A Supreme Victory

Alumnus describes her greatest legal experience

By Julie McNeill, Esq.

Last year, I had the greatest experience of my almost decade-long career practicing law: I argued a case before the Massachusetts Supreme Judicial Court. Even better, the SJC found unanimously in my client's favor.[1] Here are some highlights from the case and some things I learned while taking a case to the state's highest court.

Summary of the case: The Local Ruling

My client, Shirley Wayside LP, owned a mobile home park (referred to in the court documents as "Wayside") containing 65 units. Wayside has been located on the same parcel of land in Shirley since the 1950s. My clients bought Wayside in 1998, and in 2005, sought to expand the number of units to 79. The problem they faced was that in 1985, the Town of Shirley amended its zoning bylaw and no longer permitted mobile homes in any zoning district in the Town. When this happened, Wayside with its 65 units became what is called a "pre-existing, nonconforming" use, meaning it is allowed to continue because it existed prior to the change in the bylaw, even though it doesn't conform to the bylaw.

Expansions of pre-existing, nonconforming uses of land are governed by Mass. Gen. Laws ch. 40A, § 6, which states, "Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood."[2] In 1920, the SJC issued an advisory opinion to the Massachusetts House of Representatives, declaring constitutional House Bill No. 1660 (what is now Mass. Gen. Laws ch. 40A), which authorized cities and towns to limit buildings according to their use or construction. The SJC stated that the legislation recognized that "rights already acquired by existing use or construction of buildings in general ought not to be interfered with."[3]

Even though expansion of pre-existing, nonconforming uses are contemplated by ch. 40A, § 6, municipalities are not compelled to do so: cities and towns are free to prohibit modification or expansion of such uses. Shirley, however, has a provision allowing for expansion of pre-existing, nonconforming uses, and is therefore among the towns whose bylaw is "'permissive in spirit' in that it sanctions, by special permit, changes in nonconforming uses."[4] "In dealing with the subject, the language of the by-law unequivocally rejects the concept that nonconforming uses or structures must either fade away or remain static."[5]

Because of this provision, Wayside was able to apply for a special permit to expand its mobile home park. To grant such a permit, a town must make the finding, as articulated in ch. 40A, § 6, that the expansion will not be substantially more detrimental than what already exists. The Shirley Zoning Board of Appeals denied Wayside's special permit on a number of grounds. One reason it cited was that "the present zoning regulations do not allow additional trailers in the Town of Shirley." However, as just discussed, this reason was invalid, because even though additional mobile homes would not be allowed as of right,

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[1] *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. 469 (2012).

[2] Mass. Gen. Laws ch. 40A, § 6.

[3] *In re Opinion of the Justices*, 234 Mass. 597, 606 (1920).

[4] *Murray v. Board of Appeals of Barnstable*, 22 Mass. App. Ct. 473, 478 (1986).

[5] *Titcomb v. Board of Appeals of Sandwich*, 64 Mass. App. Ct. 725, 730 (2005), Further review denied, 445 Mass. 1107 (2005).

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Shirley's bylaw allowed for expansion of the park as it was a pre-existing, nonconforming use.

The other factors the Board took into consideration in its denial were, "1) the impact of additional residents on the area and the infrastructure of the Town of Shirley, in particular the possible economic burden on the school system, as the tax base for trailer units is much less than the tax base for residential homes; 2) the encroachment on the wetlands; 3) the density of the existing area and expansion area; 4) groundwater runoff; 5) property devaluation to the abutters; and 6) the heavy amount of traffic already on the road."

Appeal to the Land Court

My client and I believed that none of the grounds cited by the Board were valid. It was clear to us from the decision, and from what was expressed at the town hearings, that the Board simply did not want any additional trailers and inappropriately used the fact that its bylaw no longer allowed for them as a reason for denial. I appealed the denial by filing a complaint in Land Court on Wayside's behalf pursuant to Mass. Gen. Laws ch. 40A, § 17, which allows for judicial review of local zoning decisions. As required by the statute, I alleged in Wayside's complaint that the decision exceeded the authority of the Board.

Judge Long of the Land Court held a one-day trial in the matter. We called four witnesses at trial: the president of the company that runs Wayside and the manager of Wayside, who each testified about operations at the park itself; a civil engineer who worked on the application for the special permit on behalf of Wayside, and who testified about technical aspects of the expansion, and a real estate appraiser, who testified about the analysis he performed to determine that there would be no detrimental impact of the proposed expansion on the neighborhood. Wayside is restricted to residents age 55 and older, so there was testimony that the expansion would have little to no impact on Shirley's school system, which accounts for over half of the Town's budget.

The Board called one witness: the building inspector for the town who is also a member of the town's Board of Health. He testified that mobile home parks were no longer allowed under the zoning bylaw as of 1985. On cross-examination, he confirmed that the Town's zoning bylaw contains no area or density requirements for mobile home parks, but those requirements are located in Shirley's Board of Health regulations, and Wayside's proposed expansion would comply with them.

In reviewing the Board's denial, the court hears the matter de novo and, "it is the duty of the judge to determine the facts for himself upon the evidence introduced before him and then to apply the governing principles of law and, having settled the facts and the law, to inspect the decision of the board and enter such decree as justice and equity may require in accordance with his determination of the law and facts."[6] Upon hearing and evaluating the oral testimony at trial, the Land Court ruled that no rational board could have found the way Shirley's Board did on every issue—the expansion percentage limitation, impacts on the school system, road maintenance, snow removal, trash removal, traffic, wetlands, values of surrounding properties, tax contributions, emergency services, and density.

The Board then appealed that decision to the Massachusetts Appeals Court. At the Appeals Court, the panel consisted of Justices Green, Brown, and Grainger. Although the Appeals Court agreed with the Land Court judge that no rational board could have found as Shirley's Board did on most of the issues, the court found that the Board's concern about the density of the proposed expansion was enough to justify the denial of the special permit and therefore reversed the Land Court decision.[7] In doing so, the court cited the requirements for single-family homes (as opposed to mobile homes) in the relevant zoning districts and noted that Wayside did not comply with those.

However, as the Land Court judge had found—based on testimony from the Board's own witness—the Town of Shirley's Board of Health regulations contained provisions governing the densi-

[6] *Devine v. Zoning Bd. of Appeals of Lynn*, 332 Mass. 319, 321 (1955).

[7] *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 78 Mass. App. Ct. 19 (2010).

ty of mobile home parks, and Wayside's expansion complied with them. None of Shirley's zoning bylaws addressed any density or area requirements for mobile home parks. The Appeals Court stated that Wayside argued that the Board of Health regulations supersede zoning laws, but that was not what I argued. I contended that the Town of Shirley chose to regulate the density of mobile home parks under its Board of Health regulations, as it is allowed to do under Mass. Gen. Laws ch. 140, § 32B. I further argued that Wayside acknowledged that its pre-existing nonconforming use can only be extended if the extension itself complies with the ordinance or bylaw, as the Appeals Court held in *Cox v. Board of Appeals of Carver*.[8] However, unlike in the *Cox* matter, Shirley did not have any provisions in its bylaw governing mobile home parks themselves, other than they must comply with the requirements for expanding a pre-existing, nonconforming use.

The Appeals Court decision was somewhat of an anomaly and is a lesson in Massachusetts appellate practice. Although only a three-judge panel of the Appeals Court actually hears an appeal, the decision is deemed to be one approved by the entire court. Therefore, when one of the three panel justices dissents, and a majority of the members of that Court agree with the dissent, the Court is permitted to add two senior justices to the panel to in effect turn the dissent into a majority, as confirmed by *Sciaba Constr. Corp. v. Boston*.[9]

However, in my case, the original three-panel vote was apparently 2-1 in favor of Wayside. Even so, after submitting the proposed panel opinion to the entire court, the panel was expanded and the majority of the remaining justices on the Court agreed with the one justice who would have found for the Board, so the decision was published as a 3-to-2 decision for the Board. The two justices who would have comprised the majority in the three panel case continued to dissent in the written decision. Prior to this, I had not realized that the Appeals Court could expand the judicial panel, and did not realize that a decision could be affected (in my case, negatively) by justices who did not participate in the hearing.

On to the SJC

I believed very strongly that the Appeals Court decision was incorrect. By applying density standards of single-family homes to Wayside's pre-existing, nonconforming mobile home park, the Court removed the protection that is afforded to such uses under Mass. Gen. Laws ch. 40A, § 6. Also, I believed that the court misapplied the *Cox* case because, in that matter, the Town of Carver had a provision in its zoning bylaw that mobile home parks must contain 100 acres, a requirement with which that park did not comply. There was no such provision in Shirley's bylaw. Also, *Cox* involved expansion onto land that was acquired subsequent to the zoning change that made mobile home parks non-conforming, whereas in my case, Wayside sought to expand onto land that had always been part of the park.

Armed with these facts, coupled with the dissent of Justices Brown and Grainger, I applied to the SJC for further appellate review. I was very gratified when it was granted, especially when I found out after the fact that only five percent of the cases that apply for this review receive it.

Between the Appeals Court decision and hearing at the SJC, Justice Barbara Lenk, who was part of the expanded panel of the Appeals Court that decided against Wayside, was appointed from the Appeals Court to the SJC. Although she participated in the four cases that were heard previous to my case the day of my SJC hearing, she (along with another Justice, Duffly, presumably to ensure an odd number of justices would hear the case) did not participate in the Wayside matter.

In a decision written by Justice Cordy, the SJC found unanimously for Wayside and reinstated the Land Court decision. The court concluded "that the expansion complies with the zoning bylaw at issue, which we interpret as imposing minimum lot size dimensions on the entire mobile home park and not on individual mobile homes, governed only by board of health regulations. We further agree with the Land Court judge that there is no evidence that either the density within the mobile home park expansion or the modest increase in traffic will be detrimental to the sur-

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[8] 42 Mass. App. Ct. 422, 426 (1997).

[9] 35 Mass. App. Ct. 181, 181 n.2 (1993).

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rounding neighborhood. We therefore affirm the judgment of the Land Court judge."

Needless to say, my client and I were very happy with this decision. Even if I hadn't been involved with this case, though, I would believe that it is correct. The Court understood that it was the entire mobile home park that was a pre-existing, nonconforming use, and that it was improper to impose single-family home standards on the individual units. Had the Appeals Court decision been allowed to stand, then the protections afforded to pre-existing, nonconforming uses by Mass. Gen. Laws ch. 40A, § 6 would no longer exist. With this decision, however, the SJC has affirmed that towns must comply with their own bylaws and their reasons for denial of an expansion must not be "vague, speculative, or otherwise unsupported by the evidence," as the court described the Board's reasons in this case.

Aside from being very happy with the outcome of this case, I was very grateful to have worked on it for several other reasons. It gave me invaluable experience at the Land Court, the Appeals Court and the SJC. Of course, being thoroughly prepared on every aspect of your case is key. You also have to be well-versed in the precedent of your subject matter so that you can draw similarities and distinctions as appropriate. On appeal, you have not one, but several judges who will ask you any number of questions about your case or the area of law in general.

Regarding the trial level of a case, if it is a land use matter, I strongly believe that it should be brought in Land Court. Superior Court has jurisdiction over these types of matters as well, but Land Court judges have expertise in land use law, whereas in Superior Court, you may get a judge who is a former prosecutor, or one who practiced bankruptcy law, domestic relations, or any other area of law. One potential drawback of going to Land Court is that you get a bench trial, so if you have claims that you want a jury to decide, you need to bring them in Superior Court.

I got involved in land use law because, prior to becoming a lawyer, I worked at the Massachusetts Department of Environmental Protection for five years as a paralegal. I worked on a variety of environmental cases, most notably wetlands and septic matters. I graduated from Massachusetts School of Law in 2002 and joined the Chelmsford firm Hall, Finnegan, Ahern & Deschenes, which later became Deschenes & Farrell. The firm concentrated its practice in real estate, primarily permitting and transactional work. I was the attorney at the firm who would take the cases when a problem was encountered—if a developer was denied his permit (as in Wayside) I would appeal it to a state agency or to court as appropriate. Also, I would help clients resolve other land-related problems such as access issues and boundary disputes.

I started my own law office in 2010 where I continue to represent property and business owners in civil litigation, land and title disputes, environmental and zoning appeals, insurance coverage, and contract matters. To find out more about my practice, and to view arguments, materials, and the decision in Wayside, please visit my website: http://www.lawofficeofjuliemcneill.com.