

Zoning appeal survives with ‘actual’ notice to town clerk

Dennis homeowners object to stairway to waterfront

By: Pat Murphy © June 21, 2018



A town clerk’s actual notice of a homeowner appeal from a zoning board decision rendered the action timely, even though the plaintiffs failed to provide the clerk with a copy of the complaint within the statutory 20-day deadline, the Appeals Court has held in a split decision.

The defendant Dennis Board of Zoning Appeals argued that the homeowners’ appeal was untimely under the plain language of G.L.c. 40A, §17, which sets the procedural requirements for a

person to seek judicial review of a decision of a zoning board.

But Chief Justice Mark V. Green said actual notice sufficed given undisputed evidence that the town’s assistant clerk learned of the plaintiffs’ complaint within the required time.

“Since it is the state of the clerk’s knowledge that controls, the requirements of G.L.c. 40A, §17, were satisfied, and the order allowing the defendant’s summary judgment motion was error,” Green said in reversing summary judgment for the town.

In a dissent, Judge Sabita Singh wrote that the two-member majority, in departing from the statute’s plain language, had misapplied state precedent on the issue, in particular the Appeals Court’s 1992 decision in *Konover Mgmt. Corp. v. Planning Bd. of Auburn*.

“I believe this inquiry into the ‘actual knowledge’ of the clerk removes the burden from where it properly should be placed, squarely on the shoulders of the plaintiffs,” Singh said. “Where a party has failed in its statutory notice obligation, local officials should not be drawn into litigation.”

The 16-page decision is *Hickey, et al. v. Zoning Board of Appeals of Dennis*, Lawyers Weekly No. 11-071-18. The full text of the ruling can be found [here](#).

‘Kiss of death’

Boston’s John E. Bowen represented the plaintiff homeowners. Bowen said the decision fit squarely within the Appeals Court’s decision in *Konover* and Supreme Judicial Court precedent to the effect that, while the timely filing of an appeal is an essential condition of §17, the other steps necessary in pursuing a zoning appeal under the statute can be treated less rigidly.

“It’s a good decision that hearkens back to solid, earlier law,” Bowen said.

Boston commercial real estate litigator Daniel P. Dain similarly observed that state courts historically have strictly interpreted G.L.c. 40A, §17, but the more recent trend is to excuse strict compliance.

“It is based on this background that the Appeals Court in *Hickey* seemed to feel comfortable further softening the notice requirement where someone in the clerk’s office has personal knowledge of the filing,” Dain wrote in an email.

However, Dain expressed concern that *Hickey* essentially does away with the requirement for filing a complaint with the town clerk altogether, suggesting that under the court’s ruling an appellant could satisfy the notice requirement simply by calling the clerk’s office before the deadline.



"Rather than having the clear rule as provided in the statute that people can rely on, now one cannot rely on a certification of no appeal without first interviewing everyone in the office," Dain stated.

According to Springfield zoning attorney Dennis P. Powers, the *Hickey* majority essentially determined not to elevate form over substance.

"As a practitioner, it's a good decision," Powers said. "You don't want to penalize somebody when the effort [to provide notice] has been made. The majority found there was actual notice. The decision recognizes the reality that it's a notice statute and that's the bottom line."

Framingham real estate attorney Richard D. Vetstein said he found the case helpful in addressing one of the little known "traps" for the unwary practitioner.

"Usually not filing the complaint with the town clerk is the kiss of death," he said.

Jackie A. Cowin represented the defendant zoning board. The Boston attorney declined to comment.



"As a practitioner, it's a good decision. You don't want to penalize somebody when the effort [to provide notice] has been made."

— Dennis P. Powers, Springfield



Stairway to heaven

Plaintiffs Brian and Mary Hickey own a home in Dennis. Several years ago, a neighboring property owner proposed building a stairway leading to Cape Cod Bay on a parcel abutting the plaintiffs' property.

The Dennis building commissioner concluded that the stairway did not require a building permit because it qualified as a landscape feature not subject to the setback requirements of the town's zoning bylaws.

The plaintiffs appealed to the Zoning Board of Appeals, which unanimously voted to affirm the building commissioner's finding. The board's decision was filed with the town clerk's office on April 14, 2016.

On April 20, the plaintiffs filed a complaint in Land Court appealing the board's decision.

Plaintiffs' counsel sent copies of the complaint by certified mail to each of the members of the board, including the chairman. The chairman's copy was received at the Dennis Town Hall on April 25 and routed to the town planner's office the following day.

The town planner subsequently had a discussion in which he informed the assistant town clerk of the filing of the plaintiffs' complaint. The parties do not dispute that that discussion occurred sometime before §17's 20-day appeal period expired on May 4, 2016.

It was also undisputed that plaintiffs' counsel did not mail a copy of the complaint to the town clerk and that neither the clerk nor her assistant saw a copy of the complaint before May 5.

The defendant filed a motion for summary judgment in Land Court on the ground that the plaintiffs failed to provide timely notice of the complaint to the town clerk in accordance with §17. Judge Alexander H. Sands III granted the motion, dismissing the plaintiffs' complaint.

Actual notice good enough

Under G.L.c. 40A, §17, a party seeking judicial review of a zoning board decision must bring an action within 20 days after the decision has been filed in the office of the town clerk. The statute provides that "[n]otice 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."



In addressing whether the town received timely notice of the plaintiffs' complaint, Green noted that the Appeals Court in *Konover* acknowledged that receipt of notice by the town clerk was a "jurisdictional prerequisite" for an action under §17.

On the other hand, Green said, Massachusetts courts have further found that strict compliance with the notice provision is not required insofar as the notice provided is adequate to serve the purpose of the statute. In that regard, Green explained that the underlying purpose of notice to the town clerk is to ensure interested parties receive notice that a board decision has been challenged and may be overturned.

Green found the facts of *Konover* to be analogous to the case at hand.

In *Konover*, the plaintiff's attorney prepared two sets of documents for a zoning appeal to be served at the Auburn Town Hall. One set of documents was for service on the zoning board. The other set was to be delivered to the town clerk.

However, the attorney placed both sets of documents in one sealed envelope labeled "Summonses to the Auburn Planning Board in the Town of Auburn." The process server left the sealed envelope with the secretary to the town planner. When the town planner opened the envelope several days later, he walked across the hall to tell the town clerk and an assistant town clerk that he had received the complaint.

After showing the assistant clerk the front page of the complaint, the town planner placed all of the plaintiff's documents in a file in the board's office, meaning that no formal notice of the zoning appeal was ever filed with the town clerk.

The *Konover* court nonetheless concluded that the requirements of §17 had been met. The court found that Massachusetts courts had relaxed strict compliance with the zoning appeal statute in those cases in which the town clerk is actually notified within the 20-day period that an appeal has been timely filed. According to *Konover*, the state of the town clerk's knowledge rather than the physical location of the complaint controls.

Green concluded that the same reasoning applied to the Hickeys' appeal of the Dennis ZBA's decision allowing construction of the disputed staircase.

"Because the undisputed facts in the summary judgment record establish that the town's assistant clerk had actual knowledge of the plaintiffs' complaint within the required time, we reverse the judgment," Green wrote.

In her dissent, Judge Singh found no justification for the majority's decision to depart from strict compliance with §17.

"I acknowledge that dismissal of an appeal is a severe sanction for failure to give timely notice to the town clerk, particularly where it appears that the plaintiffs timely filed a complaint in court to challenge the decision of the local zoning board of appeals," Singh wrote. "Given that the requirement of G.L.c. 40A, §17, is a jurisdictional requisite to judicial review, however, this requirement must be enforced even where it leads to harsh results."

Hickey, et al. v. Zoning Board of Appeals of Dennis

THE ISSUE: Does a town clerk's actual notice of a homeowner appeal from a zoning board decision render the action timely, even though the plaintiffs failed to provide the clerk with a copy of the complaint within the 20-day period specified in G.L.c. 40A, §17?

DECISION: Yes (Appeals Court)

LAWYERS: John E. Bowen and Brian M. Hurley, of Rackemann, Sawyer & Brewster, Boston (plaintiffs)

Jackie A. Cowin and Ilana M. Quirk, of KP Law, Boston (defense)

