

Insights & Updates

SPRING 2004

MOEHRKE, MACKIE & SHEA, P.C.



Building in the New Millennium II

When the going gets tough, developers of contentious projects call on John Shea and the team at MM&S. While we often work for clients in the planning stage, more frequently we are called “after the merde has hit the fan.” We recently completed two projects of which we are especially proud.

The Estates at Walpole

The Estates at Walpole by Toll Brothers are alive with construction sounds – singing saws, the percussion of hammers, the varying rhythms of dozers and excavators, and the punctuation of truck backup bells. This 196 lot open space subdivision overlooking Bird Pond and the Neponset River will soon be a community of luxury homes with an average price between \$550,000 and \$650,000. The Estates is a product of six years of land use planning and property transactions, and ten years of zoning, wetlands and subdivision permitting, appeals, litigation and remands, negotiations and settlements. For MM&S Shareholder John Shea, this was one of the most challenging and rewarding development projects in his 22 years of land use practice.

Development planning began in 1987 and resulted in an agreement among the

landowner, the Town of Walpole, and its youth soccer team, which required the exchange of lands between the landowner and the Town, the dedication of land for soccer fields, the imposition of conservation restrictions to protect open space, and the development of a 210-220 lot open space residential subdivision.

After many zoning permits for the project were in place, the Conservation Commission unexpectedly issued a denial, which prompted Toll to engage John Shea to file appeals with DEP and in Superior Court, and to get the project back on track in all permitting venues. With John’s help, Toll obtained reconsideration, and in August 1997 the Conservation Commission approved the project. Two citizen groups and the Neponset River Watershed Association (“NepRWA”) appealed to DEP, and Norwood residents appealed to Superior Court under the local Wetlands Bylaw. To resolve the local wetlands appeal, John worked with Toll to modify its plan. To resolve

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the DEP wetlands appeal, Toll settled with NepRWA to incorporate groundwater recharge enhancements and construction monitoring. Ultimately, the Conservation Commission and the DEP approved a 196 lot project. John helped Toll avoid further appeals by negotiating settlements with two individuals.

A keystone of the project was John's negotiation of a Memorandum of Agreement ("MOA") between and among the Advisory Council on Historic Preservation, the Army Corps of Engineers, the Massachusetts Historical Commission, the Walpole Historic Commission, the Wampanoag Tribe, the landowner, and Toll. The MOA developed measures to avoid or mitigate potential impacts to Bird Pond, an archaeological resource, and to market for restoration and reuse the Bird Mansion and environs, eligible for listing on the National and State Registries of Historic Places. Unfortunately, during the pendency of appeals, arsonists burned down the mansion, which changed the historic preservation plan.

This summary does not do justice to the myriad twists and turns in every permitting process, or the blood, sweat and tears shed by the Toll Team in fighting for every square foot of ground against determined NIMBY adversaries and rogue authorities. Toll's commitment to this project never wavered under Toll Senior Vice President Werner Thiessen, who made sure the lawyers, scientists and engineers had the resources to win.

Drive down Mylod Street in Walpole this summer and inspect the Estates at Walpole by

Toll Brothers, America's leading builder of luxury homes.

DeCordova

The DeCordova Museum and Sculpture Park in Lincoln, Massachusetts was founded in 1948 by a visionary entrepreneur whose small, eclectic personal collection was kept at his summer mansion. The Castle has grown to be the largest museum of modern and contemporary art in the region, with over 2,200 works by living New England artists throughout its recently renovated galleries. The Sculpture Park exhibits over 80 art works on 35 acres of rolling woodlands and lawn abutting Flint's Pond, the reservoir for Lincoln. Over 145,000 patrons visit DeCordova annually.

In the last part of a three-phase Master Plan led by DeCordova Director Paul Master Karnik, and after years of trying numerous traffic calming measures, in 2001 DeCordova decided to permanently correct safety deficiencies in an internal roadway. DeCordova proposed a ring roadway, which would separate pedestrians and vehicles and unify the campus, and required filling 2,200 square feet of an isolated wetland and creating 200 linear feet of pavement within the 50

foot wetland buffer zone. While the environmental incursion sounded modest, Lincoln historically had not allowed the filling of any wetland for any project. Moreover, the Town was in litigation with a resident over a wetlands denial. To make matters worse, the local wetlands Bylaw posed a huge challenge: DeCordova had to prove by a preponderance of the evidence that (1) the proposed work would not have significant adverse effects, immediate or cumulative, upon wetland values, and (2) there is no feasible alternative which will have materially less effect on wetland values. DeCordova also had to establish that significant adverse effects on wetland values will not occur from work in the 50 foot buffer zone.

John Shea was instrumental in helping to run DeCordova's permitting dream team to win approval from the Conservation Commission or, if rejected, to secure victory in court on a bullet proof administrative record. Craig Halvorson, the international award winning site planner and landscape architect, developed alternative roadway alignments and campus unification features. Vanesse & Associates, transportation engineers, prepared a Campus Safety Evaluation, and with Halvorson designed a roadway that eliminated pedestrian and vehicle conflicts within the core campus area. LEC Environmental documented how the proposed roadway in combination with stormwater management improvements, a wetland replacement area, and an enhanced vegetated buffer zone meets or exceeds Bylaw performance standards, with a net improvement in the protection of wetland values. Jim Koningsor, a permitting and construction manager, advanced the technical and political acceptability of the project. It took an eleventh hour settlement with an influential abutter to seal the approval.

This summer visit DeCordova on Sandy Pond Road in Lincoln to view the Sculpture Park, the contemporary works in the galleries, and our completed project, which we are proud to say is a work of art in itself.

For more information on the firm's development services, please contact John F. Shea.

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Resolving Enforcement Cases with Consent Orders

Under new Commissioner Bob Gollidge, the Department of Environmental Protection is beefing up its enforcement efforts. DEP claims to have almost 100 cases of illegal wetland alteration to pursue as a result of its new wetlands initiative (see Environmental Law Update). DEP's Bureau of Waste Prevention is implementing a Strategic Targeting, Assessment, and Response (STAR) program, which includes targeted enforcement as a goal. In addition, the Bureau of Waste Site Cleanup is pursuing numerous claims of non-compliance with the Massachusetts Contingency Plan. DEP expects to enhance its revenue from fines and penalties. EPA has also identified enforcement as a major focus.

Both agencies prefer to resolve enforcement cases through Administrative Consent Orders (ACO), usually with a penalty. DEP typically presents a draft ACO to the violator, with the intent of securing compliance and obtaining a penalty as quickly as possible. Enforcement cases brought by the state Attorney General or the United States Attorney are also amenable to settlement through a

Consent Judgment or Decree.

MM&S has negotiated numerous ACOs and Consent Decrees with the DEP and EPA. Through this experience we believe that we have credibility with the agencies. We know where the strike zone is located. Using this experience as precedent we know where the

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agencies have flexibility to agree to a more favorable settlement. We typically add factual statements to demonstrate our client's prompt return to compliance and other mitigating factors. Our knowledge of comparable penalty calculations helps us to reduce the amount of penalties. We work very closely with clients to

ensure that they understand the business implications, costs and pitfalls of the compliance agreements embodied in an ACO. And we negotiate Supplemental Environmental Projects that allow the client to pay less of a cash penalty and implement a project that benefits the environment and the client.

For more information on the firm's enforcement defense services please call Michelle N. O'Brien.



FIRM ACTIVITIES

PROFESSORS AT LAW

John F. Shea will chair the May 13, 2004 MCLE seminar *Wetlands, Buffer Zones and Riverfront Areas*. He has assembled a stellar faculty of lawyers, environmental scientists, an environmental engineer, a watershed association director and a DEP wetlands regulator.



John Shea

SPORTS AUTHORITY

After six years of coaching Stoughton youth basketball, Coach John Shea is "retiring" as his son Carson moves up to high school hoops. His team made the playoffs of the League Championship for the third year running, with a three-year record of 48-16. "I'd like to thank Carson, the point guard responsible for my success." Congratulations on a great run, Coach!

NEW FACES

We are pleased to announce that Eric M. DiVincenzo joined the firm as an associate in December. Eric was previously an associate at Hale and Dorr LLP. He brings an unusual depth of environmental law experience to the position because he worked at the Government Bureau of the Office of the Attorney General and interned at the EPA in Boston during law school. Eric will focus on environmental litigation.



Eric M. DiVincenzo

ENVIRONMENTAL LAW UPDATE

Department Initiatives

DEP is using aerial photograph interpretation to develop enforcement cases. It has mapped changes in more than 80% of Massachusetts wetlands, and found 3000 wetlands changes over a ten-plus year period. Using a high-technology, low-cost detection method, digital aerial photos from 1991 to 1995 are compared to photos taken in 2001 and later. DEP has provided these maps to local conservation commissions for further analysis and enforcement purposes.

This spring or summer, DEP will be proposing draft changes to the Wetlands Protection Act (WPA) regulations at 310 CMR 10.00 to reduce permit review time and administrative burdens. A Buffer Zone General Permit or waiver, including new performance standards, will provide regulatory relief to projects more than 50 feet from protected areas. More restrictions may be placed on projects within 50 feet of protected areas.

The DEP has mapped the mouth of each Massachusetts coastal river. Conservation commissions have been reviewing these maps

since March; the maps should be publicly available in late April. DEP's adoption of these "mouth of the river" (MOR) maps will be the final administrative determination of a coastal river mouth location for Rivers Act jurisdiction.

***Town of Hopkinton
officials revoked building
permits after the
Land Court required them to
issue the permits.***

Significant Court Decisions

In *Porcaro v. Town of Hopkinton, et al.*, a Massachusetts court awarded a couple \$1.5 million in damages for violation of state civil rights law by town officials who arbitrarily denied issuance of building permits for a residential subdivision.

Town of Hopkinton officials revoked

building permits after the Land Court required them to issue the permits. At trial, the plaintiffs' lawyer demonstrated that several other properties in town, including the residence of one of the town officials in question (a Selectmen and member of Zoning Board of Appeals), suffered from the same zoning defect as the plaintiffs when built.

In support of the civil rights violations, plaintiffs' attorneys argued a pattern of conduct by Town officials intended to frustrate the plaintiffs to such an extent as to induce them to move out of town. Town officials allegedly violated the Wetlands Protection Act by draining the plaintiffs' pond of water without a permit and violated state public records law by destroying town files and notes from town meetings while the case was pending.

Due to its egregious facts, this case will not usher in an era of successful litigation by dissatisfied developers opposed by municipalities. However, it will stimulate town counsel to instruct town officials to follow procedures closely and make sound, rational property development decisions.

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