Emilie Cademartori <ecademartori@town.lynnfield.ma.us>

Re: Vallis Way legal question

1 message

Mullen, Thomas <tmullen@thomasamullenpc.com> Wed, Oct 26, 2022 at 4:33 PM
To: Emilie Cademartori <ecademartori@town.lynnfield.ma.us>

Emilie:

Confirming our telephone conversation just now, I am writing to advise that Atty. Kimball has correctly stated the law concerning the shedding of water from one property onto another. More fundamentally, though, I would not want the Planning Board to worry about such issues but rather would have them focus on ensuring that any plans they approve meet applicable engineering standards set forth in the stormwater regulations or elsewhere. If a developer is required by law to build and maintain a system that can handle a storm likely to occur every X years, I believe that the Board will have done its job if it determines that the proposed system suffices for an X-year event. Note that the Town cannot, in any event, be held liable for approving a plan that includes a stormwater system that sometimes fails, since the Mass. Tort Claims Act immunizes the Town from liability for negligence in connection with the issuance of regulatory permits and approvals. G.L. c. 258, s. 10(e).

Tom

On Wed, Oct 26, 2022 at 12:26 PM Emilie Cademartori <ecademartori@town.lynnfield.ma.us> wrote:

> Tom
> A legal question came up last DECEMBER (yes this hearing has been waaayyy tooo long) regarding Vallis Way definitive plan. I can't find any proof that I ever sent it to you for your opinion.
>
> Our peer reviewer asked the question highlighted in yellow below. Jay Kimball, Counsel for developer responds. Can you review his response and provide an opinion? This is on the agenda Nov 2.
>
> Thank you
>
> ---------- Forwarded message ---------
> From: **Jay Kimball** <kimballjay2468@aol.com>
> Date: Mon, Dec 6, 2021 at 4:19 PM
> Subject: VALLIS WAY Response to Peer Review
> To: ecademartori@town.lynnfield.ma.us <ecademartori@town.lynnfield.ma.us>
> Cc: planningoffice@town.lynnfield.ma.us <planningoffice@town.lynnfield.ma.us>, bjones@lindeneng.com <bjones@lindeneng.com>, pogren@hayeseng.com <pogren@hayeseng.com>
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> This is my response as counsel for the applicant to the concerns raised in Paragraph 10 of the Linden engineering report dated September 2, 2021. The specific issue is as follows: “The applicant's legal counsel should provide a memo to the Planning Board indicating their right to potentially discharge storm water in a concentrated manner in this location as related to the Massachusetts General laws and common law regarding the right to potentially discharge storm water in this manner and any liability to the Town incurred by approving this plan. He should note in his memo that the storm water discharge should it occur is being created in a concentrated location from areas which naturally drained to this location and additional areas which would not naturally drain to this location.”
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> In response to any questions concerning potential liability to the Town, I defer to Attorney Mullen as Town Counsel for Lynnfield.
>
> Concerning the Applicant’s right to potentially discharge storm water from areas which do and do not naturally drain to the proposed outfall location shown on the proposed subdivision plan as amended, a review of the existing case law concerning surface water drainage indicates a

change in the courts position from what was originally called the “common enemy doctrine” to the more recently accepted “reasonable use doctrine”.
Prior law held that in cases of artificial channeling of surface water the traditional rule was that liability depended on whether: "the defendant caused surface water which might otherwise have been absorbed or have flowed elsewhere, to be artificially channeled and discharged on the plaintiff's land in a place and quantity sufficient to entitle the plaintiff to relief.” Liability was established based on the construction of the drainage channels, not based on the amount of water discharged, and recovery of damages depended on whether the injury suffered was more than inconsequential. *See Jacobs v. Pine Manor College, 399 Mass. 411, 415-416 (1987).* MCLE

The current law has adopted the doctrine of “reasonable use” which now controls surface water diversion cases. In the Massachusetts Supreme Court case of *Tucker v. Badoian, 384 NE 2nd 1195 (Mass. 1978)* “the Court stated that only harmful interferences with surface water flow that are unreasonable can form the basis of liability. What is considered reasonable is a question of fact for the fact finder’s determination but the Court in that case provided a number of factors relevant to the determination, including the amount of harm, the foreseeability of the harm, the purpose and motive of the possessor, among several other relevant factors. In the Tucker case the court quoted from *Armstrong v. Francis Corp.,* 20 N.J. 320. 330 (1956): “Each possessor is legally privileged to make a reasonable use of his land even though the flow of surface waters is altered there by and causes some harm to others, but incurs liability when his harmful interference with the flow of surface water is unreasonable… The rule of reasonableness has the particular virtue of flexibility. The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon consideration of all relevant circumstances, including such factors as the amount of harm caused, the foreseeability of harm which results, the purpose or motive with which the possessor acted, and all other relevant matters... It is of course true that society has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases whether the utility of the possessor’s use of his land outweighs the gravity of harm which results from his alteration of the flow of surface waters.”

As the proposed drainage/recharge and infiltration system is being designed, reviewed and approved by professional engineers, in accordance with lawfully adopted state and local rules and regulations applicable thereto, I would presume, without rendering an opinion as to third party liability, that the finally designed system resulting therefrom in the process of the subdivision and development of the Vallis property, will constitute a reasonable use of the land as contemplated by applicable case law.

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