelict Fee Statute, the conveyance included the grantor's fee in the way, and that the deed's references to "a right of way in common with others" as being "appurtenant to" the land conveyed did not rise to the level of a "an express exception or reservation" sufficient to avoid application of the Derelict Fee Statute. The Court further found that the deed's reference to the grantor's property as "benefitting from" an easement, in common with others, to the way, rather than being "subject to" the rights of others in the way, was simply a mistake. A strongly written dissent argued that the deed's express language, in referencing the "right of way in common with others" and describing the conveyed property as "benefitting from" the way, constituted an "express exception" to the granting of a fee interest in the way, thereby rendering the Derelict Fee Statute inapplicable.

Sullivan
SULLIVAN & WORCESTER