Zoning and Development Newsletter

March 2023

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Introduction

Welcome to the first 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 legal developments in the field of land use and permitting with an update on notable developments in the law that might be relevant to their projects. This edition summarizes the following: (1) the status of proposals to implement rent control in Boston and substantial changes to the Boston Planning & Development Agency ("BPDA"); (2) a recent Supreme Judicial Court ("SJC") case holding that the capital gain from the sale of urban development project that qualified for a G.L. c. 121A tax exemption is not taxable by the State of Massachusetts; (3) a Superior Court case that substantially narrows a multi-count complaint challenging the adoption of an amendment to a Planned Development Area in Boston; (4) four decisions – including two appellate level decisions -- construing and applying the protection afforded to solar energy systems in G.L. c. 40A, § 3; (5) two Land Court decisions holding that special permits cannot be denied on the basis of speculative concerns about worst-case- scenarios and anticipated future violations by the permit holder; and (6) a SJC case construing the relatively new bond provision that applies to claims challenging zoning decisions under G.L. c. 40A, § 17.

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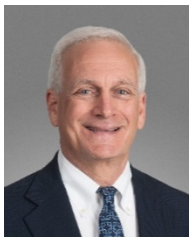

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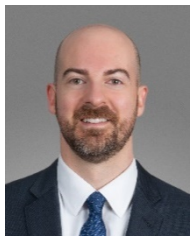

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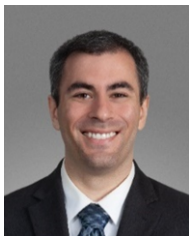

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Developments in Boston's Proposals for Rent Control and the Reconfiguration of the BPDA

On March 8, 2023, the Boston City Council voted 11-2 to approve Mayor Michelle Wu's home rule petition that seeks to allow the imposition of rent control in Boston after an almost three-decade ban. As proposed, the petition would limit the annual rental increase that landlords may impose to six percent plus the change in the Consumer Price Index, up to a combined maximum of ten percent. Excepted from the petition are owner-occupied buildings of six or fewer units. Once signed by Mayor Wu, the petition will go to the State Legislature, where, it must be authorized by State legislation. The petition's future is uncertain, as rent control is highly controversial and several members of the Legislature have expressed concerns with it. The future of Boston's petition may have a broad impact across Massachusetts, as at least two other cities – Cambridge and Somerville – are also considering home rule petitions that would authorize the imposition of rent control.

Also on March 8th, the Boston City Council voted 11-2 to approve a second home rule petition that Mayor Wu had filed to restructure the BPDA (Boston's planning and urban renewal authority) and change its mission to prioritize equity, affordability, and resiliency. The proposal would not change the cumbersome process of large project review in Boston, but Mayor Wu has stated that she would push to have that process updated through changes to the Boston Zoning Code. This proposal is less controversial than the one for rent control, but it, too, now heads to the State Legislature.

Noteworthy Recent Cases

Supreme Judicial Court ("SJC") Rules that Capital Gains from the Sale of an Urban Renewal Project Are Exempt from State Taxes

On March 10, 2022, Sullivan's tax group obtained a major victory for its client in *Reagan v. Commissioner of Revenue*, SJC-13287, which holds that Massachusetts cannot tax capital gains on the sale of an urban redevelopment project that qualified for a tax exemption under G.L. c. 121A. The SJC's unanimous decision reverses a decision of the Appellate Tax Board and rejects the Commissioner of Revenue's Letter Ruling 94-7. Additional information on this important decision is available here.

Superior Court Rejects a PDA Challenges Against BPDA

Pursuant to the Boston Zoning Code, a Planned Development Area ('PDA") is a type of zoning amendment that creates an overlay district and development plan for large projects in qualifying locations. Boston Zoning Code, §§ 3-1A.C and 80C. The process for designating a PDA includes the review, adequacy determination, and recommendation of the BPDA, a vote by the Boston Zoning Commission ("BZC"), and approval by the Mayor. See Boston Zoning Code, Section 80C. Challenges to zoning amendments in Boston, including PDAs, are governed by Section 10A of the Boston Zoning Enabling Act, St. 1956, c. 665, et seq. (challenges to zoning amendments adopted in all other Massachusetts municipalities are governed by G.L. c. 40A, § 5).

In a case in which members of our team have appeared (B*eckhardt v. Boston Zoning Commission, et al.*, No. 2284CV0077A (Suffolk Super. Ct. Dec. 14, 2022)), a Superior Court judge dismissed challenges to a PDA amendment that were brought by abutters to a PDA against the BPDA (the original PDA was adopted in 2015; the amended PDA was adopted in 2022). Specifically, the Court ruled as follows:

- Plaintiffs could not pursue a claim under Section 10A against the BPDA for its adequacy determination and recommendation, because

only the BZC is a proper municipal defendant under Section 10A.

- There is no viable non-statutory claim through which the BPDA's adequacy determination/ recommendation to adopt a PDA may be challenged.

- Plaintiffs had no viable certiorari claim against the BPDA under G.L. c. 249, § 4, because (1) the PDA process is not judicial or quasi-judicial; and (2) Section 10A provides a mechanism for challenging PDAs.

- Plaintiffs' declaratory judgment claim under G.L. c. 231A, § 1 failed because plaintiffs' claim, if any, was against the BZC under Section 10A.

Two Land Court Decisions Rule that a Special Permit May Not Be Denied Based on Speculative Concerns or an Expectation of Future Violations.

More and more commonly, special permit granting authorities are presented with a parade of horribles by those opposing developments. In two recent decisions, the Land Court made clear that unsubstantiated fears of worst case scenarios are an inadequate basis on which to deny special permits.

In *Gutierrez Co. v Martinek*, No. 21 MISC 000046 (KTS) 2022 WL 16833286 Mass. (Land Ct. Nov 9, 2022) (Smith, J.), plaintiff appealed the denial by the Town of Northborough's planning board ("board") of plaintiff's application for a special permit to construct a distribution center and warehouse facility. The board denied the application on the grounds that the project would impair "ambient groundwater quality," reduce "existing recharge capacity," and "adversely affect the quality or yield of an existing or potential water supply." While the board's peer review expert had stated that the plaintiff's proposed plan to protect groundwater resources, required under the zoning bylaw, was "well prepared" and compliant with the Department of Environmental Protection's Stormwater Handbook, he also opined that the plan was inadequate because it did not address the possibility of a catastrophic event (namely, a spill of oil, gas or other hazardous fluid outside the proposed building in a sufficient volume to flow into the groundwater recharge basins of the stormwater system).

The court ruled that, because the applicant had implemented various types of risk mitigation measures proposed by the Town, the likelihood of the catastrophic event was "so remote that it [was] best characterized as worst-case scenario speculation." While noting that the board may exercise its discretion to deny a special permit application even where the zoning bylaw criteria are satisfied, the court ruled that such "discretion does not extend to potential scenarios that are more accurately defined as speculation." And, while the board also attempted to justify its denial out of concern that the applicant, given the project's size, would not be able to consistently satisfy the project's snow removal plan, the Court held that "the expectation of future violations of a statute or bylaw is not a legally tenable ground to deny a project that on its face complies with the applicable bylaw." The Court therefore annulled the board's decision and remanded the matter to board for proceedings.

In *Garvey v. Town of Hampden*, 30 LCR 668 (2022) (Smith, J), plaintiffs appealed the Hampden planning board's ("board") denial of their application for a special permit for a self-storage facility. Rejecting the board's claim that it properly denied the application due to concerns that the project would risk exposing hazardous chemicals to private wells, the court stated that, in addition to the fact that no such concerns were identified in the decision (which, by itself, justified annulling the decision), "[a] board's expectation that a special permit holder will violate the conditions of the special permit, a town bylaw or other regulatory requirement in the future is not a legally tenable ground to deny a project that on its face complies with the applicable bylaw." The Court annulled the board's decision, remanded the matter to the board, and directed the board to decide, without any further public hearing, whether to (i) issue the special permit with the conditions that were unanimously approved or with different conditions, or (ii) deny the special permit based on the record. The Court specifically instructed that the board may not deny the application on the basis (i) that "plaintiffs

cannot 'guarantee' that there will never be any future leakage of chemicals, hazardous materials, or other noxious substances prohibited or controlled by the special permit" or (ii) "worst-case scenario speculation as to a future catastrophic event."

The Residential Lot Freeze and the Meaning of "Frontage."

What is commonly referred to as the "residential lot freeze," which applies to certain vacant lots, states as follows:

> Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

G.L. c. 40A, § 6, fourth para. In *Williams v. Bd. of Appeals of Norwell*, 490 Mass. 684 (2022), the SJC addressed the meaning of "frontage," as used in the statute. Plaintiff, claiming that his undeveloped lot ("Lot") was subject to the residential lot freeze, sought to build a house on the Lot. Plaintiffs' neighbors, who were among the defendants, successfully convinced the Zoning Board of Appeals ("Board") to overturn a building permit issued by the town's building inspector on the basis that the Lot lacked sufficient frontage on street or way that had suitable width. As the result of an administrative appeal, litigation, and remand, the Board ultimately issued the permit, but the Land Court annulled the board's decision. On appeal, the SJC noted that the purpose of the residential lot freeze is to "protect[] a once-valid lot from being rendered unbuildable for residential purposes, assuming the lot meets modest minimum area . . . and frontage . . . requirements" and that, consistent with this purpose, the freeze should be construed "broadly to protect landowners' expectations of being able to build on once-valid lots, and to avoid the hardship that would result from a lot losing its buildable status." *Id.* at 690 (internal quotation marks and citations omitted). The SJC held that, to determine whether a lot has at least "fifty feet of frontage" and therefore is protected by the residential lot freeze, it is necessary to determine (1) the "operative date" – i.e., the date when the lot was last conveyed before the zoning bylaw or ordinance was amended to place the lot out of conformity with frontage, width, yard, or depth requirements (here, that date was in 1957); and (2) whether, on the operative date, the lot had at least 50 feet of "frontage" as defined under the bylaw in effect <u>at that time</u>.

In considering the language of the bylaw in effect as of 1957 and dictionary definitions of "frontage" that applied at the time, the SJC ruled that the term "'frontage,' as used in the town's 1955 bylaw, referred to frontage on a 'way,' regardless of whether that way was public or private and, if the latter, whether the planning board had approved it." 490 Mass. at 696. Further, the SJC found that the operative 1957 deed "makes clear" that the lot had at least 50 feet of "frontage" on an existing right of way. Therefore, plaintiff's lot was protected by the residential lot freeze and plaintiff was entitled to the building permit.

The SJC Interprets and Applies G.L. c. 40A, § 17's Bond Provision.

G.L. c. 40A, § 17 governs appeals from decisions by municipal zoning boards of appeals and special permit granting authorities from all Massachusetts municipalities except Boston. The following bond provision was added to G.L. c. 40A, § 17 by 2020 Mass. Acts c. 358, § 25 ("Bond Provision"):

> The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the

> plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

The Bond Provision is incorporated into G.L. c. 40B, § 21 (part of the Affordable Housing Act (the "Act")), which provides that "[a]ny person aggrieved by the issuance of a comprehensive permit or approval [for an affordable housing project] may appeal to the court as provided in [G.L. c. 40A, § 17]." In *Marengi v. 6 Forest Rd. LLC*, 491 Mass. 19 (2022), the SJC addressed an interlocutory appeal from a decision requiring plaintiff to post a $35,000 bond in connection with plaintiff's challenge, under G.L. c. 40A, § 17, to a comprehensive permit issued for an affordable housing project.

The SJC stated that a comprehensive permit necessarily includes the approval of a site plan and, therefore, in appealing the comprehensive permit, the plaintiff necessarily challenged a site plan approval. And, because the Bond Provision applies to appeals from "site plan approval," the Bond Provision applied to plaintiff's claim. In further support, the Court cited the public policy of reducing barriers that impede the development of low and moderate-income housing, and explained that it would have been nonsensical for the legislature to have enacted the Bond Provision to protect developers of other projects from frivolous appeals, while failing to provide the same protection to developers of affordable housing.

Plaintiff argued that the sixth paragraph of G.L. c. 40A, § 17, which provides that the Court shall not impose costs absent a finding that the appellant acted in bad faith, precludes the imposition of a bond in the absence of such a finding. The Court largely agreed, but did not go quite as far as plaintiff wanted, ruling instead that a bond may be imposed only where the judge has found that the "appeal appears to be so devoid of merit that it may reasonably be inferred to have been brought in bad faith." 491 Mass. at 31.

The Court rejected the plaintiff's argument that the bond may be imposed only to secure the payment of taxable costs, but also rejected the defendant's argument that the bond may cover the expected amount of attorneys' fees and damages attributable to delay. The Court held that the Bond Provision authorizes the imposition of a bond only to secure the payment of taxable costs and consultant (expert) fees.

The Court remanded the matter to the Superior Court judge for a determination of whether a bond should issue and, if so, the appropriate amount of the bond, as it was unclear whether the judge had (1) found that the plaintiff's claims were so devoid of merit as to suggest a finding of bad faith; (2) weighed the harm to the defendant or the public interest resulting from delays caused by the appeal and whether those factors outweighed the financial burden of imposing the bond requirement on the plaintiff; and (3) imposed the bond to secure allowable costs (e.g., taxable costs and consultants/expert fees, but not attorneys' fees and damages attributable to delay).

Decisions Concerning Solar Energy System Protection

G.L. c. 40A, § 3 ("Section 3") protects a variety of uses and structures from certain types of zoning regulations. One of the Section 3 protections states as follows: "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." Section 3, para. 9. While this provision ("Solar Energy Protection") was adopted in 1985, there had been no noteworthy appellate decisions applying it until this past year, when the SJC and Appeals Court helped flesh-out the proper analysis; two notable Land Court decisions also issued in 2022.

In June, the SJC addressed a challenge, in a case brought under G.L. c. 240, § 14A, to a City of Waltham ("city") zoning ordinance that prohibited solar energy systems in all but industrial zoning districts. *Tracer Lane II Realty, LLC v. Waltham*, 489 Mass. 775 (2022). Application of Waltham's zoning ordinance, as construed by the city, would have precluded plaintiff from using its Waltham property to access a solar energy system plaintiff proposed on abutting

land plaintiff owned in Lexington. The Land Court had found that the regulation (which, according to the city's interpretation, prohibited solar energy systems in all but approximately 2% of the city's land area) contravened the Solar Energy Protection and was invalid. The SJC affirmed. The Court observed that the Solar Energy Protection was "enacted to help promote solar energy generation throughout the Commonwealth." 489 Mass. at 770. The Court ruled that the proposed access route was ancillary to the protected use, and therefore was also protected. As to the protection's scope, the Court turned to cases construing other protections in Section 3, which determine whether the regulation goes too far by "balanc[ing] the interest that the ordinance or bylaw advances and the impact of the protected use." *Id.* at 781. Applying this balancing test, the Court ruled that, while the regulation presumably advanced the city's interest in preserving each zoning district's "unique characteristics," and while that interest was "legitimate," the regulation "unduly restricts solar energy systems" by limiting them to, at most, two percent of the city's land area. *Id.* The ordinance did not pass muster because nothing in the record suggested that such a "stringent limitation [was] 'necessary to protect the public health, safety, or welfare.'" *Id.*

In *PLH, LLC v. Town of Ware*, 102 Mass. App. Ct. 1103 (2022), an unpublished Rule 23 decision (text available at 2022 WL 17491278), the Appeals Court affirmed a Land Court decision that granted summary judgment in favor of the Town of Ware in plaintiff's challenge to a zoning bylaw that required a special permit and site plan approval for ground-mounted solar energy facilities in the town's "residential business" and "rural" zoning districts. The zoning bylaw also prohibited ground-mounted solar energy facilities in the town's four most densely developed zoning districts.

Observing that certain of the Section 9 protections expressly prohibited the imposition of a special permit requirement but that the Solar Energy Protection did not do so, the Court ruled that municipalities may require special permits for solar energy systems without violating the Solar Energy Protection.

The Court also found that the special permit requirement served the legitimate purpose of helping to preserve "the character and environment of a zoning district" and "ensure that large solar installations are appropriate for their location." And, the Court found that the town's bylaw did not contravene the Solar Energy Protection because (i) the town's bylaw allowed large solar installations on 72% of the town's land area, either with a special permit or after site plan review, and exempted small solar installations mounted on buildings used for agriculture or one- and two-family dwellings; (ii) a special permit was required only for large installations and only in two of the Town's zoning districts; (iii) site plan review was the only requirement imposed on large installations in the commercial and industrial districts; (iv) the site plan review and special permit process involved the same submissions, thereby minimizing any burden on the applicant; and (v) there was no evidence that the town used the special permit requirement as a "pretext" for prohibiting solar installations or "for mere preferences regarding land use."

In *Kearsarge Walpole, LLC v. Lee*, 30 LCR 589 (2022) (Smith, J.), appeal pending, which was decided after Tracer Lane but before PLH, plaintiffs appealed a decision by the Walpole zoning board of appeals ("ZBA") to uphold the Walpole building inspector's determination that their proposed solar facility was not allowed in the rural residential district in which the locus was situated. Applying Tracer Lane, the Court stated that, although Walpole's zoning bylaws purported to allow large-scale ground-mounted solar facilities in a zoning overlay district (the "SPOD"), the SPOD occupied only 1.85%-2.07% of the land area in the town, and that, to determine if the bylaw was valid as applied to the Project, it was necessary to balance the interest advanced by the bylaw against the bylaw's impact on the installation of the solar energy facilities.

The judge ruled that, while the interests advanced by the bylaw for the district were legitimate and "important" zoning interests (e.g., the preservation of agriculture and open space for lower density, single-family residential land uses), the Solar Energy Protection prevented the town from prohibiting a large-scale ground-mounted solar facility in the rural

residential zone absent a finding of "significant detriment to the interests of public health, safety, or welfare" or that there was "ample other land in the municipality available for" such facilities. As it was not sufficient for a municipality to make only 2% of its land available for such facilities in *Tracer Lane*, it was also insufficient in *Kearsarge.* The Court, therefore, annulled the Board's denial.

In *Summit Farm Solar, LLC v. Planning Board for the Town of New Braintree*, 30 LCR 61 (2022) (Speicher, J.), which was decided before *Tracer Lane*, *PLH* and *Kearsarge*, the Land Court addressed a challenge to the New Braintree planning board's ("Board") denial of plaintiff's application for a solar array on ten acres of a 43-acre farm. The bylaw stated that, for a special permit to issue, the proposed location must be (1) one from which the facility could not be seen or (2) sufficiently distant from a residence or public way, and/or so obscured by topography, tree lines and/or vegetation, that the visual impact of the facility is rendered negligible, as determined by the Planning Board, during all seasons of the year."

The Board twice rejected (once on remand) plaintiff's application for a special permit on the grounds that the proposed location did not satisfy either requirement.

The Land Court stated that, while the bylaw requirements may be reasonable for uses that are not protected under G.L. c. 40A, § 9, "where the exemptive provisions of G.L. c. 40A, § 3 come into play, zoning bylaw provisions protecting residents from potentially intrusive impact[s] of protected uses may have to give way." The Court further stated that "[t]he better, and correct, view of the limits of local regulation of solar energy facilities allowed by G. L. c. 40A, § 3 is that such local regulation may not extend to prohibition except under the most extraordinary circumstances, and that special permits regulating solar energy facilities must be treated like site plan approval, which allows for regulation but not for prohibition." 30 LCR at 67. The Court held that the "Board's denial was not legally tenable because it violated the exemptive provisions of G.L. c. 40A, § 3." Id. Finding that remand would be futile or merely postpone an inevitable result, the Court ordered that the special permit issue.

Taken together, these cases reveal that zoning regulations governing solar energy systems, including those that impose special permit and site plan approval requirements, are less likely to be found to violate the Solar Energy Protection if they do not thwart the opportunity to install and use such facilities in large segments of the town. However, these cases suggest that ordinance and bylaw provisions are likely to contravene the Solar Energy Protection where they unreasonably or stringently restrict solar energy systems without a showing by the municipality that the regulations are necessary to protect the public health, safety, or welfare. In other words, the inquiry will be highly fact specific, and more cases can be expected in this area.

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