COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

2021-P-0855

BERLIN LANDING REALTY TRUST,

Plaintiff-Appellee

V.

TOWN OF NORTHBOROUGH ZONING BOARD OF APPEALS,

Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF THE

LAND COURT

BRIEF OF DEFENDANT-APPELLANT

Dated: December 10, 2021

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STATEMENT OF THE ISSUE PRESENTED

Whether the trial court erred in ruling that property with limited buildable area because of extensive wetlands may nevertheless be developed for use as a daycare facility without compliance with the zoning bylaw's setback requirements by virtue of the "child care facility" provisions in the Zoning Act, G.L. c. 40A, §3, third par., even when full compliance would be possible but for the presence of the wetlands.

STATEMENT OF THE CASE

On December 3, 2020, the Berlin Landing Realty Trust (the "Trust") filed a complaint in the Land Court appealing a decision of the Northborough Zoning Board of Appeals (the "Board") which upheld a determination of the Northborough Building Inspector that a day care facility the Trust proposed to construct on property in the Town's industrial zoning district was not exempt from a zoning bylaw setback requirement relating to industrial-zoned land adjacent to a residential zoning district by

reason of the so-called Dover Amendment provisions in G.L. c. 40A, §3, par. 3.

The Trust filed a motion for summary judgment on March 26, 2021 and the Board filed its opposition to the motion on April 28, 2021. A hearing on the motion was held on June 2, 2021. By Memorandum of Decision and Order dated June 9, 2021 the Land Court allowed the Trust's motion, finding that the setback requirement was unreasonable as applied to the proposed daycare facility, and ordered that judgment enter annulling the decision of the Board. (Record Appendix ("RA") 3-9) Judgment was entered on the same day. (RA 245-246) On July 7, 2021 the Board filed a Notice of Appeal. (RA 247)

STATEMENT OF FACTS

Berlin Landing Realty Trust is a trust established under declaration of trust dated November 13, 2013 and recorded with the Worcester District Registry of Deeds in Book 51737, Page 139 (the "Trust"). (RA 18-19) The Trust owns the real property located at and known as 5 Bearfoot Road, Northborough, Massachusetts (the

"Property"). It purchased the Property in 2015 for $10,000. (RA 21-23)

The Property is located in the Industrial zoning district under the Northborough Zoning Bylaw (the "Bylaw") and is adjacent to a residential zoning district, Residence C. (RA 32, 47-48)

A majority of the Property consists of wetland areas, including bordering vegetated wetland and the so-called 15 foot no disturb zone and 30 foot buffer zone under the Northborough Wetlands Bylaw. (RA 214-215, 218-219; see also 47) The Property has been vacant since the parcel was created in 1978, and has been considered a buffer area between industrial uses on the adjacent Solomon Pond Road and the surrounding residential neighborhoods. (RA 225; and see 47)

For many years, the Property has generally been treated as a non-developable parcel because of the presence of wetlands on the Property. (RA 225)

The Bylaw's Table of Density and Dimensional Regulations (in Table 2) specifies the minimum setback requirements in the Industrial district as follows: 40 feet for the front yard, 20 feet for the side yard, and 25 feet for the rear yard. (RA 28) For a property in the Industrial district which is adjacent to a Residential district, section 7-06-030(C)(4)(b) of the Bylaw provides that the minimum setback along the lot line adjacent to the Residential district is 100 feet (the "100-Foot Setback"). (RA 30) It states:

> In the Industrial District, the minimum setback along the lot line adjacent to a residential or business district shall be one hundred (100) feet from a residential district and fifty (50) feet from a business district. When the residential zoning district boundary is located in or at a street, the setback may be reduced by the width of the street which is in the residential zone." (RA 30)

The 100-Foot Setback has existed in the Bylaw, in some form, for many years, in its present form since 2009 and in other forms since at least 1966. (RA 226)

In 2017, the Plaintiff submitted an application to the Board requesting several variances: to locate duplex dwellings in an

Industrial zoning district; to allow construction subject to the Bylaw's Residential C zoning district setback requirements instead of the Industrial District setback distances; and to allow construction subject to the Residential C zoning district lot area and frontage requirements instead of the Industrial District requirements. (RA 225) The Board denied the Plaintiff's variance application by a vote on June 27, 2017, and the Trust did not appeal the Board's decision. (RA 225, 228-233)

On or about June 5, 2019, the Trust's counsel, sent a letter the Town's Building Inspector requesting a determination that construction on and use of the Property for a daycare facility would be exempt from the 100-Foot Setback pursuant to the Dover Amendment provisions of paragraph 3 of section 3 of the Zoning Act, G.L. c. 40A. (RA 32-34) The applicable language of section 3 states:

> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary,

> accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "child care facility" shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.

Pursuant to the Bylaw's Table of Uses and Section 7-05-020(A,) Exempt Uses, daycare facilities are permitted as of right in Residential districts. (RA 41-42)

On or about July 16, 2019, the Building Inspector issued a letter stating that he could not issue a zoning opinion in response to the June 5th letter until he received a specific proposal for the construction of the proposed daycare facility. (RA 71) On or about July 29, 2019, the Trust's counsel submitted a letter to the Building Inspector with a proposed site plan for the Property. (RA 44-45) According to the Trust's plans, the building proposed to be

constructed for the day care facility would be 3,576 square feet. (RA 216)

The daycare facility proposed by the Trust could be constructed on the Property in compliance with the setback requirements of the Industrial District, but could not comply with the 100-Foot Setback. More specifically, to meet the 100-Foot Setback, and avoid encroachment on any wetlands, the buildable portion of the Property would be an approximately 50 square-foot area in the northeast corner of the Property. (RA 197, 204)

If the wetland areas were not present on the Property, the Property could accommodate a buildable area measuring approximately 130 feet by 110 feet, or approximately 14,300 square feet. (RA 216)

On or about December 20, 2019, the Building Inspector issued his determination that the 100-Foot Setback was a reasonable regulation and that he would deny a building permit application for the proposed daycare facility. (RA 73-74) On or about January 21, 2020, the Trust filed an appeal

from the Building Inspector's decision with the Board. (RA 88, 91-92)

The Board held hearing sessions on the appeal on July 1, July 28, and September 29, 2020. On September 29, the Board voted to deny the Plaintiff's Application and upheld the Building Inspector's Decision that he could not apply the Dover Amendment to exempt the proposed daycare facility from the 100-Foot Setback. A written decision was filed with the Town Clerk on November 19, 2020.[1] (RA 182)

[1] Section 15 of Chapter 40A prescribes procedures for appeals from a decision of a zoning enforcement officer, including the times by which a public hearing must be held and a decision made, and the filing of the decision with the municipal clerk within 14 days. The hearing on the Trust's appeal was conducted and the decision filed during the COVID-19 state of emergency declared by the Governor on March 10, 2020. Subsection (b) of section 17 of Chapter 53 of the Acts of 2020, as amended by section 34 of Chapter 201 of the Acts of 2020, provides: "when a statute, ordinance, bylaw, rule or regulation provides that a permit shall be considered granted, approved or denied, constructively or otherwise, due to a failure of the permit granting authority to act within a specified time period, the time within which the permit granting authority must act shall be deemed tolled from March 10, 2020 to December 1, 2020 unless relief from the deadline has been granted by the secretary of housing and economic development pursuant to subsection (d)." St. 2020, c. 201,

ARGUMENT

I. THE 100-FOOT INDUSTRIAL DISTRICT SETBACK DOES NOT DISCRIMINATE AGAINST CHILD CARE FACILITIES, AND THE DOVER AMENDMENT DOES NOT COMPEL AN EXEMPTION TO ALLOW THE TRUST'S PROPOSED DEVELOPMENT.

A. Standard Of Review.

This Court reviews the allowance of a summary judgment motion de novo by examining the same record and deciding the same questions of law as the Land Court. Eaton v. Federal National Mortgage Association, 93 Mass. App. Ct. 216, 218 (2018). The question of law presented is whether the 100-Foot Setback is unreasonable as applied to the Trust's proposed construction of a daycare facility at the Property, Rogers v. Town of Norfolk, 432 Mass. 374 (2000), so as to render the Board's decision upholding the applicability of the 100-Foot Setback a decision "based on a legally untenable ground, or unreasonable,

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§34. "Permit" is defined as "a permit, variance, special permit, license, amendment, extension, or other approval issued by a permit granting authority pursuant to a statute, ordinance, bylaw, rule or regulation, whether ministerial or discretionary." St. 2020, c. 53, §17.

whimsical, capricious or arbitrary." Sedell v. Carver Zoning Board of Appeals, 74 Mass.App.Ct. 450, 453 (2009) (internal citations omitted).

B. The 100-Foot Setback Is Presumptively Valid And The Record Does Not Demonstrate A Legitimate Basis For Excusing Compliance With That Requirement.

In Rogers, the Supreme Judicial Court first considered the scope of protection afforded by the child care facility component of the Dover Amendment, in G.L. c. 40A, §3, par. 3. Two years earlier, the Appeals Court had taken up the question in Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818 (1998). In Petrucci, this Court ruled that a zoning bylaw provision construed by the board of appeals as prohibiting more than two principal uses on a single lot could not be applied so as to prohibit the use of an existing barn for a child care facility on the same lot as the plaintiff's residence. 45 Mass App. Ct. 818 at 821-822. In Rogers, the bylaw provision at issue was a maximum building footprint for child care facilities (2,500 square feet), which the

building inspector and board of appeals interpreted as precluding conversion of a residence with a larger footprint into a child care facility. The court found that the provision was not facially invalid, but was unreasonable as applied to the proposed facility because it would significantly impede the use of the property as a child care facility without furthering a legitimate municipal interest reflected in the Norfolk bylaw.

The Supreme Judicial Court rejected the reasoning behind the Rogers plaintiff's objection to the Norfolk zoning bylaw's maximum square foot requirement for child care facilities, i.e., "the principle that a court may strike down Norfolk's "use specific" provision as facially invalid, if, after some showing by her that the provision imposes a greater restriction on child care facilities than on other uses, Norfolk fails to offer a reason for the disparate treatment satisfactory to the court, even though the reason is well established as a justification for the exercise of local zoning regulation." 432 Mass. at 378-379. The court responded succinctly: "This

approach is wrong. A challenged provision in a zoning bylaw is presumptively valid, and a challenger bears the burden to prove otherwise." Id. at 379. It continued:

> There is no basis to assume that G. L. c. 40A, s. 3, third par., was intended to grant child care facilities such a measure of heightened protection that Norfolk is required to prove that the footprint provision was not intended to be discriminatory. Nothing in the language of G. L. c. 40A,s. 3, third par., requires local officials to treat a child care facility the same as a residential use, or makes unlawful the adoption of a provision in a zoning bylaw that differentiates between building coverage requirements applicable to child care facilities and other uses. 432 Mass. at 379.

Here, there was, and is, a more forceful rebuttal because there is no issue of the 100-Foot Setback differentiating between child care facilities and other uses. Rather, the 100-Foot Setback applies evenly and across the board for Industrial district parcels. Unlike the bylaw provision at issue in Rogers, the 100-Foot Setback applies to all construction on industrial-zoned lots that abut a residential zoning district. The Bylaw does not treat child care facilities differently from any other use;

rather, the 100-Foot Setback is a basic setback requirement that applies to all development on industrial-zoned property.

C. It Is Not The 100-Foot Setback That Is Restricting The Trust's Use Of The Property; It Is The Extensive Wetlands On The Property.

In the Land Court, both the parties and the judge focused on Rogers and its explanation of the protection afforded by paragraph 3 of section 3 of Chapter 40A. Although, Rogers was acknowledged as the appropriate guidance, the Board submits that the teaching of Rogers does not dictate the summary fashion in which the Land Court rejected the Board's position.

An essential component of that teaching is the direct statement that "the pertinent language of § 3, third par., seeks to strike a balance between preventing local discrimination against child care facilities and respecting legitimate municipal concerns." Rogers, supra, at 383, citing Trustees of Tufts College v. Medford, 415 Mass. 753, 757 (1993). When viewed with this fundamental principle in mind, the application of

the 100-Foot Setback to the Property cannot be characterized as anything like discrimination against child care facilities. As a result, the Board's decision did not unreasonably infringe upon the statutory protection of that third paragraph and the Land Court was incorrect in reaching that conclusion.

Below, the Trust framed the issue as one of simple application of the Dover Amendment language to its proposed daycare facility, and the court accepted that proposition. However, that approach results in an incomplete view that overlooks the reality of the situation. In order to fairly determine whether a dimensional requirement may reasonably be applied to a particular property, it is necessary to consider the nature and condition of that property. The trial court did not entertain any such consideration, flatly stating that it considered "the effect and extent of wetlands at the Property," the Trust's purchase price and its prior development efforts to be "irrelevant." (RA 241). This was even less an acknowledgment of the situation than the Trust was willing to give.

The Trust admitted that the 100-Foot Setback *and* the presence of wetlands on the Property precluded construction of the proposed facility. (RA 204, ¶13) But, that was only a partial, and therefore inaccurate, admission. It is the wetlands alone that prevent construction of the proposed daycare facility, or any other permissible use facility. In the absence of the wetlands, a building of substantially greater area than that proposed by the Trust could be constructed on the Property in compliance with all of the Bylaw's applicable setbacks. Without the wetlands, the buildable area is approximately 14,300 square feet, more than four times the Trust's proposed building area of 3,576 square feet.

By discounting the wetlands, the trial court over-simplified the question before it and inflated the significance of the result in Rogers. As a result, it did not give full scrutiny to the facts before it.

This action may be further distinguished from the dispute in Rogers, and in Petrucci v.

Board of Appeals of Westwood, supra, in that here the Property is currently vacant and undeveloped, whereas Rogers dealt with an existing house and Petrucci with an existing barn. In those cases, it was the direct application of dimensional requirements that would have restricted or prohibited the proposed child care use; here it is the existence of extensive wetlands that has made construction on the Property unfeasible. This is a critical distinction.

A fair reading of paragraph 3 of G.L. c. 40A, §3 is that zoning bylaw requirements should not prohibit or unreasonably regulate use or construction for the protected purpose. It should not be the case that paragraph 3 provides a means of completely avoiding any zoning regulation for a lot that is not otherwise reasonably developed for *any* purpose.

The result of the lower court's decision is that paragraph 3 becomes not just a shield from dimensional requirements that might preclude or unreasonably limit a protected use but also a sword against legitimate land use controls. This

is contrary to both the language and spirit of the statute. In essence, the trial court judgment provides a detour that is far more extensive than any obstacle the 100-Foot Setback may pose to reasonable development of the Property. In the absence of the wetlands, the Property could be more than amply built upon for the purpose being proposed.

D. The 100-Foot Setback Serves A Legitimate Municipal Interest And Is Not The Reason Plaintiff Cannot Proceed With Development Of The Property.

The court in Rogers framed the question as follows: "The proper test for determining whether the provision in issue contradicts the purpose of G. L. c. 40A, s. 3, third par., is to ask whether the footprint restriction furthers a legitimate municipal interest, and its application rationally relates to that interest, or whether it acts impermissibly to restrict the establishment of child care facilities in the town, and so is unreasonable." 432 Mass. at 379. While not asserting that the 100-Foot Setback is facially invalid[2], the Trust asserts that

[2] See Land Court decision at p. 6. (RA 243)

application of that setback requirement to the proposed daycare facility renders the Property unbuildable and the proposed facility unfeasible. This is misplaced reliance.

While the 100-Foot Setback reasonably seeks to separate Industrial district uses from residential uses, the true reason for any substantial impact on the buildability of the Property is the presence of extensive wetlands on the Property. On account of that condition, the Property has generally been treated as an undevelopable parcel for many years. It has been vacant since its creation, decades before the Plaintiff purchased it. Indeed, the purchase price of $10,000 is more than substantial evidence of the limitations imposed by the wetlands. Accordingly, a focus on the 100-Foot Setback is inappropriate and distracts from the heart of the matter. As a parcel largely consisting of wetlands, the Property is limited by its physical condition and not by dimensional requirements in the Bylaw.

Quite plainly, the Trust is seeking to develop a piece of marginal land long thought to

be unbuildable because it is mostly wetlands. This is not an instance of a zoning requirement conflicting with the principles of the Dover Amendment. Rather, it is no more than the physical condition of a property limiting its utility, the same as can be said for thousands of properties across the Commonwealth. That limitation is, and was, acknowledged by the Trust, a fact confirmed by the Trust's very low cost acquisition of the Property and its attempt, shortly thereafter, to develop it by means of multiple variances. The trial court should not have extended Dover Amendment protection to relieve the Trust from a limitation that is unrelated to any zoning provision.

E. The Trial Court's Decision Conflicts With The Principles of Statutory Construction.

By ignoring the realities of the Property, the trial court's decision rests on a construction of the paragraph 3 provisions that violates the general rules of statutory construction. "The general and familiar rule is that a statute must be interpreted according to

the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Industrial Fin. Corp. v. State Tax Comm'n, 367 Mass. 360, 364 (1975), quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). As the court in Rogers stated, the mischief to be remedied by paragraph 3 is discrimination against child care facilities. Yet, there is no such discrimination in the 100-Foot Setback or the Bylaw.

Equally as important, courts should construe statutes so as to avoid absurd results, Green v. Board of Appeal of Norwood, 358 Mass. 253, 258 (1970); and a statute is to be interpreted "to give effect 'to all its provisions, so that no part will be inoperative or superfluous.'" Connors v. Annino, 460 Mass. 790, 796 (2011) (internal citations omitted). Here, the trial court accepted the Trust's argument that the true reasons for the Property's limited utility should

be ignored simply because there exists a statutory category into which a proposed development may conveniently be placed. That reasoning failed to account for the totality of the circumstances, and should not have been accepted

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Honorable Court vacate the Land Court judgment and direct an entry of judgment upholding the Board's decision.

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G.L. c. 40A, §3, third par.

No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term ”child care facility” shall mean a child care center or a school-aged child care program, as defined in section 1A of chapter 15D.

RULE 16(k) CERTIFICATION

I, David J. Doneski, certify that the forgoing Brief for the Defendant-Appellant complies with Massachusetts Rules of Appellate Procedure, including but not limited to, Rule 16(a)(13); Rule 16(e); Rule 18; Rule 20; and Rule 21. Compliance with Rule 20 was ascertained by preparing the brief in a Word document utilizing the following standards: 1.5 inch margins on the left and right sides and 1 inch margins on the top and bottom of each page and 12 point Courier New font with double spacing.

Dated: December 10, 2021 */s/* David J. Doneski

CERTIFICATE OF SERVICE

I, David J. Doneski, hereby certify that on the below date, I electronically filed the foregoing brief through the Odyssey e-filing system, and that I served counsel of record by electronic mail, as follows:

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