

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

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No. 2007-P-1255

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PETER K. FREI,  
Plaintiff-Appellant

v.

PLANNING BOARD OF HOLLAND et al.,  
Defendants-Appellees

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ON APPEAL FROM A JUDGMENT  
OF THE HAMPDEN SUPERIOR COURT

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APPELLANT'S REPLY BRIEF

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Explanation of Abbreviations

H.Br.--Brief of Appellee Town of Holland.

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

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ARGUMENT IN REPLY

I. THE TOWN IMPROPERLY TREATS KUPPERSTEIN AS NOT CONTROLLING THE OUTCOME OF THIS APPEAL.

In its brief the town brazenly reiterates every argument which this Court has already rejected. H.Br. 4-17. Here, as in Kupperstein v. Planning Board of Cohasset, 66 Mass. App. Ct. 905 (2006), the Superior Court ruled that the plaintiff "is entitled to an [ANR] endorsement of his plan" pursuant to G.L. c. 41, § 81P, and "there was no appeal by the town" from this ruling. Id. at 905-906. In Kupperstein, this Court rejected the town's claim that "the judge . . . was justified in considering the underlying purpose of the subdivision control law in denying [mandamus] relief." Id.; H.Br. 9-10, 14. This Court also spurned the town's "repeated insistence that mandamus is a discretionary remedy" under these circumstances. Id. at 905-906; H.Br. 10-15. Finally, this Court squarely held that the plaintiff has "no other available or adequate remedy." Id. at 905; H.Br. 14-17.

The Town's legal arguments are frivolous.

## II. THE TOWN'S POLICY ARGUMENT IS FACIALLY FRIVOLOUS.

The Town's principal argument for disregarding Kupperstein and upholding the denial of mandamus here is the "public interest," H.Br. 7, 10, 14-17, i.e., policy. This argument is frivolous. In this context, under no circumstances may judges' view of policy trump legislative policy. Massachusetts Soc. of Graduate Physical Therapists, Inc. v. Bd. of Reg. in Medicine, 330 Mass. 601, 603-606 (1953).

Equally frivolous is the Town's substantive policy argument for disregarding Kupperstein. The Town effectively urges this Court to redraft the penalty provision of G.L. c. 41, § 81P, and make this section more like G.L. c. 41, § 81U, the section providing for approval, modification, or disapproval of a subdivision plan. H.Br. 8-10. Unlike section 81P, section 81U imposes no mandatory penalty when a Board fails to give an applicant timely notice of its decision. Add. 9; Add. 11-12 ¶5. This argument was waived when the Town did not appeal the ruling that Frei is entitled to constructive endorsement of his plan.

In any event, its claim that this Court should act as a super-legislature and strike explicit language from section 81P was rejected long ago in Cassani v.

Planning Bd. of Hull, 1 Mass. App. Ct. 451 (1973), a case notably missing from the Town's brief. Whatever policy reasons motivated the Legislature to treat ANR endorsement and subdivision approval differently, it is settled that the judiciary may not second-guess those reasons, contrary to the Town's claim. Instead, this Court held, "we must apply the statute as the Legislature wrote it." Id. at 458.

The Town's policy argument is frivolous.

**III. SANCTIONS SHOULD BE IMPOSED FOR THE TOWN'S MERITLESS BRIEF DEFENDING AN INDEFENSIBLE JUDGMENT.**

Because the Planning Board and Town Clerk refused to comply with section 81P and endorse Frei's plan, he was forced to bring a mandamus action and then--when the trial court abetted the Town--to press this appeal.

In this Court, the Town has made no good faith argument why Kupperstein does not control, nor has it advanced any good faith argument that Kupperstein should be modified or reversed. See, Mass. R. Prof. Conduct, Rule 3.1.<sup>1</sup>

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<sup>1</sup>"A lawyer shall not . . . defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."

In forcing Frei to press his appeal to its inevitable end, controlled by Kupperstein, the Town retaliates against him for its own legal mistake, punishing him with more litigation expense and more delay of his building project. It has now been five long years since he was entitled to ANR endorsement. Add. 3, 6. The Town's strategy also saps this Court's resources for no legitimate purpose.

This Court has the "inherent power to punish those who obstruct or degrade the administration of justice." Avery v. Steele, 414 Mass. 450, 457 (1993), quoting New England Novelty Co. v. Sandberg, 315 Mass. 739, 746, cert. denied 323 U.S. 740 (1944); Masterpiece Kitchen and Bath v. Gordon, 425 Mass. 325, 329 (1997) citing Worcester v. O'Keefe, 36 Mass. App. Ct. 1109, 1109 (1994); G.L. c. 211A, § 15.<sup>2</sup> Frei requests damages for

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<sup>2</sup>"If, upon the hearing of an appeal **or exceptions** in any proceeding, it appears that the appeal **or exceptions** are frivolous, immaterial or intended for delay, the appeals court may, either upon motion of a party or on its own motion, award against the appellant **or excepting party** double costs from the time when the appeal was taken **or the exceptions were allowed**, and also interest from the same time at the rate of twelve per cent a year on any amount which has been found due for debt and damages, or which he has been ordered to pay, or for which judgment has been recovered against him, or may award any part of such additional costs and interest." G.L. c. 211A, § 15 (emphases added).

his reasonable attorney's fees and double costs incurred in prosecuting this appeal which, especially after Kupperstein issued in April, 2006, should have settled. "Wise counseling should be the first option; defending hopeless litigation (especially as here) should not be an option at all." Love v. Pratt, 64 Mass. App. Ct. 454, 460 (2005) (Brown, J., concurring).

#### CONCLUSION

Peter K. Frei asks this Court to reverse the judgment and to order the entry of a new judgment (1) granting his petition for writ of mandamus and ordering ANR endorsement and (2) specifying that the dismissal of Count II incorporated the dismissal of the related prayer for damages. He also asks for attorney's fees and double costs incurred in litigating this appeal.

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

Respectfully submitted,



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