County: NORFOLK, ss.
Case No: Miscellaneous Case No. 315944 (CWT)
Date: August 29, 2007
Parties: 81 SPOONER ROAD, LLC, Plaintiff v. TOWN OF BROOKLINE Defendant.
Decision Type: JUDGMENT[1]

This case was filed on November 21, 2005 pursuant to G.L. c. 240, s.14A. The Plaintiff, 81 Spooner Road LLC (the "Plaintiff' or "Spooner" or the "developer") seeks a determination as to the validity of certain sections of the Defendant Town of Brookline Zoning Bylaw,[2] which places restrictions on the size of single family residential buildings by imposing a floor-to-area ratio ("FAR") limit. The Plaintiff claims that the bylaw is in excess of the town's authority under G.L. c. 40A, s. 3 to regulate the height, density and bulk of single family homes. The Defendant town of Brookline avers that the use of FAR and calculations using gross floor area ("GFA") are proper and reasonable ways to regulate the bulk and density of single family buildings, and, therefore, contends the bylaw is appropriate.

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[1] If not specifically defined herein, each term carries the same definition employed in the Decision

[2] Specifically, the Plaintiff questions the validity of s.5.20, table 5.01 and a recent amendment to s.5.22.2.

Plaintiffs argued the motion for summary judgment before the court (Trombly, J.) on May 11, 2006[3], and the matter was taken under advisement. In a decision entered today, the court granted Summary Judgment for the town, finding that its Zoning Bylaw s.5.20, table 5.01 and a recent amendment to s.5.22.2 were valid, and denying the developer Spooner Road's . Motion for Summary Judgment.

In accordance with the above, it is

ORDERED, ADJUDGED and DECLARED that the Town of Brookline Zoning Bylaw is valid and not in excess of the town's authority under G.L. c. 40A, s.3 to regulate the height, density and bulk of single family homes. The use of the floor-to-area (FAR) calculations using gross floor area are proper and reasonable ways to regulate the bulk and density of single family buildings. The ten year waiting period is valid, and it is not unconsistutional, because it was designed to carry out the Town's legitimate zoning interest.

SO ORDERED.

By the court (Trombly, J.)

Attest:

Deborah J. Patterson
Recorder

Judge: **/s/Trombly, J.**

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[3] The parties also argued two other Motions for Summary Judgments in related but unconsolidated cases, Miscellaneous Case No. 315662 and 315582. The court addressed those

arguments in a separate decision dated April 13, 2007

End Of Decision

County: NORFOLK, ss.
Case No: Miscellaneous Case No. 315944 (CWT)
Date: August 29, 2007
Parties: 81 SPOONER ROAD, LLC, Plaintiff v. TOWN OF BROOKLINE Defendant.
Decision Type: DECISION DENYING DEVELOPER SPOONER ROAD, LLC'S MOTION FOR SUMMARY JUDGMENT AND ALLOWING THE TOWN OF BROOKLINE'S CROSS MOTION FOR SUMMARY JUDGMENT

This case was filed on November 21, 2005 pursuant to G.L. c. 240, s.14A. The Plaintiff, 81 Spooner Road LLC (the "Plaintiff' or "Spooner" or the "developer") seeks a determination as to the validity of certain sections of the Defendant Town of Brookline Zoning Bylaw,[1] which places restrictions on the size of single family residential buildings by imposing a floor-to-area ratio ("FAR") limit. The Plaintiff claims that the bylaw is in excess of the town's authority under G.L. c. 40A, s. 3 to regulate the height, density and bulk of single family homes. The Defendant town of Brookline avers that the use of FAR and calculations using gross floor area ("GFA") are proper and reasonable ways to regulate the bulk and density of single family buildings, and, therefore, contends the bylaw is appropriate.

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[1] Specifically, the Plaintiff questions the validity of s.5.20, table 5.01 and a recent amendment to s.5.22.2.

The case was filed in the midst of an ongoing dispute involving the construction of a new home on Spooner Road. George P. Fogg, III and Frances K. Fogg (the "Foggs") are abutters of 81 Spooner Road. The developer Spooner, owner of 71 Spooner Road and former owner[2] of 81 Spooner Road, sought and was granted a building permit for a single family dwelling that the Foggs later challenged before the Zoning Board. The main dispute in the present action and two related cases[3] involves the issue of what space should be included in the floor-to-area ratio ("FAR") calculation as described in the Brookline Zoning By-law and what space should be excluded as non-habitable attic space.

On or about February 22, 2006, the LLC filed a Motion for Summary Judgment in all three cases, addressing the issue of whether the Foggs have standing in Miscellaneous Case Nos. 315582 and 315662, and challenging the validity of the bylaw in Miscellaneous Case No. 315944. The Town of Brookline filed an Opposition to the Motion for Summary Judgment and a Cross Motion for Summary Judgment on March 31, 2006 in Miscellaneous Case No. 315944[4]. A hearing on all of the Motions for Summary Judgment was held on May 11, 2006. Counsel for all parties appeared before the court (Trombly, J.), and the matters were taken under advisement.[5]

Based on the record before it, the court finds the following facts are not in dispute and are established for the purpose of trial or further proceedings in this matter. Mass. R. Civ. P. 56(d):

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[2] The present owners, to the best of the court's knowledge, are Rebecca and Fredrik Verlander, who are not parties to any of the three actions

[3] The cases are Land Court Misc. Case No. 315662, Fogg v. 81 Spooner Road, LLC, and Land Court Misc. Case No. 315582, 81 Spooner Road, LLC v. Town of Brookline Bd. of Appeals.

[4] The Foggs filed an Opposition and a Cross-Motion for Summary Judgment on the standing issue on March 23, 2007 in Miscellaneous Case Nos. 315582 and 315662.

[5] The court, in a decision dated April 13, 2007, found that the Foggs did meet the standing requirements

1. 81 Spooner Road LLC (the "LLC") is a Massachusetts Limited Liability Company with a principal place of business located at 166 Spring Street, West Roxbury, Massachusetts. In June 2004, the LLC purchased the property located at 81 Spooner Road in Brookline, Massachusetts. After the purchase, the LLC subdivided the parcel, and created two lots, one numbered 81 Spooner Road (east lot with existing house) and the other numbered 71 Spooner Road (west lot; development parcel). The developer then dug a new driveway on the east boundary of the new 81 Spooner lot to provide off-street parking. The LLC sold 81 Spooner Road and the existing house to Frederik and Rebecca Velander (the "Velanders") on March 25, 2005. They are not parties to any of these actions.

2. On April 8, 2005, the Brookline Building Commissioner (the "Building Commissioner") issued a building permit[6] authorizing the LLC to construct a house on the 71 Spooner Street parcel.

3. Neighbors George P. Fogg, III and Frances K. Fogg ("the Foggs") challenged the issuance of the building permit in a May 16, 2005 letter to the Building Commissioner, requesting that the Building Permit "be rescinded, and that all work at 71 Spooner Road be ordered stopped." Specifically, the Foggs contended in the letter that the house proposed for 71 Spooner Road had excess Gross Floor Area for its lot in violation of the Town of Brookline Zoning Bylaw.[7]

4. Under s. 5.20 of the Town of Brookline Zoning Bylaw (the "Bylaw"), "[nor any building or group of buildings on a lot the ratio of gross floor area (GFA) to lot area

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[6] Building Permit No. BL0500346

[7] The Foggs also asserted that the new driveway for 81 Spooner did not provide conforming off-street parking, as the driveway was too steep, and the existing house at 81 Spooner had Gross Floor Area in excess of the maximum for its new lot, and by reason of infectious invalidity, was not a buildable lot. Those contentions are the subject of other appeals currently pending before this court.

(FAR) shall not exceed the maximum specified in the table of dimensional requirements." The dimensional requirements vary depending on the zoning district. 71 Spooner Road is located in an S-10 Zoning District, and, according to the table of dimensional requirements, buildings on the lot are permitted to have a maximum FAR of 0.30.[8]

5. Under the Bylaw, the method of calculating gross floor area is "[t]he sum of the areas of the several floors of a building, including areas used for human occupancy in basements, attics, and penthouses, as measured from the exterior faces of the walls. [GFA] does not include cellars, unenclosed porches, or attics not used for human occupancy, or any floor space.. .intended and designed for the parking of motor vehicles..."[9] Lot area is defined as the horizontal area of the lot exclusive of a) any area in a public or private way open to public uses, and b) any water area more than 10 feet from the shoreline.

6. The Bylaw lists several exceptions to its FAR rules, which allow owners of residential property to exceed FAR limitations. The purpose of allowing

certain exceptions is to minimize the adverse impact on abutting properties.

7. Under s.5.22.2 of the Bylaw "conversions of attic, cellars or basements to habitable space for use as part of an existing single or two family dwelling, not as a separate dwelling unit, and effectively increasing gross floor area of the dwelling, shall be allowed as-of-right if a Certificate of Occupancy for the original construction and previous conversations or alterations under this section, if any, was granted at least ten years prior to the date of this application under the following conditions..."

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[8] See Table 5.01 of the Bylaw

[9] See Brookline Zoning Bylaw s.2.07.1

(Emphasis Added). The Bylaw further provides that the ten year waiting period does not apply to basements and/or cellars. The ten year waiting period was added to the bylaw by Town Meeting on May 25, 2005.

8. By letter dated May 31, 2005, the Building Commissioner denied the Foggs' request to rescind the Building Permit. On or about June 27, 2005, the Foggs filed at the Town Clerk's Office an appeal of the Building Commissioner's decision not to rescind the Building Permit. Public hearings were held on September 22, 2005 and October 20, 2005 before the ZBA.

9. In November 2005, the ZBA issued a decision upholding the Building Permit in part and rescinding it in part. Specifically, the ZBA found that the area of the proposed new dwelling at 71 Spooner Road exceeded the Gross Floor Area (GFA) permitted under the Town's Zoning Bylaw in relation to its newly-created lot.

10. The Plaintiff filed an appeal in the Land Court of the ZBA's decision pursuant to G.L.c. 240, s. 14A,[10] seeking a judicial determination that certain sections of the Bylaw, specifically s. 5.20, Table 5.01 and a portion of s. 5.22.2, as applied to single homes, are in conflict with G.L. c. 41A s. 3, the Zoning Act.[11] The Plaintiff also challenges s. 5.22.2 as being unconstitutional, alleging it is arbitrary, capricious and not related to any legitimate zoning goals.

11. The Town then filed a cross-motion for Summary Judgment, arguing that it is entitled, as a matter of law, to judgment upholding the two challenged zoning

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[10] Several appeals were filed after the ZBA's decision, resulting in many cases in the Land Court. See 81 Spooner Road, LLC, v. Brookline Board of Appeals, et. al., Miscellaneous Case No. 315582, Fogg v. Brookline Board of Appeals, Miscellaneous Case No. 315663

[11] The Zoning Act provides that single family homes are subject to reasonable regulations concerning bulk and height but that no zoning bylaw shall regulate or restrict the interior area of a single family residential building.

provisions. According to the town, the FAR limitations are reasonable because their primary purpose is to regulate the bulk of the building. It claims that

the mere fact that developers may design interior space around the FAR requirements does not make the requirements a regulation of interior space. Moreover, the Town argues that the Plaintiff would receive no benefit from an order striking the attic and basement exemptions from the GFA calculation. The Town also contends that the provision in the bylaw that allows an owner of a single family building more than ten years old to exceed the FAR requirements does not violate G.L. c. 40 s. 3 because it is not a restriction on interior space and it is not arbitrary or capricious, being rationally related to the Town's legitimate zoning interests.

12. The Plaintiffs filed this case on November 21, 2005. Arguments on the Motion for Summary Judgment took place on May 11, 2006. On April 13, 2007, the court (Trombly, J.) issued a Decision in the two related appeals, finding that the Foggs have standing in both of the related cases. The court thus far has elected not to consolidate these cases, mainly because the owners of 81 Spooner Road are not parties to any of the actions.

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"Summary Judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 643-44 (2002); Mass. R. Civ. P. 56(c). Whether a fact is material or not is determined by the substantive law, and "[a]n adverse party may not manufacture disputes by conclusory factual assertions." Ng Bros., 436 Mass. at 648; see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). With respect to any claim on

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which the party moving for summary judgment does not have the burden of proof at trial, it may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case, or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). However, the party opposing summary judgment "cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." LaLonde v. Eissner, 405 Mass. 207, 209 (1976).

It is axiomatic, and, indeed, the parties agree, that the Town of Brookline may regulate the density and bulk of single family homes. The Zoning Act, G.L. c. 40A, provides cities and towns with the authority to regulate, among other things, the height, density and bulk of single family homes. The issue in the present action is the manner in which the Town has chosen to regulate the height, density and bulk of single family homes, and specifically, whether the regulation improperly places restrictions on the interior of the home.

The Town argues that the use of FAR and GFA are reasonable ways to regulate the bulk and density of single family buildings, and that any effect the regulation may have on the interior of the home is merely incidental to the primary purpose of the regulations, which is to regulate the exterior bulk of the house. In fact, the town points out that there are similar regulations in place in various cities and towns in Massachusetts.[12] The Town also notes that the mere fact that some developers may choose to design interior space to comply with FAR requirements does not make the requirements unreasonable regulations of interior space. In actuality, the Bylaw does not

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[12] See City of Cambridge Zoning Ordinance 4.22.1

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include attic and basement space in the GFA calculation, thus giving property owners more freedom to design the interior space as they see fit.

The developer disagrees, arguing that the bylaw should be declared invalid because the Town is imposing limits on construction, and, in some cases, those limits may apply solely to the character or use of interior space. For example, they contend that under the bylaw, two identical single family residential structures could be proposed for the

same lot, yet, depending solely upon the. character and use of the interior space, one could be constructed as of right while the other would exceed the FAR for the zoning district. To determine the nature of the interior space, it may become necessary to debate whether certain uses of the attic or basement would violate the zoning law, a debate that they contend is outside the scope of the town's authority under G.L. c. 41A, s. 3. They claim that in the present action, the ZBA halted construction of the single family home on 71 Spooner Road based on nothing more than the homeowner's possible use of the attic as a livable area, as opposed to a "true" attic. While the developer agrees that municipalities may lawfully control density, it does not agree that the town may regulate density based on interior considerations, and contends the town's actions were, therefore, unlawful.

The developer also argues that the ten year as-of-right provision allowing conversions of attics, cellars or basements to habitable space or use in single family homes for ten years following the issuance of the original certificate is arbitrary, unreasonable and has no relation to public health or general welfare. They contend that there is no rational basis to treat basements and attics that were constructed within ten years from the issuance of the permit differently than the same spaces constructed more

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than ten years after the issuance of a permit, and ask the court to declare this provision unlawful.

The Town disagrees with the developer and avers that the provision in the Bylaw allowing the owner of a single family building more than ten years old to exceed the FAR requirements by finishing the attic and /or basement space does not violate the uniformity requirements of the Zoning Act because it was designed to carry out the Town's legitimate zoning interest, which includes thwarting individuals from manipulating space to avoid FAR limitations, while at the same time allowing expansion of habitable space in homes for families. The Town notes that courts traditionally give municipalities the benefit of the doubt in interpreting whether a local bylaw is inconsistent with a state statute, and will interpret bylaws so as to avoid finding them illegal if possible. In general, they claim, the exercise of the zoning power is accorded a strong presumption of validity.

I agree and rule in favor of the Town, finding that the bylaw is a valid and appropriate zoning regulation, and that the ten year waiting period is a reasonable, appropriate and legitimate way of achieving the town's legitimate zoning interest. The Supreme Judicial Court has held that "matters of density of population" constitute an appropriate subject matter of zoning regulations. See Hallenborg v. Town Clerk of Billerica, 360 Mass. 513, 521 (1971); See also G.L. c. 40A (providing interior areas of structures may be subject to reasonable regulations concerning bulk). It is clear that this Bylaw is aimed at achieving that very goal.

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The use of FAR as a regulation of density and bulk is fairly common among municipalities.[13] Less common but not unheard of is the issue of floor area requirements within the interior of a single family residential building. The issue was raised in New Jersey in Lionshead Lake, Inc. v. Wayne Township.[14] In that case, a town enacted a bylaw that required a minimum size of 768 square feet. The New Jersey Supreme Court upheld the requirement, and the Massachusetts legislature subsequently added a clause to its Zoning Enabling Act stating that in the regulation or restriction of the size of buildings or structures, "no provision of any ordinance or bylaw shall be valid which requires the floor area of the living space in a single family residential building be greater than 768 square feet."[15] The addition of this language to the statute indicates that the legislature did not view bylaws imposing regulations on the floor area requirements as conflicting with the provision in G.L. 40A, s. 3, which states that zoning ordinances and bylaws cannot regulate or restrict the interior area of a single family residential building. In other words, the legislature did not view FAR requirements as regulating or restricting the interior area of a structure.

I agree with the Town, that the FAR limitations included in the bylaw are not in conflict with G.L. c. 40A, s.3 because they are intended to regulate the exterior of structures. Any affect the FAR limits have on interior space in the building is purely incidental to the primary purpose of regulating the bulk of the building, a legitimate

interest of the town. A close look at the bylaw reveals that the FAR provisions do not actually regulate or restrict the interior of the house at all; in fact, GFA is calculated

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[13] See Baker v. Town of Islip Zoning Bd of Appeals, 799 N.Y. S2d 541 (N.Y. 2005) (court approving zoning bylaw that limits maximum total floor area to a FAR of 0.30)

[14] 89 A.2d 693 (N.J. 1952).

[15] See 1959 Mass. Acts 607

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based on the exterior of the house, and specifically upon the number of stories excluding basement and attic levels.

In this case, the ZBA determined that the attic area of the proposed construction at 71 Spooner Road was, in fact, not an attic, and was actually habitable space. Habitable space is measured based on the exterior faces of the walls and is counted without any concern for the use of that space inside the structure. The disputed so-called "attic" was located on the second floor of the house, the main factor in the ZBA's determination. Because the area was originally identified as an attic by the developer, it was not included in the original GFA calculations on which the building permit was based. Once the building commissioner determined that the so-called attic space should be included in the calculation, the house as it was proposed was going to be over 1000 square feet too large for the lot size, and for that reason alone the building permit was rescinded.

As for the ten year limitation on converting attics and basements, I did not find to be credible the developer's argument that the disputed bylaw bore no rational relationship to legitimate zoning goals. The ten year waiting period was enacted to allow homeowners to expand their homes while at the same time preventing any manipulation of the FAR restrictions by developers who could construct large "attics" for the purposes of calculating GFA that are actually intended to be converted into habitable space immediately upon completion. Avoiding this situation is deemed by this court to be a rational zoning goal that is reasonably related to the public health, safety and welfare.

In accordance with the above, it is

ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED. It is further

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ORDERED that the Town of Brookline's Cross Motion for Summary Judgment is ALLOWED. The current bylaw is valid and shall remain in effect.

Judgment to issue accordingly.

Judge: **/s/Charles W. Trombly, Justice**

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End Of Decision