

**MASSACHUSETTS MUNICIPAL ASSOCIATION
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LAND USE CASE LAW UPDATE

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SIGNS

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)

This U.S. Supreme Court case invalidated certain provisions of the town of Gilbert, Arizona sign code, based on the court's finding that the sign code provisions constituted a regulation of speech that was not strictly content-neutral. The sign code included a number of categories of signs, including "Ideological Signs", "Political Signs", and "Temporary Directional Signs", the latter of which included signs directing the public to a church or other qualifying event. Temporary directional signs were subject to stricter conditions than the ideological or political signs. The plaintiff in the case was a local church and its pastor, which held Sunday services at various temporary locations in town, and therefore posted temporary directional signs each Saturday for its services. The church was cited by the town for exceeding the time limits for temporary directional signs and failing to include an event date. After trying unsuccessfully to obtain an accommodation from the town, the church and pastor sued for infringement of First Amendment rights. A motion for a preliminary injunction was denied, and affirmed by the Court of Appeals, which concluded that the sign categories were content neutral, and that the town's regulations satisfied the intermediate scrutiny for regulation of content neutral speech.

The Supreme Court, however, ruled that the categories of signs in the ordinance were not content neutral. Regulation of speech based on the content is presumptively unconstitutional and will be upheld only if the government proves that the regulations are narrowly tailored to serve a compelling state interest. The Supreme Court analyzed the definitions in the sign code and determined they were content based. Thus, the sign code defines "Temporary Directional Signs" on the basis of its message directing persons to a church or some other qualifying event; defines "Political Signs" based on a message intended to influence the outcome of an election; and defines "Ideological Signs" on the basis of whether a sign communicates a message or idea. The sign code then regulates each category differently, thus singling out specific subject matter for different treatment. The fact that the sign code did not single out specific viewpoints within those subject matters for different treatment did not matter. The Supreme Court rejected the Court of Appeals reasoning that the distinctions were justified without reference to the content of the

speech, and noted that the benign motives of the legislative body were irrelevant. Thus, whether a regulation is content neutral must be determined before reviewing the justifications for the regulations.

Once the Court determined that the regulations were content based, the town was required to prove that the regulations were narrowly tailored to advance a compelling state interest. The interests of the Town in preserving aesthetics and traffic safety were deemed not be compelling state interests. Further, the Court found that the regulations were underinclusive, because other signs were allowed by the sign code which affected aesthetics and traffic safety. The Court noted that the town could adopt content neutral regulations governing size, building materials, lighting, moving parts, and portability. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion.

GENERAL BY-LAWS

Showtime Entertainment, LLC v. Mendon, 472 Mass. 102 (2015)

In this case, the Supreme Judicial Court (SJC) responded to certified questions from the U.S. First Circuit Court of Appeals regarding a Mendon by-law. The plaintiff, Showtime, applied for a license to operate an adult entertainment business featuring live nude dancing. Town Meeting passed a by-law regulating adult entertainment businesses as defined by G.L. c. 40A, §9, including establishments which display live nudity. The by-law by limited operating hours, prohibited the sale or presence of alcoholic beverages, and imposed other restrictions. Showtime obtained a license, then filed suit in Federal District Court seeking a declaratory judgment that the by-law placed unconstitutional limitations on expressive conduct. The District Court ruled in favor of the Town. On appeal, the First Circuit invalidated as unconstitutional the limitations placed on the physical plant and operating hours. It referred the challenge to the restrictions on alcoholic beverages to the SJC because it determined that the outcome centered on unresolved issues of Massachusetts law.

The SJC reviewed the by-law as if it were content neutral, thus needing to meet an intermediate level of scrutiny. The SJC noted that the Supreme Court has ruled that nude dancing is not protected under the U.S. Constitution in an establishment licensed to serve alcoholic beverages because the states have the authority to regulate alcoholic beverages. Under Article 16 of the state constitution, precedent has been set that the regulation of alcoholic beverages at an adult entertainment establishment raises issues of the right of free speech. A municipality has an interest, however, in addressing the secondary effects of adult entertainment, such as crime prevention, protection of retail trade and property values, and protection and preservation of the community, which must be demonstrated by evidence that the by-law was aimed at addressing those secondary effects. The SJC found that in this case, the presentation to the Town Meeting included information from studies sufficient to conclude that increased crime is a secondary effect when adult entertainment and alcoholic beverages are in physical proximity.

Although the town established a legitimate public interest, the by-law must also be narrowly tailored to focus on the source of the legitimate public concern, without at the same time banning or significantly restricting substantial speech that does not contribute to the same

public concerns. This by-law was found to be invalid as overly broad, by banning the service of alcoholic beverages at any establishment that displays live nudity to its patrons and that is located within the adult entertainment district. The SJC cited a number of examples of how this regulation was overly broad, such as banning a theater located in the district from staging the musical “Hair”. A theater showing a production such as “Hair” would not be considered an adult entertainment establishment as defined in c. 40A, §9A, and therefore would not have the problematic secondary effects of an adult entertainment venue, yet would still be subject to the ban on alcoholic beverages. The SJC determined that the town must find a narrower means of pursuing its goal of crime prevention.

Doe v. Lynn, 472 Mass. 521 (2015)

This case involved an ordinance prohibiting Level 2 and 3 sex offenders from living within 1,000 feet of a school or park with limited exceptions, effectively excluding Level 2 and 3 sex offenders from living in 95% of the city. It also prohibited Level 2 and 3 offenders from entering a school, park, or recreational facility except in certain circumstances, and from “loitering” within 1,000 feet of such facilities. The city defended the ordinance as a means to reduce the potential risk of harm to children by reducing the likelihood of Level 2 and 3 sex offenders to be in contact with children. The SJC noted that 40 municipalities have similar by-laws or ordinances. Plaintiffs, representing a certified class of sex offenders, challenged the constitutionality of the ordinance after receiving notices from the city to move. The Superior Court invalidated the ordinance as beyond the city’s authority under the Home Rule Amendment, and the SJC affirmed on direct review.

A city or town is granted authority by the Home Rule Amendment to enact ordinances or by-laws to exercise any power or function that the legislature has power to confer on it, which is not inconsistent with state law or constitution (with certain restrictions). In determining whether an ordinance is inconsistent with state law, the court analyze whether the legislature intended to preempt municipalities from enacting regulations with respect to a certain matter. The legislative intent can be inferred where the legislation on a subject is so comprehensive that it evinces a legislative intent to preempt the field, or by an explicit statement by the legislature. In this case, state laws governing sex offenders do not explicitly forbid local enactments; however, the SJC found that there is a comprehensive scheme of legislation intended to protect the public from convicted sex offenders, from which it is inferred that the legislature intended to preclude municipalities from enacting regulations limiting where sex offenders can live.

The SJC reviewed the comprehensive statutory provisions governing the identification, treatment and post-release management of convicted sex offenders. These include the Sex Offender Registry Law (G.L. c.6, §§178C-178Q) and the Sexually Dangerous Person (SDP) law (G.L. c.123A). The registry law provides a classification system for assessing the risk to the public; requires sex offenders to register with the Sex Offender Registry Board and local police department; and authorizes the release of certain information to the public. It prohibits Level 3 offenders from living in rest homes or similar long-term care facilities. The SJC found the ordinance inconsistent with this statute, in particular the relatively narrow residency restriction in the statute, as well as undermining the classification system which considers the offenders’ living and work situation.

Under the SDP law, sex offenders deemed most likely to commit further crimes may be civilly committed. The SJC interpreted the SDP law as further demonstrating the legislature's intent on maintaining the registry information as sufficient to protect public safety for those offenders not deemed dangerous enough to confine. Finally, the SJC cited the community parole supervision law, which allows the state to control sex offenders' post-incarceration by placing conditions on offenders, including wearing of a GPS device; prohibiting an offender from being in and around the victim's residence, place of employment and school; and prohibiting an offender from other defined areas to minimize contact with children. The SJC found that this approach demonstrated the intent to allow targeted monitoring of sex offenders when deemed necessary by the state, without disruption to the stability of the broad population of offenders. The Court also noted a number of other state laws placing restrictions on sex offenders, including restrictions on working in certain jobs such as child care provider or school bus operator. It concluded that the "totality of the statutory scheme, incorporating as it does a series of interdependent policies and practices specifically designed to protect the public from level two and level three sex offenders by monitoring and notification to the public, evinces the Legislature's intent to have the first and final word on the subject of residency of sex offenders." The SJC therefore invalidated the entire ordinance, including the child safety zone provisions and residency provisions.

COMPREHENSIVE PERMITS

Reynolds v. Zoning Board of Appeals of Stow, 88 Mass. App. Ct. 339 (2015)

The Appeals Court in this case overturned the grant of a comprehensive permit, finding that the potential impacts to wells on neighboring property outweighed the need for affordable housing. By way of background, in 1983, Stow Elderly Housing Corp. (SEHC) obtained a comprehensive permit to construct Plantation I, a 50 unit low-income senior apartment complex served by private well and septic on a lot adjacent to the property at issue in this case. This case involves SEHC's application for a comprehensive permit for Plantation II, a 3-story building with 37 one-bedroom units of elderly housing, a function hall and offices, on 2 acres of land. The site is located in a residential district and also in the water resource protection district (WRPD), an overlay district. The proposed site would not have frontage, relying on an undersized driveway for access, and would use private septic system. SEHC did not identify the source for the water supply, despite regulations requiring it to do so. Instead, SEHC suggested several possibilities to supply water to the project, including private wells from other nearby developments or a private water company. There is no public water or sewer serving the area.

Local sewage disposal regulations for the WRPD are more protective than state standards. They prohibit on-site septic exceeding 110 gallons per day (gpd) per 10,000 square feet of lot area. SEHC obtained a waiver of this regulation for a septic system that will discharge approximately 700 gpd per 10,000 sq. ft. Plaintiff, an abutter, appealed the comprehensive permit to the Superior Court. The Superior Court found that the proposed development would result in elevated nitrate levels in another abutter's well, (not plaintiff's well), exceeding state standards and thereby posing a public health threat. Nevertheless, the Superior Court found that

the septic system would meet all state standards, and therefore SEHC was not required to prove that adjacent wells would not be impacted, and affirmed the ZBA decision. Plaintiff then appealed to the Appeals Court.

The Appeals Court found that the town and the region have a need for elderly affordable housing, which must be balanced against the local concerns raised by plaintiff. Generally, the need for affordable housing is given substantial weight in the balancing by the court. The first issue was the ZBA's waiver of the local limitation on the amount of sewage that can be introduced into a waste disposal system in the WRPD. The Appeals Court seemed skeptical that SEHC's failure to identify the source for potable water was a minor omission as SEHC claimed, since the septic system requirements turn, in part, on the source of the project's water supply. DEP does not generally limit discharge into private waste disposal systems of less than 10,000 gpd, unless located in a nitrogen sensitive area. SEHC argued that the site is not in a nitrogen sensitive area because it is not proposing both an on-site well and an on-site septic system. The Appeals Court again expressed skepticism, noting that SEHC had not identified its water source, and it owns an abutting property with 50 apartments with on-site well and septic. Although DEP had not ruled on the matter, one of the board's consultants, and plaintiff's expert, both opined that the more restrictive nitrogen sensitive standard would apply. Importantly, the trial court had found that it is more likely than not that the waste disposal system will cause excessive nitrogen level in an abutter's well. Thus, plaintiff demonstrated that compliance with state standards is insufficient to protect the groundwater from contamination. The Appeals Court also found that maintaining clean groundwater for local private wells is an important public health issue. The Appeals Court concluded that the need for affordable housing in this case did not outweigh the health concerns of existing abutters. It therefore ruled that it was unreasonable for the ZBA to waive the local requirement limiting the flow into waste disposal systems in the WRPD. The case was remanded for entry of judgment revoking the comprehensive permit. The SJC denied a request for further appellate review.

ZONING

Palitz v. Zoning Board of Appeals of Tisbury, 470 Mass. 795 (2015)

In this case, the SJC confirms that endorsement of an approval not required (ANR) plan under the "existing structures" exemption to the Subdivision Control Law (SCL) does not entitle any of the structures on the resulting lots to "grandfather" protection. The owner of a tract of land containing three existing single family structures, which had been standing since before the SCL became effective in Tisbury, submitted an ANR plan to divide the land into three lots, each with a house on it. The plan was endorsed, resulting in a new lot at 87 Main Street which lacked the required minimum lot size and frontage; in addition, the house on the lot did not comply with front and side year setbacks. The owner obtained a variance in 1995 to make the lot and house lawful, and sold the lot. Plaintiff acquired the lot and sought a building permit to tear down the existing house and build a new one on the same footprint, but with an added third floor and basement. The permit was denied, and she applied for a new variance, which was denied. Plaintiff appealed to the Land Court, arguing that the lot was entitled to grandfather protection because the dwelling predated the zoning by-laws and the lot was created pursuant to the existing

structure exemption. The Land Court ruled that the ANR had created new zoning nonconformities that deprived the house of grandfathered status, and therefore a variance was required to tear down the house and construct a taller one in its place. The SJC granted plaintiff's application for direct review, and affirmed the Land Court.

The SJC stated that an ANR endorsement allows a plan to be recorded, but does not render a lot compliant with zoning. The structure on the lot was noncompliant with the front and side setbacks prior to the enactment of the zoning by-law, and therefore was grandfathered in that aspect. However, the introduction of a new nonconformity to a pre-existing residential structure is not entitled to grandfather protection and requires a variance. In this case, the division of the land into three lots by the ANR plan created new nonconformities as to lot size and frontage for this lot, thereby necessitating the 1995 variance. The proposed new dwelling on the lot would have expanded the nonconformities allowed by the variance, because the increased height would have expanded the front yard setback nonconformity. The SJC reviewed the legislative history of the SCL and emphasized the "distinct regulatory regime" of zoning by-laws versus the SCL. The new nonconformities of the lot were rendered lawful by the variance, not the ANR endorsement. The SJC therefore affirmed the denial of the building permit.

Drummev v. Falmouth, 87 Mass. App. Ct. 127 (2015)

The Appeals Court concluded in this case that the town of Falmouth needed a special permit in order to install a wind turbine. In 2009, the town installed a wind turbine on town land. Abutters distressed by the noise sought enforcement from the building commissioner, claiming that a special permit was required under Section 240-166 of the Zoning By-law, which provides that a special permit may be sought for a windmill. The building commissioner determined that the turbine was allowed pursuant to §240-30B of the Zoning By-law, which allows community services by right, and includes a list of illustrative municipal purposes. He denied the request for enforcement, and the board of appeals affirmed that decision. Plaintiffs appealed to the Superior Court, which deferred to and affirmed the board of appeals' decision.

The Appeals Court concluded that the building commissioner's interpretation of community services, which was affirmed by the ZBA, was in error. In the public use district, windmills are specifically designated as an accessory use by special permit. The By-law states that where an activity may be classified under more than one use, the more specific will govern. Thus, windmills could not have been intended to fall under the more general municipal use category of §240-30B. The town is not exempt from the Zoning By-law, and therefore a special permit was required. The Appeals Court vacated the Superior Court judgment, but did not consider the plaintiffs' request to issue an order that the town cease use of the wind turbine until a special permit is issued, noting that such enforcement action is assigned by the Zoning By-law to the building commissioner in the first instance.

Cohen v. Somerville, 87 Mass. App. Ct. 1112 (Unpublished 2015)

This case involves a prior nonconforming use of property as a Star Market, which was proposed to be changed to an Ocean State Job Lot store of the same size. The building permit

was denied on the grounds, among others, that a special permit was required for the proposed use, and for setback violations. Plaintiffs, rather than appealing, filed an application for special permit, which was denied. Plaintiffs then filed a complaint in the Land Court, appealing the denial of the special permit and seeking a declaratory judgment that a special permit was not required. The Land Court awarded granted defendants summary judgment, and the matter was appealed.

The Land Court concluded that plaintiffs could not seek declaratory relief because they had failed to exhaust their administrative remedies with respect to the denial of the building permit. The Appeals Court ruled that there is no requirement to exhaust administrative remedies when a land owner seeks a declaration from the Land Court as to the extent to which the zoning by-law affects the use of property.

On the merits, plaintiff argued that it was error to require a special permit. The Court noted that the burden was on plaintiffs to establish that they met the test for changing a nonconforming use. Of particular concern was the fact that the parties had not established when the use as a supermarket had become nonconforming. There was evidence that the use became nonconforming in 1990, but other evidence pointed to a change in the by-law in 2010. The Land Court judge found that the supermarket had not been used for at least two years, from 2008 to 2010, thus losing its grandfather status. The Appeals Court, however, ruled that this was not determinative as to whether the nonconforming use lost its grandfather protection, because of the uncertainty as to when the use became nonconforming. The Court noted that it is not clear under G.L. c.40A, §6 when the two year period begins to “run for a use that became dormant prior to the adoption of the zoning change.... It could begin to run at the time the ordinance that makes it nonconforming becomes effective.... Alternatively, it could be that since the property was not actively being used in 2010, there was no prior nonconforming use when the relevant ordinance passed.” *Id.* n. 12. In the absence of sufficient undisputed facts, the Appeals Court did not rule on this issue. The Appeals Court concluded that plaintiffs had submitted sufficient evidence as to whether the proposed use was not a change in use for purposes of c.40A, §6. Accordingly, the Appeals Court reversed the grant of summary judgment on the zoning counts in the complaint and remanded the matter to the Land Court.