MASSACHUSETTS LAWYERS WEEKLY

Appeals Court reverses special permit for auto body shop

Burden to show harm wrongly put on abutters

By: Eric T. Berkman June 6, 2019

Plaintiffs' lawyer prevails on appeal

A special permit for an auto body shop should not have been issued without the applicant proving that the shop would not decrease safety and air quality for neighbors, the Appeals Court has determined.

The Mashpee Zoning Board of Appeals granted a special permit allowing defendant Accident Auto Body to build a shop with a paint spray booth in an area of the town's industrial zoning district abutting residential property.

Superior Court Judge Gary A. Nickerson affirmed on appeal, noting that the shop's proposed use complied with state and federal environmental regulations. The judge also found that while the plaintiff abutters presented evidence that the paint spray contained toxic chemicals, they did not prove the paint exhaust would actually pose a health risk to the plaintiffs.

But the Appeals Court reversed, finding that the judge wrongly put the burden of proof on the project opponents rather than on the applicant.

"Because the judge found as a fact that the operation of Auto Body's paint shop would result in the release into the atmosphere of harmful molecules that for up to five minutes following their release pose a danger to people who are exposed to them, Auto Body had the burden to produce evidence and to persuade the judge that those molecules, i.e., the monomers of isocyanates that will escape from Auto Body's filtration system and reach the plaintiffs' property, 'will not adversely affect public health or safety … [and] will not significantly decrease … air quality,'" Judge Peter W. Agnes Jr. wrote for the court.

"[G]iven the judge's finding and acknowledgement of 'the known [hazards] of isocyanates,' there simply has been no showing that compliance with State and Federal standards is sufficient to ensure an absence of airborne health risks to the plaintiffs," he continued.

The 20-page decision is *Fish, et al. v. Accidental Auto Body, Inc., et al.*, Lawyers Weekly No. 11-061-19. The full text of the ruling can be found here.

'Clarifying the burden'

Christopher G. Senie of Brewster, who represented the plaintiffs, said the decision clarifies who has the burden of proof when an abutter claims that a grant of a special permit threatens a right protected by the town's bylaw.

"The case law was clearer in the case of a variance, where a number of decisions state that the holder of a granted variance has the burden," Senie said. "The cases have been a little less clear on granted special permits, and I think the land use bar has been a little unsure, too. This case helps clarify that the permit holder and the board that issued it can't just rest on a decision made at town hall."

The defendants' attorney, Shannon Dunn Resnick of Bridgewater, said the decision not only puts a "heavy burden" on applicants, it unfairly prejudiced her client by completely annulling the special permit.

"It's one thing for a court to go in and change how the law will be applied," Resnick said, adding that her client has not yet decided whether to seek further review. "But not letting my client have a second bite of the apple, it prevents my client from seeking the appropriate leave it could have sought had the case been remanded to Superior Court instead."

A plan showing the juxtaposition of the two parcels involved, and the zoning boundary in between. The plaintiffs' home appears in red (lot no. 88.72), and the lot on which Accidental Auto Body was to be constructed appears in blue (lot no. 88.27).

Donald R. Pinto Jr. of Boston, who handles land use disputes, called the decision a "good reminder" that while the standard of review for special permits is broadly deferential to the local board, the permit-holder still must prove it has met each requirement specified in the zoning bylaw.

Here, Pinto said, the bylaw explicitly required the board to find that the proposed use complied with state and local regulations and that it would not adversely affect public health or safety or decrease air quality.

"In other words, compliance with the law alone isn't enough," Pinto said.

James G. Wagner, who represents project opponents in zoning disputes, said the decision was noteworthy as one of the "fairly rare" rulings in which an appellate court reversed both a zoning board and a trial judge in the granting of a special permit.

"There is a lot of pressure on appellate judges simply to rubber-stamp robust decisions of local boards and trial judges," he said.

However, Wagner added that "Judge Agnes famously is a stickler on rules of evidence and proof. He was not going to ignore the effect of the trial court decision, which was to put the burden of production of evidence and the burden of persuasion on the project opponent."

Wagner also found it significant that the Appeals Court rejected the argument that the abutters were "coming to the harm" by purchasing homes near an industrial zone.

"The 'coming to the harm' argument is stated or implied all the time at zoning hearings," he said. "This decision now should silence those incorrect and unjust biases."

Susan C. Murphy of Boston, who represents developers and municipalities, agreed, highlighting the decision's statement that while neighbors can expect a certain level of noise or nontoxic odors, their proximity to an industrial area does not suggest they have to tolerate exposure to toxic chemicals

"When a municipality zones for residential and industrial uses in close proximity to each other, the burden to minimize impacts of a proposed use and the obligation to protect impacts on abutting owners fall to the applicant and to the local board," she said.

Special permit

On Nov. 20, 2014, the Mashpee Zoning Board of Appeals granted Accidental Auto Body's application for a special permit to construct an auto body shop on property in the economic development and industrial corporation area of the town's industrial zoning district.

The proposed shop was to be housed in a 9,000-square-foot building 74 feet from the plaintiffs' northern property line. The applicant's work would include painting repaired vehicles, with the paint applied by spray in a paint booth.

The plaintiffs appealed the permit to the Superior Court.

At trial, Nickerson noted that Accidental Auto Body planned to use the best available filter system and to locate the vent as far from the property line as possible. He also found, however, that 2 percent of the isocyanates — a useful but harmful molecule in the paint that makes it more durable — would escape with the exhaust.

Nickerson also found that the isocyanates would be rendered harmless within minutes of becoming airborne. However, he did not credit the plaintiffs' toxicology expert that the toxins would reach the plaintiffs' property within five minutes or that they would likely present health risks.

Meanwhile, Accidental Auto Body offered no expert testimony on whether the isocyanates would reach the plaintiffs' property and, if so, whether they would be rendered harmless by that point.

The judge further noted that isocyanates are widely used in the industry without harm to health and safety, that nothing in the applicant's proposed use conflicted with U.S. Environmental Protection Agency or Massachusetts Department of Environmental Protection regulations, and that the abutters themselves made the decision to purchase property adjacent to an active industrial area.

Accordingly, Nickerson affirmed the board's grant of the special permit. The plaintiffs appealed.

Burden shifting

"On appeal to the Superior Court from a decision granting a special permit, the burden of proof is upon the applicant seeking the special permit and the board granting the special permit to submit evidence to demonstrate that the statutory prerequisites for the granting of a special permit have been met," Agnes wrote in addressing the plaintiffs' petition.

Meanwhile, the judge said, "[i]t is significant that the town has chosen not to declare that the standards relating to 'public health or safety' and 'air quality' that an applicant must meet in order to qualify for issuance of a special permit are satisfied by compliance with State and Federal environmental laws."

Here, because the trial judge found that the applicant's paint shop would release potentially harmful molecules into the air, he should have required the applicant to provide evidence to prove that would not threaten public health or air quality, the Appeals Court found. Instead, the trial judge effectively and incorrectly shifted the burden to the plaintiffs.

Additionally, the court found that the trial judge improperly supported his decision by the plaintiffs' purported awareness that they knew they were moving next to an industrial area when they bought their homes.

"[T]he concept of 'coming to a nuisance' is inapplicable because the plaintiffs are not pursuing a nuisance claim," Agnes wrote, adding that while a purchaser of property near an industrial area can anticipate a certain level of noise or odors, "the judge cites to nothing that suggests that any neighbor … must tolerate a certain amount of exposure to toxic chemicals."

Accordingly, the Appeals Court vacated the Superior Court decision and ordered that the board's decision be annulled.

Fish, et al. v. Accidental Auto Body, Inc., et al.

THE ISSUE: Should a special permit for an auto body shop have been issued without the applicant proving that the shop would not decrease safety and air quality for abutting residences?

DECISION: No (Appeals Court)

LAWYERS: Christopher G. Senie of Brewster (plaintiffs)

Shannon Dunn Resnick of Clark, Balboni & Gildea, Bridgewater (defense)

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NICKERSON, GARY A.

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