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Cases Impact Development

By Mark A. Kablack

I sometimes fear that my law practice has become singularly focused when I can get excited about two recent court decisions, one involving voting procedures for conservation commissions, and the second involving relocation of access easements. At first glance the subject of both cases seems esoteric. Yet, I am confident that each case will have direct impacts on my practice as a real estate attorney. I am equally confident that they will affect decision-making strategies for builders and developers as well. The first case is Jeffries v. Conservation Commission of Milton, Norfolk Superior Court Case 02-2160. Jeffries is a lower court decision by Judge Charles J. Hely affecting development in the town of Milton. Jeffries first restates the correct voting protocol for decisions rendered by municipal boards acting within a judicial or quasi-judicial capacity. Citing the case of Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983), Hely reminds us that it is well-established law for zoning and planning board members to attend all hearings for a particular project before they can form a legal quorum for issuing a decision on a project. Hely goes on to say that such a standard should now apply equally to conservation commissions acting within the context of quasi-judicial review of the Wetlands Protection Act and local wetlands bylaws. Under Jeffries, the only qualified conservation commission members who may vote on a determination of applicability or an order of conditions are those members who have been present at all relevant hearings. In my opinion, the impact of the Jeffries decision places an additional strain on conservation commissions and, more importantly, on builders and developers who now may be tripped-up on defects in voting procedure in addition to substantive regulatory issues.

In Jeffries, a seven-member conservation commission reviewed a notice of intent over the course of four hearing dates. At the fourth hearing date, the commission approved an order of conditions by a vote of 4-2. However, of the four affirmative votes, three of the commission members had missed one or more prior hearings. Following the rule in Mullin, Hely annulled the commission's vote without prejudice to the commission rehearing the matter to take further action as it deemed necessary based upon a proper voting quorum.

The Jeffries court recognized that there can be minor flexibility in the conduct of public hearings before a municipal board. Hely stated, for instance, that there is not necessarily automatic disqualification of a conservation commission member who might "be late for a meeting" or who might miss "some minor discussion about a project." Nevertheless, the stricter voting standards may require a prior hearing to be reheard, treating a prior session as void, so that a conservation commission will have a consistent quorum of members who have attended every session. This places an obvious burden on volunteer conservation commission members who may now have to conduct repetitive hearings and project review. Additionally, a commission must ensure that, during a repetitive hearing process, rights of all interested parties are addressed. In other words, not only must project proponents be afforded time to repeat the content of a prior presentation, but project opponents must be given equal and multiple opportunities as well.

The burdens, however, are much more daunting for builders and developers who have triggered wetland jurisdiction review of their projects. First, proponents must carefully note each conservation commission member in attendance at the beginning of a public hearing and maintain meeting attendance records throughout the hearing process. A proponent must be ready to flag any attendance or voting irregularity and bring the issue to the attention of the commission chair in order to continue and rehear substantive issues. Second, given the possibility, if not probability, of having to restate a presentation at a subsequent hearing, a proponent must keep detailed records of the discussion of each hearing, including, in some instances, the added step of hiring a stenographer for a detailed hearing record. Such a detailed record may be necessary for revisiting one or more items previously discussed. Third, a proponent must calculate its development schedule in such a way as to include delays caused by an insufficient

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quorum, an insufficient quorum of voting members and the likelihood of having to repeat presentations over the course of a multiple-night hearing process.

Not Much Hope

Given this age of regulatory complexity, Jeffries does not offer much hope of a faster, more efficient hearing process. In fact, the only glimmer of hope in all of what Jeffries has to offer is that voting irregularities do not automatically equate to a de facto project denial. As noted above, the conservation commission in Jeffries retained jurisdiction to reconvene hearings and take a proper vote in light of Hely's decision.

The second case is a recent decision rendered by the Massachusetts Supreme Judicial Court in M.P.M. Builders LLC v. Dwyer, S.J.C. – 09195 (June 2004), which establishes new law in Massachusetts regarding access easements. The M.P.M. decision revises a common law principle in effect for decades and adopts the position of the Restatement (Third) of Property (2000 edition). Under the Restatement theory, and now the current law in Massachusetts, the owner of property subject to an access easement (the so-called servient estate holder) has the potential to relocate an access easement without the consent of the property owner who has the benefit of the easement (the so-called dominant estate holder). Under prior common law principles in Massachusetts, a servient estate holder would have been prohibited from relocating an easement unless there was consent by the easement holder.

In M.P.M., a property owner by the name of M.P.M. Builders LLC received approval to subdivide its property into seven home lots. In order to develop the lots, M.P.M. Builders (a servient estate holder) sought to relocate an access easement over an existing cart path that provided access to an adjoining property in three distinct locations. According to M.P.M. Builders, the alternative access would have been equally convenient and would have been constructed at M.P.M. Builders' expense. The adjoining owner objected to the relocation and wished to preserve the present cart path locations, thereby inhibiting development of the seven lots.

Consent Not Necessary

In order to obtain relief and allow for development of its property, M.P.M. Builders sought declaratory relief through a complaint filed with the Massachusetts Land Court. The land court ruled in favor of the adjoining property owner and found that the adjoining owner held the right of consent to the easement relocation under long-standing principles of common law. The Supreme Judicial Court granted M.P.M. Builders direct appellate review, reversed the land court's ruling, and remanded the case to the land court for a decision as to whether M.P.M. Builders met the criteria for relocation as set forth in the Restatement (Third) of Property. The court ruled that the consent of the easement holder is now no longer necessary to relocate an access easement.

In M.P.M., the Supreme Judicial Court recognized that an easement holder has only a limited use or enjoyment of a servient estate. An easement is a non-possessory right, and an easement holder should not possess the right to veto other issues of a servient estate that do not interfere with an easement's purposes. The court, in effect, sought to balance the rights of the easement holder together with other long-standing common law principles, such as the principle that an owner of a servient estate should have the right to make any and all beneficial use of his or her property, provided such uses are not inconsistent with an easement. The court also recognized that the ability to relocate an easement would allow a "fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate."

In adopting the Restatement (Third) of Property, a servient owner must meet certain criteria for easement relocation. The relocated easement must not significantly lessen the utility of the easement, increase the burdens on the easement holder in its use and enjoyment or frustrate the purpose for which the easement was created, and all costs of relocation must be borne by the servient estate holder. In order to establish that these criteria have been met, the court warns that the servient estate owner may not resort to self-help remedies. Absent a negotiated agreement between the two property owners, a servient owner must obtain a declaratory judgment before making any alterations in order to establish that the criteria have been met.

While an easement may always have express, written provisions for or against relocation, the parameters for relocation and the costs imposed for the same, most easements do not typically have such detail. In such circumstances, M.P.M. offers flexibility and provision for change. While a servient estate holder has the burden of seeking declaratory relief and approval of a court of law, servient estate holders at least now have the potential for easement relocation when faced with a recalcitrant dominant estate holder. The dominant estate holder no longer wields the unilateral power to stifle relocation, change and development. In my opinion, this case will have many practical benefits for those in the building and development industry. ◆

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