Zoning and Development Newsletter

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Introduction

Welcome to the second 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:

- two United States Supreme Court Decisions (one that applies to sales that result from tax takings; the other that defines "wetlands" under the federal Clean Water Act);
- a Massachusetts Supreme Judicial Court ("SJC") decision clarifying the applicable rules of construction for easements that result from eminent domain takings;
- an SJC decision holding that the protection the Dover Amendment affords to religious uses applies even where the proposed use is not intrinsically religious, so long as it is a component of a broader religious purpose;
- an Attorney General determination and Land Court decision that shed further light on the scope of the protection that the Massachusetts Zoning Act affords to solar energy facilities, and important administrative decisions involving proposed battery energy storage systems;
- a Land Court decision requiring the plaintiff to post a $200,000 bond in order to proceed with a challenge to a Boston conditional use permit;
- an Appeals Court decision nullifying a Boston conditional use permit;
- an Appeals Court decision discussing the limited power a planning board may exercise over an as-of-right project through the site plan approval process;
- an Appeals Court decision affirming the denial of an Anti-SLAPP motion to dismiss even though all of the allegedly wrongful conduct was made while engaged in petitioning activities, and a separate Appeals Court decision refusing to expand the scope of the litigation privilege; and
- a favorable decision by the New Hampshire Superior Court in a case involving easement rights over our client's property.

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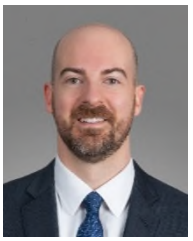

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Noteworthy Recent Cases

Two Noteworthy U.S. Supreme Court Decisions

From a land use and permitting perspective, the Supreme Court issued two noteworthy decisions in the last quarter. First, in *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322 (2023), the Court sharply circumscribed the authority of the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers under the federal Clean Water Act ("Act"). The Court held that the Act applies to a wetland only if the wetland (1) is adjacent to a "water[] of the United States," which is a relatively permanent body of water that is connected to traditional interstate navigable waters and (2) has a continuous surface connection with such a water, meaning that it is difficult to determine where the "water" ends and the wetland begins. *Id*. Second, in *Tyler v. Hennepin Cnty., Minnesota,* 143 S. Ct. 1369 (2023), the Court held that, when a local government acquires real property as the result of delinquent tax payments and effectuates a tax sale of that property at a surplus, the local government must remit the surplus to the former property owner. Massachusetts is one of only twelve states (plus the District of Columbia) that allowed local governments to keep the entire sales price.

The SJC Clarifies How to Interpret Easements that Result from Eminent Domain Takings.

In *Smiley First, LLC v. Dep't of Transp.*, 492 Mass. 103 (2023), the SJC clarified that easements that result from eminent domain takings, like negotiated easements, are to be interpreted narrowly. The plaintiff owned property in South Boston ("Site") that had previously been owned by Consolidated Rail Corporation ("Conrail"). A predecessor of the Massachusetts Department of Transportation ("MassDOT") had taken an easement with respect to the Site through a 1991 order of taking ("1991 Easement"), and MassDOT purported to effectuate a "confirmatory" order of taking of the property in 2018 ("2018 Easement"). Plaintiff claimed that the 2018 Easement exceeded the scope of the 1991 Easement and therefore required MassDOT to compensate plaintiff for the additional taking. A Superior Court judge, believing that eminent domain takings are not to be construed narrowly, had held that the 2018 Easement did not exceed the scope of the 1991 Easement. The SJC reversed.

The SJC ruled that, while the intent of the parties to an easement created by an order of taking is not considered in construing the easement (because the property owner whose interest was taken does not consent), all of the other generally applicable rules of construction apply, including the rule that, because restrictions on land are disfavored, "doubts as to the extent of a restriction in an easement should be resolved in favor of freedom of land from servitude." *Id*. at 109 (internal quotation marks and citation omitted). The SJC held that, given the language of and circumstances surrounding the 1991 order of taking, the 1991 Easement was "limited to the extent reasonably necessary to relocate Conrail's facilities." *Id*. at 110. Further, although the express terms of the 1991 Easement did not confine the easement to a particular part of the Site, once Contrail moved its facility (a single rail line) to the Site with the owner's assent and thereby fulfilled the easement's purpose, the location of the easement became "fixed" as a matter of law. *Id*. at 111. The 2018 Easement, in contrast, was taken for "all lawful railroad purposes" in order to accommodate a new MBTA test track and related facilities, and purported to apply to the entirety of the Site. *Id*. at 113.

The SJC, therefore, held that the 2018 Easement exceeded the scope of the 1991 Easement, and remanded the case for an assessment of damages for the additional taking effectuated by the 2018 Easement.

The SJC Rules that the Dover Amendment Protects Uses that, While Not Intrinsically Religious, Serve a Broader Religious Purpose.

The Dover Amendment limits, among other things, the ability of municipalities outside of Boston, unless exempted by the State Legislature, to "regulate or restrict the use of land or structures for religious purposes or for educational purposes . . . on land owned or leased by . . . a religious sect or

denomination, or by a nonprofit educational corporation." G.L. c. 40A, § 3. In *Hume Lake Christian Camps, Inc. v. Planning Bd. of Monterey*, 492 Mass. 188 (2023), the plaintiff, a religious organization that operated a religious camp on its property in Monterey Massachusetts, challenged the planning board's denial of its application for site plan approval to use its property as a recreational vehicle ("RV") camp. Plaintiff's proposed uses of the RV camp included (1) making it available to families attending plaintiff's religious camp and (2) housing camp staff and volunteers in exchange for their labor. The board denied plaintiffs' application for site plan approval on the ground that the town's zoning bylaws prohibited the principal use of a "trailer or mobile park home." The Land Court ruled that the Dover Amendment protected the proposed use of the RV camp by family attendees. However, the Land Court also ruled that the Dover Amendment did not protect the housing of camp staff and volunteers, on the ground that it served a financial rather than religious purpose.

The SJC affirmed the Land Court's decision in part and reversed it in part, holding that both of the proposed uses were protected by the Dover Amendment. The SJC emphasized that the critical inquiry for determining the applicability of the Dover Amendment's religious use protection is whether land or structures, as a whole, will be used for a predominantly religious purpose, not whether each particular use is a "necessary element" of a particular religion. Further, the proposed uses need not be "intrinsically religious in order to serve a religious purpose," and need only serve as a "component[] of a broader religious project." *Id.* at 196. Because the plaintiff's camp served a predominantly religious purpose (by, among other things, providing religious instruction and chapel services, in addition to recreational activities), and because the RV camp's dominant purpose facilitated the operations of and strengthened attendance at the camp, the Dover Amendment protection applied to all of the RV camp's proposed uses.

The fact that the proposal to house staff and volunteers was financially motivated did not alter the analysis, because "[i]f each use of land or structures itself had to be a 'religious' use, it would be virtually 'impossible' for any organization to benefit from the Dover Amendment's religious purpose exemption." *Id.* at 199 (citation omitted).

Solar Energy and Energy Storage

In our last Quarterly Update, we summarized recent decisions applying G.L. c. 40A, § 3's solar energy protection ("Solar Energy Protection"), and noted that case law will continue to develop in this area. We discuss below two new decisions applying the protection, and also discuss recent administrative decisions pertaining to battery storage projects.

Attorney General Decision

On March 1, 2023, the Massachusetts Attorney General's Office ("AG"), pursuant to its responsibility to review town zoning amendments for any inconsistency with the State Constitution or other State law, determined that a Town of Wendell zoning amendment was invalid to the extent that it prohibited stand-alone battery energy storage facilities in all of the Town's zoning districts. The AG stated that battery energy storage systems are specifically included within the Solar Energy Protection because they "facilitate the collection of solar energy," and that "[t]he development of energy storage systems is critical to the promotion of solar and other clean energy use." Decision at 6 n.5 (citing "An Act to Advance Clean Energy," c. 227 of the Acts of 2018, which established a 1,000 MWh energy storage target to be achieved by December 31, 2025). Applying the analysis set forth in *Tracer Lane II Realty, LLC v. City of Waltham*, 489 Mass. 775 (2022), in which the SJC found that a zoning ordinance violated the Solar Energy Protection by excluding large-scale solar arrays from Waltham except in two percent of the City's land area, the AG determined that Wendell's prohibition against stand-alone battery energy storage facilities was an unreasonable regulation that contravened the Solar Energy Protection.

The decision is available here.

Land Court Decision

In *NextSun Energy LLC v. Fairland Farm, LLC*, 31 LCR 323 (2023), a Land Court judge, after a trial, upheld a site plan approval that allowed plaintiff to construct a large-scale solar installation that included tracking

solar panels and a lithium-ion battery storage system ("ESS") in the Town of Norton. The Court ruled that, because large scale solar installations were allowed by right under the town's zoning bylaws, the planning board ("board") was required to approve the site plan, subject to reasonable conditions, "unless [the board] was confronted with evidence of problems with the project without any reasonable solution." *Id*. at 331. As no evidence of any such problems had been presented at trial, the Court upheld the site plan approval. The Court rejected the abutters' claim that the ESS was not entitled to the Solar Energy Protection as an accessory use, ruling that the ESS was important "to the collection, storage, and distribution of solar energy to the grid," and that, under *Tracer Lane II*, "[a]ncillary structures are considered to be part of a solar energy system" under the Solar Energy Protection. *Id*. at 332.

The Court also upheld the conditions imposed by the board, with two exceptions. First, the Court found that a condition that required no "perceptible sound" at the property line did not provide a "measurable standard," and therefore violated the Solar Energy Protection. Second, the Court held that a condition requiring NextSun to pay $486,529 into escrow to secure decommissioning costs violated the Solar Energy Protection because the bylaws allowed the board to impose a bond instead and the board failed to offer evidence that an escrow account was "superior to a bond in ensuring satisfactory removal of the project components after their lifespan." *Id*. The Court remanded the matter to the board to amend these conditions.

Administrative Decisions

The Massachusetts Department of Energy Resources ("DOER") developed an Energy Storage Initiative to make Massachusetts a national leader in the emerging energy storage market. DOER established a target of 1,000 megawatt hours ("MWh") of energy storage to be developed by the end of 2025. Despite this goal, in a pair of simultaneously issued decisions, the Massachusetts Energy Facilities Siting Board ("EFSB") dismissed two petitions seeking approval to construct 800 MWh of battery energy storage capacity – 500 MWh in Medway and 300 MWh in Carver – finding that it lacked subject matter jurisdiction over the projects. EFSB is an independent state board that reviews large scale energy facilities, such as power plants, electrical transmission lines, and natural gas pipelines. EFSB determined, however, that its enabling statute does not grant it oversight of battery energy storage projects, where electricity is not generated but is merely stored. The decisions affect the ability of a project proponent to obtain a "certificate of environmental impact and public interest" under G.L. c. 164, § 69K½, which provides some ability for energy facilities to override local authority that may otherwise prevent a project from being constructed. Importantly, however, as part of the decisions, EFSB returned the matters to the Department of Public Utilities ("DPU") to make the final decisions on the applicants' requests to apply the exemption available to public service corporations under G.L. c. 40A, § 3 ("Public Service Exemption"), preserving DPU's ability to override local zoning in the matters.

The EFSB dockets are Medway Grid, LLC, EFSB 22-02/D.P.U. 22-18/22-19 and Cranberry Point, EFSB 21-02/D.P.U. 22-59.

Shortly after these decisions were released, the DPU, by decisions dated June 30, 2023, granted the requests for Public Service Exemptions. The DPU ruled that, because the proposed battery energy storage systems ("BESS") would provide energy to the grid, the project proponents qualified as "public service corporations" under the Public Service Exemption, even though the projects did not involve a "generating facility" under G.L. c. 164, § 69J$^{1/4}$. The DPU noted that the provision of energy to the grid through the BESS is consistent with the Commonwealth's 2015 Energy Storage Initiative, the 2050 Clean Energy and Climate Plan, the Massachusetts Department of Energy Resource's Clean Peak program, and several legislative enactments. The DPU also found that the proposed uses were reasonably necessary for the public convenience and welfare, and that the projects would benefit the public by providing electricity to the electrical grid.

With respect to the Medway project, the DPU granted individual zoning exemptions from those portions of the zoning bylaws that conflicted with the project. With respect to the Carver project, the DPU granted a comprehensive zoning exemption from a new BESS bylaw that the town had enacted, but required the

project proponent to comply with the conditions of a previously issued special permit.

Overall, these decisions, combined with the AG's decision discussed above, should help facilitate the development of BESS projects in the Commonwealth.

The decisions are available here for Cranberry Point and here for Medway Grid, LLC.

The Land Court Requires Plaintiff to Post a $200,000 Bond.

Section 11 of the Boston Zoning Enabling Act, St. 1956, c. 665, as amended, authorizes courts, in appeals from decisions by the Boston Zoning Board of Appeal ("ZBA"), to require the imposition of a bond in a sum sufficient to indemnify the person in whose favor the ZBA's decision issued for "damages and costs which he or they may sustain in case the decision of said board is affirmed." In contrast, the bond provision in Section 17 of the Massachusetts Zoning Act, which applies to appeals from zoning decisions made by municipalities other than Boston, authorizes the imposition of a surety or cash bond up to $50,000 that may secure "costs," but such costs do not include attorneys' fees, and, to require such a bond, the court must find that the plaintiff's challenge "appears so devoid of merit to support an ultimate determination of bad faith or malice." *Marengi v.6 Forest Rd. LLC*, 491 Mass. 19, 30-34 (2022).

In *Adams v. Erlich*, 31 LCR 344 (2023), a Land Court judge ordered plaintiff to post a $200,000 bond in connection with his challenge to a conditional use permit for the development of a large, mixed-use project ("Project") in Boston on property across the street from the plaintiff's property. The factors the Court considered included that plaintiff was unlikely to establish that he had standing to pursue his claims and that the delay caused by the pendency of the litigation could easily result in several hundred thousand dollars of increased Project costs (including legal fees). The Court also found that, despite plaintiff's claim that he would have difficulty affording a bond, plaintiff's properties were assessed at over $2 million.

The Appeals Court Invalidates a Boston Zoning Board of Appeals Conditional Use Permit.

In *Lee v. Cai*, 102 Mass. App. Ct. 491 (2023), the Appeals Court affirmed a Superior Court judge's decision, after a trial, to annul a conditional use permit that the Boston Zoning Board of Appeal ("ZBA") had issued to allow the defendant landowner to convert his two-story rowhouse in Boston's Chinatown neighborhood to a five-unit residential dwelling. Plaintiffs owned an abutting rowhouse that shared a party wall with the defendant's building, and contended that the ZBA and the trial judge failed to properly consider adverse impacts that the proposed project would have on plaintiffs' property. The Appeals Court agreed with the plaintiffs, ruling that, based on the trial court's findings, the proposed use would increase the risk of flooding in plaintiffs' basement and cause cracks in plaintiffs' building, and that the Zoning Code precluded the issuance of a conditional use permit under such circumstances. Defendant argued, among other things, that plaintiffs' criticisms of the project related to engineering, design and construction methods under the State Building Code, and therefore should not be considered in a zoning appeal. The Appeals Court disagreed, stating that, while the Building Code does address structural issues, plaintiffs did not contend that the project violated the Building Code, and the impacts that the trial court had identified "more directly bear on whether the proposed project [was] appropriate and safe for the site," which are appropriate zoning concerns. *Id*. at 500.

The Appeals Court Affirms a Site Plan Approval for an As of Right Project.

Municipalities are increasingly using the site plan approval process as a way to impose restrictions on, and even to thwart, development projects. While relatively common, site plan approval requirements are not governed by the Massachusetts Zoning Act. Although there are many cases that address site plan approvals, this is a complicated area of law that continues to develop fairly rapidly, and developers' counsel would be well advised to keep up to speed with the expanding caselaw in this area.

Morse v. Zoning Bd. of Appeals of Wellesley, 102 Mass. App. Ct. 1112 (2023) (unreported decision; text

available at 2023 WL 2376231)), is helpful to developers. The Appeals Court affirmed a Land Court's summary judgment decision upholding a site plan approval issued for a project (the razing of a two-family home, expansion of a parking lot, and relocation of the site's driveways) that was allowed as-of-right under the town's zoning bylaws. The Court reasoned that, because the project was permitted as of right and met the town's dimensional requirements, the planning board could not deny the site plan unless the project created a "problem so intractable as to admit of no reasonable solution." Additionally, the Court rejected plaintiffs' contention that the site plan bylaw required application of certain special permit criteria, ruling that "a use allowed as of right cannot be made subject to the grant of a special permit."

The Appeals Court Gives Developers a Sliver of Hope to Pursue Claims against Private Parties for Unreasonably Opposing Land Use and Zoning Permits and Approvals.

It is a rare case in which a developer will have a viable claim against project opponents for damages the developer incurs in overcoming the opponents' opposition to obtain the necessary permits and approvals. A significant obstacle to any such claim is the Anti-SLAPP statute, G.L. c. 231, § 59H. The Anti-SLAPP statue is intended to discourage litigation that may chill the right to petition, which includes the right to speak against and otherwise oppose applications for permits and approvals and to challenge permits and approvals in court. Where a developer bases a claim on defendant's petitioning activity, the Anti-SLAPP statute authorizes the defendant to file a special motion to obtain an early dismissal and, where the motion is successful, to recover legal fees incurred in connection with the motion. The shifting burdens that apply to a special motion to dismiss are as follows: the moving party (referred to herein as the defendant, because that is usually the case) must show that the plaintiff's claims arise solely out of the defendant's petitioning activities. Where the defendant meets that burden, the claims must be dismissed unless the plaintiff shows either (a) that the defendant's petitioning activities lacked any reasonable legal or factual basis (i.e., amounted to a sham) and caused the plaintiff injury or, if the plaintiff cannot make that showing (b) that plaintiff's claims are "colorable" and not brought "with a primary motivating goal" of chilling defendants' right to petition.

In *Bristol Asphalt Co, Inc., v. Rochester Bituminous Products, Inc.*, 102 Mass. App. Ct. 522 (2023), a divided Appeals Court affirmed a Superior Court judge's denial of a special motion to dismiss even though plaintiff's claims arose solely out of defendants' petitioning activities. More specially, plaintiff, who obtained necessary approvals to build a bituminous concrete plant in the Town of Rochester's industrial zoning district ("project"), sued defendants, who operated an existing bituminous concrete plant in the same zoning district, for violations of Massachusetts' unfair and deceptive business practices statute (G.L. c. 93A) and for abuse of process based on defendants' decade-long opposition to plaintiff's project. Defendants' conduct included (i) unsuccessful challenges – at the administrative level and then in court (up to and including an appeal to the Appeals Court) – to plaintiff's applications for site plan approval for an as-of-right use and for an extension of the conservation commission's order of conditions; and (ii) sponsoring and spearheading two unsuccessful "fail-safe petitions" to the Executive Office of Energy and Environmental Affairs for MEPA review.

The Appeals Court ruled that, although defendants showed that plaintiffs' claims arose solely out of defendants' petitioning activity, plaintiffs had met their burden of establishing that defendants' petitioning activity "lacked any reasonable factual support or any arguable basis in law" and caused plaintiffs injury. *Id*. at 553 (internal quotation marks and citations omitted). A dissenting justice expressed his view that defendants had a good faith basis for at least one of their allegedly wrongful actions – namely, their opposition to site plan approval based on traffic impacts that their expert claimed could occur –and that to allow plaintiff to pursue a claim based on such conduct would violate the defendants' right to petition under the First Amendment to the United States Constitution.

While *Bristol Asphalt* gives some wiggle room to developers whose claims are based on a defendant's petitioning activities, this area of the law will continue to develop and it is likely that the SJC will, at some point in the near future, reexamine the applicable standard.

Another potential obstacle to claims against project opponents is the litigation privilege, which provides absolute immunity from civil liability for statements made in connection with litigation. Claims based on statements that are subject to the litigation privilege may be subject to dismissal under the Anti-SLAPP statute. In *Haverhill Stem LLC v. Jennings*, 102 Mass. App. Ct. 1121 (2023) (unreported decision; text available at 2023 WL 355517), however, plaintiffs' claims, which were based on threatening statements that the defendants allegedly made to plaintiffs in connection with plaintiffs' plans to seek a zoning amendment and permitting for a proposed marijuana facility, had survived an Anti-SLAPP motion to dismiss on the ground that the threats were not made as part of petitioning activity. Defendants argued that the statements were nonetheless protected by the litigation privilege. The alleged statements included (i) threatening that plaintiff either pay defendants at least $30,000 and provide defendants access to a deck on plaintiff's property or the defendants would "fight them every step of the way" (something defendants followed-through on by, among other things, opposing plaintiff's effort to rezone plaintiff's property before the City Council and in Land Court); (ii) misinforming people in the City that plaintiffs owed them $30,000; and (iii) threatening "to destroy [plaintiffs] and their business before it got off the ground."

Defendants contended that the statements bore "some relation" to their contemplated lawsuit against plaintiff's project, and therefore were subject to the litigation privilege. The Court disagreed, explaining that, while the litigation privilege is not to be construed narrowly, and while it may be applied to statements by a party, counsel or witness that are preliminary to, as well as to statements that are made during the course of a judicial proceeding, the defendants "were not entitled to use the shield of the litigation privilege to make threats or false statements that were unrelated to the subject of the contemplated city council and Land Court proceedings." 2023 WL 355517at *4. The Court also held that, even construed broadly, defendants' alleged statements fell outside the scope of the privilege because they "could not possibly [have] be[en] pertinent . . . to the contemplated" zoning amendment proceedings or court challenges. *Id*. at * 5. (internal quotation marks and citations omitted).

Both *Bristol Asphalt* and *Haverhill Stem* involve allegations of especially egregious conduct by defendants, and it will remain unusual for a developer to be able to have a viable claim to recoup fees and expenses incurred in fending-off opposition to land use and zoning permits and approvals. However, these cases provide at least some wiggle room where the facts are strong.

Sullivan Obtains a Favorable Ruling for Its Client in a New Hampshire Easement Case.

In *Market Wharf I v. Port Harbor Land, LLC*, No. 218-2022-CV-00052 (Rockingham Super. Ct. Mar. 20, 2023), a New Hampshire Superior Court judge, resolving cross-motions for summary judgment, ruled in favor of our client, Port Harbor Land, LLC ("PHL"), in a dispute over rights to an area that had been subject to a parking easement and an unsigned settlement agreement ("Site"), which the plaintiff claimed modified the easement. The settlement agreement had been discussed by the plaintiff and the Site's prior owner (PHL had not been a party to it). Although counsel for the parties to the settlement agreement had generally expressed their understanding that the parties had "come to terms" on the settlement form, the Court agreed with PHL's contention that, because the parties had not actually signed the settlement agreement, the statute of frauds made it unenforceable. The terms of the pre-existing easement, therefore, governed the parties' rights. The Court also largely agreed with PHL's interpretation of the easement, ruling that PHL was not required to make parking spaces available for oversized vehicles and that PHL was under no contractual obligation to keep the plaintiff informed of its development plans and any updates to them.

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