

# A New Look at Trespass Issues

By MARK A. KABLACK

A recent decision by the Massachusetts Appeals Court, *Brice Estates Inc., v. Smith and Others*, 76 Mass. App. Ct. 394 (2010), clarifies several interesting issues that involve basic property owner rights, permitting under the Massachusetts Endangered Species Act (MESA), and the consumer protection law commonly known as “the anti-SLAPP statute.” The *Brice* case, while limited in its scope to an interlocutory appeal on a motion



to dismiss, can provide useful information to property owners who are faced with abutters and other adversaries who trespass on private property.

There are numerous common law, constitutional law and statutory law principles that protect private property from unauthorized access, search and seizure. These principles are rooted in basic concepts of individual liberty and the conduct of what we have come to know as an orderly society. However, certain permits and regulatory approvals will often require a property owner/applicant to grant limited access rights to a regulating board or official in order that a development proposal can be investigated. Additional rights are granted post-development to ensure development compliance.

A somewhat related, but slightly different access issue often arises under the MESA program known as the Natural Heritage Endangered Species Program (NHESP). Under NHESP, properties can be identified and mapped as significant habitat, estimated habitat and/or priority habitat for the protection of endangered species, threatened species or species of special concern. The identification and mapping of property occurs based upon programs that identify areas

that are likely to be inhabited by these noted species. Numerous properties throughout Massachusetts have been currently mapped as protected habitat in this fashion. In other cases, properties not currently mapped can be made subject to NHESP jurisdiction as a result of the identification and location of an individual specimen. This type of NHESP jurisdiction can be problematic because it can arise unexpectedly in the middle of a development proposal. In addition, such specimen sightings are often the result of abutters, naturalists and others who access a property without full owner consent – in essence trespassing on the rights of the property owner.

The *Brice* case involves this latter fact pattern. In *Brice*, a developer proposed a residential development in Rutland, Mass., and had previously denied access to the local Conservation Commission under a wetland permit filing. Two individuals, one an abutter and the other a naturalist, subsequently accessed the property without the owner’s consent and observed a four-toed salamander on the property, a rare species protected under NHESP. As a result of this observational sighting, and reporting under NHESP, a portion of the property became designated as priority habitat, causing substantial delays and complexities to the development proposal. The developer, after learning of these events, filed a trespass action against the two individuals and sought monetary damages and injunctive relief from their activity.

In response to the trespass complaint, two individual defendants filed a special motion to dismiss under the anti-SLAPP statute. The anti-SLAPP statute was enacted in Massachusetts some years ago in an attempt to protect petitioning activity (communications to a government body, official or electorate). In this case, the defendants claimed that the developer’s trespass action

compromised protected petitioning activity (e.g. their identification and reporting of a rare species under NHESP). They further claimed that the trespass action was a pretense and that there was no direct injury sustained by the property owner as a result of the trespass. The Superior Court judge denied the defendant’s special motion to dismiss, finding that there was a substantial basis for the trespass action, and the two defendants appealed.

In the *Brice* decision, the Appeals Court recognized that a valid trespass action may be brought, even if the genesis of the action was “in response to” protected petitioning activity. Where a defendant’s activity includes petitioning activity as well as other conduct (in this case trespass), dismissal under the anti-SLAPP statute is not appropriate. An action for trespass is valid if supported solely by proof of ownership by the plaintiff and illegal entry by the defendant. Even if damages are minimal, the plaintiff may still be entitled to injunctive relief under a trespass action. This is enough, according to the Appeals Court, for the trespass claim to stand.

The *Brice* case brings to the forefront several of the competing issues associated with private property rights (including development rights), government intrusion upon or regulation of such rights, and the role individuals can play (or not play) in the process. While the full extent of damages arising directly resulting from the trespass is yet to be decided, and may in fact be minimal, validation of the trespass action itself will help define the boundaries of proper and lawful activity by abutters and others going forward. ♦

---

*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.*