

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

SUPERIOR COURT
CIVIL ACTION NO. 08-843

Peter K. Frei,)
Plaintiff)
v.)
Town Clerk-, Planning Board-,)
and Zoning Board of Appeals)
of the town of Holland,)
Defendants)

SUPPLEMENT TO
PLAINTIFF'S OPPOSITION
TO DEFENDANTS'
MOTION TO DISMISS

The first count of plaintiff's complaint is a request for an order in mandamus to compel the town clerk to issue the certificate stating that plaintiff's /petitioner's appeal became constructively granted due to the Zoning Board of Appeals (ZBA) failure to take final action as required pursuant to c.40A, s.15.

The Supreme Judicial Court recognized in *Capone v. Zoning Bd. of Appeals of Fitchburg*, 389 Mass. 617 (1983), that noncompliance with the requirements as in section 15 results in a constructive grant of the relief sought. The SJC discussed in *Capone* the legislative intent and history of the constructive grant provision in section 15 and the fact that the provision is not directory but mandatory.

Section 15 has been amended by the legislator since the *Capone* Court. The *Capone* Court cited part of section 15:

Failure by board to act within said seventy-five days shall be deemed to be the grant of the relief, application or petition sought, subject to an applicable judicial appeal as provided for in this chapter.

The current version of that part of section 15 reads as follows:

Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition.

The legislator explicitly names “appeal” as one of the actions that “shall be deemed to be” granted. Plaintiff’s action was an appeal of the zoning enforcing officers denial of his request to enforce the provisions of the zoning act and local zoning bylaws.

In *Board of Alderman of Newton v. Maniace*, 429 Mass 726 (1999), the SJC limited the holding in *Capone* (supra):

The defendants argue that their application was constructively allowed because the board failed to set forth the reasons for its denial. Because we do not construe § 9 as compelling ****568** the board to delineate its reasons for denying the defendants' application in order to satisfy the “final action” requirement of § 9, we conclude that a constructive grant should not have resulted.

Board of Alderman of Newton v. Maniace (supra) at 729. The decision by the SJC was not unanimous. The panel consisted of chief Justice Wilkins, Justice Abrams, Lynch, Greaney, Fried, Marshall, & Ireland, JJ. Justice Ireland dissented and Lynch and Fried, JJ., joined.

In the instant action, the ZBA failed to hold the required public hearing altogether. The only action the ZBA took is to mail two letters which are attached to plaintiff’s complaint as exhibit 12 and 14. Exhibit 13 is plaintiff’s letter in response to the first letter by the ZBA.

The defendants may argue that a constructive grant of plaintiff’s appeal of his request to enforce the zoning act under M.G.L. and local by-laws denied by the zoning enforcing officer dos no lie pursuant to section 15. This argument would be false, section 15, par. 3 provides in part:

The board of appeals shall hold a hearing on any **appeal** [emphasis added by plaintiff], application or petition within sixty-five days [...].

Furthermore, section 15, par. 5 provides in part:

Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the **appeal** [emphasis added by plaintiff], application or petition [...].

The term “appeal” as used in section 15 refers to appeals taken pursuant to section 8 as specified in par. 1 of section 15 which provides in part:

Any **appeal** [emphasis added by plaintiff] under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed

Plaintiff pro se

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