

When Approvals Aren't Constructive

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There are two recent appellate court cases that have been accepted for further appellate review by the Massachusetts Supreme Judicial Court (SJC). Both cases involve



issues of constructive plan approval and plan-based zoning freeze protection. They are *Krafchuk v. Planning Board of Ipswich*, 70 Mass. App.Ct. 484

(2007) and *Kitras v. Zoning Administrator of Aquinnah*, 70 Mass.App.Ct. 561 (2007). The cases are burdened with complicated permitting and appeal histories. However, in each instance the important protections afforded to landowners, developers and builders under the Subdivision Control Law and Zoning Enabling Act are at issue. The two cases will be joined in SJC's review and will have important roles in the subdivision plan approval process going forward.

The *Kitras* case involves action by trustee landowners to divide property located on Aquinnah in Martha's Vineyard. As a result of the municipality's inaction, and the failure to approve the plan proposal within the statutory period, the trustees sought the issuance of a certificate from the town clerk, under M.G.L. c.41, Section 81V ("the 81V Certificate"), that the plan was constructively approved. When the town clerk refused to issue the 81V certificate, the trustees sought a *mandamus* action to compel issuance. The *mandamus* action was denied when the court ruled that the action was untimely (*Kitras v. Town Clerk of Aquinnah*, 61 Mass.App.Ct. 11221 (2004)). The trustees then sought a declaratory judgment that the plan was constructively and "finally" approved, even without the 81V certificate. They argued that constructive approval

was automatic. Furthermore, the trustees claimed that constructive approval provided the full benefits of plan-based zoning freeze protection under M.G.L. c. 40A, Section 6.

Unfortunately for the *Kitras* trustees, the Appeals Court disagreed with both arguments. The Appeals Court ruled that constructive approval under Section 81V does not become "final" automatically. According to the court, Section 81V requires that a town clerk certificate must issue for constructive approval to become final. Secondly, only when a constructive approval becomes final does the plan-based zoning freeze protection apply. In the *Kitras* case, where an 81V Certificate was never issued, the trustees have lost their ability to argue for constructive approval and zoning freeze protection.

The *Krafchuk* case has a more complicated fact pattern, but the central issues are the same. In *Krafchuk*, the landowner sought to divide a 23.5 acre rural property into seven residential lots. A preliminary plan submission was denied by the planning board, and the landowners filed a definitive plan within the seven month period required by M.G.L. c.40A, Section 6, in order to tack onto the preliminary plan filing date for zoning freeze protection. The zoning freeze was crucial to the development as the town had enacted a zoning change, altering the minimum lot size affecting the property, from one acre to two acres, soon after the preliminary plan was filed.

After a series of nine definitive plan hearings, stretching over a seven month period, the planning board denied the definitive plan. Thereafter, the landowner claimed constructive approval of the plan, the planning board rescinded the constructively approved plan and reaffirmed its denial decision, and the landowner eventually requested further hearings with the planning board. Ultimately, after an additional period of sev-

eral months and four hearings, the board voted to revoke its denial and approve an amended plan of development. During this entire period, abutters brought suit at each stage of planning board action (or inaction) on one basis or another, resulting in the consolidation of claims on appeal. One of the main issues on appeal was whether there was any plan-based zoning freeze that applied to the property.

The *Krafchuk* landowner argued that the property was grandfathered under the old minimum zoning requirements (one acre zoning) as a result of the preliminary plan and definitive plan submissions. Unfortunately for the landowner, the Appeals Court again disagreed. The Appeals Court ruled that the landowner acquiesced to the continued hearings on the original definitive plan (which hearings took the plan review admittedly outside of the statutory period). The court went on to rule that a "belated assertion that the plan was constructively approved [was] without merit." According to the court, the landowner compromised its claim for constructive approval when (i) it failed to take definitive action, (ii) it was aware of and participated in further deliberations, and (iii) the board subsequently arrived at a final (appealable) decision. Consistent with the *Kitras* ruling, the court in *Krafchuk* ruled that constructive approval is not self-actuating and that the landowner did not obtain the requisite 81V Certificate.

The *Krafchuk* court was also not convinced that grandfathering protection applied to the property in any event. First, the court recognized that even if constructive approval had been achieved at one point, the board took appropriate action to rescind the constructive approval pursuant to M.G.L. c. 41, Section 81W. Secondly, the court found that the subsequently amended definitive plan was different from the original preliminary plan. The amended plan must be treated as a new plan, according to the

Appeals Court, and cannot be entitled to the grandfathering protections that tack back to the preliminary plan.

Obviously, these two decisions will have important impact on landowners, developers and builders who are processing or planning subdivisions of large land tracts. Protections afforded under the Subdivision Control Law as a result

of municipal inaction and delay are crucial to preserving a level, fair regulatory arena.

The Home Builders Association of Massachusetts has recognized the importance of these two cases, and is participating with others to file *amicus* briefs in these cases. HBAM is intent on preserving the rights of landowners, devel-

opers and builders on all issues regarding housing production. The *Krafchuk* and *Kitras* cases are instrumental to this end. ◆

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