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19-P-248 Appeals Court

CHRISTINA STEVENS, trustee,[1] vs. ZONING BOARD OF APPEALS OF BOURNE & another.[2]

No. 19-P-248.

Barnstable. February 13, 2020. - June 19, 2020.

Present: Green, C.J., Wolohojian, & Sullivan, JJ.

Zoning, Enforcement, Building inspector, Permitted use, Board of appeals: jurisdiction. Municipal Corporations, Building inspector, Selectmen. Practice, Civil, Zoning appeal.

Civil action commenced in the Superior Court Department on October 3, 2016.

The case was heard by Robert C. Rufo, J.

John D. Bowen for the plaintiff.
Jonathan D. Fitch for James F. Molloy.

GREEN, C.J. Is an abutter bound by a settlement agreement between the board of selectmen of a town and a neighboring

[1] Of the Lighthouse Realty Trust.

[2] James F. Molloy.

property owner, where the agreement concerned the permissible use of the neighbor's property under the local zoning bylaw, and resolved litigation to which the abutter was not a party? We conclude that the abutter in the present case, defendant James F. Molloy, is not so bound, and that defendant zoning board of appeals of Bourne (board) acted within its authority in concluding that the use by the plaintiff, Lighthouse Realty Trust, is prohibited under the Bourne zoning bylaw.

Background. The plaintiff, Lighthouse Realty Trust (Lighthouse), owns property in Bourne that it rents out from time to time as a venue for weddings and other large gatherings. Following complaints by neighbors concerning traffic and noise, and the issuance of a cease and desist order to Lighthouse on January 15, 2013 (January 2013 cease and desist order), the town of Bourne (as alleged in the complaint "through its duly appointed [b]uilding [i]nspector") brought a complaint in the Land Court, pursuant to G. L. c. 40A, § 7, for declaratory and injunctive relief, on the ground that Lighthouse's use of the property for such events constituted a prohibited commercial use in the residential zoning district in which the property is located (Land Court action). Lighthouse thereafter entered into a settlement agreement with the selectmen of the town, and a

judgment entered dismissing the Land Court action.[3,4] Thereafter, the building inspector issued a revised cease and desist order to Lighthouse, conforming to the terms of the settlement agreement, and defendant Molloy appealed that order to the board.[5] After hearing, the board issued a decision overturning the building inspector's revised order, and directing reinstatement of the January 2013 cease and desist order (which stated that use of the property for weddings or wedding receptions violated the Bourne zoning bylaw). Lighthouse appealed the board's decision to the Superior Court, pursuant to G. L. c. 40A, § 17, where judgment entered affirming

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[3] The stipulation of dismissal stated that the action was to be "dismissed with prejudice." See Mass. R. Civ. P. 41 (a) (1), 365 Mass. 803 (1974), which provides that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice" (emphasis added).

[4] Molloy sought to intervene after the matter was referred to alternative dispute resolution but before the stipulation of dismissal was filed. The Land Court judge denied Molloy's motion but, recognizing Molloy's potential interest in the resolution of the matter, directed the building inspector to give notice to Molloy and any other abutters of any decision vacating, annulling, or otherwise modifying the January 2013 cease and desist order.

[5] The revised cease and desist order authorized up to four "functions" (defined to include events in excess of twenty-five guests hosted by a renter of the property) per year -- one during each of the months of May, June, September, and October -- with a maximum of one hundred guests at any such function and subject to certain other restrictions (including a 10 P.M. end time, no use of the beach, and a police detail for any function with more than fifty guests).

the board's decision after a jury-waived trial. This appeal followed.

Discussion. a. Effect of the Land Court action. Citing Morganelli v. Building Inspector of Canton, 7 Mass. App. Ct. 475 (1979), Lighthouse asserts that Molloy is bound by the town's settlement of the Land Court action. In Morganelli, abutters brought an action for mandamus against the building inspector, challenging the issuance of a building permit for construction on a nonconforming lot. The question whether a building could be constructed on the lot had been the subject of prior litigation brought by a former owner of the lot, and finally adjudicated to allow construction. Id. at 480. In concluding that the prior adjudication bound Morganelli and his coplaintiff, who were not parties to the prior litigation, the court said that the prior litigation, "in which the building inspector participated as the proper enforcing officer, was, in substance, a proceeding against the municipality of Canton in which the interests of all of the citizens of Canton, including the plaintiffs, were represented. The building inspector, by having refused to grant a permit . . . and by having defended the action against him . . . already sought the enforcement of the zoning by-law that the present action seeks to require." Id. at 482. In the present case, Lighthouse contends, Molloy is situated identically to the abutters in Morganelli, and is

therefore bound by the judgment in the Land Court action. We disagree.[6]

Unlike the prior litigation in Morganelli, the Land Court action here was resolved by agreement -- in other words, by a voluntary decision by the town selectmen to determine how the bylaw should be enforced with respect to Lighthouse's property. As the board observed in its decision on Molloy's appeal, whether viewed as an amendment to the bylaw specific to Lighthouse's property (albeit outside the procedural and substantive requirements of G. L. c. 40A, § 5), or as an impermissible use variance (albeit granted by the selectmen rather than the board, which, in any event, has authority to grant only dimensional variances under G. L. c. 40A, § 10), the selectmen were without authority to adjust or determine the proper enforcement of the bylaw as to Lighthouse's property.

[6] As a threshold matter, we note that the members of the board of selectmen (who were the signatories to the settlement agreement) have no role or authority in matters of zoning enforcement, except in towns where there is no building inspector or commissioner; such matters are directed by statute to the building inspector or commissioner, subject to review by the zoning board of appeals. See G. L. c. 40A, §§ 7, 8. Simply put, the selectmen were without authority to settle any litigation purporting to determine the proper enforcement of the zoning bylaw regarding a particular use of property. We consider the agreement nonetheless to have been intended to bind the building inspector.

Setting aside any question of the role of the selectmen in the settlement agreement (or any question whether the agreement itself is an appealable order or decision of the building inspector),[7] any decision or order of the building inspector pursuant to the agreement was necessarily subject to the notice and hearing requirements of G. L. c. 40A. As we have observed in the past, c. 40A is a "comprehensive statutory scheme." See Elio v. Zoning Bd. of Appeals of Barnstable, 55 Mass. App. Ct. 424, 431-432 (2002), and cases cited, which sets out detailed requirements for notice to "parties in interest," including abutters, and for hearing appeals from decisions by the building inspector either to enforce or to refuse enforcement of zoning requirements.[8] See G. L. c. 40A, §§ 8, 11. If the building inspector could agree to settle enforcement litigation concerning property without participation by abutters or other statutory parties in interest, and without review by the board of appeals, the detailed procedural safeguards embedded in c. 40A to protect the interest of abutters and other parties in

[7] See note 6, supra.

[8] That is why an order remanding a matter to a zoning board of appeals by a court vacating the decision of a local board of appeals or planning board often includes a requirement that any action on remand occur pursuant to notice and hearing as prescribed by c. 40A. See, e.g., Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 24 (1987).

interest could be evaded by the simple expedient of a friendly enforcement action brought by a sympathetic building inspector against a property owner, and then settled out of sight of the public.

Unlike the plaintiffs in Morganelli, the abutters in the present case had no opportunity in the Land Court action itself to ensure that their interests were protected. As we previously observed, see note 4, supra, the Land Court judge denied Molloy's motion to intervene but, recognizing Molloy's potential interest in the resolution of the matter, directed the building inspector to give notice to Molloy and any other abutters of any decision affecting the previous cease and desist order, presumably to preserve their statutory right to appeal any such action by the building inspector to the zoning board of appeals -- as Molloy subsequently did. The board's decision on that appeal, and Lighthouse's appeal from that decision to the Superior Court, followed precisely the procedural requirements established by c. 40A. Contrast Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass. App. Ct. 378, 387 (2019). The settlement agreement reached in the Land Court action neither deprived the board of jurisdiction over Molloy's appeal nor operated to determine the applicability of the bylaw to Lighthouse's property.

b. Merits of the board's decision. Our review of the board's decision requires less discussion. On review of a decision by a local zoning board of appeals in an appeal to the Superior Court or the Land Court under G. L. c. 40A, § 17, the judge determines the facts de novo, and considers whether the decision of the board is arbitrary, capricious, whimsical, or based on a legally untenable ground. See, e.g., Davis v. Board of Appeals of Chatham, 52 Mass App. Ct. 349, 355 (2001).[9] In an appeal such as the present one, involving interpretation of the local bylaw's requirements, we extend deference to the reasonable interpretation of local zoning regulations by the officials charged with their administration and enforcement. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 381 (2009); APT Asset Mgt., Inc. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138 (2000). In the present case, we discern no legal error, abuse of discretion, arbitrariness or whimsy, in the board's conclusion that the advertisement and rental of the property by Lighthouse as a wedding venue constitutes a commercial and not a

[9] On appeal from such review by the Superior Court, we review the judge's findings of fact for clear error, but consider de novo the judge's application of legal requirements to those facts. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009); Steamboat Realty, LLC v. Zoning Bd. of Appeals of Boston, 70 Mass. App. Ct. 601, 602 (2007).

residential use. Neither Lighthouse's trustee nor, so far as indicated by the record, any beneficiary of the trust resides at the property. The use of the property for weddings is conducted pursuant to rental contracts with unrelated third parties, for financial gain by Lighthouse. Accordingly, we discern no reason to invalidate the board's decision that the use of the property as a venue for weddings or other large gatherings by unrelated third parties on a rental basis is not accessory to its permitted residential use. See Henry v. Board of Appeals of Dunstable, 418 Mass. 841, 844-845 (1994); Simmons v. Zoning Bd. of Appeals of Newburyport, 60 Mass. App. Ct. 5, 8 (2003).

Judgment affirmed.