

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Case No. 2021-P-0336

PAUL DALTON, DIANA WALLETT DALTON, MARK
MARKHAM, ANGELIKA MARKHAM, AIMEE ERKSINE,
WILLIAM COE, TODD STORTI, RUSSELL HOLMES, SUSAN
HOLMES, ALISON AMBROSE, DENNIS DESNOYERS, and
MICHAEL GOODRICH,

Plaintiffs/Appellants,

v.

PITTSFIELD CELLULAR TELEPHONE COMPANY d/b/a
VERIZON WIRELESS, FARLEY WHITE SOUTH ST, LLC and
CITY OF PITTSFIELD ZONING BOARD OF APPEALS and
ALBERT INGEGNI III, THOMAS GOGGINS, JOHN
FITZGERALD, MIRIAM MADURO, and ESTHER BOLEN in
their capacities as members of the CITY OF PITTSFIELD
ZONING BOARD OF APPEALS,

Defendants/Appellees

**ON APPEAL FROM A JUDGMENT OF THE BERKSHIRE
SUPERIOR COURT**

APPELLANTS' BRIEF

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Dated: June 7, 2021

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STATEMENT OF ISSUES

Whether the 90-day statute of limitations set forth in G.L. c. 40A, § 17 for filing an appeal from the granting of a special permit should be tolled where the zoning authority failed to mail notices to the plaintiff-abutters, as required under G.L. c. 40A, § 11, but issued two other forms of statutory notice – a fine print classified advertisement and posting at city hall – regarding an application for a special permit to construct a 115-foot cellular tower within 300 feet or less of the plaintiffs’ residential properties.

Whether the zoning authority’s failure to comply with the statutory requirement to mail notices to certain persons, including the plaintiffs, caused prejudice such that the time to appeal to the Superior Court should be tolled until the plaintiffs had reason to know that the zoning authority had granted a special permit for the construction of a 115-foot cellular tower in the plaintiffs’ neighborhoods.

Whether the lower court properly granted summary judgment to the defendants on the basis that the disputed fact – where the zoning authority complied with the statutory directive to mail notices to the plaintiffs – is not material.

STATEMENT OF THE CASE

The following facts and procedural history are relevant to this zoning appeal by plaintiff-appellants Paul Dalton, Diana Walleth Dalton, Mark Markham, Angelika Markham, Aimee Erskine, William Coe, Todd Storti, Russell Holmes, Susan Holmes, Alison Ambrose, Dennis Desnoyers, and Michael Goodrich (collectively, “Abutters”), all of whom live within a short distance of a cellular tower constructed by the defendant Pittsfield Cellular Telephone Company d/b/a Verizon

Wireless ("Verizon") pursuant to a special permit granted by the defendant Pittsfield Zoning Board of Appeals ("ZBA") and its members¹ (collectively, "Defendants").

STATEMENT OF PROCEDURAL HISTORY AND FACTS

In September 2017, Verizon filed an application for a special permit with the ZBA to construct a 115-foot cellular tower on a hilltop in Pittsfield. The hill abuts neighborhoods, including the "Shacktown" section of Pittsfield, which are zoned only for residential use. Each of the Abutters' properties is located within 300 feet of the site where Verizon planned to erect the tower. R. 25-31.

Under G.L. c. 40A, §§ 9 and 11, the ZBA was required to provide three forms of notice to the Abutters and other interested persons: by mail, by publication in the Berkshire Eagle, and by posting at city hall. In October 2017, the City of Pittsfield certified a list of residents, including the Abutters, who were entitled to notice of the public hearing on Verizon's application. The ZBA published the notice in a very small, fine print classified advertisement in

¹ Albert Ingegni III; Thomas Goggins; John Fitzgerald; Miriam Maduro; and Esther Bolen.

the Berkshire Eagle and posted it at city hall and on the city website. Whether the ZBA mailed the notices is a disputed issue of fact.² R. 26-31, 141-143; Infra at 26.

The ZBA conducted a public hearing on Verizon's application on November 15, 2017. None of the Abutters knew about or attended the hearing; only one person entitled to statutory notice showed up. If the Abutters had received notice or otherwise acquired actual knowledge of the hearing, they would have attended and commented on Verizon's application; several also would have objected to the tower on grounds that a 115-foot tower would diminish their property values and diminish the residential qualities of their respective neighborhoods.³ R. 78-121.

The ZBA granted the special permit and filed its decision on November 29, 2017. As with the public hearing, the ZBA was required to mail their decision to the Abutters. G.L. c. 40A, § 11. The Abutters did not receive or otherwise learn about the decision until 2020. If they

² Per their affidavits, the Abutters did not receive any mail concerning the public hearing. The Defendants offered a countervailing affidavit stating that notices were, in fact, mailed. R. 103-121, 138-143.

³ Some of the Abutters were also concerned about possible health consequences. R. 103-121.

had received or otherwise learned about it, the Abutters would have appealed within the statutory period set forth in G.L. c. 40A, § 17 (appeal must ordinarily be filed within 20 days of when decision is filed with city clerk or within 90 days if the appeal concerns procedural errors in the zoning process). R. 103-121.

In 2019, Verizon applied for an extension of the special permit. The Abutters did not receive notice or otherwise learn of the application or public hearing. If they had known about it, they would have appealed the decision granting the exception within the statutory period set forth in G.L. c. 40A, § 17. R. 103-121, 138-143.

On or around March 18, 2020, the Abutters learned about the tower for the first time when a neighbor saw construction trucks on their way to the site where the tower now sits and operates. One month later, the Abutters filed suit in the Berkshire Superior Court, asking the court to annul the special permit given the ZBA's failure to mail the required notices to the Abutters and their prior lack of knowledge about the 115-foot cellular tower that was being built within 300 feet of their residential property lines. At the time suit was filed, Verizon was in the early stages of construction. R. 78-86, 103-121.

In a joint motion for summary judgment, the Defendants argued that they are entitled to judgment as a matter of law because the special permit had been granted in 2017 and the Abutters filed suit in 2020, outside the 20- or 90-day jurisdictional limits set forth in G.L. c. 40A, § 17. The Abutters maintained that their suit was timely because the ZBA failed to mail them notices of the hearing, decision, and extension. The statutory time limit did not begin to run, the Abutters argued, until they first learned about the tower in March 2020. R. 44-47, 56-68.

The lower court properly recognized that the genuine dispute of fact as to mailing but ruled that the dispute was not material because, in the court's view, the 90-day time limit must be strictly construed and that tolling was not allowed because the ZBA provided two of the three forms of notice required under G.L. c. 40A, § 11. Thus, the lower court granted summary judgment in favor of the Defendants. Infra at p. 26; R. 319-334.

Judgment entered on August 30, 2020 and the Abutters filed a timely notice of appeal on September 11, 2020. R. 20-21, 336.

STANDARD OF REVIEW

The lower court's decision to grant summary judgment is reviewed de novo. Bank of New York v. Bailey, 460 Mass. 327, 331 (2011). "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Ng Bros., 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. Attorney General v. Bailey, 386 Mass. 367, 371, cert. den. sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982).

"A court must deny a motion for summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, there

exist genuine issues of material fact.” Locator Services Group v. Treasurer and Receiver Gen., 443 Mass. 837, 846 (2005).

ARGUMENT

I. The order of summary judgment must be reversed because there is a genuine issue of disputed fact as to whether the ZBA mailed the required notices to the Abutters, the Abutters lacked actual knowledge, and the lack of timely notice or knowledge is material to prejudice, tolling, and timeliness.

The summary judgment in favor of the Defendants must be vacated because the lower court erred as a matter of law in holding that the 90-day jurisdictional limit set forth in G.L. c. 40A, § 17 (“Section 17”) cannot be tolled unless there was a *complete* failure of notice. R. 328-333; *infra* at 26. For the reasons set forth below, the ZBA’s failure to mail the required notices is so egregious and prejudicial on the unique facts of this case that, if the disputed fact about mailing is resolved in their favor, the Abutters are entitled to tolling.

A. Notice by mail is mandatory.

“In all cases where notice of a public hearing is required, notice *shall* be given [1] by publication in a newspaper of general circulation in the city or town once in each of two successive weeks ... and [2] by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of

such hearing. In all cases where notice to individuals or specific boards or other agencies is required, [3] notice **shall** be sent by mail, postage prepaid.” G.L. c. 40A, § 11 (emphasis added). The legislature’s use of the term “shall” is important – it means that the ZBA had no choice but to comply with each of the three forms of statutory notice. See, e.g., Worcester v. College Hill Props., LLC, 465 Mass. 134, 139 (2013); Cepulonis v. Supt. of Massachusetts Corr. Inst., Cedar Junction, 61 Mass. App. Ct. 699, 702 (2004).

The mandatory language also conveys the legislative “expectation that municipal officers would in fact discharge their obligations under G.L. c. 40A, § 11, regarding notice, that is, in a way that is consistent with the presumptions of regularity and good faith.” Kramer v. Zoning Bd. of Appeals of Somerville, 65 Mass.App.Ct. 186, 193 (2005), citing Konover Mgmt. Co. v. Planning Bd. of Auburn, 32 Mass.App.Ct. 319, 326 (1992). The ZBA’s assumed failure to provide notices by mail is a significant departure from such obligations.

B. The disputed issue of fact regarding notice by first class mail is material to the question of timeliness.

Not every procedural deficiency requires tolling, but tolling is appropriate in cases involving a complete failure of notice or where the deficiency caused prejudice to the appealing party. See Kramer, 65 Mass App.Ct. at 196-197 (“[i]f no notice sufficient to meet the statutory requirements was provided, the board must hold a new hearing”); Rousseau v. Building Inspector of Framingham, 349 Mass. 31 (1965)(written notice insufficient due to timing because it failed to give adequate time to prepare opposition); Chiuccariello v. Building Comm'rs of Boston, 29 Mass.App.Ct. 482, 486 (1990) (“[s]uccessful attack on a board's decision, in the face of actual notice but in the absence of statutorily required notice, should be restricted to circumstances where prejudice is demonstrated”).

The question of prejudice turns on whether the deficient notice “interfered with the accomplishment of the purposes set forth in” the statutory scheme. Schulte v. Director of the Div. of Employment Security, 369 Mass. 74, 80 (1975). Here, the ZBA’s presumed failure to mail the required notices interfered with “[t]he clear purpose of the hearing and notice requirements of G.L. c. 40A, §§ 9 and 11, [which] is to ensure that zoning authorities act on special permit applications

only after the opposing interests have had a fair opportunity to be heard.” Tenneco Oil Co. v. City Council of Springfield, 406 Mass. 658, 660 (1990). To be sure, the time limit is designed to promote finality and preclude indefinite attacks on the grant of a special permit. However, the time “limitations are not designed to foreclose access to judicial review when there has been a total failure of notice to [a person] who was entitled to receive it.” Kramer, 65 Mass.App.Ct. at 193.

Thus, in some circumstances, the statute of limitations may be tolled until the objecting party first learns about the zoning action to which they had been entitled notice all along. Kramer, 65 Mass.App.Ct. at 193-194. The circumstances of this case support tolling.

C. Caselaw supports tolling in this case.

1. This case is controlled by Kramer v. Zoning Bd. of Appeals of Somerville.

This case is similar to Kramer, where this Court held that tolling was appropriate because the plaintiff had no practical way to know that the zoning authority held a hearing on, and granted, an application for a special permit to construct a cellular antenna on the roof of a neighboring building. 65 Mass.App.Ct. 186. Having received no

notice, Kramer filed suit well after the 90-day limit had expired. The lower court allowed the defendants' motion to dismiss, reasoning that the 90-day time limit for zoning appeals based on procedural errors must be strictly construed even in cases where there was a complete failure of notice. Id. at 187-188 & n2.

On appeal, this Court rejected the lower court's strict construction of Section 17's time limits and recognized that a failure of notice could impact due process rights.⁴ Id. Construing Section 17 in a way to avoid constitutional due process questions, the Appeals Court concluded that

at least where there has been a complete failure of notice of a public hearing in advance of the granting of a special permit, ***the ninety-day limitation in G.L. c. 40A, § 17 should not be deemed to run until the abutter has notice of the project to which he objects.*** This interpretation is consistent with the statutory scheme, which provides both that interested parties may be heard, and that the board decisions should not be challenged indefinitely. [citations omitted] ***It also comports with our duty to construe statutes so as to avoid constitutional questions,*** [citation omitted], ***such as whether the deprivation of the statutorily created right to appeal violates the due process clause.*** [citation and footnote omitted].

⁴ See LaPointe v. License Bd. of Worcester, 389 Mass. 454, 458 (1983) ([d]ue process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case").

Kramer, 65 Mass. App. Ct. at 193–94 (emphasis added).

Here, like Kramer,

- the Abutters testified through their affidavits that they did not have actual notice of the hearing, decision, or extension on Verizon’s application for a special permit to construct the 115-foot cellular tower in their neighborhood;
- the Abutters were unable to strictly comply with Section 17 because the ZBA fell short in its statutory obligation to mail the decision to them;
- like Kramer, the defective notice impacts the Abutters in their homes; and
- like Kramer, the Abutters had no way of knowing, and did not know, about the plans for the tower until the construction began, well after the ordinary time limits had passed. Had they known, all twelve Abutters would have attended the hearing or strictly complied with Section 17.

R. 103-121.

The only practical difference between Kramer and the case at bar is that here, the ZBA published a notice in the local newspaper and posted it at City Hall. Having no reason to suspect that there was a plan to construct a tower looming over their neighborhoods, however, the Abutters would have no reason to check the newspaper or look for a posting at City Hall. Providing notice in a format that is unlikely to serve the statutory purpose of providing citizens the full opportunity to

participate in the hearing and decision process does not satisfy due process. Andover v. State Fin. Servs., Inc., 432 Mass. 571, 574 (2000) (“[n]otice by mail ***or other means as certain to ensure actual notice*** is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable”)(citation omitted; emphasis added).

2. The lower court’s reliance on Robicheau v. Nissan Norwood Realty, LLC is misplaced.

The lower court places misplaced reliance upon the unreported decision in Robicheau Nissan Norwood Realty, LLC, 72 Mass.App.Ct. 1118, 2008 WL4388809 (1:28 Op. Sept. 30, 2008), rev. denied, 452 Mass. 1109 (2008) (*infra* at p. 61). In that case, Nissan sought a special permit to construct a 45,000 square foot dealership and showroom on Route 1 in Norwood. The plaintiffs owned a nearby plot of land where they intended to build a multifamily condominium complex. To comply with the notice requirements of G.L. c. 40A, § 11, the zoning authority mailed notice of the public hearing to all interested persons except for one -- the plaintiff. The zoning authority also twice published notice of the hearing in the local newspaper; posted the notice at the

town hall; and posted the notice at the proposed construction site which is located on a busy road. After a two-day hearing, the zoning authority granted the special permit. The plaintiffs did not attend the hearing. 2008 WL4388809 *1.

Approximately 8 months after the permit was granted, the Rochicheau plaintiffs filed suit for declaratory and injunctive relief, citing violations of zoning law and deficient notice. The defendants challenged the suit on several grounds, including standing and timeliness. The Robicheau Court held that the plaintiffs lacked standing to pursue their claims because they were unable to “put forth credible evidence to substantiate claims of injury to their legal rights.” 2008 WL 4388809 *2 (citation omitted). Turning next to timeliness, the Court noted that “the posted and published notice [in that case] was not perfect, but it contained an accurate street address and fully described the scope and nature of the project.” Id. *3. Distinguishing Kramer, the Robicheau panel concluded that the posted and published notices regarding Nissan’s application for a special permit were “reasonable” in the circumstances. Id., citing Rousseau, 349 Mass. at 36-37.

The Abutters’ case differs from Robicheau in material ways and requires a different result. *First*, unlike Robicheau, where the principal

issue concerned standing, the Defendants here make no such challenge.⁵ 2008 WL4388809 *3 & n7. *Second*, in Robicheau, the site of the zoning activity at issue was commercial, not residential. *Third*, in Robicheau, the special permit applicant posted a notice of the public hearing on commercial property located on a major roadway. Here, the location of Verizon’s 115-foot tower is not on a main street, it is on top of a hill which abuts several neighborhoods zoned for residential, not commercial, use. *Fourth*, in Robicheau, the plaintiffs planned to use their property for the commercial purpose of building a condominium complex, whereas the Abutters are concerned about the impact of a 115-foot tower looming over the homes where they live with their families. 2008 WL 4388809 *1-3. Thus, even if Robicheau was decided correctly, the unique facts of **this** case demonstrate that the ZBA’s failings caused the Abutters to suffer clear, severe prejudice, and

⁵ Under G.L. c. 40A, § 17, challenges to special permits may only be brought by “persons aggrieved.” As owners of abutting property or property abutting the abutters, the Abutters in this case enjoy a presumption of standing which the Defendants have not sought to overcome. See Nickerson v. Zoning Bd. of Appeals of Raynham, 53 Mass.App.Ct. 680, 681 (2002); G.L. c. 40A, § 11 (defining “party in interest” as, inter alia, “abutters ... and abutters to the abutters within three hundred feet of the property line of the petitioner”).

that the failure to mail notices of the hearing, decision, and extension was not reasonable in the circumstances.

D. The lower court's construction nullifies Section 11's requirement of notice by mail.

There is a reason why notice by mail is required where special permits are at issue: to ensure that every interested person is afforded the chance to lodge their objection to projects which would have a direct impact on their property values, the character of their neighborhood and properties, and their daily lives. Kramer, 65 Mass.App.Ct. at 192 (Section 11 requires "such **full notice** as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification") (emphasis added). If the lower court is correct that tolling is *never* appropriate simply because a zoning authority published a tiny, fine print notice in the classified ad section of a newspaper and by pinning it on a bulletin board, then the mandatory requirement that the ZBA provide notice by mail would be nullified entirely; the purpose of Section 11 would be frustrated; and residential homeowners like the Abutters here would be deprived of the type of notice that is most likely to accomplish the legislature's intent. Such a result would fly in the face of the Kramer

Court's effort read Chapter 40A as a whole and avoid a statutory construction that implicates due process rights. Kramer, 65 Mass.App.Ct. at 187-188.

Put another way, the lower court's strict construction at the sake of the Abutters' residential properties and homes as well as their due process rights "would effectively nullify the requirement to notify abutters of public hearings because a failure to comply with it would entail no consequences, as long as the abutters remained unaware of the issuance of the permit until the expiration of the appeal period." Id. at 191-192, 193.⁶

The lower court's construction also "would produce the nonsensical result that an abutter provided with less than perfect notice of a hearing would have access to judicial review, at least within ninety days, while one who suffered the more grievous injury of total absence

⁶ See also id. at 192 (rules of statutory construction require that "[w]hen the words of a statute are clear, they are to be given their ordinary meaning"); Wolfe v. Gormally, 440 Mass. 699, 704 (2004) ("[a] basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous") (quotations omitted); Taylor v. Board of Appeals of Lexington, 68 Mass.App.Ct. 503, 511 (2007) (court may not ignore statute's plain words).

of notice would be foreclosed from obtaining judicial review.” Kramer, supra at 193.

In sum, the lower court erred as a matter of law by holding that tolling is never available so long as a zoning authority complies with at least one of the three notice requirements under G.L. c. 40A, §§ 9 and 11. Where their residential properties and homes are at stake, the Abutters – greatly outmatched by Verizon’s vast wealth and resources -- should not suffer the loss of property values or cherished characteristics of their residential neighborhoods simply because the ZBA violated its statutory obligation to mail notices of the hearing, decision, and extension.

CONCLUSION

For the reasons set forth above, the lower court erred in granting summary judgment to the Defendants because, if the disputed fact is resolved in the Abutters' favor, the ZBA's violation of its duty to mail notice to all interested persons is material to tolling and timeliness. Accordingly, this Court must reverse and remand this case for further proceedings in the Berkshire Superior Court.

Respectfully submitted by:

Plaintiffs/Appellants
Paul Dalton, Diana Wallett Dalton,
Mark Markham, Angelika Markham,
Aimee Erskine, William Coe,
Todd Storti, Russell Holmes,
Susan Holmes, Alison Ambrose,
Dennis Desnoyers, and Michael Goodrich,
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CERTIFICATIONS

Certificate of Service

I, Patricia A. DeJuneas, hereby certify that I filed Appellants' Brief via Odyssey and served same electronically with the consent of Appellees' counsel:

/s/ *Patricia A. DeJuneas*

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Certificate of Compliance

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs including Rule 16(a) (13); Rule 16(e); Rule 18; Rule 20; and Rule 21 of the Massachusetts Rules of Appellate Procedure. The font is the proportional Times New Roman, size 14. The brief contains 4326 total words, exclusive of the tables of contents and authorities as counted by the word count feature on Microsoft Office Word 2020:

/s/ *Patricia A. DeJuneas*

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COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2076CV00078

PAUL DALTON et al.¹,
Plaintiffs,
vs.

PITTSFIELD CELLULAR TELEPHONE COMPANY d/b/a VERIZON
WIRELESS et al.,²
Defendants.

**MEMORANDUM OF DECISION AND ORDER
ON JOINT MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS
PITTSFIELD CELLULAR TELEPHONE COMPANY D/B/A VERIZON
WIRELESS, CITY OF PITTSFIELD ZONING BOARD OF APPEALS et al.**

The complaint in this case challenges a decision dated November 29, 2017 (“Decision”) of the City of Pittsfield Zoning Board of Appeals (“Board”) granting zoning relief to Pittsfield Cellular Telephone Company d/b/a Verizon Wireless (“Verizon”) for a proposed cell site (“Project”) at 877 South Street, Pittsfield, Massachusetts (“Property”). The plaintiffs, Mark Dalton, Diana Walleth Dalton, Mark Markham, Angelika Markham, Aimee Erskine, William Coe, Todd Storti, Russell Holmes, Susan Holmes, Alison Ambrose, Dennis Desnoyers and Michael Goodrich (“Plaintiffs”) are abutters or interested persons concerning the Property. For present purposes, the relevant defendants are Verizon, and City of Pittsfield Zoning Board of Appeals and Albert Ingegner III,

¹ Diana Walleth Dalton, Mark Markham, Angelika Markham, Aimee Erskine, William Coe, Todd Storti, Russell Holmes, Susan Holmes, Alison Ambrose, Dennis Desnoyers and Michael Goodrich.

² Farley White South St, LLC and City of Pittsfield Zoning Board of Appeals and Albert Ingegner III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals.

Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals (“Defendants”). Farley White South St, LLC is also a defendant.

Verizon and the Board have filed a “Joint Motion for Summary Judgment of Defendants Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, City of Pittsfield Zoning Board of Appeals and Albert Ingegni III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals ” (“Motion”) on the ground that the plaintiffs did not file this lawsuit within the time prescribed by G. L. c. 40A, § 17. The Plaintiffs have opposed the Motion. After hearing on August 11, 2020 and upon review of the parties’ written submissions, the Court **DENIES** the Motion.

BACKGROUND

The parties’ Rule 9A(b)(5) statement and response establishes the following facts (and disputes) for purposes of summary judgment only.

Verizon filed a petition with the Board on or about September 22, 2017, seeking a Special Permit to install a 115-foot cellular tower and related equipment at the Property. On or about October 4, 2017, the City of Pittsfield certified a list of persons consisting of abutters and the owners of land next to and adjoining the land of the abutters to the Property (“Interested Persons”). The plaintiffs are twelve people who are on that list as abutters or abutters to abutters within 300 feet of the Property.

The Board published a notice of public hearing in the Berkshire Eagle and posted a copy of the notice at City Hall and on the City’s website.

The Defendants assert, with affidavit support, that the Board mailed the notice of public hearing to each Interested Person by first-class mail on or about October 30, 2017. The Plaintiffs' affidavits assert that they did not receive any written notice by mail regarding the special permit hearing or decision and do not accept an inference that the post office was responsible. For purposes of summary judgment, the court must draw all inferences favorable to the opposing party, and therefore must assume - from the large number of Interested Persons who did not receive notice and the plaintiffs' motivation to oppose the Project if they had received notice -- that the Board did not in fact mail notice of the public hearing to the plaintiffs.

Plaintiffs did not receive or otherwise learn of the notices published in the Berkshire Eagle or at City Hall informing the general public of the Public Hearing.

The Board held the public hearing for the Special Permit on November 15, 2017. The plaintiffs did not attend the public hearing only because they did not know about it. At the November 15, 2017, the Board considered the petition and granted the Special Permit.

The Board filed the decision to grant the Special Permit on November 29, 2017. It has submitted an affidavit that it provided notice of the decision to the Interested Persons by first-class mail on or about December 4, 2017. The plaintiffs' affidavits state that they did not receive the decision, which, again, requires the court to draw the inference solely for summary judgment purposes that the Board did not in fact mail the decision to them.

The Board did publish notice of the Special Permit Decision in the newspaper and posted it in the city hall. Plaintiffs did not receive or otherwise learn about those notices.

None of the Interested Persons filed an appeal of the decision within 90 days of the decision being filed with the City Clerk. They did not do so only because they did not know about the decision. The Plaintiffs did not learn of the Special Permit hearing or Decision until on or about March 18, 2020, when a neighbor witnessed construction trucks driving through her neighborhood on their way to what because the construction site. Upon learning of the construction and prior issuance of a Special Permit during the pandemic, Plaintiffs moved immediately to hire counsel and file suit. Plaintiffs filed suit on April 18, 2020.

DISCUSSION

On summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Foley v. Boston Hous. Auth., 407 Mass. 640, 643 (1990). “[T]he court does not pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts.” Shawmut Worcester County Bank, N.A. v. Miller, 398 Mass. 273, 281 (1986). Rather, “[a]ll reasonable inferences drawn from the material accompanying a motion for summary judgment ‘must be viewed in the light most favorable to the party opposing the motion.’” Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 632 (1996) (citations omitted). See Parent v. Stone & Webster Engr. Corp., 408 Mass. 108, 112-113 (1990). The movant may meet its burden by showing that the plaintiff has no reasonable expectation of producing evidence on a necessary element of his case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party meets the burden, the opposing party must advance specific facts that establish a genuine dispute of material fact. Id.

Applying these principles, the court first analyzes whether there are genuine disputes of fact, and then determines whether the disputes are material.

I.

There is a genuine dispute of fact as to whether the City mailed the statutorily required notices. For special permits, G.L. c. 40A, § 9 provides, in relevant part: “The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, for a special permit . . .” Section 9 also requires that “notice of the decision shall be mailed forthwith to . . . the parties interest designated in section eleven . . .” G.L. c. 40A, § 11 provides, in relevant part:

In all cases where notice to individuals or specific boards or other agencies is required, **notice shall be sent by mail, postage prepaid.** “Parties in interest” as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes. [Emphasis added].

The Plaintiffs have submitted affidavits from owners of nine different properties entitled to notice, stating that they did not receive notice of the Special Permit public hearing. The statute does not, however, require that persons entitled to notice actually receive notice; it only requires the special permit granting authority to mail notice to all interested persons, first class postage prepaid. G.L. c. 40A, §§9, 11; Zuckerman v. Zoning Board of Appeals of Greenfield, 394 Mass. 663, 669 (1985).

The Defendants have submitted an affidavit attesting to the mailing of the notice and the decision to each Interested Person in accordance with c. 40A. There is no direct evidence from a witness with personal knowledge to contradict this affidavit. Moreover,

the record includes some corroboration for the City's testimony: the City did obtain an abutter's list (a copy of which is in the record), at least one citizen must have received some kind of notice, as she appeared to oppose the Project at the Public Hearing, and two mailings were returned as undeliverable on December 9, 2017 and November 14, 2017. Based on this direct evidence, the Defendants claim that there is no evidence of failure to mail notice.

The law and Rule 56, however, squarely allow proof by circumstantial evidence. E.g. Commonwealth v. Corriveau, 396 Mass. 319, 339 (1985) (there is no difference in probative value between direct and circumstantial evidence). See Burns v. McDonald's Corporation, 81 Mass. App. Ct. 908, 909 (2012) (rescript) (requiring a "basis upon which a trier of fact could infer, without impermissible speculation, that the offending object originated in the cheeseburger that McDonald's sold to him"). Moreover, if circumstantial evidence supporting a contrary conclusion exists, the court cannot simply accept the City's affidavit as true at this point, because that would require a credibility determination after trial.

Here, the Plaintiffs' circumstantial evidence consists of (1) nine affidavits attesting that the owners of nine properties did not receive notice of the hearing even though they were Interested Persons, (2) statements in the same affidavits that the owners oppose the Project and would have appeared to speak against the Project at a public hearing if notified (3) statements that the same nine owners did not receive notice of the decision, (4) an abutters list containing 32 property owners (excluding duplicates), including five listings for the City of Pittsfield itself, (5) the fact that, apparently, only one person attended a public hearing in opposition to a proposal for a new cell tower,

where land use “within the immediate vicinity” consists of “a mix of undeveloped, wooded land with residential communities located to the south and east” and proximity to an historical site (according to the Berkshire Historical Society, writing on Arrowhead stationery). A fact-finder might (or might not) infer from this pattern that there was a mistake in sending out the mailings to large numbers of Interested Parties. There may be other explanations for the pattern, but no such explanation appears to be so clear that the court must accept it at this stage.

It is, for instance, possible that the City mailed the notices and the post office failed to deliver them. That is not a foregone conclusion. On summary judgment, the court must accept the plaintiffs’ evidence that many Interested Persons did not receive the notice, the same persons also did not receive notice of the decision, and the nine affidavits attached to the complaint account for almost one-third of the non-City properties on the abutters list. The plaintiffs are within their rights to contest the inference that, by coincidence, the post office twice bungled completely separate mailings to at least 1/3 of the individuals on the same abutters list.

The case law probably does not compel the court to assume that the problem lies with the post office -- or that the plaintiffs are mistaken or lack credibility -- but the matter is not free from doubt. The Supreme Judicial Court faced a similar fact pattern in Zuckerman, 394 Mass. at 668-669. In that case, the parties stipulated that “the building inspector ‘would testify’ that the decision was mailed to the applicant on December 3, 1982, the same day the decision was filed. The applicant stipulated that he ‘would testify’ that he never received it . . .” Id. 394 Mass. at 668. On this record, the court concluded that “the board fully complied with the requirement that notice ‘be mailed . . .”

Id., 394 Mass. at 669. If mailing were contested, that holding may imply that lack of receipt does not supply sufficient circumstantial evidence to call into question affirmative testimony that items were mailed. The issue in that case, however, appeared to be whether the defendants had to prove receipt of the notice. It does not appear that the applicant contested the building inspector's testimony about mailing. Nor does it appear that the court ruled that evidence of non-receipt failed to create an issue of fact regarding mailing. Even had it done so, the evidence in that case fell short of the pattern in this case, namely non-receipt by nine or more Interested Persons of two separate mailings, amounting to about 1/3 of all legally required mailings to non-City parties. This court therefore does not read Zuckerman to foreclose factual inquiry in this case.

The Defendants also press a procedural point. They argue that the Plaintiffs failed to comply with Superior Court Rule 9A(b)(5) and therefore failed to controvert the statement (supported by the Joyner affidavit, ¶ 5) that the Board mailed notice of the public hearing and decision to all Interested Parties. They rely upon the principles and authority summarized in Green v. Southborough Zoning Board of Appeals, 132-133 ():

Green disputed DePietri's affidavit in the sense that he responded "Disputed" to Park Central's statement, pursuant to Rule 9A of the Rules of the Superior Court (2017), of material fact setting forth the expenditures, and claimed that no further response was required because the allegations were conclusions of law. This, however, falls far short of creating a genuine issue of material fact sufficient to survive summary judgment. Green offered no information -- let alone admissible evidence -- on summary judgment to counter DePietri's affidavit, whether by way of affidavit or otherwise. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); Barron Chiropractic & Rehabilitation, P.C. v. Norfolk & Dedham Group, 469 Mass. 800, 804 (2014). "[M]erely responding 'disputed' to a proposed statement of fact does not establish a genuine dispute over a material fact. Rather, the party opposing summary judgment must adduce competent evidence sufficient to show a genuine issue for trial." Jenkins v. Bakst, 95 Mass. App. Ct. 654, 660 n.9 (2019). "While a judge

should view the evidence with an indulgence in the [opposing party's] favor, . . . the opposing party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment" (quotations omitted). LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

Important as those principles are, they do not apply here. For one thing, when the plaintiffs refer to their complaint in this case, they actually are referring not just to bare allegations, but to actual affidavits regarding non-receipt of notice by residents in the "Schacktown" neighborhood on Holmes Road and Interested Persons of the South Street side of the Project. Those affidavits are exhibits to the complaint. For another thing, in denying the allegation of mailing in Defendants' to the 9A(b)(5) statement, the Plaintiff's response actually does refer to each plaintiff's "affidavit" (see e.g. Response to § 4) and their memorandum in opposition specifically alleges the additional fact of non-receipt, as support by affidavit.

It follows that, for purposes of summary judgment only, the court must assume that the City failed to mail the statutorily required notice of the public hearing and of the decision to the plaintiffs, in violation of G.L. c. 40A, §§ 9, 11. The court must also assume that the failure prejudiced the plaintiffs' ability to be heard at the public hearing and to appeal from the Decision.

II.

Even if there are genuine disputes of fact, the court should still grant the Motion if those disputes are not "material" to the issues in this case. Mass. R. Civ. P. 56(c). See Hogan v. Riemer, 35 Mass. App. Ct. 360, 364 (1993) ("For purposes of judging whether summary judgment ought to have been granted, the existence of disputed facts is consequential only if those facts have a material bearing on disposition of the case . . .

The substantive law will identify whether a fact, in the context of the case, is material.”)
(citations omitted).

The Defendants argue that failure to mail notice to the plaintiffs is not material, because, in cases challenging defective notice of a hearing, the lawsuit challenging the grant of a special permit must be brought “within ninety days after the decision has been filed in the office of the city . . . clerk[.]” G.L. c. 40A, § 17. The complaint in this case challenges a permit granted on November 29, 2017, but was not brought until 2019. The Plaintiffs counter that the ninety day deadline does not apply because the Board failed to mail notice to them as required by G.L. c. 40A, §§ 9, 11.

The lead authority is Kramer v. Zoning Board of Somerville, 65 Mass. App. Ct. 186 (2005). That appeal arose from a dismissal under Rule 12(b)(6) and therefore leaves open some questions that arise in this case. The Appeals Court held “that, at least where there has been a complete failure of notice of a public hearing in advance of the granting of a special permit, the ninety-day limitation in G.L. c. 40A, § 17, should not be deemed to run until the abutter has notice of the project to which he objects.” Id., 65 Mass. App. Ct. at 193-194. The court added:

The reasoning and spirit of the case law buttress our conclusion that where no notice has been provided under G. L. c. 40 A, § 17, the ninety-day statute of limitations does not begin to run until the aggrieved party becomes aware of the project to which he objects. Kramer has alleged that he was provided with no notice of any kind. The city and board appear to concede this point on appeal. [Footnote 9 omitted] The record before us is not sufficiently developed, however, as to whether the city and board failed to provide Kramer not only with mailed notice, but also notice by publication and posting. Not every decision of an administrative board need be invalidated for the board's failure to comply precisely with the statutory notice requirements of G. L. c. 40A, § 17. Chiuccariello [v. Building Commr. of Boston, 29 Mass. App. Ct. 482, 486 (1990)], quoting from Kasper, [v. Board of Appeals of Watertown, 3 Mass. App. Ct. 251, 256 (1975)]. A more flexible rule has been applied in situations where a municipal body failed to deliver notice precisely as required by statute, but still

provided notice adequate to allow abutters to attend the hearing. See Kasper, supra at 256; Chiuccariello, supra at 486. Accordingly, **on remand the Superior Court judge should determine whether the board provided any other form of statutory notice. If no notice sufficient to meet the statutory requirements was provided, the board must hold a new hearing.**

Kramer, 65 Mass. App. Ct. at 195-196 (emphasis added).

Here, the Board did provide some “other form of statutory notice,” namely publication in the Berkshire Eagle and posting at City Hall. The Kramer decision did not reach the question whether such forms of statutory notice were “sufficient to meet the statutory requirements.” On the one hand, the statute specifically requires notice in the “form” of newspaper publication and posting at City Hall. On the other, the “statutory requirements” specifically include mailing to Interested Persons, without which, strictly speaking, notice is not “sufficient to meet the statutory requirements.” On top of those uncertainties, the court must assume the truth of the Plaintiff’s affidavits that they did not see that publication or posting and did not become aware of the hearing or decision until 2019. One possible reading of Kramer is that, in the absence of mailing, an “other form of statutory notice” is “sufficient to meet the statutory requirements” if it accomplishes the statutory purpose of notifying the Interested Parties.

The Defendants stress the language in Kramer, 65 Mass. App. Ct. at 193-194 describing the facts in that case as “a complete failure of notice of a public hearing in advance of the granting of a special permit,” As plaintiffs note, that is not necessarily the limit of the applicable principle, because Kramer prefaced this language by saying: “at least where there has been” a complete failure to notice. Id. Nevertheless, in a non-binding Rule 1:28 (now Rule 23.0) decision, the Appeals Court held that tolling under Kramer is limited “to cases where, unlike here, there has been a total and complete failure of notice.” Robicheau v. Nissan Norwood Realty, LLC, 72 Mass. App. Ct. 1118 (2008),

further appellate review denied, 452 Mass. 1109 (2008). The stipulated facts in Robicheau established that the town failed to mail notice to the plaintiff, but did publish and post the notice. There were some defects in the published and posted notice actually given, but the court ruled that these errors did not detract from the efficacy of the notice. To be sure, unlike that case, the applicant in Robicheau did post notice on the property, which was commercial in nature, making the notice more likely to achieve actual notice. Robicheau is not binding authority, and does not definitively answer the questions left open by Kramer, but is persuasive here.

The Plaintiffs argue forcefully that, if newspaper publication plus posting at City Hall is sufficient, then the requirement to mail notice to Interested Persons would effectively become a nullity. The cases on defective notice focus “on whether a party’s rights had been affected in a meaningful way by the manner in which the agency exercised ... jurisdiction” in the absence of statutorily required notice. Gordon v. State Building Code Appeals Board, 70 Mass. App. Ct. 12, 18-19 (2007). That concern led the court in Kramer, 65 Mass. App. Ct. at 193, to accept an argument based upon a complete failure “to give, in any form, the statutory notice” that municipalities “are obliged to provide, and upon which the public hearing process fundamentally depends.” Id.³ As

³ The court said:

Such an interpretation would effectively nullify the requirement to notify abutters of public hearings because a failure to comply with it would entail no consequences, as long as the abutters remained unaware of the issuance of the permit until the expiration of the appeal period. Such an interpretation, moreover, would produce the nonsensical result that an abutter provided with less than perfect notice of a hearing would have access to judicial review, at least within ninety days, while one who suffered the more grievous injury of total absence of notice would be foreclosed from obtaining judicial review. See Cappuccio, 398 Mass. at 309 (statute should be construed to avoid absurd result). Any such interpretation of the statutory appeals provisions would be “unreasonable.” See Chiuccariello v. Building Commr. of Boston, 29 Mass. App. Ct. 482, 487 (1990) (Chiuccariello). See also Rinaldi v. State Bldg. Code Appeals Bd., 56 Mass. App. Ct. 668, 673-674 (2002) (lack of any notice fails test of “reasonable notice” under G. L. c. 30A, § 11).

stated in part I, above, these concerns are present here, where the court must assume both a failure to provide statutorily required notice and prejudice to the Plaintiff's rights.

Important as they are, the rights of Interested Persons are not the only consideration. A review of the statutory language shows legislative concern for the rights of all parties to a special permit process. The statute reflects significant legislative concern not to delay or impair applicants' ability to rely on and act under the special permits once an appeals period has run without an appeal. The Legislature thus struck a balance. It required a very prompt appeal from a zoning decision "within twenty days after the decision has been filed in the office of the city or town clerk." G.L. c. 40A, § 17, first paragraph. "To avoid delay," it required notice "by delivery or certified mail to all defendants . . . within twenty-one days after the entry of the complaint . . .," upon pain of dismissal. *Id.*, second paragraph. For the same reason, it dispensed with the requirement of an answer. It granted "precedence over all other civil actions and proceedings." *Id.*, last paragraph.

The Legislature specifically addressed the possibility of defective notice. Weighing the competing interests, the Legislature expressly resolved the competing interests in such cases:

The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing **or** posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to **defects** in procedure or **of notice** in other proceedings except with respect to such publication, **mailing or** posting and then **only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk . . .**

Id., second paragraph (emphasis added). By these words, the Legislature declined to make the appeal period commence on the date of receipt of a decision, even though

it has done so in other contexts. See, e.g. G.L. c. 30A, § 14. By using the disjunctive, “or,” the statute expressly applies the 90-day deadline to cases like this one, involving failure to provide notice by mail, but compliance with publication and posting requirements. The court must follow the statute’s clear directive.⁴

While the result may seem harsh to abutters, the opposite rule may be harsh to applicants, who may invest time, effort and money in acting under a permit in the honest belief that no one intended to contest or appeal from the permit. This case illustrates the point. Verizon did not learn of this appeal until more than a year after expiration of the appeals period, during which time, according to the complaint, it mobilized resources to commence construction. If the Plaintiffs are right, then it now must await resolution of this lawsuit and, possibly, restart the public hearing process before the Board, with the prospect of another appeal even if it is successful on remand. These problems are not limited to this case. Moreover, in many cases (though perhaps not this one), there is a real danger that claims about lack of notice will reflect the kind of innocent assumptions and errors we all make in dealing with our mail: a simple loss of memory about what mail we received months ago; assumptions that notices were “junk mail” to be ignored and discarded; or setting mail aside for a later review that never occurs. The Plaintiffs’ rule would subject the process to these uncertainties. It would delay the private benefits of any project as well as any public benefits the project may provide. The case law affirms the statutory scheme to prevent these delays. To provide finality and to avoid

⁴ As the quoted passage demonstrates, Kramer’s “complete failure of notice” test has a statutory basis: the legislature did not expressly dictate the result upon a failure of all three methods of notice: publication, mailing **and** posting, as alleged in that case. In such a case, the court would have to read “or” to mean “and.” That is not an impossible reading, but the allegations in Kramer involved a degree of statutory ambiguity and incongruity that prompted the court to apply the rule against non-sensical interpretations and avoidance of constitutional due process questions. Kramer, 65 Mass. at 193.

protracted delay, the time limit for appealing zoning decisions under c. 40A, § 17 is “a requirement [the Supreme Judicial Court] has policed in the strongest way.” Kramer, 65 Mass. App. Ct. at 194, quoting Cappuccio, 398 Mass. at 312, quoting from Pierce v. Board of Appeals of Carver, 369 Mass. 804, 808 (1976).

Moreover, the Legislature sometimes accepts a degree of harshness to achieve a greater goal, such as finality. The 90-day rule in c. 40A, § 17 is no harsher than many other statutes that provide finality, such as a statute of repose⁵ or the rule in other administrative contexts that bars an appeal after a fixed time period regardless of actual receipt of a decision.⁶ Where the responsibility for notice falls not upon the applicant, but upon the City, the Legislature had to decide which party must bear the burden of a municipal error. It chose not to visit a municipal failure upon the applicant once the extended, 90-day appeals period expires.

In short, the dispute over whether the City mailed notice to the Plaintiffs is not material. On the undisputed facts, the failure to provide notice by mail, while providing published and posted notice does not amount to a “complete failure of notice of a public hearing in advance of the granting of a special permit . . .” Kramer, 65 Mass. App. Ct. at 193-194. Recognizing that Kramer used the phrase “at least,” the court applies the 90-day deadline for the reasons stated above. It concludes that the Plaintiffs did not bring this case in timely fashion and, therefore, the court must dismiss the complaint.

⁵ See, e.g. G.L. c. 260, § 2B. Sullivan v. Iantosca, 409 Mass. 796, 798 (1991) (statute of repose is not extended by any “discovery rule.”); Klein v. Catalano, 386 Mass. 701, 702 (1982).

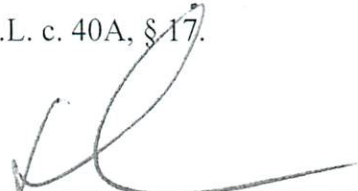
⁶ See, e.g. G.L. c. 249, § 4 (A certiorari claim “shall be commenced within sixty days next after the proceeding complained of.”). Committee for Public Counsel Services v. Lookner, 47 Mass. App. Ct. 833, 835 (1999) (“The term ‘proceeding complained of’ refers to ‘the last administrative action’ taken by an agency.”).

ORDER

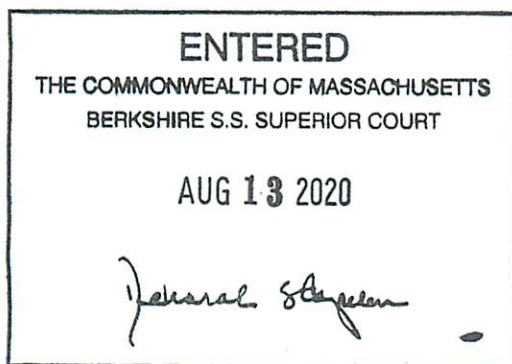
For the above reasons:

1. The Joint Motion for Summary Judgment of Defendants Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, City of Pittsfield Zoning Board of Appeals and Albert Ingegneri III, Thomas Goggins, John Fitzgerald, Miriam Maduro and Esther Bolen in their Capacities as members of the City of Pittsfield Zoning Board of Appeals is ALLOWED.
2. Final Judgment shall enter for all defendants against all plaintiffs, dismissing the complaint as untimely under G.L. c. 40A, § 17.

Dated: August 13, 2020



Douglas H. Wilkins
Associate Justice, Superior Court



A True Copy

Attest:

Clerk



Massachusetts General Laws Annotated
Massachusetts Rules of Civil Procedure
VII. Judgment

Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 56

Rule 56. Summary Judgment

Currentness

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without

substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Credits

Amended March 7, 2002, effective May 1, 2002.

Editors' Notes

REPORTER'S NOTES--1973

Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under G.L. c. 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case.

The statutes, so far as they went, embodied this philosophy. They aimed “to avoid delay and expense of trials in cases where there is no genuine issue of fact.” *Albre Marble & Tile Co., Inc. v. John Bowen Co., Inc.*, 338 Mass. 394, 397, 155 N.E.2d 437, 439 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is “no genuine issue as to any material fact.” If any such issue appears, summary judgment *must* be denied. So-called “trial by affidavits” has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only “genuine” material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponent's allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases,

summary judgment may be entered *against* the moving party. This is eminently logical. Because by definition the moving party is *always* asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed facts.

REPORTER'S NOTES TO RULE 56(C)--2002

The 2002 amendment to Rule 56(c) deletes the phrase “on file” from the third sentence, in recognition of the fact that discovery documents are generally no longer separately filed with the court. See Rule 5(d)(2) and Superior Court Administrative Directive No. 90-2. The previous reference to admissions has also been replaced by a reference to “responses to requests for admission under Rule 36.” The amendment is merely of the housekeeping variety and no change in practice is intended.

Notes of Decisions (897)

Rules Civ. Proc., Rule 56, MA ST RCP Rule 56
Current with amendments received through May 1, 2021.

End of Document

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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title VII. Cities, Towns and Districts (Ch. 39-49a)

Chapter 40A. Zoning (Refs & Annos)

M.G.L.A. 40A § 9

§ 9. Special permits

Effective: January 14, 2021

Currentness

Zoning ordinances or by-laws shall provide for specific types of uses which shall only be permitted in specified districts upon the issuance of a special permit. Special permits may be issued only for uses which are in harmony with the general purpose and intent of the ordinance or by-law, and shall be subject to general or specific provisions set forth therein; and such permits may also impose conditions, safeguards and limitations on time or use.

Zoning ordinances or by-laws may also provide for special permits authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide certain open space, housing for persons of low or moderate income, traffic or pedestrian improvements, installation of solar energy systems, protection for solar access, or other amenities. Such zoning ordinances or by-laws shall state the specific improvements or amenities or locations of proposed uses for which the special permits shall be granted, and the maximum increases in density of population or intensity of use which may be authorized by such special permits.

Zoning ordinances or by-laws may provide that special permits may be granted for multi-family residential use in nonresidentially zoned areas where the public good

would be served and after a finding by the special permit granting authority, that such nonresidentially zoned area would not be adversely affected by such a residential use, and that permitted uses in such a zone are not noxious to a multi-family use.

Zoning ordinances or by-laws may provide for special permits authorizing the transfer of development rights of land within or between districts. These zoning ordinances or by-laws shall include incentives such as increases in density of population, intensity of use, amount of floor space or percentage of lot coverage, that encourage the transfer of development rights in a manner that protect open space, preserve farmland, promote housing for persons of low and moderate income or further other community interests; provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing transfer of development rights to be permitted as of right, without the need for a special permit or other discretionary zoning approval ;¹ provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing transfer of development rights to be permitted as of right without the need for a special permit or other discretionary zoning approval.

Zoning ordinances or by-laws may also provide that open space residential developments or planned unit developments shall be permitted upon the issuance of a special permit.

Notwithstanding any provision of this section to the contrary, zoning ordinances or by-laws may provide that open space residential developments shall be permitted upon review and approval by a planning board pursuant to the applicable provisions of sections 81K to 81GG, inclusive, of chapter 41 and in accordance with its rules and regulations governing subdivision control; provided, however, that nothing herein shall prohibit a zoning ordinance or by-law from allowing open space residential developments to be permitted as of right, without the need for a special permit or other discretionary zoning approval.

Zoning ordinances or by-laws may also provide that special permits may be granted for reduced parking space to residential unit ratio requirements after a finding by the special permit granting authority that the public good would be served and that the area in which the development is located would not suffer a substantial adverse effect from such diminution in parking.

“Planned unit development” means a mixed use development on a plot of land

containing a minimum of the lesser of sixty thousand square feet or five times the minimum lot size of the zoning district, but of such larger size as an ordinance or by-law may specify, in which a mixture of residential, open space, commercial, industrial or other uses and a variety of building types are determined to be sufficiently advantageous to render it appropriate to grant special permission to depart from the normal requirements of the district to the extent authorized by the ordinance or by-law. Such open space, if any, may be situated to promote and protect maximum solar access within the development.

Zoning ordinances or by-laws may also provide for the use of structures as shared elderly housing upon the issuance of a special permit. Such zoning ordinances or by-laws shall specify the maximum number of elderly occupants allowed, not to exceed a total number of six, any age requirements and any other conditions deemed necessary for the special permits to be granted.

Zoning ordinances or by-laws may provide that certain classes of special permits shall be issued by one special permit granting authority and others by another special permit granting authority as provided in the ordinance or by-law. Such special permit granting authority shall adopt and from time to time amend rules relative to the issuance of such permits, and shall file a copy of said rules in the office of the city or town clerk. Such rules shall prescribe a size, form, contents, style and number of copies of plans and specifications and the procedure for a submission and approval of such permits.

Zoning ordinances or by-laws may provide for associate members of a planning board when a planning board has been designated as a special permit granting authority. One associate member may be authorized when the planning board consists of five members, and two associate members may be authorized when the planning board consists of more than five members. A city or town which establishes the position of associate member shall determine the procedure for filling such position. If provision for filling the position of associate member has been made, the chairman of the planning board may designate an associate member to sit on the board for the purposes of acting on a special permit application, in the case of absence, inability to act, or conflict of interest, on the part of any member of the planning board or in the event of a vacancy on the board.

Each application for a special permit shall be filed by the petitioner with the city or town clerk and a copy of said application, including the date and time of filing

certified by the city or town clerk, shall be filed forthwith by the petitioner with the special permit granting authority. The special permit granting authority shall hold a public hearing, for which notice has been given as provided in section eleven, on any application for a special permit within sixty-five days from the date of filing of such application; provided, however, that a city council having more than five members designated to act upon such application may appoint a committee of such council to hold the public hearing. The decision of the special permit granting authority shall be made within ninety days following the date of such public hearing. The required time limits for a public hearing and said action, may be extended by written agreement between the petitioner and the special permit granting authority. A copy of such agreement shall be filed in the office of the city or town clerk. A special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board.

A special permit issued by a special permit granting authority shall require a simple majority vote for any of the following: (a) multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184; (b) mixed-use development in centers of commercial activity within a municipality, including town and city centers, other commercial districts in cities and towns and rural village districts; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184; or (c) a reduced parking space to residential unit ratio requirement, pursuant to this section; provided, that a reduction in the parking requirement will result in the production of additional housing units.

Failure by the special permit granting authority to take final action within said ninety days or extended time, if applicable, shall be deemed to be a grant of the special permit. The petitioner who seeks such approval by reason of the failure of the special permit granting authority to act within such time prescribed, shall notify the city or town clerk, in writing within fourteen days from the expiration of said ninety days or extended time, if applicable, of such approval and that notice has been sent by the

petitioner to parties in interest. The petitioner shall send such notice to parties in interest by mail and each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the special permit granting authority failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the special permit granting authority failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. The special permit granting authority shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which shall be filed within fourteen days in the office of the city or town clerk and shall be deemed a public record, and notice of the decision shall be mailed forthwith to the petitioner, applicant or appellant, to the parties in interest designated in section eleven, and to every person present at the hearing who requested that notice be sent to him and stated the address to which such notice was to be sent. Each such notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date of filing of such notice in the office of the city or town clerk.

Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than 3 years, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause.

Zoning ordinances or by-laws shall also provide that uses, whether or not on the same parcel as activities permitted as a matter of right, accessory to activities permitted as a matter of right, which activities are necessary in connection with scientific research or scientific development or related production, may be permitted upon the issuance of a special permit provided the granting authority finds that the proposed accessory use does not substantially derogate from the public good.

In any city or town that accepts this paragraph, zoning ordinances or by-laws may provide that research and development uses, whether or not the uses are currently

permitted as a matter of right, may be permitted as a permitted use in any non-residential zoning district which is not a residential, agricultural or open space district upon the issuance of a special permit provided the special permit granting authority finds that the uses do not substantially derogate from the public good.

“Research and development uses” shall include any 1 or more of investigation, development, laboratory and similar research uses and any related office and, subject to the following limitations, limited manufacturing uses and uses accessory to any of the foregoing.

“Limited manufacturing” shall, subject to the issuance of the special permit, be an allowed use, if the following requirements are satisfied: (1) the manufacturing activity is related to research uses; (2) no manufacturing activity customarily occurs within 50 feet of a residential district; and (3) substantially all manufacturing activity customarily occurs inside of buildings with any manufacturing activities customarily occurring outside of buildings subject to conditions imposed in the special permit.

A hazardous waste facility as defined in section two of chapter twenty-one D shall be permitted to be constructed as of right on any locus presently zoned for industrial use pursuant to the ordinances and by-laws of any city or town provided that all permits and licenses required by law have been issued to the developer and a siting agreement has been established pursuant to sections twelve and thirteen of chapter twenty-one D, provided however, that following the submission of a notice of intent, pursuant to section seven of chapter twenty-one D, a city or town may not adopt any zoning change which would exclude the facility from the locus specified in said notice of intent. This section shall not prevent any city or town from adopting a zoning change relative to the proposed locus for the facility following the final disapproval and exhaustion of appeals for permits and licenses required by law and by chapter twenty-one D.

A facility, as defined in section one hundred and fifty A of chapter one hundred and eleven, which has received a site assignment pursuant to said section one hundred and fifty A, shall be permitted to be constructed or expanded on any locus zoned for industrial use unless specifically prohibited by the ordinances and by-laws of the city or town in which such facility is proposed to be constructed or expanded, in effect as of July first, nineteen hundred and eighty-seven; provided, however, that all permits and licenses required by law have been issued to the proposed operator. A city or town shall not adopt an ordinance or by-law prohibiting the siting of such a facility or

the expansion of an existing facility on any locus zoned for industrial use, or require a license or permit granted by said city or town, except a special permit imposing reasonable conditions on the construction or operation of the facility, unless such prohibition, license or permit was in effect on or before July first, nineteen hundred and eighty-seven; provided, however, that a city or town may adopt and enforce a zoning or non-zoning ordinance or by-law of general application that has the effect of prohibiting the siting or expansion of a facility in the following areas: recharge areas of surface drinking water supplies as shall be reasonably defined by rules and regulations of the department of environmental protection, areas subject to section forty of chapter one hundred and thirty-one, and the regulations promulgated thereunder; and areas within the zone of contribution of existing or potential public supply wells as defined by said department. No special permit authorized by this section may be denied for any such facility by any city or town; provided, however, that a special permit granting authority may impose reasonable conditions on the construction or operation of the facility, which shall be enforceable pursuant to the provisions of section seven.

Credits

Added by St.1975, c. 808, § 3. Amended by St.1977, c. 829, §§ 3E, 3F, 4A; St.1980, c. 508, § 5; St.1982, c. 344; St.1985, c. 408; St.1985, c. 637, §§ 3 to 5; St.1986, c. 471; St.1987, c. 498, § 1; St.1987, c. 584, § 10; St.1989, c. 239; St.1989, c. 341, § 22; St.1990, c. 177, § 109; St.2000, c. 148; St.2002, c. 197; St.2006, c. 205, § 8, eff. Aug. 2, 2006; St.2016, c. 219, § 30, eff. Aug. 10, 2016; St.2018, c. 209, § 16, eff. Aug. 9, 2018; St.2020, c. 358, §§ 20 to 24, eff. Jan. 14, 2021.

Notes of Decisions (270)

Footnotes

¹
So in original.

M.G.L.A. 40A § 9, MA ST 40A § 9

Current through Chapter 8 of the 2021 1st Annual Session

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)
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Title VII. Cities, Towns and Districts (Ch. 39-49a)

Chapter 40A. Zoning (Refs & Annos)

M.G.L.A. 40A § 11

§ 11. Notice requirements for public hearings; parties in interest defined; review of special permit petitions; recording copies of special permit and variance decisions

Effective: November 2, 2008

Currentness

In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. "Parties in interest" as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list, notwithstanding that the land of any such owner is located in another city or town, the planning board of the city or town, and the planning board of every abutting city or town. The assessors maintaining any applicable tax list shall certify to the permit granting authority or special permit granting authority the names and addresses of parties in interest and such certification shall be conclusive for all purposes. The permit granting authority or special permit granting authority may accept a waiver of notice from, or an affidavit of actual notice to any party in interest or, in his stead, any successor owner of record who may not have received a notice by mail, and may order special notice to any such person, giving not less than five nor more than ten additional days to reply.

Publications and notices required by this section shall contain the name of the petitioner, a description of the area or premises, street address, if any, or other adequate identification of the location, of the area or premises which is the subject of the petition, the date, time and place of the public hearing, the subject matter of the hearing, and the nature of action or relief requested if any. No such hearing shall be held on any day on which a state or municipal election, caucus or primary is held in such city or town.

Zoning ordinances or by-laws may provide that petitions for special permits shall be submitted to and reviewed by one or more of the following and may further provide that such reviews may be held jointly:--the board of health, the planning board or department, the city or town engineer, the conservation commission or any other town agency or board. Any such board or agency to which petitions are referred for review shall make such recommendations as they deem appropriate and shall send copies thereof to the special permit granting authority and to the applicant; provided, however, that failure of any such board or agency to make recommendations within thirty-five days of receipt by such board or agency of the petition shall be deemed lack of opposition thereto.

When a planning board or department is also the special permit granting authority for a special permit applicable to a subdivision plan, the planning board or department may hold the special permit public hearing together with a public hearing required by sections 81K to 81GG inclusive of chapter 41 and allow for the publication of a single advertisement giving notice of the consolidated hearing.

Upon the granting of a variance or special permit, or any extension, modification or renewal thereof, the permit granting authority or special permit granting authority shall issue to the owner and to the applicant if other than the owner a copy of its decision, certified by the permit granting authority or special permit granting authority, containing the name and address of the owner, identifying the land affected, setting forth compliance with the statutory requirements for the issuance of such variance or permit and certifying that copies of the decision and all plans referred to in the decision have been filed with the planning board and city or town clerk.

No variance, or any extension, modification or renewal thereof, shall take effect until a copy of the decision bearing the certification of the city or town clerk that twenty days have elapsed after the decision has been filed in the office of the city or town clerk and no appeal has been filed, or that if such appeal has been filed, that it has

been dismissed or denied, or that if it is a variance which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the petition for the variance accompanied by the certification of the city or town clerk stating the fact that the permit granting authority failed to act within the time prescribed, and no appeal has been filed, and that the grant of the petition resulting from such failure to act has become final, or that if such appeal has been filed, that it has been dismissed or denied, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.

A special permit, or any extension, modification or renewal thereof, shall not take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed after the decision has been filed in the office of the city or town clerk and either that no appeal has been filed or the appeal has been filed within such time, or if it is a special permit which has been approved by reason of the failure of the permit granting authority or special permit granting authority to act thereon within the time prescribed, a copy of the application for the special permit-accompanied by the certification of the city or town clerk stating the fact that the permit granting authority or special permit granting authority failed to act within the time prescribed, and whether or not an appeal has been filed within that time, and that the grant of the application resulting from the failure to act has become final, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone. This section shall in no event terminate or shorten the tolling, during the pendency of any appeals, of the 6 month periods provided under the second paragraph of section 6. The fee for recording or registering shall be paid by the owner or applicant.

Credits

Added by St.1975, c. 808, § 3. Amended by St.1977, c. 829, §§ 4C to 4F; St.1979, c. 117; St.1987, c. 498, § 2; St.2006, c. 205, § 9, eff. Aug. 2, 2006; St.2008, c. 239, § 1, eff. Nov. 2, 2008.

Notes of Decisions (144)

M.G.L.A. 40A § 11, MA ST 40A § 11
Current through Chapter 8 of the 2021 1st Annual Session

End of Document

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KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Prior Version Recognized as Repealed by Implication T-Mobile Northeast LLC v. Town of Barnstable, 1st Cir. (Mass.), Aug. 07, 2020



KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title VII. Cities, Towns and Districts (Ch. 39-49a)
Chapter 40A. Zoning (Refs & Annos)

M.G.L.A. 40A § 17

§ 17. Judicial review

Effective: January 14, 2021

Currentness

Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said land court or, superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said land court or superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the

decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or special permit granting authority shall be named as parties defendant with their addresses. To avoid delay in the proceedings, instead of the usual service of process, the plaintiff shall within fourteen days after the filing of the complaint, send written notice thereof, with a copy of the complaint, by delivery or certified mail to all defendants, including the members of the board of appeals or special permit granting authority and shall within twenty-one days after the entry of the complaint file with the clerk of the court an affidavit that such notice has been given. If no such affidavit is filed within such time the complaint shall be dismissed. No answer shall be required but an answer may be filed and notice of such filing with a copy of the answer and an affidavit of such notice given to all parties as provided above within seven days after the filing of the answer. Other persons may be permitted to intervene, upon motion. The clerk of the court shall give notice of the hearing as in other cases without jury, to all parties whether or not they have appeared. The court shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, notwithstanding any defect of procedure or of notice other than notice by publication, mailing or posting as required by this chapter, and the validity of any action shall not be questioned for matters relating to defects in procedure or of notice in any other proceedings except with respect to such publication, mailing or posting and then only by a proceeding commenced within ninety days after the decision has been filed in the office of the city or town clerk, but the parties shall have all rights of appeal and exception as in other equity cases.

The court, in its discretion, may require a plaintiff in an action under this section appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than \$50,000 to secure the payment of costs if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

A city or town may provide any officer or board of such city or town with independent legal counsel for appealing, as provided in this section, a decision of a board of appeals

or special permit granting authority and for taking such other subsequent action as parties are authorized to take.

Costs shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice.

Costs shall not be allowed against the party appealing from the decision of the board or special permit granting authority unless it shall appear to the court that said appellant or appellants acted in bad faith or with malice in making the appeal to the court.

The court shall require nonmunicipal plaintiffs to post a surety or cash bond in a sum of not less than two thousand nor more than fifteen thousand dollars to secure the payment of such costs in appeals of decisions approving subdivision plans.

All issues in any proceeding under this section shall have precedence over all other civil actions and proceedings.

Credits

Added by St.1975, c. 808, § 3. Amended by St.1978, c. 478, § 32; St.1982, c. 533, § 1; St.1985, c. 492, § 1; St.1987, c. 498, § 4; St.1989, c. 649, § 2; St.2002, c. 393, § 2; St.2020, c. 358, § 25, eff. Jan. 14, 2021.

Editors' Notes

VALIDITY

<For validity of this section, see T-Mobile Northeast LLC v. Town Of Barnstable, 969 F.3d 33, 2020 WL 4558644. >

Notes of Decisions (833)

M.G.L.A. 40A § 17, MA ST 40A § 17

Current through Chapter 8 of the 2021 1st Annual Session

72 Mass.App.Ct. 1118
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

1 Dorothy J. Robicheau.

Joseph A. ROBICHEAU & another¹

v.

NISSAN NORWOOD REALTY, LLC., & another.²

2 Planning board of the town of Norwood.

No. 07–P–1514.

|

Sept. 30, 2008.

By the Court (RAPOZA, CJ., ARMSTRONG & LENK, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 More than eight months after defendant planning board of the town of Norwood (board) approved an application by defendant Nissan Norwood Realty, LLC (Nissan), for a major project special permit, the plaintiffs, Joseph A. Robicheau and Dorothy J. Robicheau, filed suit in the Superior Court to challenge the validity of the board's action. On cross motions for summary judgment, the judge granted judgment as matter of law in favor of the defendants, concluding that the plaintiffs had no standing to maintain their challenge, which they had in any event filed beyond the strict statute of limitations. See  G.L. c. 40A, § 17.

Background. We recite the undisputed facts of record in the light most favorable to the plaintiffs, reserving some for our later discussion of the issues. Nissan sought to construct a car dealership in Norwood, consisting of a 45,000 square-foot building and at least 200 parking spaces, on five acres of land at and around 525 Boston–Providence Highway, also known as Route 1. The plaintiffs own a plot of land nearby, to the northwest of the Nissan's site, at 429 Neponset Street, on which they planned to construct a multifamily condominium complex. Nissan's five acres consisted of two separate

plots; one plot measured 1.67 acres (plot one), while the second measured 3.5 acres (plot two).

To initiate its application for the necessary major project special permit it needed to build the dealership, Nissan requested a list of parties in interest³ from the Norwood board of assessors (assessors) on April 25, 2005. Nissan omitted plot two from this request, which had the effect of limiting the produced list to abutters to, and abutters to abutters within 300 feet of, plot one only. The respective locations of plots one and two are such that the relevant property line of the plaintiffs' Neponset Street land is within approximately 130 feet of plot two, but over 300 feet from plot one. The plaintiffs' Neponset Street address was thus not included on the list of parties in interest.⁴

³ “Parties in interest” are abutters and abutters to abutters within 300 feet of the property line of the applicant for a special permit. See G.L. c. 40A, § 11. A list of all parties in interest must be requested from the assessors and attached to the application for a major project special permit. See Norwood planning board major project special permit rules, art. I § 2(A)(4),(5).

⁴ Plot one was joined with plot two on August 31, 2005, after the board approved Nissan's application. Nissan had signed a purchase and sale agreement for plot two before it began the application process for the subject special permit, and had described the arrangement to the board at some point before the public hearings occurred. Although the reason for this sequence of events is left unexplained in the record, it is immaterial to our resolution of this appeal.

Pursuant to its duties set forth by statute and local rules, see G.L. c. 40A, § 11, and Norwood planning board major project special permit rules, art. II, § 2(A)(4), the board undertook to provide notice of the required public hearing on Nissan's special permit application. Notice of the hearing was posted on the proposed site at 525 Boston–Providence Highway, and at the Norwood town hall. Similar notice was also twice published in the local newspaper, the Daily News Transcript, on June 22 and 29, 2005.⁵ The board also sent notice by first class mail to all of the parties in interest included on the aforementioned list of abutters.

⁵ Like the request for an abutters list, the posted and published forms of notice omitted plot two, describing the proposed location of the project as “Assessor's Map 18, Sheet 4, Lot 3” (emphasis supplied). Plot one actually consisted of assessor's maps 18–14–3, 18–14–4, and 18–14–35 through 18–14–46; plot two was identified as assessor's map 18–9–83. The posted and published notices did correctly state the project's street address as well as the scope and nature of the project.

The noticed hearing was held on July 18, 2005, and the board granted Nissan's special permit application following the continued public hearing that was held on August 15, 2005. The plaintiffs did not attend either hearing.

It was not until April 25, 2006, approximately 250 days after the grant of Nissan's special permit, that the plaintiffs filed suit in the Superior Court alleging certain violations of the zoning law and seeking declaratory and injunctive relief, as well as money damages,

fees, and costs. Preliminary injunctive relief to prevent Nissan from further construction, which was then well underway, was denied by a Superior Court judge, and was also denied after review by a single justice of this court pursuant to G.L. c. 231, § 118.

*2 The parties then filed cross motions for summary judgment in January of 2007, on which judgment later entered in favor of the defendants. The plaintiffs appeal, arguing, first, that they have standing to maintain a substantive appeal of the board's action, see  *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 27, 34 (2006), second, that the ninety-day period of limitation pursuant to  G.L. c. 40A, § 17, should be tolled because there was an alleged total failure of notice of the subject public hearing, see  *Kramer v. Zoning Bd. of Appeals of Somerville*, 65 Mass.App.Ct. 186, 193–194 (2005), and, finally, that reversal is in order because of alleged bias by the motion judge. Nissan cross appeals, contending that the judge erred in dismissing, sua sponte, its counterclaims.

Discussion. The grant of summary judgment will be upheld if “all material facts have been established and the moving party is entitled to a judgment as a matter of law.”

 *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). “We consider the facts ... and all reasonable inferences drawn therefrom, in the[] light most favorable to ... the nonmoving party.” *Scott v. NG U.S. I, Inc.*, 450 Mass. 760, 763 (2008). “If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the motion].”  *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989).

1. *Standing.* Judicial review of challenges to local zoning decisions on the merits may only be undertaken if the challenging party is a “person aggrieved.”⁶ “A ‘person aggrieved’ is one who ‘suffers some infringement of his legal rights.’ ... The injury must be more than speculative, and plaintiffs ‘must put forth credible evidence to substantiate claims of injury to their legal rights.’” *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 543 (2008), quoting from  *Marashlian v. Zoning Bd. of Newburyport*, 421 Mass. 719, 721, 723 (1996). A plaintiff must do so by way of “direct facts and not by speculative personal opinion.” *Standerwick, supra* at 33, quoting from  *Barvenik v. Alderman of Newton*, 33 Mass.App.Ct. 129, 132 (1992). “Conjecture, personal opinion, and hypothesis are ... insufficient.”  *Butler v. Waltham*, 63 Mass.App.Ct. 435, 441 (2005).

6 “Any person aggrieved by a decision of the board of appeals or any special permit granting authority ... may appeal to ... the superior court....”  G.L. c. 40A, § 17, as amended by St.1989, c. 649, § 2.

In their opposition to summary judgment, the plaintiffs contend that, because their injuries are distinct from those suffered by the general public, see *id.* at 440, the grant of the special permit will cause them to suffer a direct harm from: “1) damage to wetlands directly abutting [their] property; 2) erosion problems; 3) compromised road safety; 4) increased noise disturbances due to close proximity of cars and delivery trucks; 5) inadequate landscaping; 6) density; 7) storage of hazardous materials; and 8) inadequate drainage.” Yet the only support in the summary judgment record for these assertions of injury takes the form of unsubstantiated deposition testimony by Joseph Robicheau.

*3 Joseph stated that he had “problems” with certain aspects of Nissan's project, and after listing his “concerns” about the same, stated, “That's how I feel I'm going to be hurt by this.” Joseph further acknowledged that he was “unclear” about details of the project, stating, with regard to landscaping and possible impact on nearby wetlands, that “I have no idea what's going to be there.” When given the opportunity by Nissan's attorney to specify further how the plaintiffs might be damaged by the project, Joseph demurred, but stated that “I may come up with something.”

In light of the fact that the plaintiffs offered no other evidence, in the form of expert testimony, specific affidavits, or the like, to buttress any of the “concerns” cited by Joseph, it is clear that the plaintiffs' allegations of harm are based entirely on the sort of “speculative personal opinion” that is insufficient to establish standing.  *Standerwick*, 447 Mass. at 33. The plaintiffs have not offered credible evidence to show that they are aggrieved by the subject board action. Hence, they do not have standing to maintain a substantive challenge.⁷

7 The plaintiffs erroneously contend that requiring a showing of actual or credible evidence improperly shifts to them the burden of proving standing because they are presumptively aggrieved as “parties in interest.” While the plaintiffs did initially enjoy a rebuttable presumption that they possessed standing, see *Marashlian*, *supra* at 721, Nissan was permitted to, and did, rebut this presumption by simply “seeking to discover ... the actual basis of [the plaintiffs'] claims of aggrievement.” *Standerwick*, *supra* at 37. It is always the plaintiff's burden to prove standing. *Id.* at 34 & n. 20.

2. *Statute of limitation and notice.* Apart from requiring that parties be “aggrieved” in order to maintain substantive challenges of a board's action on a special permit,  G.L. c. 40A, § 17, establishes a twenty-day window within which such a challenge must be filed. However, if an appeal is grounded in a defect of notice as required by G.L. c. 40A, § 11,⁸ litigants enjoy an expanded filing period of ninety days.  G.L. c. 40A, § 17. These time periods are “policed in the strongest way” and “failure to file the action ... within the statutory period has fatal consequences.”  *Pierce v. Board of Appeals of Carver*,

369 Mass. 804, 809–810 (1976). Nissan points out, and the plaintiffs concede, that the instant suit was not filed until almost five months after the ninety-day limitation period expired. The plaintiffs rely, however, on our decision in  *Kramer*, 65 Mass.App.Ct. at 193–194, to support their view that this action was nonetheless timely filed.

8 Section 11 of G.L. c. 40A, requires that notice of public hearings be provided in three forms: (1) publication in a newspaper; (2) posting in a conspicuous place in the town hall; and (3) by mail to parties in interest. “Parties in interest” are defined as “abutters, owners of land directly opposite on any private street or way, and abutters to abutters within three-hundred (300) feet of the property line of the petitioner.” *Ibid*.

We held in *Kramer, supra*, that, where there has been a “total ” and “complete failure of notice of a public hearing in advance of the granting of a special permit, the [ninety-day time limit] should not be deemed to run until the abutter has notice of the project to which he objects” (emphasis supplied). The plaintiffs argue that the undisputed failure of notice by mail to them, taken with the deficiencies in the posted and published forms of notice,⁹ are the functional equivalent of no notice at all. We disagree.

9 See note 5, *supra*.

To be sure, the posted and published notice here was not perfect, but it contained an accurate street address and fully described the scope and nature of the project. Notice in this context need only be “reasonable,”  *Rousseau v. Building Inspector of Framingham*, 349 Mass. 31, 36–37 (1965), and “not every decision of [a board] ... need be invalidated for ... failure to comply precisely” with the notice requirements.  *Kasper v. Board of Appeals of Watertown*, 3 Mass.App.Ct. 251, 256 (1975). The notice provided in this case served adequately to inform the plaintiffs, and those in the general public, that the planning board would consider the described major project special permit application in a public forum on the listed date.

*4 “The statutes of limitation for judicial review of special permit decisions ... exist to promote finality and to preclude attacks indefinitely on decisions which have already been tested in the hearing process.” *Kramer, supra* at 192–193. Just as this statutory premium on finality causes the ninety-day limitation period for filing a challenge of a board's action to be “policed in the strongest way,” *Pierce, supra* at 808, so too must it limit the exception established in *Kramer* to cases where, unlike here, there been a total and complete failure of notice.

3. *Personal bias of motion judge*. The plaintiffs also challenge the impartiality of the motion judge, arguing that his alleged bias requires reversal. However, the question whether a judge should recuse himself when his impartiality has been challenged is left to the sound discretion of that judge. *Clark v. Clark*, 47 Mass.App.Ct. 737, 739 (1999).

See  *Demoulas v. Demoulas Super Mkts., Inc.*, 428 Mass. 543, 546 & n. 5 (1998). There is no indication that the plaintiffs asked the motion judge to consider their allegation of partiality, and the issue, not having been raised below, is not properly before us. See *Palmer v. Murphy*, 42 Mass.App.Ct. 334, 338 (1997). In any event, because we have independently confirmed that summary judgment in favor of the defendants was correct as matter of law, the judge's conduct was, at worst, harmless error. See *Fidelity Mgmt. & Research Co. v. Ostrander*, 40 Mass.App.Ct. 195, 203 (1996).

4. *The defendant's cross appeal.* Nissan alone cross appeals, contending that the judge erred in dismissing its counterclaims. The plaintiffs agree that these counterclaims, not having been raised by either party in the summary judgment motions, were not properly before the judge.

Conclusion. To the extent that the judgment dismissed Nissan's counterclaims, it is reversed, and the counterclaims are remanded to the Superior Court for further proceedings. The

judgment is otherwise affirmed.

So ordered.

All Citations

72 Mass.App.Ct. 1118, 893 N.E.2d 1286 (Table), 2008 WL 4388809