

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13272

BERLIN LANDING REALTY TRUST,
Plaintiff-Appellee,

v.

ZONING BOARD OF APPEALS OF NORTHOROUGH,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

**BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF THE PLAINTIFF-APPELLEE**

NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

Ben Robbins
BBO No. 559918
Daniel B. Winslow, President
BBO No. 541972
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
(617) 695-3660
brobbins@newenglandlegal.org

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

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ISSUE PRESENTED

On April 20, 2022, the Court issued the following amicus announcement in this case:

Where, pursuant to the Dover Amendment, G. L. c. 40A, § 3, third par., a proposed child care facility would otherwise be exempt from a particular zoning bylaw setback requirement, whether or how the existence of wetlands or other conditions on the site bears on the exemption.

New England Legal Foundation (NELF) believes that this amicus announcement is in need of clarification because it appears to conflate two separate legal grounds for invalidating the application of the zoning setback requirement at issue to the proposed child care facility in this case, under G. L. c. 40A, § 3, third par.

Accordingly, NELF wishes to reframe the question that it will address in its amicus brief as follows:

Where a local zoning setback requirement applies to structures in a municipality's industrial zone that border a residential zone, is the application of that setback requirement to a proposed child care facility in the industrial zone unreasonable, and therefore a violation of G. L. c. 40A, § 3, third par., where (1) the proposed structure is a *protected* use, and not an industrial use; and (2) the enforcement of the setback requirement would substantially diminish the usefulness of the proposed structure as a child care facility?

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the enforcement of a statute that protects property owners from local discrimination in the use of their land for protected purposes. NELF is also committed to the principle of *stare decisis*, under which a court should adhere to its own precedent interpreting the same and similar provisions in the same statute, to ensure consistency, predictability, and legitimacy to the court's decisions.

NELF has appeared regularly as amicus curiae before this Court in a wide range of cases involving statutes

that balance the rights of property owners and businesses with the interests of state and local government.¹ This is such a case, and NELF believes that its brief will assist the Court in deciding the legal issues presented here.²

ARGUMENT

I. A MUNICIPAL ZONING SETBACK REQUIREMENT FOR STRUCTURES IN THE INDUSTRIAL ZONE THAT BORDER A RESIDENTIAL ZONE IS AN "UNREASONABLE REGULATION" AS APPLIED TO A PROPOSED CHILD CARE FACILITY IN THAT INDUSTRIAL ZONE, BECAUSE THE FACILITY IS A PROTECTED USE AND, THEREFORE, WOULD HAVE BEEN ALLOWED AS OF RIGHT IN THE RESIDENTIAL ZONE.

This case concerns the statutory protection afforded child care facilities under § 3 of the

¹ See, e.g., *Tracer Lane II Realty, LLC v. City of Waltham*, No. SJC-13195, 2022 WL 1789794 (Mass. June 2, 2022); *Jinks v. Credico (USA) LLC*, 488 Mass. 691 (2021); *Oracle USA, Inc. v. Comm'r of Revenue*, 487 Mass. 518 (2021); *Rosenberg v. JPMorgan Chase & Co.*, 487 Mass. 403 (2021); *Kauders v. Uber Techs., Inc.*, 486 Mass. 557 (2021); *Donis v. Am. Waste Servs., LLC*, 485 Mass. 257 (2020); *Gammella v. P.F. Chang's China Bistro, Inc.*, 482 Mass. 1 (2019).

² Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the plaintiff-appellee, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

Massachusetts Zoning Act, G. L. c. 40A (the Act). In particular, the third paragraph of § 3 of the Act permits the placement of a child care facility in any zoned district, residential or otherwise, subject only to *reasonable* regulations concerning certain statutorily enumerated dimensional requirements, including the setback restriction at issue in this case:

No zoning ordinance or bylaw in any city or town shall prohibit . . . the use of land . . . for the primary . . . purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.

G. L. c. 40A, § 3, third par. (emphasis added).

To constitute a "reasonable regulation" under this provision, the local zoning bylaw must "be related to a legitimate municipal concern, and *its application* [must] bear[] *a rational relationship* to the perceived concern.'" *Rogers v. Town of Norfolk*, 432 Mass. 374, 378 (2000) (quoting *Trustees of Tufts College v. City of Medford*, 415 Mass. 753, 758 (1993) (applying same rationality test to "reasonable regulation" requirement of similarly worded Dover

Amendment, codified in second paragraph of § 3, which protects use of property for religious and educational institutions) (emphasis added).

In this case, the property owner, Berlin Landing Realty Trust (the Trust), wishes to build a child care facility on its plot of land located in the town of Northborough's industrial district, in an area that borders a residentially zoned district. The town has a zoning bylaw that requires a 100-foot setback for any industrial use that borders a residential district. "In the Industrial District, the minimum setback along the lot line adjacent to a residential district . . . shall be one hundred (100) feet from a residential district" Appellee's Brief, Addendum (Add.) at 21 (Land Court Memorandum of Decision at 2). The Land Court held that the town's application of this setback requirement to the Trust's proposed child care facility was an "unreasonable regulation" and therefore violated the Act.

The Land Court was correct. It should be noted from the outset that the Trust does not challenge the facial validity of the setback requirement. Appellee's Brief, Add. at 25 (Land Court Decision at 6). To be sure, the setback requirement, on its face,

is related to the legitimate municipal concern of creating a buffer between industrial uses and nearby residential properties. See *id.* (discussing same). See also *Rogers*, 432 Mass. at 378 (“preserving the character of an adjacent neighborhood” is a legitimate municipal interest, for purposes of “reasonable regulation” requirement).

However, the *application* of the setback requirement to the proposed child care facility does not “bear[] a rational relationship to th[is] perceived [local] concern.” *Rogers*, 432 Mass. at 378 (cleaned up). This is because the child care facility is a *protected use*, and not an industrial use. See G. L. c. 40A, § 3, third par (quoted above). As such, the child care facility would have been permitted as of right in the residential zone that is adjacent to the town’s industrial zone, if the Trust’s property had been located in that residential zone.

Indeed, this Court has long held that local government cannot prohibit the construction of a § 3 protected use on residential property. See *Attorney Gen. v. Dover*, 327 Mass. 601, 603-04 (1951) (town’s 1946 amended zoning bylaw prohibiting use of residential property for religious schools was

abrogated by 1950 Dover Amendment, which barred any "by-law or ordinance which prohibits or limits the use of land . . . for any religious, sectarian or denominational educational purpose") (quoting St.1950, c. 325).

Put differently, the purpose of the setback requirement is to prevent the intrusion of industrial uses into a bordering residential neighborhood, where such industrial uses are not allowed. The setback requirement is intended to shield the residential neighborhood from any potential disturbances created by those outside industrial uses.

However, the Legislature has decided that a child care facility, though a commercial use, is permitted in residential neighborhoods as of right, *despite* the differences between that facility and surrounding residential properties. See G. L. c. 40A, § 3, third par. Therefore, enforcing the setback requirement in this case is not rationally related to the local interest in shielding the bordering residential neighborhood from outside industrial uses.

Indeed, the application of the setback requirement under these circumstances would suggest a forbidden local animus to discriminate against this

protected land use. “[T]he pertinent language of § 3, third par., seeks to strike a balance between *preventing local discrimination* against child care facilities and respecting legitimate municipal concerns.” *Rogers*, 432 Mass. at 383 (emphasis added). Since the application of the setback requirement in this case would not serve a legitimate municipal concern, the enforcement of that requirement would not be a “reasonable regulation” under § 3, third par. Therefore, the Land Court’s decision for the Trust should be affirmed.

II. APPLICATION OF THE SETBACK REQUIREMENT CONSTITUTES AN “UNREASONABLE REGULATION” BECAUSE IT WOULD SUBSTANTIALLY DIMINISH THE USEFULNESS OF THE PROPOSED CHILD CARE FACILITY, WITHOUT ADVANCING ANY LEGITIMATE MUNICIPAL CONCERN.

The town’s attempt to enforce the setback requirement constitutes an “unreasonable regulation,” in violation of § 3, third par., for the additional reason that the restriction “would substantially diminish or detract from the usefulness of [the] proposed structure . . . without appreciably advancing the municipality’s legitimate concerns.” *Rogers*, 432 Mass. at 383 (cleaned up). Indeed, enforcing the setback requirement would not advance any legitimate local concern, as amicus has argued above. At the

same time, however, enforcing the setback requirement would render the Trust's proposed facility virtually impracticable.

To serve its protected purpose, the proposed child care facility would require large, spacious rooms to accommodate the movement of several energetic young children. See *Rogers*, 432 Mass. at 384 (observing that "large rooms for functional utility," among other features, "make [a structure] ideal for child care use."). However, enforcement of the 100-foot setback in this case would reduce to a mere 50 square feet a corner of the proposed facility, due to the presence of wetlands on the Trust's property. See Appellee's Brief, Add. at 22 (Land Court Decision at 3) ("If the 100-Foot Setback Requirement is applied, the buildable area of the Property would be reduced to an approximately 50 square-foot area in the northeast corner of the Property due to the presence of wetlands on the Property.").

As a result, enforcement of the setback requirement would substantially impede the use of the proposed structure as a child care facility, while failing to serve any countervailing legitimate local interest. This extreme imbalance of interests, in

turn, would constitute an "unreasonable regulation," in violation of § 3, third par.:

When the record satisfactorily demonstrates . . . that the application of the [dimensional] requirement to the plaintiff's property would significantly impede the use of the premises as a child care facility, while not substantially advancing a valid goal of [the town's] zoning regulation, the provision is *unreasonable as applied*.

Rogers, 432 Mass. at 385 (emphasis added). See also *id.* at 384 (application of local footprint restriction to use of existing, large residential structure for proposed child care facility would constitute "unreasonable regulation," in part because restriction would require elimination of garage and porch: "[I]f the porch and the garage were removed, the uncontested evidence is that elimination of the garage would affect the structural integrity of the building, and would serve *no useful purpose*.")) (emphasis added).

In sum, the application of the setback requirement to the Trust's proposed child care facility would constitute an unlawful "unreasonable regulation" of that protected use. This is simply because the imposition of the requirement would virtually *nullify* the protected use while failing to

advance a legitimate municipal interest. As the Land Court aptly summarized its conclusions:

As applied to the Proposed Daycare, not only does the 100-Foot Setback Requirement not advance the Town's legitimate municipal interests at all, it renders the project unbuildable. To say that it "would significantly impede the use of the premises as a child care facility, while not substantially advancing a valid goal of [the Town's] zoning regulation," *Rogers*, 432 Mass. at 385, is an understatement.

Appellee's Brief, Add. at 26 (Land Court Decision at 7) (emphasis added).

CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court affirm the judgment of the Land Court.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its counsel

/s/ Ben Robbins

Ben Robbins
BBO No. 559918
Daniel B. Winslow, President
BBO No. 541972
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
brobbins@newenglandlegal.org

Dated: June 14, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 12-point Courier New. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of pages to be counted in this brief is 11.

/s/ Ben Robbins

Ben Robbins

CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 14th day of June, 2022, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Plaintiff-Appellee, in *Berlin Landing Realty Trust v. Zoning Board of Appeals of Northborough*, SJC-13272, by causing it to be delivered by eFileMA.com to counsel for the Plaintiff-Appellee, Mark L. Donahue, mdonahue@fletchertilton.com; and to counsel for the Defendant-Appellant, David J. Doneski, ddoneski@k-plaw.com.

Signed under penalties of perjury.

/s/ Ben Robbins

Ben Robbins
brobbins@newenglandlegal.org
BBO No. 559918
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660