

June 4, 2008

Appeals Court Clarifies Appeal Process in Zoning Enforcement Matters

The Massachusetts Appeals Court issued an important ruling yesterday, interpreting the zoning enforcement provisions of the state Zoning Act, Chapter 40A. In *Gallivan v. Wellesley ZBA*, the Court considered the appellate remedies when a building permit is issued authorizing the construction of a structure that fails to comply with a local zoning ordinance. Under Chapter 40A, Section 8, an aggrieved person, such as an abutter or a municipal official, may request the building inspector to enforce the zoning ordinance with respect to a illegal structure or use, and if the building inspector declines, the party may appeal to the "permit granting authority" (typically, the zoning board) within 30 days. There is a six year statute of limitations for nonconforming structures.

There is another appeal mechanism in Section 8, through which an aggrieved person may appeal to the board directly from the issuance of the building permit. In most circumstances, however, an aggrieved person would not necessarily know that a building permit has been issued-formal notice to abutters of building permit applications is not required under state law. Some municipalities, including Wellesley, require that such notice be given. In a case of first impression, the Court held that where a person has "adequate notice" of a building permit application, such as through the notification required under the Wellesley ordinance, they must exercise the direct appeal remedy to the board in order to preserve their rights - they cannot bypass an appeal and bring a request for enforcement to the building inspector at some later date. Unfortunately, the Court declined to elaborate on what constitutes "adequate notice."

The Court's ruling seems to contradict its previous decisions, which held that the right to request enforcement was "independent" of the direct appeal remedy from the issuance of the building permit. Until yesterday, most practitioners in this field had assumed, as explained by the Massachusetts Zoning Manual, that "[clearly, the failure of an abutter to appeal the issuance of a building permit... does not preclude the same abutter from later bringing an enforcement action within six years." Zoning Manual, Section 13.3.5. Now, however, aggrieved persons should be wary of their appeal rights being foreclosed by failure to appeal within 30 days, and should be prepared for the courts to expand the concept of "adequate notice" beyond the formal notice requirements found in some local bylaws. In towns that don't require formal notices, property owners and builders can probably insulate themselves from future zoning attacks by voluntarily notifying abutters and municipal officials by certified mail of their building permit applications. The Court's decision includes a thinly-veiled admonition to municipalities to adopt abutter-notification requirements. To be effective, however, notifications should describe the project with sufficient clarity to enable a lay person to understand whether it conforms to zoning - a notice that doesn't describe the proposed setbacks, for example, could enable an unscrupulous builder to evade challenge from abutters by failing to disclose a setback nonconformity. Please note that since this is an Appeals Court decision, there is a chance that the Supreme Judicial Court could exercise further appellate review. Before relying on this as precedent, you should confirm whether the SJC has weighed in on this case.