

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13218

BASK, INC. vs. MUNICIPAL COUNCIL OF TAUNTON.

Suffolk. April 6, 2022. - July 21, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,
& Georges, JJ.

Marijuana, Recreational. Land Court, Jurisdiction.
Jurisdiction, Land Court. Injunction. Practice, Civil,
Injunctive relief. Municipal Corporations, Marijuana, City
council. Permit. Zoning, Special permit. Administrative
Law, Decision.

Civil action commenced in the Land Court Department on October 25, 2019.

The case was heard by Howard P. Speicher, J.; a posttrial motion for injunctive relief was heard by him; and a complaint for contempt, filed on January 12, 2021, also was heard by him.

Proceedings for interlocutory review were heard in the Appeals Court by John C. Englander, J. After consolidation, the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

George P. Field for the defendant.
Richard E. Burke, Jr. (Lisa Raimondi also present) for the plaintiff.

Shawn M. McCormack, Nicholas P. Shapiro, & Daniel P. Dain, for Real Estate Bar Association for Massachusetts, Inc., & another, amici curiae, submitted a brief.

WENDLANDT, J. This case presents the question of the permissible scope of a Land Court judge's authority. Specifically, in connection with an appeal from the denial of a special permit, pursuant to G. L. c. 40A, § 17, a Land Court judge ordered the issuance of the special permit to the applicant; he also issued a second injunction that, in effect, enjoined a municipal licensing authority from conducting previously scheduled licensing proceedings to consider applications from nonparties themselves seeking licenses to operate a retail marijuana dispensary. We conclude that the second injunction exceeded the permissible scope of the judge's authority. Further concluding that the judge did not err in his factual findings or in his conclusion that the denial of the special permit was arbitrary and capricious, we affirm that portion of the judgment.¹

1. Factual and procedural background. We set forth the facts as found by the judge, leaving some disputed findings for later discussion. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 375 (2009) (Wendy's).

¹ We acknowledge the amicus brief submitted by the Real Estate Bar Association for Massachusetts, Inc., and the Abstract Club.

a. Special permit. In September 2018, the city of Taunton (city) adopted as part of its ordinances chapter 222, which permitted the city to issue five licenses to operate recreational marijuana establishments in its highway business or industrial districts.² In August 2019, the plaintiff, Bask, Inc. (Bask), applied for a special permit (a predicate to receiving a license to operate a recreational marijuana establishment) for 400 Winthrop Street in the city's highway business district. In October 2019, the city's municipal council (city council), acting as a special permit granting authority under G. L. c. 94G, § 3, and city ordinance sections 222-1 and 440-304, denied Bask's special permit application. The city council cited concerns about traffic, economic impact, utilities, health and safety, location of the proposed project, and the general welfare of inhabitants.

Notably, in January 2020 (almost four months after denying Bask's application), the city council granted a special permit to a different applicant that proposed a site for a recreational

² "Chapter 94G gives municipalities the power to regulate the operation of recreational marijuana establishments within their borders, including the ability to adopt ordinances governing the total number of such establishments, as well as the time, place, and manner of marijuana sales (with certain exceptions) as long as the ordinances do not conflict with the provisions of c. 94G. See G. L. c. 94G, § 3 (a)." Mederi, Inc. v. Salem, 488 Mass. 60, 62 (2021).

marijuana establishment approximately one-quarter mile away from Bask's proposed site.³

Bask filed a single-count complaint in the Land Court under G. L. c. 40A, § 17,⁴ challenging the denial of its special permit application. Following a trial in August 2020 and posttrial submissions, the Land Court judge took the case under advisement.

b. Preliminary injunction. On October 30, 2020, with no decision from the judge and with hearings scheduled for November 4 and 10 to consider whether to issue any of the four remaining licenses to any of the five pending applicants, Bask filed a motion for a preliminary injunction, seeking to enjoin the city council from holding the scheduled licensing hearings and from issuing any of the four licenses to any of the pending applicants.⁵ On November 4, 2020, the judge allowed Bask's requested injunction.

³ Bask's expert at trial testified that the other applicant's proposed site had "more traffic" and roughly twice as many cars going in and out of the site.

⁴ General Laws c. 40A, § 17, provides: "Any person aggrieved by a decision of the board of appeals or any special permit granting authority . . . may appeal to the land court department . . . by bringing an action within twenty days after the decision has been filed"

⁵ One license had already been issued, and there were five pending applicants who had been granted special permits.

On December 4, 2020, with licensing procedures on hold, the city council filed an interlocutory appeal from the preliminary injunction to a single justice of the Appeals Court pursuant to G. L. c. 231, § 118. On December 21, 2020, the single justice vacated the preliminary injunction, reasoning that the judge likely exceeded his jurisdiction. With the injunction vacated, the city council rescheduled hearings on the then-pending applications of the five nonparty applicants to occur on December 28 and 29, 2020. On January 5, 2021, Bask appealed from the single justice's decision vacating the preliminary injunction.

c. Merits decision and applications to stay injunction.

Meanwhile, on December 23, 2020, the Land Court judge issued a decision in Bask's favor, finding that the city council's denial of Bask's special permit application was "pretext[ual]," arbitrary, capricious, and based on legally untenable grounds. He ordered that the city council issue the special permit; in addition, pursuant to G. L. c. 40A, § 17,⁶ which authorizes the Land Court to "make such other decree as justice and equity may

⁶ General Laws c. 40A, § 17, provides: "The court shall hear all evidence pertinent to the authority of the board [of appeals] or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require."

require," he ordered specific licensing procedures that directly had an impact on the rescheduled licensing hearings for the nonparty applicants. The judge ordered that

"the special permit shall be issued in sufficient time for the plaintiff to apply for a license pursuant to Chapter 222-1 of the Ordinances of the City of Taunton and to participate as an applicant in any hearing held by the Municipal Council with respect to the issuance of licenses pursuant to said Chapter 222-1, and that the Municipal Council shall consider such application by the plaintiff for a license pursuant to Chapter 222-1 at any such hearing along with all other duly filed applications."

On December 24, 2020, the city council filed a notice of appeal. That same day, the city council filed two applications to stay the above quoted portion of the judge's December 23 order -- one in the Land Court, and one with the single justice of the Appeals Court. The Land Court judge scheduled a hearing on the city council's application for stay for January 5, 2021.

However, on December 28 and December 29, 2020 (the next business days after the judge's December 23 order),⁷ the city council held its previously scheduled hearings to consider the marijuana dispensary license applications of the five nonparty applicants. The city council awarded three of the remaining four licenses to nonparty applicants, some of whom had been awaiting a licensing hearing for as long as fourteen months.

⁷ The city's offices closed for the holidays on December 23, 2020, the day the Land Court's order issued. The next business day following the interim holidays was December 28, the first day of the previously scheduled licensing hearings.

Bask did not participate in the hearing, and, as of the time of the licensing hearings, the city council had not issued a special permit to Bask.⁸

d. Contempt proceedings. On January 5, 2021, at the hearing on the city council's application to stay, the Land Court judge ordered Bask to file a complaint of contempt pursuant to Mass. R. Civ. P. 65.3, as appearing in 386 Mass. 1244 (1982), on the ground that the city council violated the judge's December 23 order. Bask did so. On January 15, 2021, the city council filed a third petition under G. L. c. 231, § 118, before the single justice of the Appeals Court, seeking relief from the Land Court's December 23 order.⁹ On February 2, 2021, the single justice ordered a partial stay pending appeal from the December 23 order, insofar as it enjoined the city's licensing proceedings. On March 2, 2021, Bask appealed.

e. Consolidated appeal. Bask's appeal from the single justice's December 21, 2020, decision vacating the preliminary

⁸ Both applications for stay (before the Land Court judge and before the single justice, respectively) were denied in early January. Each denied the application because, inter alia, the city council failed to show that it would suffer irreparable harm in the absence of a stay.

⁹ This petition also sought (i) relief from the Land Court's order that Bask file a complaint of contempt, (ii) dismissal of the contempt complaint because the underlying December 23 order was outside the Land Court's jurisdiction, and (iii) relief from summonses and hearing notices to nine individual members of the city council.

injunction, Bask's appeal from the single justice's February 2, 2021, decision ordering the partial stay of the Land Court's December 23 order pending appeal, the city council's appeal from the merits of the Land Court judge's December 23 decision regarding its denial of Bask's special permit application, and the city council's appeal from the contempt proceeding were consolidated.¹⁰ We then transferred the case sua sponte to this court.

2. Discussion. Because it concerns the Land Court's jurisdiction, we first address the Land Court judge's authority to enjoin the licensing proceedings in his December 23 order before turning to the merits of the judge's decision regarding the city council's denial of the special permit.

a. Land Court's jurisdiction. Jurisdictional questions are questions of law, which we review de novo. See Concord v. Water Dep't of Littleton, 487 Mass. 56, 60 (2021). The Land Court is a court of limited jurisdiction, as prescribed by statute. See G. L. c. 211B, § 1 (establishing Land Court as department of Trial Court). See also Bevilacqua v. Rodriguez,

¹⁰ In addition, the city council appealed from the Land Court judge's March 24, 2021, decision to sanction it for violating Mass. R. Civ. P. 11, as amended, 456 Mass. 1401 (2010), because the city council's lawyer sought removal of the judge under an inapplicable statute. The city council mentions this appeal in the background section of its brief, but does not substantively argue the issue; thus, it is waived. See Goldman v. Dennis, 375 Mass. 197, 200 (1978).

460 Mass. 762, 766 (2011), quoting Riverbank Improvement Co. v. Chapman, 224 Mass. 424, 425 (1916) ("The Land Court is a statutory court, not of general but of strictly limited jurisdiction"). Over time, its jurisdiction has expanded, as set by statute. See G. L. c. 185, § 1 (enumerating Land Court's jurisdiction).

General Laws c. 40A, § 17, authorizes a court reviewing the denial of a special permit application to

"hear all evidence pertinent to the authority of the board [of appeals] or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require" (emphasis added).

Bask contends that the emphasized language permitted the judge to order, as a matter of equity, that "the special permit shall be issued in sufficient time for the plaintiff to apply for a license . . . and to participate as an applicant in any hearing held by the Municipal Council," and "that the Municipal Council shall consider such application by the plaintiff for a license . . . at any such hearing along with all other duly filed applications." We disagree.

Our discussion in Konstantopoulos v. Whately, 384 Mass. 123, 127 (1981), is instructive. In that case, we considered the argument that the grant of general equitable powers to the Probate Court allowed that court to review the licensing

decision of a town licensing authority. Id. at 128. We held that such review fell outside the Probate Court's subject matter jurisdiction. Id. at 128-129. We explained that "review of an action of an administrative board in suspending or revoking a license is not a matter cognizable under the general principles of equity jurisprudence" and that such review could be obtained through an action in the Superior Court. Id. at 128. Thus, we held that the Probate Court did not have subject matter jurisdiction to review the licensing procedure, despite the grant of "general equity jurisdiction" to that court. Id. at 128-129. Probate courts, we explained, "remain courts of limited jurisdiction." Id. at 127. The scope of the Probate Court's equitable powers, albeit broad, was tied necessarily to its limited subject matter jurisdiction. Id.

We come to the same conclusion here. The Land Court judge had before him an appeal from the denial of a special permit; jurisdiction over that appeal arose pursuant to G. L. c. 185, § 1 (p), which grants the Land Court jurisdiction over "[a]ctions brought pursuant to the provisions of [G. L. c. 40A, § 17]," and G. L. c. 185, § 1 (k), which grants the Land Court jurisdiction over "[a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved." The language in G. L. c. 40A, § 17, authorizing the judge to "make such other decree

as justice and equity may require" does not grant to the Land Court general equitable powers; instead, it provides the court with limited equitable powers necessarily tethered to the court's specific jurisdictional grant over the denial of the special permit application.¹¹

There was no claim pending in the Land Court concerning the licensing procedure. Yet, the relief ordered regards the city council's licensing procedure, in effect enjoining the city council from conducting any hearings for the four outstanding licenses¹² on the five then-pending applications until Bask was able to apply for a license so as to require consideration of Bask's to-be-filed license application alongside those of each

¹¹ Thus, for example, if the city council refused to issue the special permit, the judge could hold the city council in contempt. See G. L. c. 185, § 25 ("In all matters within its jurisdiction, the [Land Court] shall have all the powers which the [S]uperior [C]ourt has including power to grant injunctions and restraining orders in accordance with the Massachusetts Rules of Civil Procedure as justice and equity may require . . .").

¹² Indeed, Bask (at most) could obtain one license; yet, the order held each of the four licenses open pending Bask's yet-to-be-filed application. The Land Court's order essentially put the entire licensing procedure for all applicants in Bask's hands, as the five pending applicants and the city council would have been required to wait until Bask submitted its materials. While there is nothing in the record to suggest Bask abused the hold-up power ostensibly granted to it, such an order, and its potential chokehold on the entire licensing process, went beyond the Land Court judge's authority.

of the five nonparty applicants, some of whom had already been waiting over one year for consideration.¹³

Notably, Bask could have sought relief regarding the denial of both the special permit and the licensing proceedings. See Recinos v. Escobar, 473 Mass. 734, 741 (2016) ("A fundamental maxim of general equity jurisprudence is that equity will not suffer a wrong to be without a remedy"). Because "'[a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved, including actions for specific performance of contracts,' are subject to the concurrent jurisdiction of the Supreme Judicial Court, the Superior Court, and the Land Court," O'Donnell v. O'Donnell, 74 Mass. App. Ct. 409, 411-412 (2009), quoting G. L. c. 185, § 1 (k), Bask could have brought its action challenging the denial of its special permit application in the Superior Court, see G. L. c. 185, § 1 (p); G. L. c. 40A,

¹³ Bask's appeal from the single justice's December 21, 2020, order vacating the preliminary injunction is dismissed as moot. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 2), 424 Mass. 471, 472 (1997) ("A preliminary injunction lapses when a final decree is entered"). Furthermore, a party may not be held in contempt of an order that exceeded the jurisdiction of the issuing court. See Stow v. Marinelli, 352 Mass. 738, 744-745 (1967); Oakham Sand & Gravel Corp. v. Oakham, 54 Mass. App. Ct. 80, 87 (2002). Accordingly, we remand the case for consideration of the contempt complaint in light of our ruling that the December 23, 2020, order with respect to the city council licensing procedure exceeded the Land Court judge's authority.

§ 17, which court also could have reviewed any challenges Bask may have raised related to the city council's licensing decisions. See, e.g., Mederi, Inc. v. Salem, 488 Mass. 60, 64, 67 (2021) (reviewing unsuccessful certiorari claim brought in Superior Court based on denial of license to retail marijuana establishment). Alternatively, Bask could have commenced an action in the Land Court with respect to the special permit appeal, and brought a separate action in the Superior Court for relief regarding the licensing stage.¹⁴ Cf. Carstensen v. Zoning Bd. of Appeals of Cambridge, 11 Mass. App. Ct. 348, 356-357 (1981) (noting difference between zoning laws and related substantive laws -- there, building codes for safety and structure -- and that "[e]ach has its own appellate procedure"). Bask also could have sought leave to amend its complaint in the Land Court to add a claim regarding the licensing proceedings, and then requested that the Chief Justice of the Trial Court assign the Land Court judge to sit as a Superior Court judge for the resolution of the claim, allowing both aspects -- the permit

¹⁴ Thereafter, Bask could have urged the Land Court judge to seek interdepartmental judicial assignment under Massachusetts Trial Court Rule XII(1) (2005), which allows "interdepartmental assignment so that one judge may hear all related matters" in two separate actions "involving substantially the same or similar issues and parties" in order "to promote speedy disposition of cases" and "to afford complete and permanent relief."

and the licensing relief -- to be addressed in the single pending action. See G. L. c. 211B, § 9 (xi).¹⁵

b. Arbitrary and capricious denial of special permit. On an appeal from the denial of an application for a special permit, the reviewing court finds facts de novo and then, based on those facts, affirms the decision "unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970). This judicial review "involves a highly deferential bow to local control over community planning." Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012), quoting Wendy's, 454 Mass. at 382. "Even if the record reveals that a desired special permit could lawfully be granted by the board because the applicant's evidence satisfied the statutory and regulatory criteria, the board retains discretionary authority to deny the permit." Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury, 94 Mass. App. Ct. 594, 600 (2018), quoting Buccaneer Dev., Inc. v. Zoning Bd. of Appeals of Lenox, 87 Mass. App. Ct. 871, 874 (2015). However, that discretion is

¹⁵ The Chief Justice of the Trial Court has "the power to assign a justice appointed to any department of the trial court to sit in any other department of the court, for such period or periods of time as he [or she] deems will best promote the speedy dispatch of judicial business." G. L. c. 211B, § 9 (xi).

not unlimited; "the general deference afforded actions of a local [special permit granting authority] may yield to a court's sense of fairness when it appears that special permit granting authority has applied dramatically different standards to similarly situated applicants" (quotations and citation omitted). Wendy's, supra at 388. Simply preferring one applicant to another is a legally untenable ground, because the special permit granting authority "injects criteria not found in the enabling act." Clear Channel Outdoor, Inc., supra at 599-600, quoting Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148, 156 (1977).

On appeal, "the [lower court] judge's findings of fact will not be set aside unless they are 'clearly erroneous' or there is 'no evidence to support them.'" Wendy's, 454 Mass. at 383, quoting DiGiovanni v. Board of Appeals of Rockport, 19 Mass. App. Ct. 339, 343 (1985). We review the judge's determination of the law de novo. Shirley Wayside Ltd. Partnership, 461 Mass. at 475, citing Needham v. Winslow Nurseries, Inc., 330 Mass. 95, 99 (1953). Our review reveals no clear error in the eleven factual findings challenged by the city council on appeal. Each of the challenged findings is supported by the record, including expert testimony, which the judge was able to hear and credit.

We also have no trouble affirming the Land Court judge's decision that the denial of a permit was "legally untenable,

arbitrary, capricious, unreasonable, and otherwise beyond the proper exercise of the Municipal Council's lawful authority." The city council denied Bask's special permit application principally on the basis of concerns regarding traffic. Yet, almost four months after it denied Bask's special permit application, the city council approved a different applicant's special permit application for a site approximately one-quarter mile further down the same street. Bask's expert at trial testified that the other applicant's proposed site had "more traffic" and roughly twice as many cars going in and out of the site.

The city council's emphasis on traffic concerns when denying Bask's permit, while granting a different applicant a permit for a site on the same street with twice as much predicted traffic, without additional credible explanation for the distinction made between the two applicants, indicates that the decision was made for "reasons not related to the purposes of the zoning law." Vazza Props., Inc. v. City Council of Woburn, 1 Mass. App. Ct. 308, 312 (1973). Thus, the judge did not err in determining that the city council's denial was arbitrary and legally untenable. See Wendy's, 454 Mass. at 386, quoting Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999).

3. Conclusion. For the reasons stated, so much of the Land Court judgment dated December 23, 2020, that concerns the city council's licensing hearings is vacated; in all other respects the judgment is affirmed, including the Land Court judge's finding that the city council's denial of Bask's special permit application was arbitrary, capricious, and legally untenable. The Land Court judge's March 24, 2021, order sanctioning the city council is also affirmed. The appeals from the single justice's December 21, 2020, and February 2, 2021, orders are dismissed as moot. We remand for consideration of the contempt complaint in light of our ruling.

So ordered.