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Is governmental response to virus worse than the disease itself?

BY EDMUND A. ALLCOCK

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COVID-19 has turned our country and our way of life upside down. For those of us in real estate, it has had a significant impact. Like some emergencies, sometimes the cure is worse than the disease.

Massachusetts is one of 28 states that have enacted some sort of eviction and foreclosure moratorium. In Massachusetts, the moratorium was enacted in March and is currently extended through October. In conjunction with that moratorium, back in March, Attorney General Maura T. Healey issued a 90-day collection moratorium on everything other than evictions and foreclosures. Both moratoriums prohibited the sending of any collection notices and also prohibited the filing of almost all court cases to collect rent or mortgage payments.

The AG's collection moratorium was challenged in federal court and found to be unconstitutional as it violated the First Amendment to the U.S. Constitution's guarantee of freedom of speech (i.e. collection notices sent in the mail) as well as the guaranteed right of every citizen to access the court system.

Currently, there is a similar constitutional challenge in Massachusetts state court to the eviction moratorium.

Presumably, the response to COVID-19 is well intentioned. The concept, albeit having a decidedly socialistic bent, is to prevent people from losing their homes, but at what cost?

Instead, the idealistic and socialistic response to COVID-19 has created an unprecedented constitutional crisis. If freedom of speech and access to the court system can be eradicated because of a virus, then we are in big trouble. Blanket moratoriums cut a big swath and destroy the promise of the American dream. Stimulus checks and an extra $600 a month for the unemployed might be an appropriate response; closing the courts and restricting freedom of speech are dangerous. Our legislators and politicians have once again forgotten the working man or woman. What about the individual who buys a two- or three-family in an effort to live out the American dream?

Whether intentioned or not, the eviction moratorium sends a message that tenants do not have to pay rent. Why should they? After all, the landlord can't even set foot in a court of law. In fact, he can't even communicate with his tenant. Meanwhile, the landlord still must pay the taxes, the electricity, etc.

The response to COVID-19 is more dangerous than the disease itself. Tenants can still be protected in the courts. Judges and courts are well equipped to review (as they often do) each case on its facts, consider the equities in each case that may be presented by the COVID emergency, and then rule accordingly.

As U.S. District Court Judge Richard Stearns said in his recent decision declaring the Massachusetts collection moratorium unconstitutional:

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Non-party abutter deemed not bound by Land Court pact

BY MICHAEL J. O'NEILL

In a clear, well-reasoned opinion deciding the case of *Stevens, Trustee v. Zoning Board of Appeals of Bourne*, No. 19-P-248 (June 19, 2020), the Appeals Court (Green, C.J.) held that a settlement agreement between the town's selectmen and a property owner resolving a Land Court action did not bind an abutter who was not party to the litigation.

Consequently, the abutter was entitled to use all procedures available under G.L.c. 40A to challenge a use as a violation of the Bourne Zoning Bylaw.

The case of *Morganelli v. Building Inspector of Canton*, 7 Mass. App. Ct. 475 (1979), has been a leading case on the application of res judicata in the zoning context and was relied upon by the property owner. The Appeals Court in *Stevens* confronted *Morganelli* head on, distinguishing it on several procedural grounds.

In *Morganelli*, an abutter brought an action for mandamus against the building inspector, challenging a building permit for construction on a non-conforming lot. The question of whether a building could be constructed on the lot had been the subject of a prior action by a former owner of the lot and was finally adjudicated to allow construction. *Id.* at 408. The abutter was not a party to the prior action.

In *Morganelli*, the Appeals Court concluded that the prior action was, in substance, an action against the citizens of Canton, in which the building inspector

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SJC: no per se zoning injuries as basis for standing

BY DANIEL P. DAIN

Last September, the Appeals Court rocked the zoning litigation world when it found in *Murchison v. Sherborn ZBA* that an injury sufficient to confer standing in zoning appeals can be inferred from the combination of proximity and an allegation of a violation of a zoning requirement. What was missing from the Appeals Court's analysis was any proof of actual injury by the plaintiff.

On March 6, one day after oral argument on further appellate review, the Supreme Judicial Court issued a terse order affirming the Land Court's dismissal of the zoning appeal, by implication reversing the Appeals Court. A more detailed decision by the SJC followed, on July 16. The decision takes a close look at density as a basis for standing, but its reasoning is more broadly applicable in zoning appeal cases.

The facts of the case are unusual for a battle over density. Merriann Panarella and David Erichsen proposed to build a single-family home on an unimproved wooded three-acre lot in Sherborn. When the building inspector issued a foundation permit for an as-of-right project (meaning the inspector found that the proposal fully complied with all applicable zoning requirements and did not need any zoning relief), Robert and Alison Murchison, who live across the street on a 13-acre similarly wooded lot, appealed to the Sherborn Zoning Board of Appeals, arguing that the building inspector had incorrectly measured lot width.

The ZBA disagreed and the Murchisons appealed under G.L.c. 40A, §17, to the Land Court, asserting that they would be injured by the increased neighborhood density introduced by a new house across the street.

After a four-day trial and a view, the Land Court dismissed the action on the ground that the Murchisons had failed to introduce non-speculative evidence of a more than de minimis injury if the proposed house were actually built.

Worry not, the Appeals Court concluded in reviewing the Land Court's decision. No such evidence is required to establish standing. To reach that conclusion required some maneuvering by the Appeals Court.

It started with the zoning violation — lot width — asserted by the plaintiffs. If a house does not comply with a lot-width requirement, then it is not a buildable lot, and hence a house built thereon would impermissibly increase density. This was an unusual expansion of the conception of density controls. Under this reasoning, every dimensional requirement would be a form of density control as permitting construction of a house that does not comply with zoning would add a house that otherwise would not have been there. But density is usually not thought of in this way; rather, density

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Claims to reform don't necessarily accrue on recording

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Simply stated, the SJC has long required more meaningful notice of a problem than mere recording at the registry. For example, in *Cherubini*, the lessee was permitted to reform a property description in a recorded 1951 lease even though suit was not filed until 1961. The lessee only discovered the mistake after exercising its purchase option 10 years into its lease.

The SJC rejected the lessor's statute of limitations defense because the "first occasion which the [lessee] would have had to check the sufficiency of the description of the land was its search of the title subsequent to the exercise of its option to purchase." *Cherubini*, 351 Mass. at 588.

Cherubini illustrates that record notice does not equate to accrual of a reformation claim based on mistake in these nobody-realizes situations. Any suggestion that the clock always starts to run upon recording is fundamentally incorrect.

After all, "when a plaintiff knew or should have known of his cause of action is one of fact which in most instances will be decided by the trier of fact." *Riley v. Presnell*, 409 Mass. 239, 240 (1991). More importantly, finding a reformation claim time-barred in a nobody-realizes situation leads to an inherently inequitable result on a claim with its roots in equity.

A New York state of mind?

It is conceivable more is expected of those holding property rights today. An argument might be made that cases such as *Johnson* or *Cherubini* are outdated and parties should not get the benefit of additional time to correct mistakes that are apparent from the registry (and, nowadays, the online registry).

However, this approach would be devastating to the nobody-realizes reformers who likely acquired property rights from their predecessors well past a six-year window for a necessary reformation claim and have enjoyed them since then without interruption or objection. Such an interpretation would appear to require all landowners in the commonwealth to re-run title searches on their property and would flood the courts with claims brought out of an abundance of caution, even on matters that may appear relatively trivial or where no controversy even exists.

New York's *Hart* exception presents an interesting carve-out to protect the nobody-realizes landowners if this harsher view were to take hold. See *Hart v. Blabey*, 39 N.E.2d 230, 232 (N.Y. 1942). The exception provides that "'as to one who is in possession of the real property under an instrument of title, the statute never begins to run against his right to reform that instrument until he has notice of a claim adverse to his under the instrument, or until his possession is otherwise disturbed.'" *Wilshire Credit Corp. v. Ghostlaw*, 300 A.D.2d 971, 973 (N.Y. App. Div. 2002) (quoting *Hart*, 39 N.E.2d at 232).

This "well recognized exception" has been widely applied in New York to protect nobody-realizes landowners seeking reformation well after the limitations clock would otherwise have run. *TEG N.Y. LLC v. Ardenwood Estates, Inc.*, 2004 WL 626802, at *5 (E.D. N.Y. March 30, 2004) (invoking exception to find limitations period to reform 1993 instrument did not start to run until 2002) (internal quotations omitted).

More importantly, this carve-out would be consistent with the public policy behind the longstanding (but misunderstood) meaningful-notice accrual for these claims in Massachusetts. Its rationale is consistent with the no-fault logic pronounced by the SJC in *City of New Bedford*. See *Schlotthauer v. Sanders*, 153 A.D.2d 731, 732 (N.Y. App. Div. 1989) ("a Statute of Limitations is ... designed to put an end to stale claims, and was never intended to compel resort to legal remedies by one who is in complete enjoyment of all he claims.").

The carve-out would also appropriately treat the "ought to have been discovered" question as one of fact as opposed to treating nobody-realizes landowners as on notice simply because of a flawed instrument's recording many years or even decades earlier.

The commonwealth has always protected landowners that are quietly enjoying property rights based on flawed instruments without any interruption or objection. It should continue to do so.

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SJC: no per se zoning injuries as basis for standing

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controls generally regulate the number of units given a particular area of land.

Having turned a lot-width requirement into a density control, the Appeals Court then observed that municipalities adopt density controls to prevent injuries to neighborhoods. The court wrote that "cities and towns are free to make legislative judgments about what level of density constitutes harm in various zoning districts and to codify those judgments in bylaws."

This too was an unusual conclusion because legislative intent was not part of the trial record and it does not necessarily follow that density controls are meant to protect against injuries to neighbors. Rather, to the extent that there ever is legislative history as to the adoption of zoning controls, the adoption of density controls generally is motivated by the interest in preserving municipal resources — to prevent overcrowding schools or stressed water or sewer systems — and not out of a concern for neighbors, whose interests are more traditionally and directly protected through dimensional controls such as height and setback (with which the proposed house in this case complied).

The final step in the Appeals Court's analysis was to derive injury from the combination of proximity and allegation of violation alone. The court wrote, "But Murchison did not need an expert to determine that, if the proposed development violated the bylaws, then it would be too close to his house. This is simply a function of the language of the bylaws and the fact that his house is across the street from the vacant lot."

In a similar case then pending in the Land Court, *Chilton v. Medford ZBA*, Judge Foster in a lengthy footnote seemed to solicit Supreme Judicial Court further appellate review of the Appeals Court's decision in *Murchison*. Though binding on the Land Court, Judge Foster observed that the Appeals Court's decision in *Murchison* appeared to be a significant departure from traditional standing jurisprudence in its conflating of the separate analyses of standing and the merits. He wrote, "The effect of the Murchison decision is to give abutters standing per se — that is, without any need to demonstrate particularized harm — when the interest in density is at issue." The Supreme Judicial Court granted FAR.

The SJC's decision reversing the Appeals Court can be understood as a reaffirmation of traditional standing law. The decision does not particularly break new ground, but it does clarify a couple of points that this author finds of interest. The project-proponents (Panarella and Erichsen) and their counsel (this author) argued that the Appeals Court's reasoning was flawed in part because, even if one accepts plaintiffs' argument that the building inspector had miscalculated lot width, there was no nexus between the plaintiffs' claims of injury and the lot width requirement. A lot-width requirement might protect immediate abutters on either side, but not someone across the street (who would be protected from overcrowding by the front setback requirement).

The SJC seemed to accept the requirement of a nexus between the alleged zoning violation and the alleged injury, noting that "injury must be *causally* related to violation of zoning laws ... ." (emphasis added). If the alleged violation is not the cause of the alleged injuries, then there would not be standing.

Second, going back to the 2008 *Dwyer v. Gallo* standing case, the Appeals Court stated that evidence that a neighborhood is already more densely developed than the zoning code permits is necessary to establish injury from an alleged density violation. More recently, however, courts had become lax in their enforcement of this element of standing based on density. The Appeals Court in *Murchison* had gone a step further, rejecting the *Dwyer v. Gallo* analysis on the reasoning that "[t]here is no reason the first neighbor to violate a density regulation should have a free bite at the apple if that violation causes particularized harm to another property owner."

Panarella and Erichsen attacked this reasoning. If the plaintiff chooses density as the basis for injury, then it makes no sense that the injury derives from the overcrowding of land from the construction of a single home. Only when the number of units in a particular area exceeds the density control can one even make a claim related to overcrowding.

The SJC did not get into a deep discussion of the point, only noting that the plaintiffs had failed to make the showing that the neighborhood is already more densely developed than zoning permits, thereby effectively reinstating this requirement.

Finally, apart from setting new ground in standing law, the SJC's decision in *Murchison* may be most notable for its comprehensiveness. It promises to be the new principal case cited on the state of standing law.

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