LCR Commentary *First Quarter 2019*

Kendra L. Berardi, Esq.
Robinson & Cole

The cases before the Land Court justices so far in 2019 have run the gamut from run-of-the-mill zoning appeals to a decision awarding attorney's fees after one party had to file a stunning *five* complaints for contempt. Justice Vhay was the latest judge to consider two defendants' repeated and fairly flagrant violation of a Land Court judgment while Justice Roberts rejected the fairly simplistic argument that water rights do not constitute an interest in land because, well, water isn't land. Finally, Chief Justice Piper reminded all litigants in the Land Court that the strength of your argument won't matter if you don't have standing to assert the claim.

But, up first, is Justice Foster's review of a group of abutters' joint attempt to regulate recreational marijuana via a general bylaw amendment in the Town of Charlton despite the prior passage of a zoning bylaw regulating marijuana uses at a meeting that, unfortunately, missed 4/20 by one month and a day.

1. Charlton's attempt to regulate recreational marijuana through a general bylaw goes up in smoke.

With the passage of G. L. c. 94G, many municipalities worked to enact bylaws that would regulate the sale and use of recreational marijuana. The Town of Charlton chose to do so in 2018 by enacting a zoning bylaw allowing recreational marijuana uses a special permit in certain districts. Those efforts came under scrutiny in *Valley Green Grow, Inc., et al.* v. *Town of Charlton, et al.*, 27 LCR 99 (2019).

After the zoning bylaw had been passed, a group of abutters, unhappy about the idea of recreational marijuana use in the town, advanced two warrant articles at a town meeting. First, the abutters advanced a warrant article seeking to resend the previously adopted zoning bylaw allowing recreational marijuana uses. Second, the abutters advanced a warrant article seeking to adopt a general bylaw banning all non-medical marijuana uses within the Town of Charlton. As a change to the zoning bylaw, the repeal of the previously adopted bylaw required a two-thirds majority vote to pass. Although it got a majority vote, the effort failed to obtain the necessary two-thirds vote and, as a result, did not succeed.

The second warrant article was a general bylaw and required only a simple majority to pass, which it got. The abutters took the position that the passage of the general bylaw banning all non-medical marijuana uses was sufficient to repeal the zoning bylaw allowing such uses a special permit. Justice Foster disagreed.

Massachusetts law is clear that a general bylaw may be used to regulate a subject if there is no history of the municipality regulating that subject pursuant to the zoning bylaw. The circumstances of this case clearly show why. General bylaws require only a simple majority to pass, rather than the more strict two-thirds majority required for zoning bylaws. Furthermore, as subsequently adopted, the zoning bylaw does not affect pre-existing nonconforming structures or uses. There is no such protection with a general bylaw. If a municipality could use a general bylaw to overrule or change the zoning bylaw, it could circumvent these limits on municipal authority.

There was no requirement that the Town of Charlton regulate recreational marijuana uses through the zoning bylaw. Chapter 94G does not specify how a municipality may regulate such uses. Certainly, the Town could have chosen in the first instance to regulate recreational marijuana through a general bylaw. However, because the Town of Charlton chose to regulate recreational marijuana users through the zoning bylaw, it could not modify or repeal that regulation bypassing a general bylaw.

As a result, Justice Foster held that the warrant article prohibiting all recreational marijuana uses in the Town of Charlton was invalid and of no force and effect.

2. Litigants ordered to pay fines and attorney's fees in the face of consistent and repeated violations of a Land Court order.

A court order is a serious, weighty thing and litigants and attorneys tend to take them seriously. Of course, there is always an exception that proves the rule and the defendants in *City of Taunton* v. *Dbaib, et al.*, 27 LCR 87 (2019) are certainly that exception. The *Dbaib* saga began in 2011, when Taunton filed a lawsuit to stop the defendants' unauthorized use of a property owned by the City. That lawsuit resulted in an agreement for judgment, which was approved by the Land Court (Sands, J.) in 2012. That judgment enjoined the defendants from using the subject property for the storage or placement of vehicles, storage of materials, and as an automobile wrecking yard until the defendants brought their business into compliance with 26 conditions and all applicable laws.

Despite having agreed to the judgment, the defendants failed to comply with its terms. In 2017, the City of Taunton filed the first of *five* complaints for contempt. In September 2017, while awaiting trial on the first complaint for contempt, the parties agreed to interim measures designed to bring the defendants into compliance with the original judgment. Those interim measures were entered as a Court order, which the defendants promptly violated.

This prompted a series of efforts by the City to ensure the defendants' compliance. The City would file a complaint for contempt, the defendants would subsequently agree to the entry of an order requiring their compliance, the order would enter, and the defendants would promptly violate it. At various points, the defendants claimed to have forgotten the date required for compliance or asserted that they had, in fact, complied with the terms of the order.

Finally, on the City's *fifth complaint for contempt*, eight years after the defendants had first agreed to judgment requiring their compliance, the City asked the Court to order the defendants to pay certain fines and attorney's fees associated with the City's efforts to compel the defendants' compliance. In light of the defendants' flagrant violation of every court order entered in this matter, and particularly in light of the fact that many of those orders were entered upon with the defendants' agreement, Justice Vhay readily agreed and ordered the defendants to pay over $3,000 in fees and fines.

3. Water rights, by any other name, are still an interest in land.

In *Town of Concord* v. *Littleton Water Department*, 27 LCR 130 (2019), Justice Roberts considered a new angle on a challenge to the Land Court's subject matter jurisdiction. The Town of Concord initiated an action to request that the Land Court determine to what extent the Littleton Water Department's ("LWD") right to draw water from Nagog Pond had been superseded by the Water Management Act, G. L. c. 21G, or negated by the Town of Concord's registration of rights under that Act.

The LWD sought to avoid the Land Court's determination in its entirety by asserting that the Land Court lacked jurisdiction over a dispute about water rights. The LWD's argument was simple: water isn't land.

However, as Justice Roberts pointed out, that oversimplification ignored a history of Massachusetts case law interpreting water rights as real property interests. Dating back to an 1866 case, *Goodrich* v. *Burbank*, 12 Allen 459, the right to take water has been held to be an interest in land. It follows then that a challenge to the LWD's right to take water from Nagog Pond was a challenge to a right, title, or interest in real property and properly implicated the Land Court's equity jurisdiction under G. L. c. 185, § 1(k) as an action "where any right, title, or interest in land is involved."

Accordingly, Justice Roberts denied the LWD's motion to dismiss for lack of jurisdiction.

4. The strongest case in the world won't help you if you aren't the one with the right to enforce the law.

Every so often a case comes along to reinforce the truism that it doesn't matter how strong your argument is if you don't have standing to assert the claim. Chief Justice Piper's decision in *Stevenson* v. *TND Homes I, LLC*, 27 LCR 116 (2019) is one such reminder.

In *Stevenson*, the plaintiff filed suit to restrictions and covenants entered into by the defendant TND Homes I, LLC ("TND Homes") with the local housing authority. TND Homes is the owner of a seven-unit residential property, which is operated pursuant to the requirements of the federal Low Income Housing Tax Credit ("LIHTC") program, which requires that units be leased to tenants who meet certain income and asset limitations. Stevenson was a tenant at the TND Homes property.

TND Homes brought two summary process complaints against Stevenson seeking to recover possession of the premises both for non-payment of rent and for noncompliance with the income recertification provisions of the occupancy agreement. After trial, judgment was entered in favor of TND Homes.

Subsequently, Stevenson filed an action in the Land Court seeking to enforce certain recorded land restrictions that were entered into by TND Homes, including issues relating to habitability of the premises, use restrictions, and the tenant recertification process. TND Homes moved to dismiss, asserting that Stevenson did not have standing to sue over the relevant restrictions. Chief Justice Piper agreed.

Even granting Stevenson the most favorable reading of her complaint as the law would allow, Chief Justice Piper found that Stevenson could not demonstrate that she was entitled to the relief she sought. Specifically, Stevenson did not have standing to enforce the restrictive covenants. The restrictions were binding on the grantor and holder and their successors. In fact, the agreement establishing the restrictive covenants specifically provided that there were no third-party beneficiaries who would benefit from the restrictions. As a result, Stevenson, a former tenant who no longer resided at the property by the time the lawsuit was filed, lacked standing to enforce restrictions to which she was not a party and which clearly established, by its own terms, a lack of standing in others to enforce the restrictions.

Consequently, whether Stevenson's argument ultimately had merit or not was a moot point. Stevenson did not have standing to enforce the restrictions and, as a result, her claims had to fall on deaf ears in the Land Court. Chief Justice Piper dismissed the suit. ■