The Bump Rock Road Court Decision: A Summary

The Plymouth County Land Court has issued a decision in the matter of Dennis and June Smith v. Paul McAlduff, Timothy Grandy, Robert Bielen, and Malcolm Macgregor as they comprise the Planning Board of the Town of Plymouth and T&K Retail, LLC, 21 MISC 000182 (2020), the case challenging the Planning Board's decision allowing a change to the previously approved Bump Rock Road Subdivision. Because it is a decision by a judge and not a jury, and is based on papers submitted by the parties and not a trial, it is written in a certain legal fashion which may not be easily followed by those unfamiliar with these types of rulings. So here is an explanation of the process, the evidence submitted, and the court's key findings.

NOTE: This is only an explanation of the factual and legal reasons set forth by the court in reaching its decision – It is not a statement as to whether or not the modification should have been permitted by the Planning Board.

Why wasn't the case herd by a jury?

In Massachusetts, there are no juries in Land Court, all cases are decided by a judge.

Why wasn't there a trial?

The purpose of a trial is to decide questions of fact. Where there are no facts in dispute, a judge can decide the case as a matter of law, which is called summary judgment. In this case, the parties filed cross motions asking the court for summary judgment, meaning that they both felt that based on the evidence they were submitting there were no disputed facts. So the judge issued a ruling based on the papers submitted as sought by the parties.

What was in dispute?

At issue was whether a developer could build more houses than originally allowed by a restrictive covenant. There were two lawsuits regarding Planning Board actions in this regard.

In 2016, a group of abutters appealed the Board's endorsement of a plan allowing the further subdivision of certain parcels because it created more house lots than houses allowed by the covenant at issue. In that case, Withington v. Grandy**,** 26 LCR 350 (2018) (Misc. Case No. 16 MISC 000536), Judge Lombardi ruled, in essence, that the case was premature because there had been neither a request for, nor an approval allowing, construction on the new lots. However, in his ruling, the judge also noted that "In order to further divide any lot in a subdivision limited by such a condition [the Covenant restricting the number of lots], there must be a modification of the original approval pursuant to Mass. Gen. L. c. 41, § 81W."

On December 22, 2020, the developer filed an application seeking to build on the additional house lots. To accomplish this, per the prior court ruling, they also sought to modify the original subdivision plan by increasing the total number of homes which could be built from three to six. The Planning Board held hearings on February 9, and March 9, 2021, and ultimately approved the subdivision modification to allow for construction of the additional three homes. The Smiths, whose property both faces and abuts the T&K property, appealed the Planning Board's decision, which is the current case of Smith v. McAlduff.

What was the court asked to decide?

The court's role is to decide whether the Planning Board had the authority to make the decision that it did. It is not to decide whether the Planning Board should or should not have made that decision, as legally the court may not substitute its judgment for that of the Planning Board.

To decide whether or not the Planning Board decision could be legally overturned, Judge Rubin of the Land Court had to consider two issues:

A. Did the Smiths who brought the lawsuit have standing to do so?

B. Was the Planning Board's decision legally supportable?

What did the judge rely on in making her decision?

Legal decisions, whether by a judge or a jury, are made by applying the facts to the law. The judge decides the law by conducting research. The judge decides facts one of three ways:

- Agreed facts. These are as they sound – facts both sides acknowledge are true.

- Legally unrefuted facts. These are facts presented by one side with support that the court recognizes as authoritative which are then not countered with opposing authority.

- Disputed material facts. These are facts which are central to an issue which the parties disagree on and each have admissible evidence to support their position. The parties present their evidence (documents and/or testimony) at trial and the fact finder determines which they believe is true or accurate.

In this case, based on the evidence submitted by the parties, the judge determined there were no disputed material facts. If there were, then she would have held a trial and heard evidence to decide which side's view was more persuasive. Here are the key facts the judge relied on in her decision:

Agreed Facts:

The property at issue was originally part of thousands of acres of land first purchased by Sherman L. Whipple, Sr. between 1905 and 1910 (the "Whipple Estate"). In 1985, a subdivision plan was prepared in order to distribute the Whipple Estate to certain Whipple heirs. This was called the "Bump Rock Road" Subdivision Plan. The Bump Rock Road Subdivision Plan divided the Whipple Estate into four lots: (a) Lot A1-6, containing 72.9 acres; (b) Lot A1-7, containing 29.85 acres; (c) Lot 4A-2 containing 38.06 acres; and (d) Lot 4A-1, containing 27.66 acres, all of which were then owned by the Sherman L. Whipple Revocable Trust (the "Trust").

The Bump Rock Road Subdivision Plan was submitted for approval to the Town of Plymouth Planning Board ("Planning Board"). On January 21, 1986, the Planning Board voted to modify and approve the Bump Rock Road Subdivision Plan as a Definitive Subdivision Plan. That decision granted certain waivers from sections of the Town Subdivision Rules and Regulations and was

conditioned on the execution of a covenant containing certain conditions. One of those conditions was a limit on the further subdivision of Lot 4A-1.

Per the Planning Board decision, the Trust executed a Covenant granting a restrictive covenant to the "Planning Board and the successors in office of said Board, pursuant to G. L. Ch. 41, Sec. 81U," to take effect upon the approval of the Definitive Subdivision Plan (the "Covenant"). The terms imposed by the Planning Board were included as Exhibit A to the Covenant, which included the following restriction:

> Lot 4A-1 shown on the Definitive Plan shall never be subdivided into more than three parcels each of which shall be used only for single family residential purposes and uses accessory thereto.

After the Bump Rock Road Subdivision was finalized, the Trust began to distribute the various properties. On June 12, 1986, the Trust conveyed Lot 4A-1 to one of the Whipple heirs, Mettie M. Whipple. Ms. Whipple then began her own process of further dividing that lot.

On May 22, 2000, the Planning Board endorsed a plan submitted by Ms. Whipple subdividing Lot 4A-1 into two lots - Lot 4A-4 (2.91 acres) Lot 4A-5 (24.75 acres). Then, on May 31, 2007, the Board endorsed a further plan submitted by Ms. Whipple subdividing Lot 4A-5 into two lots - Lot 4A-6 and Lot 4A-7. Ms. Whipple then sold Lots 4A-6 and 4A-7 to T&K Retail, LLC ("T&K) on December 2, 2008.

In 2009, T&K built a single-family dwelling on Lot 4A-7, as it was allowed to do under the original subdivision approval. But after that, it started to take actions which were 'inconsistent' with the original subdivision restrictions. Specifically, on September 12, 2016, T&K filed an application with the Planning Board seeking to subdivide Lots 4A-6 and 4A-7 into five lots: Lot 4A-8, 4A-9, 4A-10, 4A-11, and 4A-12. All of these lots were vacant land except Lot 4A-9, which contained the single-family house which had been built on Lot 4A-7. Then, in 2020, it sought to build houses on all of the other vacant lots, which were more than allowed by the original Covenant. A dispute over whether T&K could request, and the Planning Board could grant, a modification of the Covenant followed.

Legally Unrefuted facts due to Authoritative Support:

The parties did not agree on whether the road providing access to the new lots, Bump Rock Road, was adequate for the proposed additional development. As this is a technical matter, the parties were required to offer authoritative support from qualified experts. **[It should be noted this would have been necessary whether the case was decided on paper filings or at trial.]** T&K addressed these issues through an expert opinion from a professional engineer. The Smiths did not provide any expert opinion refuting those statements, which is why the Court accepted T&K's position.

First t issue was the question whether Bump Rock Road could adequately handle the amount of traffic that would be generated by additional development or provide needed access for emergency services. T&K provided an affidavit from an expert, licensed professional engineer Mark M. Flaherty, with his opinion as to the adequacy of the road and the basis for his opinion. The Smiths did not present any countervailing affidavit refuting these statements. They did provide a letter sent by the Plymouth Fire Department to the Planning Board stating that there

was a need to improve Bump Rock Road for emergency access, but that letter was not a statement made under oath and did not provide the factual basis for the opinion offered as is required for the court to consider expert opinions. Therefore, per Massachusetts procedural law, the court was allowed to consider Flaherty's statements as undisputed facts upon which it could base its decision. **[If the judge did not consider the expert's statement to be sufficiently supported, she did not have to accept them as facts.]**

Flaherty also provided an affidavit stating that given the topography of the land, drainage onto Bump Rock Road would not be an issue. In contrast, the Smiths provided an affidavit from Dennis Smith stating that given his knowledge of and experience with the area he had concerns about drainage if four additional homes were built. But because Mr. Smith is not a professional qualified to give an engineering opinion, and because he did not provide scientific support for his statements, the court did not consider his affidavit legally sufficient to counter that of Flaherty.

What did the judge decide?

The judge in this case was asked to determine whether the Smiths were parties legally allowed to challenge the decision and, if so, whether the Planning Board decision was permitted by law. She found that neither of these conditions were present, and therefore entered judgment against the Smiths.

The Smiths do not have standing to appeal the Planning Board decision.

Not everyone can appeal a subdivision decision of the Planning Board. Under Massachusetts statute (G.L. c. 41 §81BB), only persons who are "aggrieved… by any decision of a planning board concerning a plan of a subdivision of land" may challenge such decision. So the court first considered whether the Smiths were considered "aggrieved" parties.

In the context of a modification of a subdivision plan, per Massachusetts law (G.L. c. 41 §81W) in order to be aggrieved the changes need to "affect" the other lots in the subdivision. The word "affect" has a specific meaning under the law. Specifically, the cases interpreting this statute hold that only changes which impair the marketability of title to property, such as changes to the shape or area of lots, denied access, impeded drainage, imposed easements, or restrictions on use, constitute an "affect" to property. Changes which might have just an indirect, qualitative impact, such as complaints about traffic, unwanted noise, views, and overall neighborhood density, do not meet that standard. However, those were the principal types of complaints the Smiths presented to the court, namely their desire to maintain the current low density and rural character of the neighborhood along with concerns about potential loss of privacy.

The Smiths did present three arguments which related to potential tangible issues:

- That the narrow road they use to access their property, Bump Rock Road, cannot accommodate the increased traffic associated with the proposed additional houses;

- That there was a potential for stormwater to flow onto the road, and

- That there was inadequate access for fire safety vehicles.

As noted above, the law holds that these are engineering issues of a technical nature, meaning that they require expert testimony to establish. T&K submitted expert witness testimony demonstrating that the road size was adequate under modern standards for both traffic and fire access and that the proposed construction would not result in drainage problems on the road. The Smiths offered only their own personal assertions and statements regarding these issues, as well as the Plymouth Fire Department's letter to the Planning Department. But as none of these provided the necessary engineering support for the opinions offered, they were not considered to be admissible evidence sufficient to rebut the other side's expert opinion.

Since the concerns with the proposed new houses were either of an intangible nature or were rebutted by required expert testimony, the Smiths were not considered "aggrieved parties" so as to have standing to challenge the Planning Board decision as required by Massachusetts law. As such, they did not have legal standing to challenge the decision.

The Planning Board decision was legally supportable.

Even though the court ruled that the Smith's appeal failed because they were not aggrieved persons, the judge went on to further explain why the appeal would have failed even if they were. In addressing whether the Planning Board decision could stand legal scrutiny, the questions was whether it was arbitrary, capricious, or legally untenable. The Smiths presented four arguments in support of their position, but once again, the judge found those arguments were without factual and/or legal support.

i. The Smiths do not have standing to enforce the Covenant

The first argument was that given the language of the Covenant, the Smiths could enforce the Covenant and prevent the building of additional houses. This argument was rejected for both procedural and substantive reasons. Procedurally, the judge ruled that the issue had already been decided in the prior case (Withington v. Grandy) by Judge Lombardi, and because all of the same parties were involved the matter could not be re-litigated (the legal doctrine is called *res judicata*, meaning it has already been adjudicated). However, even if it were to be reconsidered, the judge held that the Smiths also did not have standing to seek to enforce the Covenant. That was because the Covenant was issued to the Planning Board as part of a subdivision plan approval, meaning that only the Planning Board has the authority to enforce it, as with other conditions of its approval. However, as the Planning Board is also not legally obligated to enforce a subdivision Covenant, they were permitted to allow it to be changed.

ii. The Planning Board was not obligated to impose additional formal conditions

The second argument the Smiths offered was that the Planning Board failed to include additional formal conditions and waivers in the decision to modify the subdivision. Since new houses were being added, new conditions were necessary, and by failing to do so the Planning Board determination was inadequate. However, as the judge noted, the subdivision modification only changed the number of allowed dwellings; it did not alter all of the previously imposed conditions for construction. As such, not only were the prior conditions in place, they were also applicable to the new dwelling units, meaning the scope of the modification decision was not inadequate.

iii. There were no *ex parte* communications to the Planning Board

The Smiths also argued to the court that by allowing counsel for T&K to answer questions from Board members after the Board closed the public comment portion of the public hearing via Zoom, counsel for T&K and the Planning Board engaged in improper "*ex parte* communications". An *ex parte* communication is a "communication between counsel and the court when opposing counsel is not present." Black's Law Dictionary 296 (8th ed. 2004). In general, *ex parte* communications are looked down upon as "contrary to the basic values of fairness governing litigation under our adversary system." Olsson v. Waite, 373 Mass. 517, 531 (1977). Massachusetts has a specific regulation, 360 Code of Massachusetts Regulations, section 1.08, applicable to such communications in connection with proceedings before boards and commissions:

> No Party or other person directly or indirectly involved in an Adjudicatory Proceeding shall submit to the Presiding Officer, or any Authority employee involved in the decision making process, any evidence, arguments, analysis, or advice, whether written or oral, regarding any matter at issue in an Adjudicatory Proceeding, unless such submission is part of the record or made in the presence of all Parties.

The judge noted that the exchange in question occurred as part of the public meeting, and therefore was not *ex parte*. Instead, the judge considered the claim to be an assertion of bad faith by the Planning Board. However, based on the record, including watching the recording of the hearing, the judge found that there was no evidence that the Planning Board decision was undertaken without regard to the interests of the public.

iv. T&K was not time barred from seeking to modify the Subdivision Plan.

Under Massachusetts law, anyone seeking to appeal a decision of the Planning Board has to do so within 20 days of the recording of such decision by the town clerk. G.L. c. 41, § 81BB. The Smiths argued that because T&K didn't appeal the original subdivision decision within 20 days, it couldn't seek to modify the decision years later. But that rule applies only to the appeal of a denial of an application. Massachusetts law, G.L. c. 41, § 81W, specifically allows for modification of a local board's approval of a prior decision:

> A planning board, on its own motion or on the petition of any person interested, shall have power to modify, amend or rescind its approval of a plan of a subdivision . . . . All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as apt, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changed under this section.

Therefore, T&K was not precluded from applying to the Planning Board for a modification.