The Leading Land Use Cases of 2021 and 2022

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SJC Rules that Each New Property Owner Opens a New Window for Local and State Enforcement Against Old Wetlands Protection Act Violations

By Gregor I. McGregor

Town of Norton Conservation Commission v. Robert Pesa, 488 Mass. 325 (2021) is a seminal case of the Supreme Judicial Court supporting a commission, under the state Wetlands Protection Act, in a long-running attempt to get compliance from recalcitrant landowners. The decision is of singular importance to Commissions and the Massachusetts Department of Environmental Protection (MassDEP) which also enforces the Act

The original property owner in 1979 filed a Notice of Intent (NOI) with the Norton Conservation Commission to construct a store and parking lot. The Commission approved the project with a permit in the form of an Order of Conditions. Construction took place, but a Certificate of Compliance was never requested by the permit holder.

The owner died and the property transferred to his wife. In 1984, 1987 and 1988 the Commission sent letters about excess fill beyond the approved project plans.

In 2014 the Commission inspected the site and reviewed aerial photographs of the property and informed prospective purchasers of 11,000 square feet of unauthorized fill on the property and vegetation removal.

The prospective purchasers acknowledged the issue, asked for time to resolve it. but became new owners in December 2014 and said they would not remove the fill. In 2015 the Commission issued an Enforcement Order directing removal and restoration to the original condition. The new owners did not appeal that Enforcement Order to court or comply with it.

In 2016, the Commission sued the new owners in Superior Court. In 2020 a Superior Court judge ruled that the Commission's enforcement order as to original work was barred by the two-year statute of limitations and that a three-year statute of repose in the Act against a new owner required the Commission to have brought an enforcement action within three years of the first transfer of ownership in the property (the wife).

The Town of Norton appealed. The SJC ruled favorably for the Town that the three-year time limit for actions against new owners did not apply to just the first new owner. Rather, the Court interpreted the Act to allow a court action to be initiated against any subsequent owner within three years of that particular individual obtaining title to the property.

This important decision gives Conservation Commissions a useful tool to cure historic fill violations and some other types of noncompliance. In effect, each transfer of title renews the opportunity for the Commission to enforce against each subsequent owner who allows unauthorized fill to remain in place.

Be sure to consult the actual wording of the Act’s statute of repose. It also facilitates actions against violators of Enforcement Orders even where the violation is not unauthorized fill or other permanent change to the land.

Take note that a Commission issuing an Enforcement Order, which is an administrative action, is not sufficient to toll the statute, a common misperception. Rather, the enforcement action to be timely must be a court action. This would mean a civil suit or criminal prosecution.

21-Day Deadlines for Convening Hearings and Issuing Permits Under Wetlands Act Are Mandatory and Pre-Empt Local Home Rule Bylaws

By Gregor I. McGregor

Local wetlands bylaw (or ordinance) jurisdiction over projects in and near resource areas depends on Conservation Commission compliance with the 21-day deadlines for commencing public hearings and issuing decisions on Notices of Intent (NOI). Indeed, you may safely regard those timing provisions in the state Wetlands Protection Act (the Act) as binding on the Commission, with failure to meet them potentially fatal to any decision the Commission may render. This could apply to Determinations of Applicability, as well.

Recall that a Commission loses its "Home Rule" wetland bylaw control (with the result that the applicant has no need for the local permit) if it fails to issue its denial, permit or other decision on an NOI by the deadline of 21 days from the close of the public hearing and the applicant appeals this inaction to the Massachusetts Department of Environmental Protection (MassDEP) under the Act. This is by virtue of the Supreme Judicial Court's 2007 decision in *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 866 (2007). Now, by virtue of the Massachusetts Appeals Court's decision in *Boston Clear Water Company, LLC v. Town of Lynnfield,* No. 21-P-166, 100 Mass. App. Ct. 657 (Mar. 23, 2022), the Commission loses its control, and the applicant does not need to obtain the local wetlands permit, if the Commission fails to convene the public hearing by the deadline of 21 days from the NOI being filed and the applicant appeals to MassDEP under the state Act.

The upshot of either untimely default by the Conservation Commission is that the project is no longer subject to the municipal bylaw and, in most situations where this comes up under both the state Act and local bylaw, the only wetlands permit needed for an applicant's project is the Superseding Order of Conditions from the MassDEP under the Act.

The Appeals Court applied the doctrine of preemption of municipal regulatory authority by the superseding authority of the Commonwealth, based on the intent of the 21-day time frames in the state Act. Home rule authority of cities and towns, while regarded as very broad and deep in Massachusetts, is nonetheless subject to state preemption in certain circumstances. One such circumstance is when the Legislature has made specific provision for a procedure with which a city or town may not conflict. The 21-day periods specified in the state Act for convening the hearing and issuing the decision, as interpreted in these two court decisions, are such specific provisions and thus critical timelines to meet for the municipality to be able to exercise its home rule wetlands power.

At issue in the *Boston Clear Water* case was whether the Lynnfield Commission's failure to conduct a hearing within 21 days of receiving the Notice of Intent, pursuant to G. L. c. 131, § 40, and its town wetlands protection bylaw, caused it to lose its authority over the proposed project and as a result forfeit the right to apply and enforce its bylaw. While under Home Rule principles enunciated in earlier decisions about the state Act and local bylaws, the general rule is that if provisions of a local wetland bylaw are more stringent than the Act, those provisions will apply, that freedom does not apply to the statutory time frames for opening hearings and issuing decisions.

In other words, the Lynnfield Commission's failure to commence its public hearing within 21 days was not discretionary, it could not unilaterally reschedule the date for later, and so the Commission lost its jurisdiction to MassDEP when the applicant appealed to the state.

Consequently, MassDEP's Superseding Order of Conditions controls.

The Appeals Court saw the Supreme Judicial Court's ruling in *Oyster Creek* as binding precedent as to the beginning of the public hearing, concluding: "As a result, we are constrained under *Oyster Creek* to conclude that, by failing to conduct a hearing within the act's twenty-one-day mandatory time period, the commission lost the authority to regulate BCWC's project under the town bylaw. The DEP's superseding order of conditions approving the project thus controls."

It bears emphasizing what the Appeals Court found most significant in the *Oyster Creek* decision where that SJC observed that the Act's "timing provisions" --in the plural--are "obligatory."

The Commission was unable to convene a quorum within 21 days, did not obtain from the applicant a waiver of the deadline, and commenced the hearing late. Even though the applicant did not participate and made clear its position that it did not need Commission approval, the Commission held several hearing sessions without the applicant and denied the OOC for lack of participation or lack of information. The applicant already had appealed to MassDEP the Commission's failure to open the hearing in timely fashion, as per the Act and MassDEP Regulations, and MassDEP had issued a Superseding OOC approving the project. The court case arose because the applicant sued the Commission seeking a ruling to confirm the invalidity of its late hearing and decision. The Commission won in the Superior Court, but the Appeals Court overturned that short-lived victory, for the essential reason that the "timing provisions" in the Act are "obligatory," under the Act an applicant may appeal noncompliance to the MassDEP, and the resulting Superseding OOC will govern.

These *Oyster Creek* and *Boston Clear Water* holdings, both of which dealt with Commission disapprovals of proposed projects (either after the time for commencing the public hearing or after the time for issuing a decision), warrant renewed attention to the Commission's timing of all its hearings, meetings, and decisions. Commissions, their staff, the applicants, their consultants, and any legal counsel involved should attend to these 21-day time periods, even though at times that can be challenging, inconvenient, difficult, and even impossible.

Fortunately, there is available the common practice where the applicant and Commission arrange to time the NOI filing to fit the Commission hearing schedule, agree to leave the hearing open (continuing it to dates certain) until all the relevant information is received for the administrative record, plan carefully the Commission meeting(s) for deliberations after the hearing has closed so as to not run out of time, manage efficiently the drafting and circulation of the OOC or other decision for vote, signature and issuance, leave time for the necessary hand delivery or US Postal Service mailing, or, if time is about to expire, secure the applicant's written waiver of the legal deadline.

Oyster Creek and *Boston Clear Water* might govern another Commission action that is subject to the same 21-day deadline in the Act. The Commission must act on a Request for Determination of Applicability within 21 days of it being filed. This does not involve convening and conducting a public hearing under the Act. Here is the phrasing in the Act which we think comprises the "timing provisions" the courts are referring to in making these preemption rulings: "If a conservation commission has failed to hold a hearing within the twenty-one day period as required, or if a commission, after holding such a hearing has failed within twenty-one days therefrom to issue an order, or if a commission, upon a written request by any person to determine whether this section is applicable to any work, fails within twenty-one days to make said determination…."

Outdoor Advertising, the First Amendment, and Free Speech: The Supreme Court Refines the Case of *Reed v. Gilbert* by its Decision in *Austin v. Reagan*

By Gregor I. McGregor

The City of Austin, Texas regulates signs that advertise things not located on the same premises as the sign, and signs directing readers to offsite locations, all known as "off-premises signs." The City's sign code prohibited construction of new off-premises signs, but gave existing signs vested rights and treated on-premises signs liberally. An outdoor advertising company filed suit alleging the prohibition against digitizing off-premises signs, but not on-premises signs, violated the First Amendment's Free Speech Clause. The federal courts reviewed the City's ordinance to see if it was content neutral under the seminal sign case of *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015).

The District Court ruled for the City, but the Court of Appeals found the on-/off-premises distinction to be facially content based because, as the Court said, a government official had to read a sign's message to determine whether the sign was off-premises. On this logic, applying the strict scrutiny test to sign rules that are not content neutral, the City lost in the Court of Appeals. The U.S Supreme Court reversed, holding the City's on-/off-premises distinction is facially content neutral, so it does not violate the Free Speech Clause.

The Supreme Court applied and explained *Reed* in a way that ameliorates (some say undercuts) the strictness of that sweeping and controversial decision. *Reed* had caused much consternation as apparently applying to all regulation of speech, not just signs for advertising, political, informational, directional and other purposes, and virtually banning whatever remotely controls speech or expression. You could say that the *Austin* decision brings some order to the chaos left in the wake of the *Reed* decision concerning regulation of signs, and even speech, nationwide.

The case is *City of Austin, Texas v. Reagan National Advertising of Austin, LLC,* 596 US ___ (April 21, 2022). Justice Sotomayer authored the decision. Not surprisingly, Justice Thomas, who authored the *Reed* decision, filed a dissent. *Austin* does not so much rebuke *Reed,* though, as a refine what it meant, discuss how to apply it, and dampen the doubts thrown at every form of sign regulations. The Supreme Court disapproved the misconceived "reading the sign" logic: "The Court of Appeals' interpretation of *Reed*—to mean that a regulation cannot be content neutral if its application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent."

Specifically, *Reed* had ruled that a regulation of speech is content based if it targets speech based on its communicative content, meaning that it "applies to particular speech because of the topic discussed or the idea or message expressed." 576 U. S., at 163. *Reed* moreover had lumped into content-based sign rule regulating speech directly for its particular subject matter, as well as more subtly by its function or purpose. 576 U. S., at 163. Commentators and lower courts since *Reed* had seen this as making content-based any regulation of speech and expression by subject matter, function or purpose.

The Supreme Court in *Austin* sweeps away that concern, stating with clarity that the "subject-function-purpose" test "does not mean that any classification that considers function or purpose is *always* content based."

Recall that in *Reed*, a comprehensive and detailed sign code of Gilbert, Arizona applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events).

In *Austin,* in contrast, the Supreme Court found "the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny."

The Court pointed out that precedents and doctrines in this field have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. Examples are valid regulation of solicitation, where speech must be read or heard to determine whether it entails solicitation, and regulation of off-premise signs, where they must be read to know if they are on-premises or off-premises.

Thus, even while citing (and not overturning) *Reed,* the Supreme Court in *Austin* told us: "Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, content-based regulations are those that discriminate based on 'the topic discussed or the idea or message expressed.' *Reed*, 576 U.S., at 171. Pp. 8-10."

The Court remanded the case to the lower courts for what it termed the rest of the inquiry whether the sign ordinance violates the First Amendment. Much is specifically left to do on remand. The Court indicated that its determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest."

The lessons of *Reed* as moderated by *Austin* seem to be these:

- ordinary time, place and manner restrictions on signs, and on Free Speech more broadly, do not trigger strict scrutiny, just intermediate scrutiny;

- more sign rules will be found to be facially content-neutral; typical on-/off- premises signs distinctions likely will be upheld;

- the classic prohibitions of off-premise advertising signs will remain valid, as will the typical limits on digitized, moving and changing signs;

- federal, state, county and municipal rules about most informational and directional signs, permanent or temporary (like event signs) remain safe;

- an underlying impermissible purpose or justification, however, will change the nature of the restriction, level of scrutiny, and likely result in court;

- therefore, beware inappropriate motives and unstated reasons for targeting specific advertisers, products, messages, property owners, land uses, political positions, or religious faiths; and,

- regardless, be sure that any restrictions that are imposed on signs, or on any speech or expression, are narrowly directing to accomplish a significant government interest.

First Circuit Rules Federal Clean Water Act Citizen Plaintiffs Are Not Completely Trumped by Past or Pending EPA or State Agency Administrative Enforcement Against the Violator

By Gregor I. McGregor

Can citizen plaintiffs in federal court sue the same violator for the same water pollution violation against which the U.S Environmental Protection Agency (EPA) or state agency is taking or has taken administrative enforcement? The answer to the question is yes, as long as the federal citizen suit does not seek civil penalties. This according to the First Circuit Court of Appeals decision, issued April 28, 2022, in the case of *Blackstone Headwaters Coalition, Inc. v. Gallo Builders*, No. 19-2095, 32 F. 4th 99 (1st Cir. 2022).

Civil penalties are court-ordered money sanctions. Previously, the conventional wisdom was that EPA or state enforcement of any kind against the same violator for the same violation could entirely preclude a federal water pollution suit filed by citizens, seeking any type of relief. Indeed, a common tactic of choice of companies targeted by citizen suits has been to quickly arrange some form of EPA or state administrative enforcement, and then agree to comply. Sometimes this agency enforcement might be tough and strong, other times token and weak.

Until recently, then, EPA or state enforcement usually has been regarded as a complete defense to a citizen suit. Courts have declined to order permanent injunctive relief, for example, where the defendant had made a persuasive showing that it was complying with orders issued as a result of a federal or state administrative enforcement action and that the defendant's compliance yielded improvement in the environmental conditions of concern.

Against this background, the First Circuit, sitting *en banc* in the *Blackstone* case, ruled that under the CWA, administrative enforcement action by the government results in preclusion only a citizen's "civil penalty action." The Court of Appeals interpreted this term in the CWA to mean only a court suit seeking civil monetary penalties. A federal citizen suit seeking other (non-monetary) forms of relief, *such as* equitable relief like a prospective injunction or declaratory judgment, therefore, may proceed notwithstanding the government's action.

The *Blackstone* case arose as a result of stormwater discharges from defendants' development project in Worcester. The Massachusetts Department of Environmental Protection (MassDEP) had entered into an administrative settlement with the main defendant in the form of an Administrative Consent Order with Penalty (ACOP). The MassDEP ACOP required the defendant to pay an $8,000 civil penalty, to undertake certain remedial measures at the site, and to pay additional stipulated penalties if there were further discharges of turbid stormwater from the site.

About three years later, the *Blackstone* plaintiff organization filed a citizen suit under the CWA against several defendants involved in the construction site. This suit sought civil penalties, as well as declaratory and injunctive relief against alleged continued stormwater discharges. The *Blackstone* defendants argued that the citizen suit was precluded by Section 1319(g)(6)(A) of the CWA because the violations were subject to an ongoing "diligent prosecution" by MassDEP under its ACOP. Their defense relied on the First Circuit's earlier decision in the case of *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991). There, a First Circuit panel had ruled that the limitation on citizen suits established by Section 1319(g)(6)(A) precludes a citizen suit which seeks to obtain declaratory or prospective injunctive relief for a violation of the CWA. The panel had reasoned that duplicative enforcement actions, one by the government and one by citizens, would be inconsistent with the CWA's statutory scheme entrusting the government with primary enforcement authority.

That preclusion of suit defense by "diligent prosecution" refers to language in the CWA. In the language of the CWA, the *Blackstone* defendants defended on the ground that the MassDEP's administrative "enforcement action" constituted a "diligent prosecution" under a state law "comparable" to the CWA for the "same violations" alleged in the citizen suit.

As context, we briefly note that a federal citizen suit is totally precluded by EPA or state litigation—that is actually a civil suit or criminal prosecution. The court cases call that the "broadest preclusion." A "narrower preclusion" exists, they say, when the federal or state agency does something less than judicial enforcement, such as here in *Blackstone*.

In the first appeal phase of the *Blackstone* case, indeed, a panel of the First Circuit agreed with the defendants and relied on *Scituate* to affirm the federal District Court's grant of summary judgment against the citizen organization. In an interesting twist, the full First Circuit Court of Appeals, upon request, then revisited and reconsidered its decision in *Scituate,* decided it was wrongly decided back then, and vacated its own panel opinion in the pending case. The Court of Appeals ruled that the limitation set forth in Section 1319(g)(6)(A) bars only a citizen suit that seeks to impose a civil penalty for an ongoing violation of the CWA and does not bar a citizen suit for declaratory and prospective injunction relief to redress an ongoing violation of the CWA.

The practical implications are important. The CWA and several other federal environmental statutes contain citizen suit provisions. These simplify standing for private persons by eliminating the "injury in fact" part of the test of standing. These citizen suit provisions effectively make private plaintiffs "little attorneys general" seeking the same, similar or different remedies (or often more extensive or stricter remedies) as the federal and state air, water, wetlands, sewage, drinking water, solid waste, and hazardous waste agencies.

Citizen suits are usually filed in the absence of *any* government enforcement. Overall, the courts have recognized the benefits of citizens being empowered to sue environmental violators. Citizen suits are regarded as an important supplement to government enforcement of the CWA, given that the government has only limited resources to bring its own enforcement actions. Here in the First Circuit, EPA and MassDEP cannot be everywhere and know everything. Now citizen plaintiffs can seek civil money penalties if the EPA and MassDEP have not.

Supreme Court Strikes Down the City of Boston's Flag-Flying Practice at City Hall Plaza as Going Over a Bright Line Between Rightful Control of Government Speech and Relaxed Regulation of Private Speech

By Gregor I. McGregor

In *Shurtleff v. City of Boston,* 596 US ___ (May 2, 2022), the U.S. Supreme Court held that the City of Boston's flag-raising program did not constitute government speech. Consequently, the City's refusal to allow the petitioners to fly their flag because of its religious viewpoint violated the Free Speech Clause of the First Amendment to the US Constitution. The result hung on whether and when a governmental entity engages in government speech (which can be highly regulated) and when it does not engage in government speech.

Justice Breyer delivered the opinion, in which all members of the Court joined or concurred. The decision is important, even if out of proportion to the stakes for one flag at Boston City Hall. It affects governmental flag-flying policies and practices, as well as management of free speech and expression generally, as to controls of all kinds of signs, posters, flyers, forums, programs, exhibitions, announcements, and (nowadays) government sponsored social media posts.

Outside Boston City Hall, Boston flies the American flag, the flag of the Commonwealth of Massachusetts, and usually the City's own flag. Boston for years allowed groups to hold ceremonies on City Hall Plaza, during which participants may hoist a flag of their choosing in place of the City's flag. Boston regulated the content of the flags not at all. Between 2005 and 2017, Boston approved raising about 50 unique flags for 284 such ceremonies. Most of these flags were other nations' and some were associated with groups or causes, such as the Pride Flag. The Plaintiff asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community. He wished to raise what he described as the "Christian flag." Worried that flying a religious flag at City Hall could violate the First Amendment's Establishment Clause, and never having flown such flag, the City of Boston told the Plaintiff no. The Plaintiff sued, claiming Boston's refusal to let him raise his flag violated the Free Speech Clause.

The Federal District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston legally could refuse petitioners' request without running afoul of the First Amendment. The First Circuit Court of Appeals affirmed and the City was pleased. The Supreme Court then granted certiorari to decide whether the flags Boston allows others to fly express government speech, and whether Boston could, consistent with the Free Speech Clause, deny the Plaintiff's flag-raising request. The decision was long-awaited among government officials, civil rights advocates, and of course the property managers, agency staffers, and event sponsors who actually process applications for events and messages.

The Supreme Court acknowledged that the Free Speech Clause does not prevent the government from declining to express a view, citing the leading case of *Pleasant Grove City* v. *Summum*, 555 U. S. 460 (2009). It is firmly established that government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies, or implements programs. The Court then cautioned, though, that the boundary between government speech and private expression can blur when, as here, the government invites the people to participate in a program.

In those situations, the Court said it conducts a holistic inquiry to determine whether the government intends to speak for itself or, rather, to regulate private expression. This begs the question, what are the facts and factors for such an "holistic inquiry." The Court's cases over the years have looked to

several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. Considering these indicia, the Court has dealt with permanent monuments in a public park (government speech, even for monuments privately funded and donated); license plate designs proposed by private groups (government speech since, among other reasons, the state maintained direct control over the messages conveyed); and trademarking words or symbols for private registrants (NOT government speech as the Patent and Trademark Office did not exercise sufficient control over the nature and content).

Applying these factors to Boston's flag-flying, the Court was ambivalent, stating that the history of flag flying, particularly at the seat of government, supports Boston. However, on the 20 or so times a year when Boston allowed private groups to raise their own flags, did those flags express the City's message? On the one hand, the Court stated that flags evolved as a way to symbolize communities and governments. Not just the content of a flag, but also its presence and position have long conveyed important messages about government. Flying a flag other than a government's own can convey a governmental message. On the other hand, the Court stated that the circumstantial evidence of the public's perception did not resolve the issue.

The Court concluded that the key issue is whether Boston shaped or controlled the flags' content and meaning, as such evidence would tend to show that Boston intended to convey the flags' messages as its own. And on that critical issue, the Court found, Boston's record was thin with respect to the way in which the flag policy has been administered. Specifically, the Court pointed out that Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza; the City's application form asked only for contact information and a brief description of the event, with proposed dates and times; the City did not request to see flags before the events; the City's practice was to approve flag raisings without exception—until the Plaintiff's request; and the City had no written policies or clear internal guidance about what flags groups could fly and what those flags would communicate.

As a result, on balance the Court ruled that Boston's control is not comparable to the degree of government involvement in the selection of park monuments or license plate designs. "Boston's come-one-come-all practice—except, that is, for petitioners' flag—is much closer to the Patent and Trademark Office's policy of registering all manner of trademarks…. All told, Boston's lack of meaningful involvement in the selection of flags or the crafting of their messages leads the Court to classify the third-party flag raisings as private, not government speech." That being so, the Supreme Court reversed the lower courts and ruled against the City of Boston. When the government does not speak for itself, it may not exclude private speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."

In light of the Court's government-speech holding, Boston's refusal to allow the Plaintiff to raise his flag because of its religious viewpoint violated the Free Speech Clause. While the decision about one flag is interesting to federal, state, county, and municipal property managers, event sponsors, parade managers, and government attorneys, and those who track evolving Supreme Court law and attitudes about Free Speech and Expression under the First Amendment, the unanimity of the ruling adds to the impact.

The fallout is yet to be felt, as the case is recent, but initial indications are that many governments are reviewing their flag, sign, message, and comment-posting policies (if indeed they have any). Some are getting out of the business of allowing too much private expression by signage on public properties, while others are allowing more free-flowing expression with a hands-off attitude. Yet all are becoming mindful of the rightful controls that are attendant to what is properly classified as government speech.

SJC Rules Regulatory Taking Claim in Casino Dispute May Proceed to Discovery and Trial

By Gregor I. McGregor

The case of *FBT Everett Realty, LLC v. Massachusetts Gaming Commission*, 489 Mass. 702 (May 23, 2022) arose from financial disputes about the former Wynn casino, now operating as Encore Boston Harbor in Everett. The SJC handed a win to the former owners of the casino site, ruling that the Superior Court erroneously had dismissed a lawsuit the former landowners filed against the Massachusetts Gaming Commission in a bid to collect an additional $40 million for the Everett land. We commend the decision for its comprehensive discussion and citations of the leading cases on regulatory taking, both federal and Massachusetts.

Plaintiff brought this suit against the Commission alleging various claims including tortious interference with contract and a regulatory taking after the Commission refused to allow Plaintiff to receive a "casino-use premium" on the sale of a parcel of land in Everett. The result is an SJC decision illuminating the so-called three-factor balancing test enunciated in the seminal case of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The *FBT* decision was noted in the popular press for its impact on the economics of the original casino developers, and for leaving the path open to litigate the regulatory taking claim on the merits. In truth, the decision amounts to a fine law review article on how the SJC sees the regulatory taking doctrine, how the taking test under *Penn Central* is applied, and what is the relevant evidence for the three *Penn Central* factors, with particular attention to federal and Massachusetts jurisprudence.

Specifically, the SJC affirmed the Superior Court judgment dismissing FBT's claim against the Massachusetts Gaming Commission alleging intentional interference with a contract and reversed the grant of summary judgment on the regulatory takings claim, holding that there were material-disputed facts at issue precluding summary judgment.

The SJC found that the Gaming Commission took "highly unusual" action in 2013 after discovering that a businessman with a criminal record and organized crime ties was suspected of having a hidden interest in FBT Everett Realty LLC, which had negotiated a deal to sell the Everett property to Wynn for $75 million. Wynn's casino license was approved after it slashed the purchase price for the 35 acres on the Mystic River to $35 million, the estimated value of the land if the buyer were not building a casino.

Central to the ruling is language familiar to all of us following the evolution of regulatory takings jurisprudence at the U.S. Supreme Court and, for an even longer time, the Massachusetts Supreme Judicial Court:

"The regulatory takings inquiry is a fact-intensive evaluation that should consider multiple factors, including not only reasonable investment-backed expectations but also the economic impact and character of the challenged regulatory action."

"The motion judge here limited his analysis to the investment-backed expectations factor. This was error, as he also should have considered the significant $40 million economic impact and the highly unusual character of the government action here --conditioning the award of a casino license to Wynn on FBT not receiving a casino-use premium on the sale of the Everett parcel, thus effectively compelling the transfer of this economic benefit to Wynn."

Left open for discovery and maybe trial on remand, according to the SJC, are disputed facts about "exactly what the commission expected or required Wynn to do, and what Wynn did on its own initiative."

"Whether the commission directed such a compelled transfer of property, or merely accepted it as a cure to its concerns about undisclosed criminal ownership interests at FBT, cannot be decided without further discovery," the Court stated, allowing the suit to go forward on the regulatory claim.

Noteworthy is the SJC's compilation of the U.S. Supreme Court's long line of decisions on proper formulation of the three-factor *Penn Central* balancing test:

"We note that the Court has expressly cautioned that interference with investment-backed expectations is only "one of a number of factors that a court must examine" … "*Penn Central* inquiry does not turn "exclusively" on regulation's economic impact and degree of interference with legitimate property interests"… "Investment-backed expectations … are not talismanic under *Penn Central*"…"all three *Penn Central* factors are important, or at least may be important in determining whether a regulatory taking occurred, and should be considered in the regulatory takings inquiry."

Amplifying its understanding of the "investment backed expectations" factor, the Court states:

"We have recognized that an important determinant of the reasonableness of an owner's investment-backed expectations is the regulatory environment at the time that the owner purchased or otherwise took title to the property at issue" … (citations omitted) … "a property owner's investment-backed expectations must be reasonable and predicated on existing conditions."

While allowing the suit to proceed on the regulatory taking claim, the SJC affirmed the Superior Court's decision to dismiss a second claim by FBT alleging that the Gaming Commission intentionally interfered with its contract to sell the land. As a public employer, the Court ruled, the Gaming Commission is immune from suit for intentional torts under the Massachusetts Tort Claims Act, G.L. c. 258.

Some take-aways seem to be that:

- the regulatory takings doctrine is alive and well in Massachusetts;
- proper pleading of it and documentation in agreed facts and summary judgment record can survive attack;
- the *Penn Central* three-factor test must be applied in a fact-intensive analysis;
- reliance on the absence of reasonable investment-backed expectations alone will not win the day;
- reliance on the economic impact on governmental restriction alone likewise will fail;
- reliance on attacking the nature of the governmental interest is a hard hill to climb;
- rather, all three *Penn Central* factors are important with none weighted more than the others;
- there are many federal and Massachusetts decisions explicating how they properly apply; and
- this *FBT* decision is a nice synopsis of this constitutional doctrine which limits governmental power.

Real estate, land use, and environmental lawyers take heed.

SJC Gives Shot in The Arm for Commercial Solar Developments

By Madison Gaffney

Tracer Lane II Realty, LLC v. City of Waltham, decided by the Massachusetts Supreme Judicial Court on June 2, 2022, was eagerly awaited by municipalities and solar project sponsors alike. The citation is *Tracer Lane II Realty, LLC v. City of Waltham*, No. SJC-13195 (Mass. Jun. 2, 2022). Real estate, environmental and energy attorneys and their clients take note.

The State's Zoning Act, M.G.L. c. 40A, § 3, protects solar energy systems from local regulation that is not "necessary to protect the public health, safety or welfare." The SJC was faced with the issue of whether an ancillary structure was a part of the zoning code's legally protected solar use.

In the Town of Lexington and City of Waltham, solar developer Tracer Lane owned two properties. The Lexington land is located in a commercial and manufacturing use zoning district. The Waltham land is located in a residential use zoning district.

Tracer Lane proposed to build a "one-megawatt solar energy system centered on the Lexington property that will cover an area of approximately 413,600 square feet and contribute solar energy to the electrical grid."

In addition, to this solar energy system, Tracer Lane intended to construct an access road through its Waltham property. Tracer Lane anticipated that construction vehicles and maintenance trucks would utilize the access road during the solar energy system's assembly and lifetime.

Waltham officials informed Tracer Lane that it could not construct the access road as a road for commercial use was "not permitted in a residential zone." Tracer Lane then brought a complaint in Land Court against Waltham pursuant to M.G.L. c.240, §14A (portions of which are called the Dover Amendment). Tracer Lane sought a declaration that Waltham could not prohibit Tracer Lane from constructing the access road.

Both parties cross-moved for summary judgment and the Land Court granted Tracer Lane's motion. The Land Court cited the statute's language that "no zoning ordinance or bylaw 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."

Waltham appealed the Land Court decision and the case was transferred from the Massachusetts Appeals Court to the SJC.

Both parties argued whether Waltham's zoning code permitted or prohibited solar energy systems. Tracer Lane insisted that it does not because the zoning code does not mention solar energy systems, so, therefore, solar energy systems are prohibited. Waltham, however, argued that the zoning code "expressly permits solar energy systems in industrial zones, which encompass approximately one or two percent of Waltham's total area."

Waltham pointed out that the zoning code's definition of industrial zones could include "establishments for the generation of power for public or private consumption purposes that are further regulated by Mass. General Laws." Further, Waltham asserted that "accessory solar energy systems" are permitted in residential and commercial zones.

The Supreme Judicial Court looked to governing case law to interpret the statute's intention as to whether the access road must be governed by M.G.L. c. 40A, §3, ninth paragraph. From those cases, ancillary structures are a protected use. Here, the Court reasoned that the access road is imperative to the proposed solar energy system's construction and therefore is "part of the solar energy system." Therefore, the statute protects the access road.

The SJC then asked whether the statute barred Waltham's action. Again, the SJC turned to the case law which addresses other protected uses. The Court conducted a balancing test between the interest that the bylaw advances and the impact on the protected use and concluded that the zoning code's interest does not outweigh the benefits of the proposed energy system.

The Court added that "these standalone, large-scale systems, not ancillary to any residential or commercial use, are key to promoting solar energy in the Commonwealth" and limiting solar energy development directly conflicts with the statute's purpose. The SJC then affirmed the Land Court's judgment.

The *Tracer Lane* case confirms that large-scale solar generation systems are protected under M.G.L. c. 40A, §3. The unanimous SJC decision clarifies that a municipality cannot justify "zoning out" such solar developments just because of the uses or features ancillary to the solar facility.

This decision is welcomed by solar developers like Tracer Lane confronted with a myriad zoning bylaws and ordinances (not to mention non-zoning codes and regulations) across Massachusetts. Effectively, solar energy developers cannot be stopped from using residential zones for all or some of their project facilities except on a "very site-specific basis, use-by-use, parcel-by-parcel, neighborhood-by-neighborhood."

Other environmental law and land use attorneys have stated that "[t]he outcome of Tracer Lane should encourage municipalities that now ban large scale solar facilities from most or all of their territory, to adopt reasonable regulations that permit these kinds of o facilities with site plan or special permit review." Further, the Court's directive from the statute will yield solar facility evaluations on a "site-by-site" basis. Which will require more participation and effort from local municipalities and courts but will likely result in meeting the statute's purpose of "protecting the public health, safety, [and] welfare" while also promoting climate activism.

Madison Gaffney is a rising 3L at Vermont Law School where she is pursuing her J.D. and Master's in Environmental Law and Policy.

SJC Nixes Boston Waterfront Harbor Plan and with it the Harbor Tower Garage and the Municipal Harbor Plan Approval Process: Stay Tuned for Revamped MassDEP MHP Regulations

By Gregor I. McGregor

The Massachusetts Supreme Judicial Court (SJC) decided July 12, 2022, the case of *Katherine Armstrong et al v. Secretary of Energy and Environmental Affairs et al*, 490 Mass. 243 (2022), and a consolidated case brought by the Conservation Law Foundation of New England, Inc. (CLF) and others. From a land use dispute over proposed development of a high rise building on the Harbor Garage parcel near the New England Aquarium and Harbor Towers condominium, this matter grew into a full-blown litigation on the Public Trust Doctrine, the Waterways Act (M.G.L. c. 91), and the legality of Massachusetts Department of Environmental Protection (MassDEP) regulations creating and approving Municipal Harbor Plans (MHPs).

The decision is of intense interest to landowners, developers, managers, lenders, investors, real estate attorneys, and their clients in the Boston Downtown Waterfront MHP, which includes 42.1 acres and 26 parcels along the waterfront from Long Wharf to Seaport Boulevard. This area includes the Aquarium, Long Wharf, and Rowe's Wharf.

The case did not challenge the legality of the Boston MHP itself (only the process), the legality of any Chapter 91 license (not applied for yet), or the legality of the other 16 MHPs approved over the decades. Specifically, the SJC ruled that MassDEP exceeded its authority by promulgating provisions in its Chapter 91 Regulations, 310 CMR Section 9.00 *et seq*, that require MassDEP, when licensing certain projects subject to a MHP approved by the Secretary, to apply standards specific to that particular harbor area that have been approved by the Secretary. This delegation was ruled *ultra vires* Chapter 91. MassDEP plans curative amendments to its Waterways Regulations regarding the fundamental MHP scheme.

The Waterways Act is implemented through the Waterways Regulations, which set forth the basic requirements and performance standards for uses and structures licensed on public and private tidelands. These range from engineering and dimensional specification to use and open space limitations. According to the SJC, an MHP in effect for a harbor typically allows a substitution of some but not all of the generic specifications with local-specific specifications "that deviated (sometimes substantially)" from those in the MassDEP regulations, assertedly tailored to that particular harbor area but differing nonetheless.

The Boston Downtown Waterfront MHP was approved in April 2018 after a five-year planning process. The crux of the case was its particular application (and not the generic standards) to two parcels, namely the Harbor Garage site and the Hook Wharf site. These are on filled tidelands within 100 feet of the Boston Harbor high water mark. The MHP for the Boston waterfront contemplated construction of at least a 600-foot-tall tower at the Harbor Garage site and a 305-foot-tall building at the Hook Wharf site plus 30 more feet to accommodate building mechanicals. The SJC compared this with the MassDEP regulations which generally impose a 55-foot height restriction at the water's edge with graduated increases inland.

CLF and 13 private citizens filed suit in July 2018. At the same time residents of the Harbor Towers condominium filed suit. The Superior Court consolidated the cases and ruled on cross motions for summary judgment. That court reasoned that under our Public Trust doctrine, the Legislature expressly delegated to MassDEP the obligation to preserve the public trust and to protect the public's interest.

The Superior Court ruled, then, that the agency may not delegate or relinquish to the Secretary any of the oversight responsibilities that the Waterways Act entrusted to it. As the Act lacks an express authorization for MassDEP's MHP approach, it is irreconcilable with its enabling act and the Waterways Act.

Relying on its decision in *Moot v. Department of Environmental Protection*, 448 Mass. 340 (2007), striking down a MassDEP regulation exempting landlocked tidelands as improperly relinquishing licensing jurisdiction, the SJC saw an unlawful delegation of Chapter 91 licensing determinations to the Secretary through the Municipal Harbor Plan approval process. The MHP Boston Harbor provisions, it ruled, are *ultra vires* and invalid.

The decision amounts to a legal treatise on the Public Trust Doctrine. The SJC decision begins with a condensation of the legal principles, legislative delegation, the MHP approval process, the "substitute specifications" of the Secretary, what MassDEP judgment they override, and the resulting invalidation of the Boston Waterfront MHP. Essentially the SJC saw the MassDEP "bound to determine that the project meets the requirements…" of the MHP. Citing *Moot*, 448 Mass. at 353, the Court saw the MHP rules and process as relinquishing "all public rights that the Legislature has mandated be preserved through the licensing requirements…."

The SJC discussed the nature and scope of review ("reconciling regulations with the Legislature's intent"), the weight accorded an agency's discretion ("deference, not abdication"), the Legislature's history of delegation to MassDEP (rather narrow and strict), the constraints on licensing "nonwater dependent uses of tidelands", the Secretary's substitute specifications (which MassDEP "shall presume" comply with the Waterways Act's "proper public purpose" test which mandates "greater benefit than detriment to the rights of the public in such lands"), and the small opportunity for rebuttal of that presumption (only on " narrow grounds").

The SJC helpfully observes, "To be sure, the department is free to consider – but should not be bound to adopt -- the Secretary's input when it makes licensing decisions…." The bottom line, to this author, is that "the department may not cede to the Secretary the decision whether nonwater-dependent uses of tidelands serve, *inter alia*, a proper public purpose…."

The SJC's decision was unanimous and so stands as another strong rebuke of the MassDEP administration of the Chapter 91 program in recent years. Fortunately, in a footnote, the SJC allowed all prior MHPs to stand as-is, noting the window of time in which they could be legally challenged has expired. We feel this means those MHPs and all the Chapter 91 licenses that were issued pursuant to them are beyond legal attack by virtue of the statutes of limitations.

The MassDEP meanwhile has set about revising its Waterways Regulations and may take steps to re-approve the MHPs in a legally-prescribed way. Last February, for instance, the agency published proposed amendments and took written comments. As a result, in September the agency published further revised rules which would apply to 16 MHPs (but not yet the Boston Harbor MHP). We await all that MassDEP wishes to do to conform its MHP regime to the SJC decision.

Supreme Judicial Court Instructs Conservation Commissions on Home Rule Wetland Protection Power: Use It or Lose It

By Gregor I. McGregor

A local conservation commission can have regulatory authority under a local wetland protection town bylaw or city ordinance that is independent from, and in addition to, its authority under the state Wetlands Protection Act ("Act"). The effective use of this municipal authority was made contingent on the commission relying on bylaw provisions which are more stringent than those in the Act. This test of reliance is important. Otherwise, the commission decision is said to be null and void as preempted by the state.

This rule of preemption in the field of municipal wetlands protection is sometimes (half-seriously) referred to as the DeGrace Doctrine, named after the case of *DeGrace v. Conservation Comm'n of Harwich*, 31 Mass. App. Ct. 132, 135-136 (1991). As the SJC enunciated in seminal cases since then, where a conservation commission "rests its determination on provisions of a local bylaw that are more protective than the act[,] . . . a superseding order of conditions issued by the DEP cannot preempt the conservation commission's bylaw-based determination." *Oyster Creek Preservation, Inc. v. Conservation Comm'n of Harwich*, 449 Mass. 859, 865 (2007). "This rule is [premised] on the recognition that the act establishes Statewide minimum wetlands protection standards, and local communities are free to impose more stringent requirements." *Oyster Creek* at 866.

The issue came before the SJC in *City of Boston v. Conservation Commission of the City of Quincy*, SJC No. 13244, July 25, 2022 (LW 10-092-22). Boston had filed an NOI with the Quincy Conservation Commission (Commission) to rebuild a bridge to Long Island in Boston, as the bridge work (specifically the piers and roadway) would alter wetlands in Quincy. The Commission denied Boston's application pursuant to the Act and Quincy's local wetlands ordinance. Boston appealed the denial to MassDEP for a Superseding Order of Conditions, which MassDEP granted as the project met the requirements of the Act and MassDEP Regulations. Boston also appealed to Superior Court, for review in the nature of certiorari (for any legal errors on the certified record), insofar as the denial was under the ordinance. The Superior Court overturned the Quincy denial and Quincy took appeal to the Massachusetts Appeals Court.

In the Boston-Quincy dispute, the issue for the SJC as usual was whether MassDEP's order supersedes the Commission's local ordinance denial decision. The Commission argued that it relied on its ordinance's reference to "cumulatively adverse effect[s] upon wetland values," and that this language is more stringent than the language in the Act. This stricter-than-the-Act language had been approved by the Appeals Court in an earlier case, as a basis for upholding a denial. *Cave Corp. v. Conservation Comm'n of Attleboro*, 91 Mass. App. Ct. 767, 771-772 (2017). Several cities and towns have this "cumulative effects" language in their Home Rule wetland protection bylaws and ordinances and sometimes take heart that the *Cave Corp.* case validates that wording and lets commissions consider and rely on it in evaluating and acting on projects. The lesson from the Boston-Quincy case, as we will shortly see, is that it matters whether they merely invoke it or actually utilize it.

The SJC in this Boston-Quincy case distinguished the *Cave Corp. case*, saying that the Attleboro commission concluded that any disturbance to the 125-foot area on the subject parcels of land will result in cumulative adverse impacts upon the resource area values. This conclusion was appropriate despite a MassDEP superseding order of conditions "[i]n light of the commission's mandate to consider the cumulative effects of the proposed subdivision with regard to the purpose and the objectives of the ordinance, and the evidence before it." *Cave Corp.* at 771-772, 774. Specifically, in *Cave Corp*. the

Attleboro ordinance itself, in so many words, specified the cumulative effects that the commission should consider. It directed the commission to "take into account the cumulative adverse effects of loss, degradation, isolation, and replication of protected resource areas throughout the community and the watershed, resulting from past activities, permitted and exempt, and foreseeable future activities." *Cave Corp.* at 773.

The crux of the case before the SJC was whether the Quincy Commission actually relied on – and explained in its decision how it relied on – the provisions of its ordinance and any regulations to support its project denial. It did not. Therefore, the SJC here concluded that the MassDEP order supersedes the Commission's denial. Earlier, the SJC, as well as the Appeals Court, had cautioned in this line of cases that "[t]he simple fact[] . . . that a local by-law provides a more rigorous regulatory scheme does not [prohibit] a redetermination of the local authority's decision by the DEP except to the extent that the local decision was based exclusively on those provisions of its by-law that are more stringent and, therefore, independent of the act." *Healer v. Department of Envtl. Protection*, 73 Mass. App. Ct. 714, 718-719 (2009).

A local conservation commission, then, that wishes to rely on a more stringent local bylaw or ordinance to deny a project must explain how the bylaw or ordinance applies to the facts presented. "[I]f a town conservation commission simply refers to a by-law without providing any indication that its protective provisions, and a commission's general reference to the by-law in its decision, without elaboration, would allow it to insulate the decision from scrutiny". *Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich,* 449 Mass. 859 (2007), at 866 footnote 12.

As applied to Quincy, the SJC ruled: "(T)he commission claims it relied on the local ordinance's reference to 'cumulatively adverse effect[s] upon wetland values,' and that this language is more stringent than the language in the act. According to the commission, it did not have enough information to determine the cumulative effects of the work that would occur on the piers and the access road. The commission does not explain in its brief, and did not explain in its decisions denying Boston's application, how its own analysis differs from the analysis that the DEP was authorized to perform. Accordingly, and as discussed further infra, we conclude that the DEP's superseding order of conditions preempts the commission's determination."

It was relevant to the SJC that "the local ordinance is concerned almost entirely with the procedure for permit applications. Its substantive provisions are limited to broad '[p]urpose' and '[s]cope' sections, which merely prohibit several activities in protected areas without the commission's approval. These sections do not give the commission additional authority over fisheries, wildlife habitats, pollution, land under the ocean, or land containing shellfish that the DEP does not also have." On this score the SJC held that "the commission did not rely on cumulative effects when analyzing the piers. The commission relied on distinct factors that the DEP also could consider pursuant to the act and the regulations. Additionally, the ordinance at issue in *Cave Corp*., unlike the local ordinance here, specified the cumulative impacts that the commission should consider."

In summary, since the Quincy Conservation Commission did not couch its stated concerns on wetland interests different than the Act, did not base its findings on any Regulations other than those of MassDEP, did not raise issues other than those within the purview of MassDEP, and did not have an ordinance stricter than the Act except in its general purpose and scope language, the Quincy denial was preempted. Legally, the Commission's ordinance denial was null and void and thus of no legal effect, and hence the MassDEP permit governs the wetland aspects of the Long Island Bridge reconstruction.

Housing Choice Act Of 2020 Promotes Multi-Family in Massachusetts Zoning Act and 40R

By Michael J. O'Neill

Governor Baker signed the Housing Choice Act of 2020, Chapter 358 of the Acts of 2020 (the "Housing Choice Act") on January 14, 2021, as an emergency law, which made it effective immediately.

It made significant procedural and substantive changes to the Massachusetts Zoning Act (Chapter 40A) and Smart Growth Districts (Chapter 40R), largely to facilitate multi-family housing near transportation facilities.

Mandatory Zoning Allowing Multi-Family Housing in MBTA Communities

The Housing Choice Act added a new requirement for "MBTA Communities," which are broadly defined to include essentially all communities served by the MBTA. MBTA Communities now are required under the Zoning Act to have at least one zoning district of reasonable size in which multi-family housing is allowed as a matter of right.

Such MBTA Community districts must be unrestricted as to age, must be suitable for children, and must have a minimum gross density of at least 15 units per acre. If applicable, they must be located not more than a half-mile from a commuter rail station, subway station, ferry terminal, or bus station.

This provision has sharp teeth. If a MBTA Community does not adopt the requisite zoning, it cannot qualify for the Local Capital Projects Fund, MassWorks Infrastructure Program, and Housing Choice Initiative Program.

The Housing Choice Act says that the department (presumably, the Department of Housing and Economic Development) shall promulgate guidelines to determine if an MBTA Community is in compliance with this new section of law. Guidelines have yet to be issued.

What is not specified is whether a MBTA Community may elect not to enact the requisite zoning and accept ineligibility for the specified state programs. The law is mandatory and does not seem to provide that option. It requires an MBTA Community to enact this specific zoning despite the fact that zoning traditionally is a strictly local decision.

Court May Require a Bond in Some Appeals Under G.L.c. 40A, sec. 17

The Housing Choice Act added another provision to the Zoning Act giving a court discretion to require a plaintiff appealing certain land use permissions to post a surety or cash bond 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 is directed to consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

This new provision is limited to appeals of a special permit, variance, or site plan approval, regardless of whether the project involves housing or multi-family housing near transportation facilities. Note that the surety or bond is not mandatory or automatic; rather, it is up to the discretion of the court.

This provision significantly changes existing practice. A plaintiff's finances are now open to discovery and scrutiny by the defendant, as well as the court, at the very beginning of a case. Such information is not presently open to such disclosure at the very beginning of a case. This may have a chilling effect discouraging appeals.

Voting Requirements to Approve Certain Zoning Amendments Reduced

The Housing Choice Act makes it easier to enact zoning amendments to provide for multi-family housing and certain other uses allowed as a matter of right. Zoning amendments allowing the following uses as of right require a simple majority rather than a two-thirds vote:

- multi-family or mixed-use development in an eligible location;
- accessory dwelling units;
- open space residential development;
- Transfer development right zoning or natural resource protection where it will not result in a reduction of the number of housing units that could be developed;
- the adoption of a smart growth zoning district or starter home zoning district in accordance with Chapter 40R.

Voting Requirements to Approve Certain Special Permits Reduced

The Housing Choice Act also makes it easier to obtain a special permit for multi-family housing near a transportation facility. It amends the voting requirements by the Special Permit Granting Authority for approval of a special permit from 2/3 to a simple majority for a special permit for certain uses, namely, multi-family housing within a half-mile of a commuter rail station, subway station, ferry terminal, or bus terminal, provided that not less than 10% of the housing is affordable housing.

Definitions of Basic Terms Added

The Housing Choice Act adds definitions to the Zoning Act of a number of basic zoning terms, including: "Accessory dwelling unit," "As of right," "Eligible locations," "Gross density," "Lot," "MBTA community," "Mixed-use development," "Multi-family housing," "Natural resource protection zoning," and "Open space residential zoning." The definition for "Transfer of development rights" was revised. These definitions will help judges, as well as attorneys and other land use professionals, in their work.

Conclusion

While the word on the street is that the Housing Choice Act affects only MBTA Communities and multi-family housing developers, in actuality it changes the Town Meeting and City Council votes for several kinds of housing the Commonwealth wants to promote, alters the vote needed for a Special Permit for multi-family projects near transportation nodes (if there is some affordable housing included), poses the prospect of appellants having to post bonds in Section 17 appeals to Superior Court and Land Court, and gives us several good definitions of many land use terms that have been common parlance amount community planners, boards, applicants, engineers, and lawyers for many years.

PFAS Update: What EPA Designation of PFAS as a Superfund Substance Under CERCLA Means

By Caroline E. Smith

The United States Environmental Protection Agency ("EPA") has proposed to designate Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This is the federal Superfund law. Collectively these chemicals are known as "PFAS."

The EPA Administrator may designate a substance as hazardous if, when released into the environment, it may present substantial danger to the public health or welfare or the environment. PFAS are water soluble and over time have seeped into surface soils, leached into groundwater and surface water, and contaminated drinking water. PFAS are now found in rivers, lakes, fish, and wildlife. That scientific reality is why the EPA is moving in this direction.

This proposed Superfund coverage of this new class of chemicals is significant. CERLCA imposes liability on the following "potentially responsible parties" (PRPs) for the actual or threatened release of any hazardous substances and the cleanup costs of any release. Release is broadly defined as "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). The class of PRPs includes a long list: current owners and operators of a facility, past owners and operators of a facility at the time hazardous wastes were disposed, generators, parties that arranged for the disposal or transport of the hazardous substances, and transporters of hazardous waste that selected the site where the hazardous substances were brought. 42 U.S.C. § 9607(a).

If PFOA and PFOS are designated under CERLCA, as appears likely to happen, any person in charge of a facility would be required to report releases of one pound or greater of PFOA and PFOS within a 24-hour period to the National Reporting Center in accordance with 40 C.F.R. 302. For example, Section 304 of the Emergency Planning and Community Right-to-Know Act also requires facility owners or operators to immediately notify their community emergency coordinator or local emergency planning committee of a release. Upon notification, the Federal government will evaluate the need for a response in accordance with the National Oil Hazardous Substance Contingency Plan.

Because current owners and operators of facilities can be found liable under CERCLA, that means even passive receivers of PFAS can be found liable. It is expected that this new designation by EPA would affect PFAS manufacturers and processors, manufacturers of products containing PFAS, downstream product manufacturers, users of PFAS products, and waste management and wastewater treatment facilities. A small sample of potentially affected businesses includes car washes, carpet manufacturers, airports, landfills, firefighting foam manufacturers, municipal fire departments, paper and textiles mills, wastewater treatments plants, waste management services, water utilities, and many more.

An increasing number of states have their own PFAS policies or regulations with which the listed manufacturers and users need to comply. Designation of PFAS under CERLCA may introduce a uniform and more predicable nationwide application of PFAS regulations and enforcement, or at least a set of minimum standards and specifications on which states may improve. We shall see.

Designation of PFOA and PFOS under CERCLA certainly will affect real estate transactions. Environmental due diligence, at some level, should always be a part of any real estate transaction,

certainly for industrial, commercial, agricultural and larger residential developments. Any buyer, lender, investor, or tenant always is well advised to determine the current and past uses and owners of a property to establish whether a release of a hazardous substance could have occurred. This should include CERCLA, TSCA, RCRA and counterpart state regulatory laws.

Large commercial developers routinely use the American Society of Testing and Materials International Standard E1527-13 Phase I Environmental Site Assessment ("Phase 1") process in order to identity any history of any potential contaminants on the site. This has been called the "paperwork review." By using this standard, purchasers of properties can satisfy one of the requirements to qualify as an innocent landowner or bona fide prospective purchaser under CERCLA and limit their liability under CERCLA. As of now (and until PFAS are listed as hazardous substances under CERCLA), Phase 1 does not include PFAS in its due diligence standards and developers would not be protected from liability for PFAS even if they complied with all the standards set out in Phase 1. Until the rule is finalized, developers may be wary of redevelopment projects.

The addition of PFOA and PFOS under CERCLA will bring new parties to existing Superfund sites since the EPA is authorized to bring in new liable parties. Existing parties also are able to make contribution claims against those new liable or potentially liable parties. This addition will also expand the geographic scope of current remediation projects and reopen old Superfund sites since they likely will contain PFAS. Many parties that have resolved their CERCLA liability via settlement agreement have reopener clauses in their contracts that may subject them to additional liability.

The new designation will enable the EPA and states to identify more Superfund sites that are not currently designated as such. These practical implications will increase the time, cost, complexity, and uncertainty of the remediation process.

One way state and municipalities have been reckoning with PFAS is through litigation. Multidistrict litigation consisting of hundreds of lawsuits brought by state attorneys general, municipalities, and private and public water districts is ongoing. State and local officials are using litigation as a tool to punish wrongdoers and obtain large sums of money to spearhead testing and cleanup efforts.

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