KEVIN J. JOYCE, LEGAL AND REAL ESTATE ADVISORY SERVICES

3 MINUTES ON PERMITS

VOLUME 1, ISSUE 2 OCTOBER 1, 2007

LAND USE GAMBLING ON MASSACHUSETTS CASINOS

To gamble, or not to gamble - that is only part of the question facing Massachusetts.

Where to locate these facilities is the larger and possibly protracted question given the present state of land use controls in many municipalities.

The Mashpee Wampanoag experience is different from what casino developers can expect for a development under local zoning because local zoning otherwise applicable to the federally designated tribal-owned land is preempted by federal law.

For new slots and table gaming to work effectively for those who seek to gain from its economic and fiscal benefits, comprehensive and inclusive land use planning must be a part of the Legislative process to legalize gaming.

Otherwise, piecemeal land use regulation, municipality to municipality, will enable local project opponents to delay or even deny the people of the Commonwealth access to the intended benefits of such legislation.

The need for comprehensive legislative process is in part based upon the fact that up until now, slots and table gaming have been illegal, eliminating the need to create applicable zoning.

The absence of land use planning for these formerly 'illegal uses' will create a somewhat unpredictable process for reviewing proposed gaming facility permit applications submitted for zoning approval.

Would such 'gaming uses' be treated as bingo parlors, race tracks, off track betting facilities or their own complete and separate uses? For example, presently Boston Zoning Code Articles 2 and 2A provide no definitions for a 'casino' or 'gaming facility.' The state building code to which Boston Zoning defaults when a definition is lacking, provides no guidance either. "Amusements" as defined under Articles 2 and 2A is

(Continued on page 3)

STATE ISSUES NEW "ONE AND TWO FAMILY" BUILDING CODE

The Board of Building Regulations and Standards has issued the Seventh Edition of Massachusetts State Building Code with an effective date of October 1, 2007.

The seventh edition is actually two independent codes– the new "One And Two Family" building code and the "Basic" building code for all other structures and buildings.

The new "One And Two Family" building code is designed to better define roles and responsibilities between professionals involved in the design, construction and inspection of one and two family homes.

Several distinctions in the new code include:

New minimum requirements for documentation of

(Continued on page 2)

KEVIN J. JOYCE ESQ.

- *Kevin J. Joyce, Legal and Real Estate Advisory Services, Law Offices of Gerard F. Doherty 2004-present*
- *Instructor, Boston Architectural College, 2004-2006*
- *Commissioner, Boston Inspectional Services Department, 1998-2004*
- *Chief, Government Services Bureau and Special Prosecutor, Boston Environmental Strike Team, City of Boston Law Department, 1994-1998*
- *Assistant Corporation Counsel, City of Boston Law Department 1990-1994*
- *Associate, O'Connell, Welch & Quinlan, 1983-1990*

INSIDE THIS ISSUE:

Tide Still Out on Tidelands Exemption . . .2

G. L. c.40B A Developer's Green Light . .3

Managers And Owners Beware; Sanitary Code Now Pierces The Corporate Veil 4

ABUTTER AWARDED ATTORNEYS FEES IN ANTI-SLAPP DEFENSE

When abutters or community groups attempt to use public process as a means to stop real estate projects, owners may seek relief in court for abuse of process. The public's right to participate in the process and petition the courts as part of that process is a protected right.

The state Appeals Court has recently issued a decision that provides guidance on the Anti-SLAPP statute, G. L. c. 231, §59H which serves as a defense for members of the public facing abuse of process or similar claims arising out of their public process activities.

A party asserting an Anti-SLAPP defense must make a threshold showing that activities were 'protected petitioning activities' that have no other 'substantial basis.' *Duracraft Corp. v. Holmes Prod. Corp.*, 427 Mass. 156, 167-168 (1998). A 'substantial basis' would be, for example, using litigation or appeals merely as project roadblocks when the claim lacks any factual or legal basis.

In *DePiero v. Burke*, DePiero filed an abuse of process claim against Burke who had a long trail of opposing DePiero's development plans. The Appeals Court ruled that even though the Burkes had failed to perfect an earlier zoning appeal against DePiero, Depiero failed to show how bringing the appeal was 'malicious.' or without merit.

TIDE HAS NOT CHANGED YET FOR TIDELANDS EXEMPTION

Developers waiting on the sidelines to see how the Legislature will cure *ultra vires* regulatory powers used by the state Department of Environmental Protection to grant exemptions from landlocked tidelands licensing requirements to development projects may have to wait two more months for their answer.

The Supreme Judicial Court recently extended the September 6, 2007 deadline it gave to the Legislature for a period of 60 days.

In February 2007 the Court had ruled that the Department of Environmental Protection lacked authority to grant exemptions from landlocked tidelands licensing requirements without approval from the Legislature.

Governor Deval Patrick filed a bill in March 2007 to cure the statutory defect. The Legislature convened a conference committee in August 2007.

Licensing waterfront lands is a tricky undertaking even in the absence of the Court's ruling and should be undertaken carefully.

NEW ONE AND TWO FAMILY BUILDING CODE

(Continued from page 1)

a building permit;

New licensing requirements for demolition, windows and siding, swimming pools; and

New construction supervisor licensing and responsibilities including requiring construction supervisors to be present on site at key points of construction to directly supervise the work of installing the foundation, framing the structure and the installation of chimneys and special systems; and

New technical standards including now requiring heat and carbon monoxide detectors, NFPA sprinklers for all two family structures over 14, 000 sq. ft. and new snow load and wind resistance requirements.

By their very nature permitting processes, especially regulatory routes for appeals and variances, are difficult to navigate. For this reason, developers should consult professionals of their choice so that their projects can avoid regulatory delays.

LAND USE-TO GAMBLE OR NOT TO GAMBLE

(Continued from page 1)

the closest existing definition that could be applied, but that definition is not inclusive enough.

The zoning difficulties ahead do not stop with fulfilling only the need for use definitions.

The need to designate where the 'uses' fitting the new definitions will be 'as of right,' 'conditional,' or 'forbidden' must also be carefully considered by municipalities.

It could be foreseen that local anti-gaming or 'NIMBY' activists or public officials may act to preempt gaming in their municipalities by adopting zoning regulations that allow gaming 'as of right' only in the most impractical of places for the use, if they allow the use at all.

This tactic was utilized with partial success by gaming opponents in Philadelphia, one of the only other major cities in the United States to have recently legalized gaming.

Opponents of gaming in Philadelphia challenging the Pennsylvania Gaming Act of 2004 used local zoning bylaws to delay projects while they sought to thwart the gaming industry's efforts to include local zoning preemption in the new gaming statute. Ultimately the efforts of the gaming industry to preempt local zoning were defeated and applications for gaming facilities are now required to comply with the local zoning in place at the time an application is made.

If Philadelphia's past experience is Boston's prologue, to be successful those interested in developing casinos must engage in the legislative process now rather than wait to become involved in a individual project later on.

BUIDLINGS GRAPPLE WITH NEW FEDERAL EVACUATION PLAN DIRECTIVES

At the sixth anniversary of September 11, 2001, managers are still struggling to implement building evacuation plans that fit federal emergency management standards.

Customarily, building evacuation plans were based on the P.A.S.S. and R.A.C.E. acronyms. The guidance combined fire alarm and sprinkler systems with self evacuation and rally point procedures for occupants to follow in an emergency.

New federal emergency management standards however require a much broader and integrated approach. This new approach is forcing evacuation plan managers to include additional components into their plans.

New measures, such as temporary sheltering, security at rally points, off campus transportation, and greater coordination with government officials and the media are factors that were not specified before. Having already completed studies for two institutions in Boston, I am confident that coming to understand standards as they evolve will ease the burden for all.

"AT THE SIXTH ANNIVERSARY OF SEPTEMBER 11, 2001, MANAGERS ARE STILL STRUGGLING TO IMPLEMENT BUILDING EVACUATION PLANS THAT FIT FEDERAL EMERGENCY MANAGEMENT STANDARDS."

AFFORDABLE HOUSING DEVELOPMENT GETS *GREEN LIGHT* UNDER G. L. C. 40B

The state Appeals Court has upheld a municipality's power to balance the "regional need" for affordable housing against the need for retaining local zoning controls when considering a comprehensive permit application under G. L. c. 40B in a case the Court decided in June 2007.

In *Boothroyd v. Zoning Board of Appeals of Amherst*, the Court ruled that satisfying the municipality's low and moderate income housing obligations under the statute is not a bar to exceeding those obligations in approving a permit based upon a "regional need" for affordable housing.

In a subsequent decision announced two weeks later, the same court further interpreted G. L. c. 40B holding that meeting affordable housing obligations under the statute is not the only consideration upon which a municipality may base the denial of a comprehensive permit application; it is only one consideration. *Town of Wrentham v. Housing Appeals Committee.*

KEVIN J. JOYCE, LEGAL AND
REAL ESTATE ADVISORY SERVICES

Kevin J. Joyce, Attorney at Law
Law Offices of Gerard F. Doherty
50 Franklin Street Boston, MA 02110

Phone: 617-542-8905
Fax: 617-542-6479
Email: kjj@dohertylawoffices.net

"A REFERRAL FROM A SATISFIED CLIENT IS THE BEST COMPLIMENT"

Dear Reader:

I hope that you enjoyed this issue of *3 Minutes On Permits*.

Many readers have called me for more information about the topics which appeared in the last issue of *3 Minutes On Permits*. Some readers have made requests for covering topics that they would like to see in future editions of *3 Minutes On Permits*.

I am available at your convenience to provide additional information or guidance regarding any topic discussed in any issue of *3 Minutes On Permits*. I am also happy to include articles on topics that readers request.

As I value your feedback please feel free to call or write to me with questions or requests for what topics you would like to see covered in future editions.

Thank you for your interest in *3 Minutes On Permits*. I look forward to hearing from you soon.

Kevin J. Joyce

October 1, 2007

BEWARE; SANITARY CODE VIOLATIONS NOW PIERCE THE CORPORATE VEIL

Residential property managers who operate as Massachusetts Limited liability Companies or LLC should take notice of a recent precedent setting decision from the Housing Court regarding the personal liability of LLC agents.

The decision ordered the resident agent of Longhill Omega LLC, a residential property management company to pay $1.3 million to a court appointed receiver for repairs and tenant relocation costs associated with shoddy management of the units under the LLC's control.

The units were deemed unfit for human habitation by officials in Springfield, Massachusetts under the state sanitary code and the LLC lacked the funds necessary to make the required repairs.

For such mismanagement and neglect the Court ruled that the LLC's corporate veil could be pierced to reach the resident agent personally.

The Court reasoned that where the individuals managing the LLC have personally benefited from their ownership it follows that they should also be personally responsible for its failures– in this case failing to maintain the units under management in compliance with the minimum standards for human habitability specified in the state sanitary code.

While in some circumstances the law requires municipalities to initially pay the costs for making buildings safe, these costs can be recouped from building owners through the imposition of liens on the properties or from lawsuits brought against the offending property owners.

The 'piercing of the veil' decision adds to the already strong, but little known legal powers granted to receivers appointed pursuant to G. L. c. 111,127I to remedy conditions at residential property. A court may appoint a receiver when it is shown that sanitary code violations will not be promptly remedied without the appointment and that the appointment is in the best interests of the occupants.

The costs incurred by the receiver are given a lien status superior to any other lien except the government. The decision of the Housing Court was upheld by the Appeals Court in *Code Enforcement v. Concerned Citizens for Springfield*.

Based on my experience administering Boston's receivership policy, maintaining properties to standards is prudent.