

TOWN OF BROOKLINE & others¹ vs. MASSDEVELOPMENT FINANCE AGENCY & others.²

2014-P-1817.
APPEALS COURT OF MASSACHUSETTS
September 25, 2015

JUDGES: Cypher, Green & Hanlon, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from a judgment issued by a judge of the Superior Court dismissing their complaint seeking a declaratory judgment and relief in the nature of certiorari. We discern no cause to disturb the judgment and affirm. We address the plaintiffs' claims of error in turn.

1. 1946 agreement. Under G. L. c. 184, § 23, as amended by St. 1969, c. 666, § 1, "Conditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument or the date of the probate of the will creating them, except in cases of gifts or devises for public, charitable or religious purposes." The judge concluded that the statute of limitations created by § 23 applies to the restrictions created by the 1946 agreement, and accordingly concluded that those restrictions are no longer in effect or enforceable. We agree.

The plaintiffs' reliance on *Killorin v. Zoning Bd. of Appeals of Andover*, 80 Mass. App. Ct. 655, 955 N.E.2d 315 (2011), and *Samuelson v. Planning Bd. of Orleans*, 86 Mass. App. Ct. 901, 12 N.E.3d 407 (2014), is unavailing. As the court in *Killorin*, supra at 657-658, observed, G. L. c. 184, § 23, applies to restrictions created by deed, will, or other instrument. In *Killorin* and *Samuelson*, the restrictions at issue were imposed as conditions to the grant of a permit or approval under the Zoning Act, G. L. c. 40A, or the subdivision control law, G. L. c. 41, §§ 81K-81GG, respectively. As the court in *Samuelson* observed, "the key distinction we drew [in *Killorin*] was between land use restrictions 'created by deed, other instrument, or a will,' and land use restrictions imposed as a condition to the discretionary grant of regulatory approval under the police power." 86 Mass. App. Ct. at 902, quoting from *Killorin*, supra. In the present case, by contrast, the deed restrictions at issue were created by written agreement between the town and the then-owner of the property, in precisely the sort of instrument described in the above-quoted language from *Killorin*. That the parties entered into the agreement incident to the property owner's request for favorable action by the town meeting on the owner's request for a change to the town's zoning by-law does not alter the essential nature of the instrument itself. The agreement imposing the restrictions, executed by the property owner, was conditioned on the rezoning, and designed as an inducement to the town meeting to approve the requested rezoning. It was not, and could not be, an exercise of the police power, because the property owner did not hold that power. The rezoning amendment itself, by contrast, was an exercise of the police power, but did not impose the restrictions, nor was it conditioned on their imposition.³ The judge correctly concluded that the restrictions imposed by the 1946 agreement are no longer enforceable.

2. Certiorari. The plaintiffs' attempt to obtain judicial review of the issuance of a project eligibility letter is controlled by our decision in *Marion v. Massachusetts Hous. Fin. Agency*, 68 Mass. App. Ct. 208, 211-212, 861 N.E.2d 468 (2007). As observed in that case, "the issuance of an eligibility determination by [the Massachusetts Housing Finance Agency] was not a judicial or quasi judicial action . . . [and] an alternative and reasonably adequate remedy exists for the town: review of the [Housing Appeals Committee] decision by the Superior Court through G. L. c. 30A." *Ibid.*⁴ We are unpersuaded by the plaintiffs' argument

that amendments to the related regulations subsequent to the decision in Marion vitiate the rationale underlying that case. The issuance of a project eligibility letter is a necessary precondition to consideration of a comprehensive permit application, but it is not final action on the permit itself. In that respect, it is analogous to the review and recommendation by a local board of health of an application for approval under the subdivision control law, see *Loring Hills Developers Trust v. Planning Bd. of Salem*, 374 Mass. 343, 348-350, 372 N.E.2d 775 (1978), or site plan approval by a planning board or board of appeals prior to issuance of a building permit, see *Dufault v. Millennium Power Partners, L.P.*, 49 Mass. App. Ct. 137, 142-143, 727 N.E.2d 87 (2000). If and to the extent that the factual conclusions encompassed by a project eligibility letter under the new regulations warrant judicial review, such review may be obtained incident to review of any permit that subsequently may be issued. Cf. *Loring Hills Developers Trust*, supra at 350.

Judgment affirmed.

By the Court (Cypher, Green & Hanlon, JJ.⁵)

Notes

1 Stephen Chiumenti, Robin Koocher, Gerald Koocher, William Pu, Deborah Dong, Charles Dal Corrobo, Nancy Fulton, David Fulton, Judith Leichter, and Alan Leichter.

2 The president and chief executive officer of MassDevelopment Finance Agency, and The Residences of South Brookline, LLC.

3 *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 793 N.E.2d 359 (2003), is similarly inapposite. The fact that the enactment (or amendment) of the town zoning by-law is an exercise of the police power does not mean that the execution of a negotiated agreement independent of legislative action on the zoning amendment is also an exercise of the police power; indeed, it is the distinction between, and independence of, the two that protected the legislative action in *Durand* from a challenge that it constituted impermissible "contract zoning." *Id.* at 53 & n.14.

4 We take judicial notice of the fact that, as in *Marion*, supra, the town and several of the individual plaintiffs in the present case have sought review of the comprehensive permit (issued in this case by the zoning board of appeals of Brookline). See Land Court Case No. 15 MISC 000072.

5 The panelists are listed in order of seniority.