

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Docket No. 2009-P-0827

PETER K. FREI
Plaintiff-Appellant
v.

TOWN CLERK OF HOLLAND et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE HAMPDEN SUPERIOR COURT

APPELLANT'S REPLY BRIEF

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Explanation of Abbreviations

- "Add." Addendum reproduced after the text of the Blue brief. Pages 01-15.
- "A." Appendix reproduced after the Addendum of the blue brief. Pages 001-092.
- "PBH" Planning Board of the town of Holland.
- "ZBA" Zoning Board of Appeals of the town of Holland.
- "town" The town of Holland.

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ARGUMENT IN REPLY

I. The town falsely and improperly claims that this matter is governed by chapter 40A, section 17.

In their legal argument the town is presenting a series of arguments designed to mislead and confuse this court. The town's attorneys then falsely claim Frei of "acknowledging" the same as a fact. In their argument the town made the false and misleading statement:

In his brief, Frei acknowledges that Mass. Gen. Laws, c.40A, s.17 governs this matter and acknowledges that only aggrieved parties have the right to appeal a zoning decision: "The legislature provided in its language of section 17 aggrieved parties the right to appeal. . ." Red Brief, p. 7.

The town repeated their false statement in their red brief on p. 5, footnote 2; and p. 15.

The town's statements are a brazen attempt to deceive this court. Frei did not file an appeal seeking judicial review as claimed. To the contrary! The local ZBA failed to take action on Frei's original appeal. This failure by the ZBA, as a matter of law, led to the constructive grant of Frei's original appeal.

Frei's argument - intentionally misquoted by the town in part and thus taken out of context - refers to

language included in section 17 which provides parties aggrieved by a constructive grant an opportunity to seek judicial review. Pursuant to section 17, the town with its 24 defendants, as well as other aggrieved parties, had an opportunity to appeal the constructive grant of Frei's original appeal to any court authorized to hear such an appeal. They chose not to do so.

Frei's statement and its meaning is clear when read with the language omitted by the defendants:

The legislature provided in its language of section 17 aggrieved parties the right to appeal **a constructive grant to prevent a potential hardship.**

[Emphasis added to the part omitted by the town in bold letters.] Blue brief p. 11.

Frei certainly had no reason to be aggrieved as his original appeal to the ZBA - due to the ZBA's failure to act - "shall be deemed to be the grant of the appeal," and this pursuant to section 15.

Not surprisingly, the town **failed** to file an appeal appealing the constructive grant of Frei's original appeal. They could not. There was and still is no tenable legal argument that would help the town. An appeal by the town or one of its 24 defendants would be governed by section 17 and would subject **them**

to the standing requirement of section 17 to file an appeal. They did not; provisions of section 17 are therefore inapplicable. Section 17 most certainly does not govern this case as the town falsely claims.

Per arguendo, Frei addressed the issue of "standing" anyway but declared it as superfluous. Blue brief pages 15-20.

II. The town does not rebut Frei's claim to the constructive grant of his appeal to the ZBA.

Frei's action in the lower court is primarily a request for mandamus ordering the Town Clerk to issue the mandated certificate¹ of the constructive grant of his appeal to the ZBA. A. § 1, 2, p. 018; Section 15, Add. p. 07.

Frei's request for mandamus is governed by G. L. chapter 249 section 5, and the constructive grant of his appeal to the ZBA by chapter 40A, section 15.

Instead of rebutting Frei's claim to the constructive grant and his ensuing request for mandamus the town argues that Frei would lack standing to file an appeal for judicial review pursuant to

¹Frei inadvertently referred to section 17 instead of section 15 as the section containing the constructive grant provision. A. 015, § 86.

section 17. What decision would Frei appeal? There was no public hearing, no action by the ZBA, and no decision filed in the Town Clerk's office! **Frei did not file any such appeal and had no reason to file one as previously explained.**

To "ground" its capricious "standing argument," the town now attempts to deceive this court into believing that Frei's action in Superior Court was in fact an appeal pursuant section 17. It was not.

The town's other arguments "based" on section 17 are equally frivolous:

The argument that Frei's section 17 appeal - **he never filed** - would be untimely (red brief § II(A), p. 12; and § II(C), p. 14); and also

the argument that Frei failed "to file the statutorily required affidavit" certifying that he served the defendants a copy of his section 17 appeal - **this again would be the appeal he never filed because there was no reason to do so** - , red brief p. 5 and 15.

"Wise counseling should be the first option; defending hopeless litigation should not be an option at all." Love v. Pratt, 64 Mass. App. Ct. 454, 460 (2005) (Brown, J., concurring).

Spurious and false arguments that lack any basis, as put forward by the town for want of any argument with substance or actual basis, should not be considered or allowed to carry the day for the town.

III. The town fails or refuses to recognize the narrow issue that is before this court.

The issue before this court is a very narrow one. The issue is whether the Superior Court erred in pegging the constructive grant provision of section 15 to the standing requirement included in section 17.

The legislature did not word the constructive grant provision of section 15 to include any standing requirement (blue brief p. 12); the Superior Court is therefore not authorized to interpret section 15 this way. In fact, the Superior Court does not mention section 15 in its reason to grant the town's rule 12(b)(6) motion.

Both, the Superior court's reason to dismiss and the town's argument, ignore the constructive grant of Frei's original appeal. Both made an argument that would be proper if Frei had appealed a decision by the ZBA to the Superior Court pursuant to section 17. Frei did not! Blue brief p. 15.

The Judiciary is mandated to read the statute the way the legislature wrote it. The case here on appeal is a legal case not an equitable one.

CONCLUSION AND RELIEF SOUGHT

The strict constructive grant requirement mandated in section 15 by the legislature is impervious to judicial discretion. Section 15 prescribes a full and adequate legal remedy for the factual circumstances of this case. There is no other remedy.

The Superior Court's order dismissing Frei's action is a substantial miscarriage of justice. Frei has a legal right to the relief he is entitled to by the unambiguous language of section 15.

Denying Frei his statutory right to the constructive grant would reward the officials for their illegal activity and promote corruption.

Frei requests that the Superior Court's judgment be vacated and the case be remanded for further proceedings consistent with the statutes as the legislature wrote them.

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

Respectfully submitted
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CERTIFICATE OF SERVICE

I Peter K. Frei certify that I served two copies of the forgoing Appellant's Reply Brief on this 30 day of July 2009, per first class mail, postage prepaid to the following recipients:

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