Massachusetts Home Rule, Local Permit Granting Authority

Case Law around Local Authority to say "no" to Special Permit applications

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There have been questions, recently, about whether or not the Board of Selectmen can deny Concord's Nagog Water Treatment Plant upgrade application. Or better said, "how" can the BoS can deny a Special Permit application.

Such a denial would include a straight forward one or two page memo, denying the application based on reasons of size of building, for example, citing the Master Plan and the Zonging Bylaw. In the Nagog Water Treatment plant application, the proposed building is almost 4 times the size of the nearest house. That in and of itself is probably enough. Then there's the increase in traffic. The risk to the fishery. The refusal to do monitoring. etc. I believe there's a list of reasons going around. I don't feel a need to try and recreate that.

The paper is intended to provide research to help you and other officials feel confident that we have the authority to deny this permit. When saying "no", or denying an application, Counsel often likes to see case law relative to the reasons put forth in such a denial which helps to strengthen the basis of the authority to say no.

This paper is intended to show various cases where judges in Massachusetts have supported the local authority's denial of a proposed project for various reasons. There are more, if you want me to do additional research.

DISCLAIMER: While I am not a lawyer, I have been doing legal research for citizens in a long list of towns relative to similar issues.

Here I present research I believe is relevant to the matter.

INTRODUCTION

The history of Massachusetts courts' authority on matters of size of building and other determinations of "injurious" appears to be limited to the question of "balancing" whether a concern is less or more important than a greater community need, for example, affordable housing.

Where a "special permit" is required by a local bylaw, the determination of whether something is injurious or not is almost always left to the local authorities, whether the determination is based on qualitative criteria or not.

It's worth noting, at this point, that the Concord case is not about balancing a mandated or proven need for water. Or a regional need to pump the water. Concord has plenty of water. Its case relies, instead, on a presumed "right" to withdraw water, not on an actual "need". In fact, Concord's assertion is not about a greater regional or societal need at all, but rather Concord's presumed "right" to pump water and therefore its right to build more than it actually needs

Either way, courts have already decided that towns have the right to limit the size of projects.

LOCAL RIGHT TO LIMIT THE SIZE OF A BUILDING

This first case is about a college that wanted to change a use from a multi-family resident to a 50 student dormitory. The local Board of Appeals ruled that the proposal was not appropriate, quoting from the case, where the BoA ruled:

"that the specific site is not an appropriate location for the use, that the proposed use will adversely affect the neighborhood, that this will be a hazard to vehicles and pedestrians, that a nuisance will be created by the proposed use in that adequate and appropriate facilities cannot be provided on this locus for the proper operation of the intended use." source: http://masscases.com/cases/sjc/393/393mass303.html

Upon appeal, the judge affirmed the local Board of Appeals, citing that:

"local regulations are presumed valid unless a sharp conflict exists between the local and the State regulation. School Comm. of Boston v. Boston, 383 Mass. 693 <http://masscases.com/cases/sjc/383/383mass693.html> , 701 (1981)" source: http://masscases.com/cases/sjc/393/393mass303.html

In other words, Concord would have to prove that something we're doing is prevented by State Law.

This is a high bar, because in Massachusetts strong Home Rule tenets apply...

LOCAL AUTHORITY RULES UNLESS THE LEGISLATURE HAS ENACTED SPECIFIC LIMITS

In Wellesley vs Ardemore Apartments, the judge noted that local autonomy must be respected, specifically stating [[emphasis added]]

"'[Note 22] <http://masscases.com/cases/sjc/436/436mass811.html#back22> Article 60 of the Amendments to the Massachusetts Constitution, ratified in 1918, gives the Legislature authority "to limit buildings according to their use or construction to specified districts of cities and towns," ***but deference to local autonomy in matters of land use***

and zoning is well established. See Symposium, supra at 328. ***Indeed, the Legislature has delegated almost entirely its constitutional zoning authority to cities and towns.*** See 760 Code Mass. Regs. § 30.01(1) (1993) ("The General Court has chosen to delegate this [art. 60] authority almost entirely to the cities and towns instead of exercising it more directly through a state agency"). Moreover, under the Home Rule Amendment, art. 89 of the Amendments to the Massachusetts Constitution, towns generally are no longer required to seek authority from the State in order to impose controls relative to zoning. Baldiga v. Board of Appeals of Uxbridge, 395 Mass. 829 <http://masscases.com/cases/sjc/395/395mass829.html> , 834 n.5 (1985). General Laws c. ***40A itself expressly recognizes local autonomy in dealing with land use and zoning issues***. Id. at 834. See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339 <http://masscases.com/cases/sjc/363/363mass339.html> , 368 (1973); Burnham v. Board of Appeals of Gloucester, 333 Mass. 114 <http://masscases.com/cases/sjc/333/333mass114.html> , 117 (1955) (zoning "has always been treated as a local matter and much weight must be accorded to the judgment of the local legislative body"); Symposium, supra at 345-354. See also Trustees of Tufts College v. Medford, 415 Mass. 753 <http://masscases.com/cases/sjc/415/415mass753.html> (1993) ("legitimate municipal concerns . . . typically find expression in local zoning laws")." SOURCE: http://masscases.com/cases/sjc/436/436mass811.html

Futher...

[Note 9] <http://masscases.com/cases/sjc/436/436mass811.html#back9> General Laws c. 40B, § 21, ***provides that the local zoning board has "the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section.***" See Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339 <http://masscases.com/cases/sjc/363/363mass339.html> , 355 (1973). SOURCE: http://masscases.com/cases/sjc/436/436mass811.html

And in Robert Manning v BRA, the judge states [[emphasis added]]

"***We give substantial deference to the construction placed on a statute or an ordinance by the agency charged with its administration***. See, e.g., Amherst-Pelham Regional School Comm. v. Department of Educ., 376 Mass. 480 <http://masscases.com/cases/sjc/376/376mass480.html> , 491-492 (1978)." source: http://masscases.com/cases/sjc/400/400mass444.html

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THE BURDEN OF PROOF IS ON THE PLAINTIFF

The burden is on the applicant to prove that overruling the local authority has a compelling state interest. And that is very difficult...because "no person has a legal right to a variance".

In Alison Sheppard v Boston ZBA, the judge reminds us [[emphasis added]]:

"***As the party who had sought the variances, McGarrell bore the burden at trial of proving his entitlement to them.*** 39 Joy St. Condominium Assn. v. Board of Appeal of Boston, 426 Mass. 485 <http://masscases.com/cases/sjc/426/426mass485.html> , 488 (1998). In reviewing the trial judge's decision, we are mindful that "***[n]o person has a legal right to a variance and they are to be granted sparingly***," since if they "are granted with undue frequency or liberality, and without strict compliance with the prescribed statutory criteria, zoning regulations can become a matter of administrative whim." Damaskos v. Board of Appeal of Boston, 359 Mass. 55 <http://masscases.com/cases/sjc/359/359mass55.html> , 61- 62 (1971). source: http://masscases.com/cases/app/81/81massappct394.html

"***"crowding of an abutter's residential property by violation of the density provisions of the zoning by-law will generally constitute harm sufficiently perceptible and personal to qualify the abutter as aggrieved***" Sheppard v. Zoning Bd. of Appeal of Boston, 74 Mass. App. Ct. 8 <http://masscases.com/cases/app/74/74massappct8.html> , 12 (2009), quoting from Dwyer v. Gallo, 73 Mass. App. Ct. 292 <http://masscases.com/cases/app/73/73massappct292.html> , 297 (2008)." source: http://masscases.com/cases/app/81/81massappct394.html

Similarly in Eileen Standerwick v Andover ZBA, we are reminded further of the plaintiff's burden of proof, that to overrule local authorities would necessitate Concord proving that its own legal interests were injured by Acton's decision. A high bar, given it has no actual need for the water.

"our long-standing jurisprudence that standing to challenge a zoning decision is conferred only on those who can plausibly demonstrate that a proposed project will injure their own personal legal interests and that the injury is to a specific interest that the applicable zoning statute, ordinance, or bylaw at issue is intended to protect." See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427 <http://masscases.com/cases/sjc/324/324mass427.html> , 431 (1949)" source: http://masscases.com/cases/sjc/447/447mass20.html

"See also Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290 <http://masscases.com/cases/sjc/373/373mass290.html> , 293 (1977) (party has standing when alleging "injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred"); B.C. Levey, Massachusetts Zoning and Land Use Law § 5-26(b) (1996 & Supp. 1998) (***plaintiff must show that proposed project "will injure his legal or property interests and that the***

injury is to an interest the zoning law was intended to protect"); Healy, Judicial Review of Variance and Special Permits, 1 Massachusetts Zoning Manual § 11.5.2 (b), at 11-39 (Mass. Continuing Legal Educ. 2000 & Supp. 2002) (to be "person aggrieved," plaintiff's injury "must relate to a cognizable interest protected by the zoning provisions at issue")." source: source: http://masscases.com/cases/sjc/447/447mass20.html

"See also Perley v. Perley, 144 Mass. 104 , 107-108 (1887) (if presumed fact is "met and encountered" by defendant's contrary evidence, ***burden of proof remains with plaintiff and is "not for the defendant to show that [the presumed fact] does not exist")***. " source: http://masscases.com/cases/sjc/447/447mass20.html

THE RISK OF PRECEDENCE

No application for a special permit for the increase in building size or traffic increase has been approved in Acton in a residential neighborhood. And thus approving this one would set the stage for others, making it a dangerous proposition to approve an increase of 400% for an industrial use, in a residential neighborhood.

It is long established, that if you do it once you'll have to do it again. This tenet is highlighted in SCIT, INC v Braintree Planning Board [[emphasis added]]:

"The uniformity requirement is based upon principles of equal treatment: all land in similar circumstances should be treated alike, so that ***"if anyone can go ahead with a certain development [in a district], then so can everybody else***." I Williams, American Land Planning Law Section 16.06 (1974).
http://masscases.com/cases/app/19/19massappct101.html

"A zoning ordinance is intended to apply uniformly to all property located in a particular district . . . and the properties of all the owners in that district [must be] subjected to the ***same restrictions for the common benefit of all.***"source:
http://masscases.com/cases/app/19/19massappct101.html

"Some exceptions to uniformity are sanctioned by The Zoning Act and involve generally a limited tolerance for nonconforming uses (Section 6 of c. 40A) and provision for special permits and variances (Sections 9 and 10 of c. 40A, respectively). These exceptions aside, Section 4 does not contemplate, once a district is established and uses within it authorized as of right, conferral on local zoning boards of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated." source: http://masscases.com/cases/app/19/19massappct101.html

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LOCAL SPECIAL PERMIT POWER, IN PARTICULAR

"Special permit procedures have long been used to bring flexibility to the fairly rigid use classifications of Euclidean zoning schemes (see 3 Anderson, American Law of Zoning Section 19.01 [2d ed. 1977]; see also Burnham v. Board of Appeals of Gloucester, 333 Mass. 114 <http://masscases.com/cases/sjc/333/333mass114.html> , 116 [1955]) by providing for specific uses which are deemed necessary or desirable but which are not allowed as of right because of their potential for incompatibility with the characteristics of the district. See 3 Rathkopf, Zoning and Planning Section 41.01, at 41-3 (4th ed. 1984)." source: http://masscases.com/cases/app/19/19massappct101.html

Interestingly, Concord was, in its own case against Sellors claimed that the locality had the right to decide whether something was injurious to the neighbors or not. http://masscases.com/cases/sjc/329/329mass259.html

This case was found in the SCIT INC vs Braintree, case where the judge listed a number of cases establishing the "broad power of a local board in the special permit area", including the claim by Concord that the local authority had the right to decide, not the court:

"[Note 11] <http://masscases.com/cases/app/19/19massappct101.html#back11> The broad power of a local board in the special permit area has been commented upon in a number of decisions of which Humble Oil & Refining Co. v. Board of Appeals of Amherst, 360 Mass. 604 <http://masscases.com/cases/sjc/360/360mass604.html> , 605 (1971), and Subaru of New England, Inc. v. Board of Appeals of Canton, 8 Mass. App. Ct. 483 <http://masscases.com/cases/app/8/8massappct483.html> , 486 (1979), state the relevant principles concerning a denial of a special permit. See also (as a sampling of decisions on both the grant and denial of special permits), Sellors v. Concord, 329 Mass. 259 <http://masscases.com/cases/sjc/329/329mass259.html> (1952); Gulf Oil Corp. v. Board of Appeals of Framingham, 355 Mass. 275 <http://masscases.com/cases/sjc/355/355mass275.html> (1969); MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635 <http://masscases.com/cases/sjc/356/356mass635.html> (1970); Josephs v. Board of Appeals of Brookline, 362 Mass. 290 <http://masscases.com/cases/sjc/362/362mass290.html> (1972); Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147 <http://masscases.com/cases/sjc/371/371mass147.html> (1976); Pioneer Home Sponsors, Inc. v. Board of Appeals of Northampton, 1 Mass. App. Ct. 830 <http://masscases.com/cases/app/1/1massappct830.html> (1973); S. Volpe & Co. v. Board of Appeals of Wareham, 4 Mass. App. Ct. 357 <http://masscases.com/cases/app/4/4massappct357.html> (1976); and S. Kemble Fischer Realty Trust v. Board of Appeals of Concord, 9 Mass. App. Ct. 477 <http://masscases.com/cases/app/9/9massappct477.html> (1980)." source: http://masscases.com/cases/app/19/19massappct101.html

"As to site plan approval as a permissible regulatory tool, attention is directed to Y.D. Dugout, Inc. v. Board of Appeals of Canton, 357 Mass. 25 <http://masscases.com/cases/sjc/357/357mass25.html> (1970). In that case, a by-law which required site plan approval for all commercial development in nonresidential districts (but not for the residential uses permitted as of right in those districts) was upheld as a valid exercise of the town's zoning power." source: http://masscases.com/cases/app/19/19massappct101.html

The courts have firmly determined that town's have the right to limit building size. They courts continue to support local decision making.

EVEN IN AFFORDABLE HOUSING, WITHOUT A REGIONAL NEED, THE LOCALS DECIDE

Even in affordable housing, there time after time, courts side with the developer, the applicant has to prove that there is a compelling need for housing, or else the local authorities hold all the approval power. In these cases, the town has the last say, unless the applicant can prove a regional need for such building.

The burden of proof is firmly on the applicant. And if the applicant can not prove such a regional need, then home rule applies, and the courts side with local authorities.

In the case ZONING BOARD OF APPEALS OF CANTON vs. HOUSING APPEALS COMMITTEEhttp://masscases.com/cases/app/76/76massappct467.html#back4 <http://masscases.com/cases/app/76/76massappct467.html#back4>, the court refers to the need for regional housing as a reasonable justification for trumping local needs.

However, the judge also notes that a balance is allowed to ensure that [[emphasis added]]:

"(b) ***the weight of the local concern will be commensurate with the degree to which the health and safety of occupants or town residents is imperiled***, the degree to which the natural environment is endangered, the degree to which the design of the site and the proposed housing is seriously deficient, the degree to which additional open spaces are critically needed in the city or town, and the degree to which the local requirements and regulations bear a direct and substantial relationship to the protection of such local concerns..."

Of course, the question of balance rests with the court in matters of housing. But the case at hand is not about housing. That said, while this project isn't about housing, using the housing example is important to this case, because of the weight of local needs over an individual property owner is respected so thoroughly.

As a result, there does not appear to be any authority for the Land Court to overrule a town's claim that a development is injurious to the town EXCEPT where regional low

income housing is required. This is key because what Concord is proposing is NOT to satisfy a regional housing need. It's not to satisfy any "need" at all.

And so this case is important to our case.

EVEN IN HOUSING, TRAFFIC DETERMINATIONS FALL TO THE LOCAL AUTHORITIES

As further evidence that traffic safety determinations do not fall in the court's purview, I refer you to WILLIAM B. BEARD vs. TOWN OF SALISBURY http://masscases.com/cases/sjc/378/378mass435.html where the court states [[emphasis added]]:

"***it is not this court's province to evaluate the wisdom of a matter of municipal policy. Because due regard must be accorded to the wishes of local residents,*** the only questions which this court or other courts may address, apart from those involving the constitutionality of a challenged regulation or the procedural prescriptions precedent to the law's adoption, are whether a local enactment extends beyond the authority conferred by its enabling statute or whether it exceeds the implied powers which are granted municipalities by the Home RuleAmendment.
<http://masscases.com/cases/sjc/363/363mass136.html>
<http://masscases.com/cases/sjc/363/363mass136.html> (1973)."

In other words, if there is no specific Legislative action indicating that Acton does NOT have the right to determine what is safe or not safe, injurious or not injurious, then the Town has the right to decide.

There does not appear to be any authority for the courts to overrule a town's safety determination or determination of injurious, except when its about housing.

TOWNS CAN ENACT STRICTER SAFETY REGULATIONS THAN STATE/FED LAW INDICATES

Further, there is much precedence for a town's ability to be MORE STRICT relative to state level regulations, EXCEPT where affordable housing is in question. I can cite many cases in this regard, starting with the protection of water, where a municipality often has more strict protections than afforded by federal regulations.

And so if Concord's pumping a "registered" amount of water" is not a mandate, and the town has theright to self-determination, where the Legislature has not specifically taken away that right, I claim that we have every right to say no, when we believe that a project is unsafe or injurious to our town.

Finally, we look to RALPH TITCOMB vs. BOARD OF APPEALS OF SANDWICH (http://masscases.com/cases/app/64/64massappct725.html), the Superior Court concluded, "the board's decision disclosed an error of law. In addition, the judge concluded that the proposed use would be substantially more detrimental than the existing nonconforming use to the neighborhood."

In this case, it was determined that the local board was more familiar with the traffic [[emphasis added]]:

"we hold that, in light of the factors cited above, it is ***"the board's evaluation of the seriousness of the problem, not the judge's, which is controlling."*** Copley v. Board of Appeals of Canton, 1 Mass. App.Ct. 821 (1973). See Pendergast v. Board of Appeals of Barnstable, 331 Mass. at 560; Cliff v. Board of Health of Amesbury, 343 Mass. 58 , 62 (1961).

In this last case, the ruling was a boon for the applicant who was granted a special permit. A lower judge ruled against the applicant, citing that the traffic would be too much. But that was overturned with the stipulation that the town knows better.

The point here is yet again, in cases where there is not a specific mandate (i.e. affordable housing), local determinations hold more authority.

The SJC has determined that, although it is difficult to define the scope of the police power, it plainly “extends to all matters affecting the public health or the public morals,” http://caselaw.findlaw.com/ma-supreme-judicial-court/1670795.html#sthash.346TF9HE.dpuf The point here is yet again the Legislature cannot surrender its broad authority to regulate matters within its core police power - See more at:http://caselaw.findlaw.com/ma-supreme-judicial-court/1670795.html#sthash.346TF9HE.dpuf

THE STRENGTH OF HOME RULE

As evidence as to how strong home rule is in Massachusetts, I present the AG's memo (from the then Attorney General of Massachusetts, Martha Coakley, defending Concord's right to enact a limited ban on the sale of single-use water bottles. In this memo, the AG responds to the water industry's claim that Concord has not adequately proven that single-user-water bottles are dangerous to its citizens health and safety. The AG declares, in response to that claim, the AG declares that Concord does not have to PROVE that single-use water bottles are dangerous to the health and safety of its residents, only that voters BELIEVE that they are detrimental to their health. And then prove that voters have then banned the single-use water bottles (with limitations, spelled out in their bylaw. As a result, the town rules. The state and the feds do not preempt the local authorities, in this case, Concord's Town meeting.

In our case, we do not have to prove that that proposed plant is injurious, only that the local authorities BELIEVE that it will be injurious.

Further, Acton's Town Meeting approved not only the zoning, to be residential "suited for residences", but it enacted its Master Plan to ensure that all special permit approvals "protect the quality and quantity of Acton's water."

And so that provides not only the legal basis, but a strong legal basis.

As evidence for the re, I go back to the AG's claim, that for a town to have a valid ordinance for safety's reason, that it does not have to PROVE that something is unsafe, only that the citizens believe that it's unsafe.

The court has no constitutional mandate to ensure Concord's desire for enough water to satisfy the unquenchable thirst for lawn watering. And there is no stated legislative requirement for Acton to allow Concord to increase the size of their building 400% or to have access to as much water as it wants. There is no stated legislative requirement for Acton to imperil the neighborhood and possibly even the town itself.

And therefore, as so well articulated in Wellesley v Arden, in Massachusetts at least, "***deference to local autonomy in matters of land use and zoning is well established.***"
source: http://masscases.com/cases/sjc/436/436mass811.html

I hope this helps...

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