July 18, 2006

Andy, chan, john, karyl, and bob

Also – susy and mark cerel

Called to order at 7:17 pm

Andy – thank you for offering to do this for us

Mark Cerel - give a couple of things to look at.

1. outline for what I did for Franklin's land use boards
2. illustration – portion of special permit section from Franklin's senior village bylaw
3. excerpt from a recent Mass appeals court case – 2001 – which clearly lays out the standard for special permits and court review

basic sheet to work off – outline for workshop on holding public hearings – I will go thru parts of it generally and then we can get into specific questions – big picture –

Legal authority under which you are acting – special permit granting authority under the zoning law, not the subdivision law – different criteria and standards – acting akin to the ZBA – under chapter 40A, there are a number of entities can be a special permit granting authority other than the ZBA: PBs often are the SPGA for development projects like arcpud – not unusual – for mixed use, overlay

Karyl – why then as a permit granting board don't we review 40B projects?

Mark – the statute specifically makes it the ZBAs – I think you have to go back historically to understand – the real genesis of 40B in the late 60s and 70s is that suburbs were zoning out apartments – 40B was a direct response to that – but then it lay dormant for many years and morphed into what it is now – pushing entirely different kind of projects, particularly home ownership

Chan – didn't they want to prevent the groups that were promulgating land use zoning bylaw to be reviewing projects?

Mark – I don't think so . . . 40B is a very small part of statute – 40A and subdivisoiin control law are huge . .

Mark – in the case of special permits – your authority is chapter 40A and the home rule amendment – at one time, municipalities were creatures of the state and only had authority that was granted to them, i.e. zoning enabling statute – in the 70s – the state constitution was amended to include home rules – municipalities had their own inherent authority to do whatever

the state prohibits them from doing – but 40A is still on the books – towns have a lot of flexibility – for example – site plan approval is not specified anywhere in 40A

Mark – so when you are doing special permits, you are working under your local bylaw – for an attorney to tell you that . . . that is just not true –

Karyl – unless it says you cannot do somelkthing,

Mark – so what you are really under is the local bylaw – for your purposes your authority is the bylaw which has a presumption of validity to it. On the other hand, you have the PB's ARCPUD rules and regs and those are a little more suspect.

Andy – do the rules and regs limit us

Mark – If you were doing something absolutely contrary to your rules and regs

Mark – local boards – you don't automatically have authority to enact regs – in this case, the authority to have rules comes from 40A – intended to be procedural in nature – they should not be dealing with substantive matters . . . the basic bylaw is what the authority that gives. . if you look at your ARCPUD bylaw, you get into certain open space standards and site development standards – I don't think you can be stricter than those – if it is a matter of clarification, then there is more leeway. You have those standards . But what really matters is the findings that you have to make to grant the special permit – as an example . . . #8 – gives you a lot of discretion to determine if something is satisfactory. If your engineers or some standard is different than what the applicant purposes - or you can make it a condition . . . provided that they meet such standards – FINDINGS requirements are the most important – that is what ties into the court decision I gave you.

Mark – what is very important to understand is that acting under zoning . . . discretioninary – unlike subdivisions which have a right as long as they meet standards and need no waivers.

In zoning appeals – the court holds a trial denova – they are not even looking at your decision – the judge hears the matter all over again – then the judge compares what comes out in the trial to what the SPGA did. Is there a basis for their action - The j udge hears the evidences and compares to the findings required in the bylaw and then looks at what the PB did. . . . PB cannot be arbitrary, capricious, whimsical, etc. turn down for no articulatable reason

Franklin – ARCPUD type decisioin – PB voted 3-2 – not a supermajority – applicatnt took town to court – issue was traffic. 4 corners area – applicant offered to do traffic mitigation

Andy – PB finds that the following circumstances exist and there is no way to mitigate, so therefore we are denying this

Mark – the most critical thing is what went on at the hearing – the testimony that is offered – you can rely on your own experts – you don't have to take the applicant's experts as given – there is not all perfect scnience – it is as much art as scnience – different formulas for drainge calcs,

different results – it is incumbent on you to have the consultants at the hearing level that will give you as much information as possible – applicant is paying for it – if you go to court, it will cost the town to get the consultants.

Andy – we can ask people to come in and give testimony about different things – for example, Charles River Watershed Council. They can be an advocate for

Mark – any such comments need to be site specific – neighbors need to hire engineers to challenge the applicant or PB.

Mark – so, you should be going through the most critical part is Section F – page 88 and 89 – the 14 criteria – it is incumbent upon the applicant to address all the criteria – you don't have to grant waivers – the bylaw requires you to make these findings – if they want one of the criteria waived, they have to go to the ZBA

Mark – You can almost disregard your regs, we want to hear a presentation that addresses all 14 of the ARCPUD criteria – and to a lesser degree to the development standards -

John – rules and regs are supposed to be procedural . . . the requirement to provide an existing conditions plan – that would be a rule and reg – so that is something we can do and we have the authority to require that –

Mark – in my opinion, YES. That is just good practice.

Andy – it sounds like we have made a mistake in having a reference in our rules and regs?

Mark – you can use any standards you wish as long as they are reasonable . . .

Susy - the intent of the PB in the year 2000-2001, was to default to the subdivision rules and regs for an ARCPUD because the subdivision rules and regs were what they knew . . .

Mark – there has to be some basis, reasonable, rational relationship to legitimate public purpose

Andy – our ARCPUD rules and regs default to the subdivision rules and regs . . should all these references be in our bylaw?

Mark – I don't think it needs to be in the bylaw or in the rules and regs

Mark – the bylaw says that you will make a finding regarding . . .

Bob – I understand where you are coming from . . .

Karyl – what about bridge standards?

Mark – you can use the standard that you wish

Andy – the applicant is drawing on our guidelines

Mark – they have the burden to convince you and create sufficient factual record to support making the findings that you need to make. You have no authority to change the bylaw . . you have to make the findings that this bylaw requires you to make

Andy – lets look at an inverse . . suppose we deny something because we cannot agree to the finindgs – the alternative is that they come in with a subdivision plan, that needs to be in the backs of their mind??

Mark – keep in mind if they can come in with a waiverless subdivision plan . . they would be entitled to this . .

Mark – if an applicant is denied, then there is an 18 month cooling off period before somebody could apply for a 40B for the site. They are limited on their profits . . . 40B does not trump state laws (wetlands and river front acts - concom) – 40B only trumps local bylaws/standards

Mark – from a development standpoint, the town is better off to do something with clustering, than the sprawl of a conventional subdivision –

Karyl – problematic sites, marginal sites are being jammed in . . .

Mark- you should have a bylaw in place to address INI (infiltration and inflow) – the joints of the pipes leak – the more of that you can reaplace – towns can require developer to pay some money for the town to fix the problem or the developer can do the work . . this is a major thing – something that DEP pushes . . . line the pipes or redo the manholes . . . .

Mark – lets talk about . . exactions – goodies, monetary . . . starting point is that you have to understand that generalized impact fees are illegal (school system and municipal services) – that is a very thin line – it is a one thing if a developer in a give and take situation

Mark – even if a developer is willing to do someklthing (money or work) and you still can't make a positive finidng,k that is contractual zoning and that is illegal

Mark – if you try to impose someklthing on a developer without a basis for doing so – got to be very careful . .

John – if the senior center costs the town $32 per senior, and they are bringing in 152 seniors into the town what can we do?

Mark – another example – every kid in town costs $6,000 to $7,000 for schools – you cannot do impact fees in Massachusetts – end of story

Karyl – we have been led down the wrong road, according to certain applicants, it has to be impact only – hoping that we would bite at that . .

Mark – Emerson case . . Emerson College case with supreme court – going back to home rule matter – one of the areas that the state has prohibited municipalies to be involved in is TAX, but you can impose fees for services, The question becomes whqt is a fee and what is a tax. Supremee Court laid out a 3 prong test – Boston looked at a fire alarm service fee across the board – College challenged it – supremem court – what distinguishes between a fee and a tax

1. fee – there has to be something unique about the project or service being required as opposed to what is generally provided to the population at large

2. has to be voluntary – you have a choice whether to except the service or not – not a mandatory service

3. primarily to pay for the service being provided and not as a revenue generating vehicle

example – pay to throw is OK

apply the emerson challenge – franklin's impact fee proposal – falls flat –

Extensive Discussion - on requiring that open space be open to the public – Mark feels that this is going to far – needs incremental standards – if you provide more open space, then you can do this and that . . .

andy – to what extent can you exact something??? If the town's infrastructure does not

mark - lots of grey areas . . .

Andy – we need to figure out questions we can ask . .

Mark – if you are doing subdivision control – sidewalks – negotiable

Mark – if you are talking special permit – sidewalk rule is not reasonable/suspect

Mark – conditions/exactions must bear reasonable relationship to the relief needed – DOLAN vs. City of Tigard – US Supreme Court – rough proportionality between exaction and relief

Mark – when it comes to conditions, those conditions that are going to make it a good project, that will benefit the users of the project and of impose a burden on the community vs. conditions that are piling on or picking on a developer or giving him a disproportionate burden

Imposing a requirement that designated open space is available to the general public – Mark thinks that is challengeable . . . .

Special Counsel Discussion –

Andy – I have asked Karyl to start making some phone calls to collect info from prospective attorneys who might be able to assist us – susy is preparing a list

Mark – too much in flux right now in the town for me to consider doing this . . . I don't want to get conflicted with CPC or Moderator - very complicated – I don't like to turn down work – I thought perhaps at least in the interim, it could give you some direction – you have considerable discretion and authority – you have all these findings –

Burden of proof is on the applicant to show how they meet the required ARCPUD findings –

Mark – dover amendment only comes into play if they assert it which they are not doing . . . related to certain uses being exempt from zoning – this is simply a cluster housing development

Andy – chan has said that because they are religious organization they are exempt from our review - we need to not say such things during the public hearing

Bob – I think as a board, we have gone far beyond, we have played the game far too long – I don't want to look at their waiver request until I see the plans.

Mark – say something at the next public hearing – we need to refocus here – look at section F – how do you meet those standards

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Motion to Release the CVS bond for $15,000 by Karyl , sec by chan – all yes . . .

Bob – Is there anything left undone? Anything wrong with the signs??

Special Counsel – karyl will be contacting list of people –

Motion to adjourn – karyl, john – 10:12 pm