DLS

DIVISION OF LOCAL SERVICES

MA DEPARTMENT OF REVENUE

Supporting a Commonwealth of Communities

"What's New In Municipal Law" 2021

Recent Cases

Local Taxes

Murrow v. Boston Assessors,
ATB 2021-1 (January 22, 2021)

- Condominium parking easement held taxable as a present interest in real estate
- ATB entertained cross motions for summary judgment
  - 831 CMR 1.22: "Issues sufficient in themselves to determine the decision of the Board may be separately heard and disposed of in the discretion of the Board"
  - Board found "no genuine issue[s] of material fact and assessors were entitled to judgment as a matter of law"
- Taxpayer's argument that the tax fell on the fee simple interest (condo unit owners) rejected

Murrow v. Boston Assessors
(cont'd.)

- **Commissioner of Revenue authorization to assess present interests in real estate not required**
  - **St. 2016, c, 218 § 251 eliminated requirement of COR authorization**
- **ATB cited an Appeals Court opinion involving the same taxpayer, *Cashin v. Murrow***
  - **Parking easements are not part of the condominium common area**
  - **Area in which parking easements are situated is part of limited common area, but excluded by declarant from the provisions of c. 183A**
  - **Freely alienable easements in gross are separate from unit owners' interests**

Murrow v. Boston Assessors
(cont'd.)

- **Appeals Court rejected argument that freely alienable, non-appurtenant parking easements subject to tax as part of the common areas**
  - ***Rauseo v. Assessors of Boston***
  - **Following *Rauseo* the ATB ruled that parking easements are subject to taxation separate from the condo units *See Gacicia v. Boston Assessors***
- **Taxpayer held "full possessory rights" in her parking space through the easement, including the right to exclude others**
- **"Absurd result" if unit owners with no interest or rights to use the parking space are taxed while easement owner escapes taxation**

Atlantic Union College v, Lancaster Assessors,

ATB 2020-533 (November 17, 2020)

- **ATB previously ruled for appellant educational institution on this exemption claim under Clause Third**
- **Appeals Court reversed and remanded to the ATB for failure to "'state adequate reasons in support of its decision so as to permit meaningful review[.]'" *Atlantic Union College v. Lancaster Assessors,* Mass. App. Ct. No.19-P-142, Mem. And Order Under Rule 23 (August 13, 2020)**
- **Appeals Court directed the ATB to explain whether it considered the 12 parcels at issue separately or instead reviewed the campus as a whole**

Atlantic Union College v, Lancaster Assessors
(cont'd.)

- **Total of 30 parcels constituted the entire campus**
- **ATB explained that the 12 subject parcels were variously used for educational purposes notwithstanding the suspension of the taxpayer's bachelor of arts degree program in 2011**
- **Certain other educational activities continued, including the music and performing arts program, the evangelism training school, the healthy living education, and the Teach Out program**
- **Nursing students were allowed to live on campus as they completed their degree studies at Wachusett Community College**
- **Academic office continued operations**

Atlantic Union College v, Lancaster Assessors
(cont'd.)

- **Taxpayer continued to maintain the entire campus by paying for utilities, insurance, landscaping, security and building repairs**
- **Taxpayer never lost its charter, though it did temporarily lose accreditation for its degree-granting programs**
- **Taxpayer intended to resume degree-granting programs, and did so in August of 2015**
- **When viewed as a whole, the subject parcels were occupied in furtherance of charitable educational purposes during the fiscal years at issue: 2014—2016**

Atlantic Union College v, Lancaster Assessors
(cont'd.)

- **Board approached the question of exemption of the subject parcels as an integrated whole**
- **In a prior case involving Boston College, the ATB held that the scope of uses in support of charitable educational purposes for a college was wider than a case involving a single parcel**
- **ATB distinguished cases in which properties charitably owned were reviewed on an apportioned basis**
- **Taxpayer did not lease out any of the subject parcels**

Atlantic Union College v, Lancaster Assessors
(cont'd.)

- **In treating the exemption question as involving the subject properties as a whole, the ATB concluded that they were occupied by taxpayer in furtherance of "the overall educational mission"**
- **Even during the suspension of the Bachelor of Arts degree-granting accreditation, the subject properties were used for interim purposes, like passive recreation, overflow parking, and buffer space**
- **ATB stressed that taxpayer was focused on regaining accreditation in the fiscal years at issue during the entire period of the suspension**
- **Exemption finding was reinstated after remand**

Unquity House Corp. v. Milton Assessors,
ATB 2021-22 (February 16, 2021)

- Unquity House is a non-profit corporation recognized by the IRS as an exempt entity under 26 U.S.C. § 501(c)(3)
- Taxpayer owns a single residential building consisting of 40 260 sq. ft. studio apartments and 99 400 sq. ft. one-bedroom apartments, and multiple common areas including a library, lobby, dining area, communal sitting room, laundry, hair salon, resident-operated convenience store, café and commercial kitchen
- Taxpayer claimed exemption under G.L. c. 59, § 5, Clause Third and filed a Form 3ABC and Form PC

Unquity House Corp. v. Milton Assessors
(cont'd.)

- During fiscal year 2019, taxpayer operated a Rental Assistance Demonstration ("RAD") under the US Dept of Housing and Urban Development ("HUD")
- Eligible residents required to be over 62 years old and have an income no more than 50% of Average Median Income for the area. The ceiling in FY 19 was $42,000 for one person and $47,400 for two people
- HUD and others supplemented below-market rents. In 2016, taxpayer received $867,866 in rental income and $1,158,297 in rental subsidies from HUD and municipal housing authorities

Unquity House Corp. v. Milton Assessors (cont'd.)

- **A security deposit is required and rent can be changed at any time for certain reasons, *inter alia*:**
  - **Change in Lessor's Rent Schedule**
  - **Change in HUD allowances for utilities or services**
  - **Change in income, number of residents or other factors change**
  - **Changes are required by recertification or subsidy termination procedures**
  - **Section 8 housing assistance contract is terminated**
  - **Residents' failure to provide required information**

Unquity House Corp. v. Milton Assessors
(cont'd.)

- **Termination of tenancy provided for material non-compliance with the lease, including one substantial or multiple minor violations of the lease, failure to supply timely required information, non-payment of rent, or lessee's refusal to accept changes to the lease if the HUD subsidy ends**
- **Services provided to tenants at the subject property included daily social or educational activities, food programs, and subsidized transportation**
- **All residents have emergency alert cords such that the live-in maintenance worker is immediately dispatched to unit in an emergency**

Unquity House Corp. v. Milton Assessors (cont'd.)

- South Shore Elder Services evaluated resident needs and, if appropriate, provided responsive services
- Greater Boston Food Bank supplied provisions distributed to residents. Hebrew Senior Life provided some nursing services as a part of a grant
- Lease authorizes the lessor's access to units without advance consent only in cases of emergency

Unquity House Corp. v. Milton Assessors (cont'd.)

- **Taxpayer failed to show that its dominant mission was traditionally charitable, or that it provided community benefits to the Town of Milton**
- **The provision of moderately priced housing to low-income persons was held not to be a charitable endeavor in *Charlesbank Homes v. Boston***
- **Charitable services were largely rendered by third parties**

Unquity House Corp. v. Milton Assessors
(cont'd.)

- **Taxpayer failed to detail or substantiate charitable services provided to residents beyond those inherent in the relationship of landlord to tenant**
- **Taxpayer failed to prove its presence in residents' units to perform charitable activities**
- **Exemption claim denied**

Winter Valley Residences, Inc. v. Milton Assessors,
ATB 2021-43 (February 16, 2021)

- **Findings and Report were released the same day as *Unquity* House Corp.**
- **Similar claim by non-profit elderly housing corporation for exempt status under G.L. c. 59, § 5, Clause Third**
- **Factual findings mirror the fact pattern of *Unquity House Corp.*, which is managed by the same entity, Milton Residences for the Elderly, Inc. ("MRE"), as Unquity House**
- **Exemption claim rejected as in *Unquity House***

Winter Valley Residences, Inc. v. Milton Assessors
(cont'd.)

- **Relationship of Winter Valley to residents was "essentially that of landlord to tenant"**
- **If HUD rental subsidy terminates, the lease automatically ends**
- **Winter Valley did not demonstrate that it performed charitable services for the benefit of its residents**
- **Winter Valley "failed to detail or substantiate with its records or more extensive testimony" the extent of its services to residents**

Winter Valley Residences, Inc. v. Milton Assessors
(cont'd.)

- **Taxpayer failed to substantiate its presence in patient residences to provide charitable services**
- **Taxpayer failed to prove that its dominant purpose was traditionally charitable**
- **Taxpayer failed to demonstrate that "it provided a sufficiently robust community benefit"**
- **Simply providing low-income seniors with moderately priced, government-subsidized housing is not a charitable activity *See Charlesbank Homes v. City of Boston***

Williams v. Bd. of Appeals of Norwell,
100 Mass. App. Ct. 1102, Memorandum and Order pursuant to Rule 23 (July 19, 2021)

- **Appeals Court interpreted G.L. c. 40A, § 6, a grandfathering provision that allows for development of parcels which have a minimum of 5000 square feet in size and 50 feet of frontage**
- **Subject Parcel was non-buildable under Norwell's current zoning by-laws**

Williams v. Bd. of Appeals of Norwell
(cont'd.)

- **Three requirements for grandfathering:**
  - **Subject "was not held in common ownership with any adjoining land;"**
  - **Conformed to then existing requirements [when created]; and**
  - **Met minimum size and frontage requirements**
- **Owner argued that an existing private way provided the necessary frontage**
- **Appeals Court in previous appeal of this matter remanded for determination whether the subject locus met the applicable frontage requirements of 1942 Norwell zoning by-laws**

Williams v. Bd. of Appeals of Norwell
(cont'd.)

- **Land Court, relying on a 1948 precedent of that court, treated the 1942 Norwell by-laws as invalid**
- **Land Court looked to zoning by-laws from the 1950's for the definition of frontage**
- **Appeals Court reversed the Land Court because it did not comply with appellate court instructions on remand**
- **Appeals Court held that the definition of frontage in the 1942 by-laws was good law and in effect upon creation of the subject locus**

Williams v. Bd. of Appeals of Norwell
(cont'd.)

- **Purpose of 40A:6 is "to protect landowners' expectations of being able to build on once valid lots"**
- **Land Court's reliance on by-laws adopted after creation of the subject locus could lead to the result that a parcel originally buildable would be rendered unbuildable by after-arising by-laws**

Williams v. Bd. of Appeals of Norwell
(cont'd.)

- **Appeals Court did not reach the question of how to define "frontage" in the absence of an applicable provision in the zoning by-laws in effect upon the creation of the subject property per the grandfathering provision**
- **Court stressed that post-hoc requirements could not govern the question of whether the subject locus was buildable when created and thus grandfathered**

Williams v. Bd. of Appeals of Norwell
(cont'd.)

- **Effect of 40A:6 is to make buildable lots that were buildable when created but inconsistent with later zoning requirements**
- **Relevant to Land of Low Value Foreclosure Statements**
- **If parcel is at least 5000 sq. ft. with 50 ft. frontage on a public way, current zoning rules are inapplicable to grandfathered lots**
- **In such circumstances current zoning by-laws should not be relied upon to prove low value**

Kali Family Limited Partnership v. Milton,

99 Mass. App. Ct. 112 M.A.C. Rule 23.0 Unpublished (February 24, 2021)

- **Appeals Court upholds trial court decision against Taxpayer who claimed Town was unjustly enriched by what Taxpayer described as excessive tax assessments**
- **Taxpayer owned several parcels, did not pay tax bills or seek abatement for one parcel from 2002 to 2014**
- **Abatement is exclusive remedy absent extraordinary circumstances (inadequate remedy, novel questions, repetitive problems or public interest)**

Hurley v. Assessors of Quincy,

ATB 2021-65 (February 26, 2021)

- ATB reversed City's denial of real estate tax deferral under Clause 41A
- Facts:
  - Taxpayer/spouse (trust) enter deferral in 2011; then entered into reverse mortgage on same property; spouse dies 2019
  - Thereafter, assessors request, as part of application for deferral, in part, reverse mortgage holder's grant of permission for deferral
  - Holder refused to provide; application denied by assessors

Hurley v. Assessors of Quincy
(cont'd.)

- **Facts Continued:**
  - **Per denial, current FY taxes now delinquent**
  - **Assessors also deem all deferred taxes due/payable**
  - **Assessors contact mortgagee who pays all back taxes against amount of proceeds intended for living expenses**
  - **Taxpayer moves to sell property**

Hurley v. Assessors of Quincy
(cont'd.)

- **ATB:**
  - **Back taxes only due upon death or sale**
  - **Requirement to provide reverse mortgage permission is only for deferral agreement in first year of deferral; not required if reverse mortgage takes place after agreement entered**
  - **Deferral, therefore, should have been granted**
  - **Grants abatement as difference in applicable FY of delinquent interest and interest that would have been owed under deferral (14% v 4%)**

Recent Cases

Collections

Patch v. Hingham,

99 Mass. App. Ct. 1103 M.A.C. Rule 23.0 Unpublished (December 11, 2020)

- Appeals Court upholds dismissal of complaint filed by taxpayer pertaining to a betterment assessment for a sewer extension project
- Taxpayer objected on several grounds:
  - Challenge to "uniform unit method"
    - Failing to impose assessment on certain parcels
    - Classification of 1 residence as single-family rather than two-family
  - Failure to obtain project approval from DPH
  - Inclusion of certain costs in assessment

Patch v. Hingham
(cont'd.)

- **Court's examination of those challenges:**
  - **Challenge to "uniform unit method"**
    - **Proper and voted as such**
  - **Failing to impose assessment on certain parcels**
    - **Standard is who will receive a benefit; existence of other parcels doesn't change that (even w/ bylaw to contrary)**
  - **Classification of 1 residence as single-family rather than two-family**
    - **Inspector determined residence is classified as single-family; Town can rely on that determination**

Patch v. Hingham

(cont'd.)

- **Court's examination of those challenges:**
  - **Failure to obtain project approval from DPH**
    - **No approval required from DPH; required from DEP which was received**
  - **Inclusion of certain costs in assessment**
    - **Namely costs for extension of sewer into private way; Use of grinder pumps; % of project paid by the Town**
    - **Essentially argument is overassessment, proper avenue is abatement**
- **Further appellate review denied**

City of Holyoke v. Tosado,

2021 Mass. LCR LEXIS 25 (March 2, 2021)

- City sought to foreclose right of redemption
- During title examination, court found two errors in notices City was required to make to one of the property owners
- One error was fatal and the court dismissed the action by the City
- Non-fatal error: 60:16 wrong name on demand but jointly owned
- Fatal error: 60:53 not all names on notice of intention to exercise power of taking
- 60:53 construed strictly

Oak Ledge Prop., LLC v. Hub Realty Co.,
2020 Mass. LCR LEXIS 198 (November 16, 2020)

- Town of Randolph's attempt to sell parcel unsuccessful since there was no Land Court foreclosure of the tax title
- Town then assigned instrument of taking to Oak Ledge (60:52)
- Oak Ledge filed foreclosure petition in Land Court
- State tax form on assignment had been modified to include language about a request for proposals
- Land Court held 60:52 required a public auction
- Land Court held assignment invalid and dismissed foreclosure petition

Ithaca Finance, LLC v. Leger,
99 Mass. App. Ct. 368 (March 30, 2021)

- Private firm purchased city's real estate tax receivables
- Firm sought foreclosure of parcel in Land Court
- Owner was provided with notice of foreclosure petition and Land Court issued foreclosure decree
- Owner did not file petition to vacate decree within one year period (60:69A)
- Private firm's failure to follow strict terms of G.L. c. 60, sec. 2C did not mean that the owner was denied due process
- Land Court rejected owner's equitable claims and foreclosure was upheld. Appeal to SJC denied.

LHPNJ, LLC v. Jefferson Dev. Partners,
2021 Mass. LCR LEXIS 37 (March 17, 2021)

- Mortgagee challenged City of Taunton's assignment of tax title under 60:52
- Land Court held mortgagee not entitled by statute to notice of tax title assignment auction
- Land Court found no authority to support mortgagee's claim that lack of notice was a denial of due process
- Land Court reserved for trial whether Taunton's firewatch liens were perfected and then, if they were perfected, would address mortgagee's denial of due process claim and the abatement of interest

Recent Cases

CPA

Silverio v. North Andover,

C.A. No. 1977CV00629 Superior Court

(March 22, 2021)

- 17 North Andover taxpayers had standing to challenge CPA appropriation for a sports complex in a public park
- Judge reviewed CPA Projects Database to support CPA expenditure which only incidentally benefited the public school
- Judge found the project was mostly the rehabilitation of open space recreation land
- Bleachers were not a prohibited stadium
- Artificial turf and groundwork were prohibited
- Other features of the project were held to satisfy CPA

Recent Cases

Employment

Brookline v. Alston,

487 Mass. 278

(April 27, 2021)

- **In this extensive case, Town appealed a decision of the Civil Service Commission ruling that the Town had acted in bad faith in unjustly terminating Alston, a firefighter, and awarding reinstatement with back pay**
- **Alston, a black firefighter, had received a voicemail from a lieutenant superior that concluded with a racial slur, which he later claimed was not meant to refer to Alston**
- **Alston filed a formal complaint with the then-fire chief, who after meeting with Alston and other Town officials, moved the lieutenant to another fire station, and told Alston the lieutenant would never be promoted**

Brookline v. Alston

(cont'd.)

- **The Selectboard conducted a disciplinary hearing for the lieutenant and, contrary to the fire chief's recommendation of harsher discipline, including no promotions, approved only a lesser 42-hour unpaid suspension**
- **The Town made a series of FD promotions, including promoting the lieutenant to temporary fire captain, then full captain**
- **A fellow firefighter posted on a union blog a derogatory message referring to Alston**
- **MCAD trainers conducted discrimination prevention for Town employees, Town circulated an anti-discrimination policy**

Brookline v. Alston

(cont'd.)

- **Alston filed a complaint with MCAD alleging the Town had discriminated against him by promoting the lieutenant; he later amended his complaint to include claims alleging systemic retaliation with the FD, after he reported the voicemail**
- **He subsequently withdrew his MCAD complaint and filed a civil action in state court**
- **Alston subsequently found the word "leave" written on the door of his assigned fire engine seat; he also reported feeling shunned by his fellow firefighters and began expressing fear that they would not "have his back" during an emergency fire situation**

Brookline v. Alston

(cont'd.)

- **In response, Alston allegedly made comments to superiors that were perceived to be threats of workplace violence; he was placed on paid leave and met with a Town-hired psychiatrist**
- **The Town hired another psychiatrist to evaluate Alston; she reported that Alston could return to the FD, with a plan to reduce his stress**
- **She recommended three conditions for his return: mental health care, stress-reducing workplace accommodations and random drug screenings**

Brookline v. Alston

(cont'd.)

- **Town Counsel contacted Alston's attorney about the steps Alston would need to take to return to work, including a required drug test**
- **He missed the drug test, and his paid leave was terminated due to noncompliance**
- **Town later allowed him to be placed on paid sick leave, which he subsequently exhausted**

Brookline v. Alston

(cont'd.)

- **Lieutenant who made offending remark now claimed that Alston besmirched his name in complaining about voicemail; other firefighters spoke about "narrative fabricated" against superior**
- **When Alston failed to appear for evaluation, Selectboard voted to fire Alston**
- **Alston appealed decision to the state Civil Service Commission (CSC), which upheld his termination**
- **Alston appealed CSC ruling to Superior Court**

Brookline v. Alston

(cont'd.)

- **In proceeding under 30A:14, SC judge vacated CSC's order, and remanded it to CSC for full evidentiary hearing**
- **SC judge, interpreting CSC law, held that "an employer lacks 'just cause' if a termination would not have occurred but for the employer's racially hostile environment, maintained in violation of basic merit principles"**
- **Judge also reasoned that "an employer has no right to demand proof that an otherwise fit employee can perform job duties in a racially hostile environment" and remanded case**

Brookline v. Alston

(cont'd.)

- **On remand, after a hearing, the CSC concluded that the Town lacked just cause to terminate Alston and ordered reinstatement**
- **Town appealed to SC, which upheld CSC**
- **On appeal, SJC considered Town's claim CSC exceeded its authority by considering claims of discrimination that must instead be addressed to the MCAD, pursuant to c.151B**
- **SJC reasoned that c. 31 civil service law's fundamental purpose is "to ensure decision-making in accordance with basic merit principles" assuring fair treatment to all employees, including assuring constitutional protections**

Brookline v. Alston

(cont'd.)

- **SJC stated that MCAD does not have sole authority to consider fair treatment of all employees regardless of race; CSC can also determine that an employee has been subject to racist and retaliatory acts by an employer**
- **Town next argued that prior MCAD filing by Alston later filed in SC should bar Alston's claims of racial discrimination; SJC concluded there was no impediment to this matter, as it involved a 151B issue, not civil service matter**
- **Town finally argued that CSC lacked sufficient evidence to render its decision invalid**
- **SJC held that CSC made proper findings**

Recent Cases

Land Use

Valley Green Grow v. Charlton,

99 Mass. App. Ct. 670

(October 14, 2020)

- VGG purchased commercial fruit orchard containing 94.6 acres, at which it planned to construct a 1m-sf cannabis cultivation facility for growing, manufacturing and processing medical and recreations use cannabis
- Town's building inspector opined that the site and proposed purpose were consistent with zoning bylaw's agricultural district uses
- VGG filed preliminary subdivision plan w/ PB, which triggered a zoning freeze for the site
- Town's selectboard voted to approve both a development plan with VGG and a Host Community Agreement (HCA)

Valley Green Grow v. Charlton

(cont'd.)

- **VGG filed for site plan review, per development agreement, which PB denied, claiming that the use was light industrial, not an agricultural use allowed by zoning**
- **In another action, abutter sought declaratory judgment, stating VGG's use was not allowed**
- **Land Court disposed of two cases, holding that marijuana cultivation was agricultural use, not industrial**
- **Land Court also held that zoning allowed proposed use by right and that postharvest processing facilities and cogeneration energy plant were lawful accessory uses**

Valley Green Grow v. Charlton

(cont'd.)

- **Appeals Court upheld Land Court decisions**
- **Appeals Court reasoned that VGG's uses were primarily agricultural and the proposed facility fit within the zoning bylaw's allowed uses as an indoor light commercial horticulture/floriculture establishment (e.g., greenhouse) use allowed by right in the two zoning districts**
- **Appeals Court also discussed MA regulation of cannabis industry**
- **Appeals Court also held that the postharvest production and cogeneration facilities did not overwhelm the main use and were accessory**

Mederi, Inc. v. Salem,

SJC-13010

(July 31, 2021)

- Aggrieved cannabis license applicant appeals City's denial of HCA, pursuant to 94G:3[d]
- Mederi had argued that 94G:3[d] imposes a duty on municipalities to enter into an HCA with a prospective applicant on the basis that such applicant can demonstrate that it is able to fulfill municipal HCA requirements
- Trial court upheld City's motion to dismiss
- SJC upheld dismissal, holding that 94G:3[d] provides only that an applicant must enter into an HCA before it can operate

Mederi, Inc. v. Salem

(cont'd.)

- **SJC stated that there is no obligation on the part of municipalities to enter into an HCA**
- **94G:3[d] contemplates that a municipality will establish its own regulations for applicants and the municipality will negotiate with applicants regarding stipulations of responsibilities between the parties, including impacts and benefits to the community**
- **Mederi further argued that the City, in choosing to enter HCAs with other applicants, had created an unlawful "pay-to-play" scheme and that it acted arbitrarily in its decisions**

Mederi, Inc. v. Salem

(cont'd.)

- **The SJC analyzed the City's local efforts in determining which applicants best met the City's criteria for successful applicants and noted that the City made a decision to limit the number of licenses it would issue**
- **The SJC ruled that the City's analysis showed a rational basis for its recommendations and were not arbitrary and capricious**
- **The SJC's decision is significant in affirming local control for municipalities to articulate their own reasonable criteria for awarding HCAs as long as they clearly articulate such objectives and act reasonably in their reviews**

Abuzahra v. Cambridge,

486 Mass. 818

(February 17, 2021)

- **City made eminent domain taking of property, pursuant to G.L. c. 79**
- **City would not pay pro tanto damage award to owner until title dispute was clarified**
- **When owner sought pro tanto damages, City claimed that owner may not receive damage award until after valuation claim is resolved**
- **Superior court found in City's favor**
- **On appeal, SJC ruled in favor of owner**
- **SJC analyzed statutory construction and legislative history of G.L. c. 79**

Abuzahra v. Cambridge

(cont'd.)

- In its analysis of statutory construction, SJC reasoned that plain meaning of the statute was conclusive of legislative intent
- Here, there was no language in G.L. c. 79 that prohibited a preliminary award of pro tanto damages before final resolution of damages
- Also, SJC reviewed eminent domain statutes and emphasized that they must be strictly construed because they concern the power to condemn land despite private property rights
- In holding that legislative history showed evolution of taking statute to give owners more rights, SJC ordered City to pay pro tanto

Cobble Hill Center, LLC v. Somerville Redevelopment Authority,
487 Mass. 249
(April 22, 2021)

- City redevelopment authority (SRA) took by eminent domain, per G.L. c. 121B, § 46(f), 4 vacant acres owned by CHC, as part of stalled project SRA claimed made property blighted
- SRA stated that taking was a "demonstration project" under § 46, which provides an alternative to full urban renewal option that required a lengthier review process
- SRA asserted its plan was unique enough to qualify as a demonstration project, on the basis it allowed for needed economic development, construction of a long-needed police station and transit-oriented amenities

Cobble Hill Center, LLC v. Somerville Redevelopment Authority (cont'd.)

- Developer appealed, claiming that:
  - G.L. c. 121B does not give SRA eminent domain taking authority for "demonstration projects," as it did not include an urban renewal plan; that "demonstration plan" was actually an urban renewal project, requiring full SRA plan review; and that takings for blight elimination were not a proper public purpose for eminent domain
- SC held for SRA; and on appeal, SJC agreed
- SJC reviewed statutory construction and legislative history and concluded that § 46 allows eminent domain for demonstration projects, and did not require renewal plan

Cobble Hill Center, LLC v. Somerville Redevelopment Authority (cont'd.)

- **SJC also reviewed claim that demonstration project was actually a "run of the mill" urban renewal plan, requiring full SRA review**
- **§ 46(f) allows SRA to "develop, test and report methods and techniques to carry out demonstrations," to eliminate blight - §46(f) does not define "demonstration"**
- **Nevertheless, SJC reasoned that SRA's stated purpose to combine police station and transit and economic uses was unique enough to be considered a demonstration project**
- **SJC did, however, note that future such projects must identify unique characteristics**
- **SJC next dealt with claim of unlawful taking**

Cobble Hill Center, LLC v. Somerville Redevelopment Authority
(cont'd.)

- **In addressing claim that SRA's power to use eminent domain authority for demonstration projects for economic purposes was not for a valid public purpose , SJC reviewed prior US Supreme Court case of *Kelo v. New London, CT*, 545 US 469, 480 (2005) and state cases**
- **In *Kelo*, the US Supreme Court held that taking for economic development was proper public purpose, in eliminating slums, blight**
- **SJC, having concluded validity of taking, finally concluded that demonstration projects must not only show that they eliminate blight, but they must also demonstrate that they satisfy the definition of "demonstration"**

City of Malden v. Robert Zeraschi,

99 Mass. App. Ct. 1124 Unpublished

(May 12, 2021)

- **Zeraschi had operated an unlicensed open air parking facility in Malden since 2010**
- **In violation of city ordinance §6.47 (2018) adopted pursuant to G.L. c. 148, § 56**
- **Malden sought to stop Zeraschi from operating the lot until be obtains a license and sought an order for him to pay all citations that he has accumulated**
- **Zeraschi believes the fees are an illegal tax**
- **SC ruled Zeraschi in violation of ordinance but did not grant injunction against the operation or require payment of citations (jurisdictional reasons); dismissed claim fees are illegal**

Malden v. Zeraschi

(cont'd.)

- **Zeraschi continued to operate lot after SC ruling; City filed contempt; Contempt dismissed; both parties appeal**
- **City argues that SC ruling should prevent operation and mandate fines; Zeraschi says claim of illegal tax was not considered**
- **Concerning declaratory relief, there must be a real dispute caused by the assertion by one party of a duty, right or other legal relation in which he has a definite interest and the judge must declare the rights of the parties**
- **Here, there is a dispute; judge erred by not ruling on whether there is an illegal tax**

Malden v. Zeraschi

(cont'd.)

- **Issue is therefore remanded back to SC**
- **Appeals Court ruled SC applied the wrong standard when considering the request of City to order Zeraschi to stop the operation**
- **Refusal of SC to grant injunction is vacated and remanded**
- **City need only show that an injunction will not adversely affect the public interest and not that an injunction is superior to other available remedies**
- **Appeals Court upholds the dismissal of the contempt claim as there was no directive or command**

Nextsun Energy LLC v. Fernandes,

29 LCR 52

(February 16, 2021)

- Fairland Farms owns 265 acres of land off Bay Road in Norton and Easton
- A portion of that land has historically been used for the cultivation of cranberries
- Fairland Farms intended to execute a long-term lease with NextSun
- NextSun plans to use 23.3 acres of Fairland Farm's Property for a large-scale ground mounted solar photovoltaic installation
- NextSun filed with the Norton Planning Board an application for Site Plan Review and Special Permits

Nextsun Energy v. Fernandes

(cont'd.)

- **2018: Certain solar bylaw amendments proposed; passed at Special Town Meeting; Planning Board then considered application; Original application requested site plan approval and two special permits**
- **Board held public hearings on original application in January –April 2019; the Board decided that the solar bylaw amendments applied to the original application and, therefore, NextSun did not require a special permit**
- **Norton Planning Board approved site plan with conditions and denied special permits**
- **Citizens of Norton shortly after, obtained signatures for a petition to compel the town to hold a special town meeting to consider revoking the solar bylaw amendments**

Nextsun Energy v. Fernandes

(cont'd.)

- **Notice stated a public hearing would take place on "*Wednesday* December 18, 2018" (December 18, 2018 was on a Tuesday)**
- **April 2019: Nextsun filed with the Board 2 plans for which it sought endorsement as ANR per the Subdivision Control Law; The Board endorsed the ANR plans as not requiring approval under the Subdivision Control Law**
- **Kevin O'Neil was not a member of the board when original application was considered**
- **Board held 3 public hearings on amended application, Kevin O'Neil missed 1 of the hearings; He completed a certification he reviewed an official audio and video recording of the missed hearing**

Nextsun Energy v. Fernandes

(cont'd.)

- **October, 2019: Board voted 5-1 to approve NextSun's application for site plan review with 64 conditions**
- **4-2 vote to approve NextSun's application for a floodplain overlay district special permit; A special permit requires a supermajority vote of the Board, meaning the application was denied**
- **Board issued two written decisions; One approving the amended project site plan with conditions (the site plan remand decision) and a decision denying the amended application for a floodplain overlay district special permit; NextSun timely filed an appeal for both decisions**

Nextsun Energy v. Fernandes

(cont'd.)

- **Five Issues taken up by this court:**
- **1. Was the Board's public hearing on the solar bylaw amendments properly noticed under G.L. c. 40A § 5 and Norton bylaw?**
- **2. Are the solar bylaw amendments spot zoning?**
- **3. Were the ANR plans properly endorsed?**
- **4. Were a board member's participation in the public hearings on amended application and his votes on the site plan remand and special permit remand lawful?**
- **5. Was NextSun obligated to obtain a floodplain special permit and if so what was the scope the of the special permit?**

Nextsun Energy v. Fernandes
(cont'd.)

- ***1. Was the Board's public hearing on the solar bylaw amendments properly noticed under G.L. c. 40A § 5 and Norton bylaw?***
- **A town must hold a public hearing on a zoning bylaw amendment and make recommendation to town meeting after which a 2/3 vote is required for adoption of the amendment**
- **Town gave proper public notice of the hearing in accordance with G.L. c. 40A § 5 and a minor error in the date did not invalidate the notice**
- **Individual residents were not entitled to notice of the public hearing**

Nextsun Energy v. Fernandes
(cont'd.)

- ***2. Are the solar bylaw amendments spot zoning?***
- **Spot zoning occurs when there is a singling out of one lot for different treatment from that accorded to similar surrounding land indistinguishable from it in character all for the economic benefit of the owner of that lot**
- **Zoning Act: no zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or building of structures that facilitate the collection of solar energy except where necessary to protect the public health, safety or welfare G.L. c. 40A § 3**

Nextsun Energy v. Fernandes

(cont'd.)

- ***3. Were the ANR plans properly endorsed?***
- **Subdivision: under G.L. c. 41, § 81L, if plan shows all the new lots as having sufficient frontage on a public way, a way shown on an approved subdivision plan, or a way in existence at the time of the town's adoption of subdivision control law, then not a subdivision and no approval required**
- **G.L. c. 41, § 81P - if the plan does not require approval, it shall without a public hearing endorse thereon.. "approval under the subdivision control law not required"**

Nextsun Energy v. Fernandes
(cont'd.)

- ***4. Were a board member's participation in the public hearings on amended application and his votes on the site plan remand and special permit remand lawful?***
- **A member of a planning board may not vote on a zoning matter unless the member participated in all the public hearings on the matter**
- **A member may miss one meeting and still vote if the member files a written certification that the member has reviewed all the evidence received at the missed meeting, G.L. c. 39, §23D(a)**
- **The vote here was valid**

Nextsun Energy v. Fernandes
(cont'd.)

- ***5. Was NextSun obligated to obtain a floodplain special permit and if so what was the scope the of the special permit?***
- **The Board required NextSun to apply for a flood plain special permit which they did under objection**
- **The flood plain overlay is intended to help prevent emergencies and reduce costs and damage from flooding**
- **The Board should have approved the application**

Recent Cases

Other

Citizens for a Safe Chatham Airport Inc. v. Town of Chatham,

99 Mass. App. Ct. 1115 Unpublished
(March 15, 2021)

- **Citizens for a Safe Chatham Airport and 3 homeowners near the airport seek to prevent the resumption of skydiving**
- **2012: Skydive Cape Cod Inc. (SDCC) starts operating a full-time business at the airport pursuant to a contract**
- **2013: Citizens complain to Chatham, and Chatham decides not to renew the contract. SDCC files a complaint with FAA; Town found in non-compliance**
- **2015: Chatham agrees to requests for proposals; they receive 2, one is from SDCC**

Safe Chatham Airport Inc. v. Chatham
(cont'd.)

- **Chatham asks the FAA to assess whether skydiving could occur safely here**
- **14 Risk factors were reviewed and it was determined 12/14 of the risk factors were "low risk"**
- **Conclusion: it was feasible for skydiving to occur at the airport**
- **Court: No current contract in place; no evidence could infer that the alleged injuries (noises, plane crashes, and offsite landings) are imminent**
- **Dependent on facts that have yet to occur; claims are not ripe for review; Court affirms SC decision in favor of Town**

Springfield City Council v. Sarno,

2021 Mass. Super. LEXIS 46

(April 16, 2021)

- 2018 ordinance calls for resurrection of a five-member citizen Police Commission to oversee the Springfield Police Department (SPD)
- Mayor Sarno vetoed ordinance
- Council overrode the veto
- Mayor ignored the override and appointed Cheryl Clapprood as police commissioner in 2019
- Was this ordinance legally valid?

Springfield City Council v. Sarno,
(cont'd.)

- ***Allocation of Springfield's Legislative and Executive powers*:**
- **G.L. c. 41 § 109O Mayor has appointing authority and may establish an employment contract with the police commissioner and the contract will prevail over any conflicting ordinance**
- **However, the 2018 ordinance was effective in December 2018, nine months prior to Mayor Sarno entering into the 2019 contract with Clapprood**
- **Mayor's power to contract doesn't prevail over G.L. c. 43 § 5 giving Council authority to reorganize departments**

Springfield City Council v. Sarno,
(cont'd.)

- ***Mayor's Authority to appoint department heads:***
- **G.L. c. 43 § 5 accords city council the authority to reorganize municipal departments**
- **Such reorganization does not diminish Mayor Sarno's power to make appointments to department heads**
- **2018 ordinance makes the head of the SPD the board, not the commissioner, and Mayor Sarno appoints board members**
- **No conflict between the city council's authority to reorganize and the Mayor's authority to appoint**

Springfield City Council v. Sarno,
(cont'd.)

- ***Eligibility Criteria for Board Members:***
- **Need to be a Springfield resident for three years and cannot be a compensated elected official**
- **G.L c. 43 § 52: Mayor's decision to appoint department heads must be free from restrictions imposed by the city council**
- **Eligibility of board members is invalid and has no effect, but it is not fatal to the rest of the 2018 ordinance**

Springfield City Council v. Sarno,
(cont'd.)

- ***Board's Powers and Duties:*** **There is confusion on transition of power between the police commissioners and it would help to clear this issue up but does not impair the validity of the ordinance**
- ***Mayor's Obligations and Powers under the 2018 Ordinance*: The Mayor is not required to fill board vacancies unless he can attest to the fitness of eligible, qualified and willing candidates**
- ***Holding*: Mayor Sarno cannot ignore the ordinance and must use good faith in trying to seek out candidates**
- **This case was appealed to the SJC**