

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2007-P-1255

PETER K. FREI,
Plaintiff-Appellant

v.

PLANNING BOARD OF HOLLAND et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE HAMPDEN SUPERIOR COURT

APPELLANT'S BRIEF AND APPENDIX

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Explanation of Abbreviations

"Add."--Addendum reproduced after the text of the brief.

"A."--Appendix reproduced after the Addendum.

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QUESTIONS PRESENTED FOR REVIEW

1. After ruling that a landowner is entitled to a planning board's ANR endorsement of his plan under G.L. c. 41, § 81P, did the Superior Court err in refusing to grant mandamus relief ordering the board to endorse the plan?
2. If this appeal is successful, must Frei's motion to dismiss his prayer for damages be allowed?

PRIOR PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On November 20, 2002, Peter K. Frei filed a complaint in Hampden Superior Court seeking a writ of mandamus ordering the Planning Board of Holland (the Board) to endorse a particular plan of land as "approval under subdivision law not required" (ANR) under the Subdivision Control Law, G.L. c. 41, § 81P. A. 10. After a jury-waived trial, the Superior Court ruled: "Because the Board failed to notify Frei of its decision not to endorse his ANR submission within twenty-one days as required by § 81P, Frei is entitled to an endorsement of his plan." Add. 6.

The Superior Court nonetheless refused to order the Board to endorse the plan, purporting to act "in the exercise of its sound discretion." Add. 7. Judgment entered for the Board on January 3, 2005, and

Frei's motion for new trial was denied on March 2, 2005. A. 188-190. He claimed a timely appeal. A. 7, 191.

STATEMENT OF THE FACTS

Frei's property is a peninsula jutting out into the Hamilton Reservoir; a map of the locus is reproduced on page 8 of the Addendum. The land includes his own house lot, conveyed to him in 1987, and a larger tract of about five acres conveyed to him in 1989. A. 109-111. A private way runs through the peninsula from Maybrook Road, a public way. Add. 2, 8.

On October 15, 2002, Frei submitted a plan to the Board for ANR endorsement under G.L. c. 41, § 81P. Add. 8, A. 15, 26. The plan divides about four acres of the five-acre tract into three lots, labeled A, B, and C; grafts the balance of this tract, labeled parcels 1 and 2, onto Frei's existing house lot; and provides for widening and, in places, relocating the private way. Add. 8. On October 16 Frei notified the Town Clerk of his submission, as required by G.L. c. 41, § 81T, and local rules and regulations. Add. 10,

16; A. 26. Section 81P required the Board to give written notice to Frei of its decision within twenty-one days after submission. Add. 9, A. 124.

Not until November 21, 2002--thirty-seven days after Frei submitted his plan to the Board and one day after he filed his complaint seeking mandamus--did the Board send him written notice that it had denied his application. Add. 3; A. 107, 113-113A. At trial, the Board "stipulated and admitted that notice was not sent timely to Mr. Frei," A. 101-102, 158, and it did not appeal from the Superior Court's ruling that, as a result, Frei is entitled to ANR endorsement. A. 7.

ARGUMENT

I. BECAUSE SECTION 81P ENTITLES FREI TO ANR ENDORSEMENT AND NO OTHER REMEDY IS AVAILABLE, THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING MANDAMUS RELIEF.

A. This Appeal is Controlled by Kupperstein v. Planning Bd. of Cohasset, 66 Mass. App. Ct. 905 (2006).

Where, as here, a local board fails to give timely notice to a landowner of its denial of ANR endorsement, the Legislature crafted a single, mandatory remedy:

"deemed" endorsement. G.L. c. 41, § 81P, is unambiguous on this point:

Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town. . . . **If the board . . . fails to notify . . . the person submitting the plan of its action within twenty-one days after its submission, it shall be deemed to have determined that approval under the subdivision control law is not required, and it shall forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk shall issue a certificate to the same effect.** Add. 9 (emphasis added).

This language leaves no wiggle room. The repeated use of "the mandatory word *shall*" means just one thing: late notice to the landowner results in "deemed" or constructive approval of his plan. Kupperstein v. Planning Bd. of Cohasset, 66 Mass. App. Ct. 905, 905 (2006). Under these circumstances, the statute commands the Board to endorse the plan "forthwith." Further, if the Board refuses or otherwise fails to act, the statute commands the Town Clerk to issue a certificate of endorsement "forthwith."

Here, because both the Board and the Town Clerk defied these statutory duties, Frei was forced to seek mandamus in the Superior Court, where the judge abused her discretion in denying relief. Kupperstein, supra, at 905-906.

The judge's view that allowing ANR endorsement would be "contrary to the purposes of the statute," Add. 7, ignores the plain language of the statute itself. The unqualified remedy of constructive endorsement enacted by the Legislature applies without regard to the specifics of the plan.

The judge's other reason for refusing mandamus was equally mistaken: that Frei has the alternative remedy of "resubmitting his proposal to the Board for their further consideration." Add. 7. The Board has no legal authority to give any further consideration to the plan. Cassani v. Planning Bd. of Hull, 1 Mass. App. Ct. 451, 456-458 (1973). By the explicit terms of section 81P, the Board's endorsement--whether explicit or constructive--is "conclusive on all persons." This phrase includes the Board, which accordingly retained

no "power to determine that approval is required" or otherwise to revisit its action on Frei's October 15, 2002, submission. Id. at 457.

Accordingly, other than endorsement by the Board or a certificate from the Town Clerk, Frei has "no other available or adequate remedy." Kupperstein, 66 Mass. App. Ct. at 905.

B. The Kupperstein Holding is Unassailable.

Because the Town has declared its intention to ask the Supreme Judicial Court to abrogate Kupperstein, we anticipate its argument and show the frivolous folly of this quest.

In Cassani v. Planning Bd. of Hull, 1 Mass. App. Ct. 451 (1973), this Court observed that the draftsmanship of chapter 41, including the constructive endorsement provision of section 81P, is "detailed, specific, and careful." Id. at 454. As a result, judges "must apply the statute as the Legislature wrote it" and "are not at liberty to interpose" their own "personal notions of sound policy." Id. at 457-458.

Once a Board endorses a plan "approval not required"--whether explicitly or constructively--and the statutory period for action on the plan has run, the statute extinguishes the Board's power to alter this endorsement, regardless of reservations by individual judges about the impact of this policy on the public interest. Id. at 457-458. In this comprehensive scheme, Id., the Legislature left only one power to the Board: the ministerial and "mechanical" duty to endorse the plan. Kupperstein, 66 Mass. App. Ct. at 905.¹

Accordingly, in Kupperstein this Court correctly ruled that mandamus may not be denied as a matter of discretion to a plaintiff who is legally entitled to ANR endorsement. Where mandamus is "the only effective remedy" for securing an absolute legal right, a judge is "not justified in refusing the writ on discretionary grounds" and her refusal of the writ is "arbitrary" as a matter of law. Massachusetts Soc. of Graduate

¹In contrast, after a board approves a subdivision plan under G.L. c. 41, § 81U, it retains the explicit authority to "modify, amend, or rescind its approval." Cassani v. Planning Bd. of Hull, 1 Mass. App. Ct. 451, 453-456 (1973); G.L. c. 41, § 81W. Add. 11-15.

Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601, 605-606 (1953). "To deny the writ in such cases is to quarrel with the policy of the law which creates the right." Id. at 605.

Disagreement with the statutory policy of constructive ANR endorsement is at the heart of the judge's denial of the writ here. Add. 7. Her decision must be reversed and a new judgment entered directing the Board to endorse Frei's plan "approval under subdivision law not required."

II. THE SUPERIOR COURT'S RULING ON FREI'S MOTION FOR VOLUNTARY DISMISSAL OF HIS REQUEST FOR DAMAGES IS AMBIGUOUS AND MUST BE EXPLICITLY ALLOWED.

This appeal solely concerns Count I of Frei's complaint. Add. 1 n.2, A. 11-12. If this Court rules in his favor, it is asked to tie down a loose procedural matter.

Before trial, Frei filed an unopposed "Motion for Voluntary Dismissal of Count II, Count III and the Request for Monetary Damages, Without Prejudice and Without Conditions." A. 6, 23. Count II alleged the violation of "substantive due process and statutory

rights," Count III alleged "constructive taking of property," and the sole "Request for Monetary Damages" was tied to Count II, for "violation of substantive due process and statutory rights." A. 11-12.

A Superior Court judge (not the trial judge) endorsed the motion, "Allowed as to the dismissal of Counts II and III; denied as to remainder." By rule, this dismissal was without prejudice, Mass. R. Civ. P. 41(a)(2),² so the order created an ambiguity: what part of the motion was left to be denied?

To the extent that the order can be read as denying Frei's motion to dismiss his "Request for Monetary Damages," such denial was error. Once Count II was dismissed, the related prayer for damages evaporated. Harris v. Doggett, 82 Mass. (16 Gray) 118, 120 (1860).

²Mass. R. Civ. P. 41(a)(2) provides, ". . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

CONCLUSION

Peter K. Frei asks this Court to reverse the judgment and to order the entry of a new judgment granting his petition for writ of mandamus and ordering the Board to endorse the plan submitted on October 15, 2002, "approval under the subdivision control law not required." He also asks for an order specifying that the dismissal of Count II incorporated the dismissal of the prayer for damages in the complaint.

Respectfully submitted,
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Certificate of Compliance

I certify that this brief complies with the rules of court that pertain to the filing of briefs.

Wendy Sibbison, Esq.

ADDENDUM

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*Document designated for Appendix by Town of Holland.