Reprinted from the First 2010 issue of
Mass Builder
The Official Magazine of the Home Builders Association of Massachusetts

The Floodgate to Municipal Litigation

By Mark A. Kablack

Development in Massachusetts is frequently constrained and complicated by governing permits and regulations. There are often numerous boards and committees that sit in review of almost all development projects. Boards and committees can be both municipal- and state-based. In some situations, permit and regulatory review can be redundant. In other situations, review by multiple boards and committees can be conflicting and contradictory.

Leaders in the building and development industry have focused on the need for streamlining permit and regulatory review. The Comprehensive Permit statute (M.G.L. c.40B), the Office of Permit Ombudsman and the Expedited Permitting Program (M.G.L. c.43D) are all examples of past efforts made to improve efficiencies within the permitting and regulatory arena. Numerous other efforts are currently underway by the Home Builders Association of Massachusetts (HBAM) and other trade associations to ensure that development review is made prompt and predictable.

When permits and regulatory approvals are issued and/or denied, the time and expense associated with appeals and litigation can further exacerbate the development dilemma, often eliminating any of the efficiencies gained in the efforts mentioned above. Attempts have been made to limit frivolous litigation through stricter rules on "standing," the requirement to post appeal bonds, and the avenue of administrative appeals in certain instances. However, these efforts have fallen short of their targeted goal, and court dockets are crowded with land use litigation of one form or another.

A recent Massachusetts Appeals Court decision involving municipal-based litigation further exposes the perils of land development in Massachusetts. The case, *Twenty Wayland, LLC v. Town of Wayland Historic District Commission* (2009), raises the issue of whether an individual municipal board or commission can appoint its own legal counsel to prosecute or defend a permit appeal. The *Wayland* case will be of interest to builders, developers and landowners generally. It will be of particular interest to those who have development projects that enjoy broad political support yet have component parts that are controversial to one or more groups.

The well established law prior to the *Wayland* case was that an individual municipal board or committee had no inherent authority to appoint or retain counsel. In accordance with statutory law and prevailing municipal charters and laws, the power of appointment of counsel customarily falls to the chief governing officer or board of a municipality (i.e. a mayor in a city or a town manager/board of selectmen in a town). The intent of such customary law and practice is to effectively manage litigation, including the cost of litigation. The power of appointment of counsel is often critical to whether a particular case can be properly prosecuted or defended, resulting in a "checks and balances" system between the chief governing officer or board and numerous other constituent boards and committees.

The *Wayland* decision is noteworthy in that it reverses this well established law. In Wayland, a land development project involving the development of a new town center was the subject of permit review before the Wayland Historic District Commission (WHDC). The project had previously received overwhelming approval at Wayland Town Meeting by a vote of more than 80 percent of Town Meeting members in attendance. After a controversial hearing process with the WHDC, the project eventually received a conditional permit approval, limiting certain traffic improvements that were otherwise required in and around the project site. The developer appealed the WHDC permit to Superior Court in an effort to strike the permit conditions as invalid.

Upon filing the appeal, the Wayland Town Administrator made it clear that he would not appoint Town Counsel or Special Counsel to defend the WHDC. As a result, the WHDC was faced with a pending default deadline, where non-action would have resulted in a favorable ruling for the developer. At the last minute, a local Wayland attorney offered to provide *pro bono* legal services to the WHDC and filed an answer in the appeal. The filed answer prompted the developer's attorney, Brian Levey, Esq., of Beveridge & Diamond, P.C., to move to disqualify the WHDC's attorney based upon the well established law referenced above, strike the filed answer, and seek entry of default. The WHDC argued in response that it had an "inherent right" to select its own counsel, particularly where legal services were provided *pro bono* (or without cost to the town).

The Superior Court ruled in favor of the WHDC, finding certain circumstances in the case to be extraordinary or emergency in nature, and finding significance in the fact that legal services were provided *pro bono*, noting that municipal cost controls were not an issue in this particular case. The court also was influenced, at least in part, by the fact that the WHDC was a creature of statue (under MG.L. c.40C) as well as a municipal agency. The developer's motions were denied, prompting an interlocutory appeal to the Appeals Court, where the Appeals Court upheld the lower court ruling and denied the developer's petition.

The long term impacts of the *Wayland* case remain to be seen. The case may be viewed in limited fashion given

the unique aspects of the WHDC under the historic districts statute or other specific circumstances of the case. However, builders, developers and landowners should be concerned that this case may open the floodgates to municipal-based litigation going forward. As Mr. Levey has opined, there may be "a potential avalanche of lawsuits brought by any municipal official, board, commission, committee, agency or task force that happen[s] to disagree with another municipal decision or policy and [is] resourceful enough to locate an attorney/advocate willing to provide *pro bono* legal services." Such a result could have devastating impacts on the effort to provide prompt and predictable permitting in Massachusetts. ◆

Mark Kablack is a principal of M.A. Kablack & Assoc., a Westborough-based real estate law firm specializing in land-use law and real estate development.