SCR PAGE #10
Raboth Rd

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Plymouth, ss.

Miscellaneous
Case No. 127173

MITCHELL J. HUNT, NEIL A. HULTEEN and JOHN VENTURA, as Trustees of Continental Field Associates Realty Trust and as Joint Venturers of Continental Field Associates,
Plaintiffs

vs.

PAUL L. ARMSTRONG, SUSAN FARRELL, FREDERICK E. CORROW, and EDMUND J. KING, JR., as they are members of the TOWN OF KINGSTON PLANNING BOARD, GEORGE W. CUSHMAN, as Town Clerk of the Town of Kingston and FREDERICK M. TONSBERG, as Trustee of Indian Pond Realty Trust and Individually,
Defendants

D E C I S I O N

By this action, Mitchell J. Hunt ("Hunt"), Neil A. Hulteen ("Hulteen") and John Ventura, as Trustees of Continental Field Associates Realty Trust and, as Joint Venturers of Continental Field Associates (collectively referred to as "Plaintiffs"), seek relief based on seven counts. Count I is brought pursuant to G.L. c. 41, §81BB for the annulment of a decision of the Defendant, Town of Kingston Planning Board ("Board"), dated February 22, 1988, wherein the Board denied approval of the Plaintiffs' Definitive Subdivision Plan ("Definitive Plan") (Exhibit No. 18). By Count II, the Plaintiffs seek a declaration that Raboth Road, a certain

way located in the Town of Kingston, is a public way, or is so maintained and used, and accordingly, should be so certified by the Kingston Town Clerk. Counts III through VII are brought against the Defendant, Frederick M. Tonsberg ("Tonsberg"); Counts III and IV being for injunctive relief enjoining Tonsberg from engaging in any conduct amounting to a public or private nuisance, and for damages suffered on account thereof and Counts V and VI being for injunctive relief enjoining Tonsberg from engaging in any conduct endangering the continued existence of Raboth Road in breach of a certain covenant ("Covenant") entered into between Tonsberg and the inhabitants of Kingston on November 24, 1986 and in breach of contract, as well as for related damages. By Count VII, the Plaintiffs seek a declaration that a certain revised subdivision plan submitted to the Board by Tonsberg constitutes a slander of the Plaintiffs' title and further, that the Court issue an injunction ordering Tonsberg to revise said plan by excluding that portion of the Plaintiffs' land depicted thereupon.

A trial was held in the Land Court on October 18, 19 and 25 of 1988 and January 20, March 3, 6 and 7 of 1989, at which times all testimony was recorded and later transcribed by a court-appointed reporter. Thirty-one (31) witnesses testified, seventy-seven (77) exhibits were introduced into evidence and sixteen (16) exhibits were marked for identification. All exhibits are incorporated herein for purposes of any appeal. On November 17, 1988, the Court, in the presence of counsel, took a view of Raboth Road and the respective properties of the Plaintiffs' and Defendant

Tonsberg.

On all of the evidence, I find and rule as follows:

1. The Plaintiffs are the owners of approximately seventy-eight (78±) acres of undeveloped land ("Plaintiffs' Land") situated off of Indian Pond Road in Kingston.

2. Tonsberg is the owner and developer of two tracts of land situated off of Indian Pond Road in Kingston, commonly referred to as "Indian Pond Estates" ("Tonsberg Subdivision") and "Indian Pond Estates Phase II," an area not at issue herein.

3. As shown on maps, plans and atlases introduced into evidence, dating from the 1700's to the present, and as testified to by numerous witnesses, Raboth Road has, since this time, run in varying widths and on similar, if not identical, courses from Indian Pond Road to at least the vicinity of Smelt Pond in Kingston. The earlier dated maps, plans and atlases reveal that, at least prior to 1921, the easterly portion of Raboth Road, or the ways connecting thereto, traversed various courses, some of which differed from its present course, although its connection with Smith Lane, as shown on the United States Geologic Survey Map of Kingston (Exhibit No. 44), has been in use by the general public since at least 1950. The portion of Raboth Road running easterly of Smelt Pond constitutes the subject matter of a pending Superior Court action and is not at issue herein, except as a source and destination for vehicular traffic. In its present condition, Raboth Road may be traversed by automobiles, with adequate passing room, for the majority of its length. The same does not hold true,

however, for certain portions of the westerly end of Raboth Road as it crosses the Tonsberg Subdivision. These portions of Raboth Road have been altered, and in some instances relocated, in the course of the construction of the Tonsberg Subdivision.

4. From at least the 1920's to the present, that portion of Raboth Road running westerly from Smelt Pond ("disputed portion" or "westerly portion") has been used openly and continuously for foot and vehicular traffic by abutters therealong, neighbors and members of the general public. Such use of Raboth Road during this time has been directed primarily at accessing Indian Pond, Smelt Pond and the general surrounding area in a westerly direction and portions of the Towns of Kingston and Plymouth in an easterly direction. Occasionally since about 1948 the Town has graded at least a part of this portion.

5. On April 7, 1986, the Board approved Tonsberg's Definitive Subdivision Plan of "Indian Pond Estates" ("Original Tonsberg Plan") (Exhibit No. 7). Raboth Road is not specifically depicted on the Original Tonsberg Plan nor is it identifiable or recognizable thereupon.

6. In Land Court Miscellaneous Case No. 119749, Hunt and Hulteen appealed the Board's decision granting approval of the Original Tonsberg Plan on the ground that the Plan failed to acknowledge the existence of Raboth Road. This case was disposed of on November 3, 1986, upon the parties' filing of an Agreement for Judgment ("Agreement") (Exhibit No. 1), which Agreement provides in part as follows:

Whereas plaintiffs have certain rights in Raboth Road, I hereby order that:

1. [The Original Tonsberg] Plan is remanded to the . . . Board for further consideration . . . in order to provide that:

a. The Plan shall identify and show the continued existence of Raboth Road in the [Tonsberg] Subdivision.

b. The construction of ways, installation of services, provisions of house lots, and all other aspect of the Plan shall be designed to coordinate with and not affect Raboth Road and its continued existence. . . .

7. Following the entry of the Agreement, Tonsberg's Original Plan was remanded to the Board and thereafter amended by Tonsberg to show Raboth Road ("Amended Tonsberg Plan") (Exhibit No. 10). As a prerequisite to the Board's grant of approval to the Amended Tonsberg Plan, Tonsberg entered into a Covenant (Exhibit No. 54) with the inhabitants of Kingston on November 24, 1986. The Covenant provides in relevant part, as follows:

Raboth Road shall not be removed, altered blocked, or modified in any way except as shown on [the Amended Tonsberg Plan].

8. In direct contravention of both the Agreement and Covenant, Tonsberg has caused a house to be constructed on Lot 17-59 of his subdivision (See Exhibit No. 10), which house abuts squarely on a portion of Raboth Road, all physical evidence of which has been obliterated. The driveway accessing the house from the subdivision street also crosses the location of Raboth Road. At the point of such interference, Tonsberg has laid out and paved

alternative ways.

9. On December 1, 1987, Hunt and Hulteen filed a Definitive Subdivision Plan of their land with the Board. The course of Raboth Road as it traverses the Plaintiffs' Land and the Tonsberg Subdivision is depicted and identifiable on the Definitive Plan.

10. Hunt and Hulteen furnished the Kingston Board of Health ("Board of Health") with a copy of the Definitive Plan on December 2, 1987. Thereafter, the Board of Health took no action with respect to the Definitive Plan.

11. As shown on the Definitive Plan, High Pines Drive is the proposed primary means of access to the Plaintiffs' subdivision from the public way known as Indian Pond Road. Raboth Road appears thereupon as the Plaintiffs' proposed secondary means of access to the subdivision.[1]

12. At a public hearing held on February 22, 1988, the Board voted to deny approval of the Definitive Plan.

13. By letter addressed to Hunt and Hulteen, dated February 24, 1988 (Exhibit No. 30), the Board proposed its reasons for denying approval of the Definitive Plan. The reasons given by the Board are essentially as follows (See Exhibit No. 41):

1. The status of Raboth Road has not been fully clarified to the Board.

2. Subdivision access through wetlands violates the Regulations of the Board and proper planning.

---

[1]The requirement that a proposed subdivision have a primary and secondary means of access to a public way does not appear to be a Rule or Regulation of the Kingston Planning Board (See Exhibit No. 42).

3. The subdivision exceeds the Board's five hundred feet (500') dead-end Regulation.

4. The Board is not willing to waive any of its Regulations.

5. Hunt and Hulteen failed to supply the Board with proper documentation of filing with the Board of Health.

6. Hunt and Hulteen did not demonstrate that Indian Pond Road is capable of handling the increase in traffic posed by their subdivision.

7. Hunt and Hulteen failed to show adequate site distances at the entry of High Pines Drive off Indian Pond Road.

8. The Definitive Plan contains certain design flaws.

In cases where a Planning Board ("Board") denies approval of a subdivision, the applicant for subdivision approval may appeal the Board's decision to the Land Court. The Court then conducts a de novo hearing at which it hears all pertinent evidence, determines the facts, and upon the facts so determined, annuls such decision if it is found to exceed the authority of the Board. C. 41, §81BB; Rettig v. Planning Board of Rowley, 332 Mass. 476, 479 (1955); Mac-Rich Realty Construction Inc. v. Planning Board of Southborough, 4 Mass. App. Ct. 79, 81 (1976); Canter v. Planning Board of Westborough, 4 Mass. App. Ct. 306, 307 (1976). The developer bears the burden of convincing the trier of fact that the Board exceeded its authority and acted improperly in denying approval of the subdivision plan. Mac-Rich at 83; Fairbairn v. Planning Board of Barnstable, 5 Mass. App. Ct. 171, 173 (1977). The Court's review is confined to the reasons propounded by the

Board in its decision for disapproval of the subdivision plan. Canter at 307; Fairbairn at 173. The Board's decision will be upheld if the Court deems one reason of substance given by the Board to be valid. Mac-Rich at 80-81.

VALIDITY OF THE BOARD'S
REASONS FOR DENIAL OF THE
DEFINITIVE SUBDIVISION PLAN

1.) Status of Raboth Road has never been fully clarified. . .

The Plaintiffs' Definitive Plan depicts Raboth Road as the proposed secondary means of access to the subdivision. In so depicting Raboth Road, the Plaintiffs presume the same to be a "public way". On all the evidence, however, I find the Plaintiffs' characterization of Raboth Road to be misplaced.

When the fact of a public way is disputed, the burden of proof falls on the party asserting that fact. Commonwealth v. Hayden, 354 Mass. 727, 728 (1968); Town of Boxborough v. Joatham Spring Realty Trust, 356 Mass. 487, 490 (1969); Witteveld v. City of Haverhill, 12 Mass. App. Ct. 876, 877 (1981). As a general rule, an existing way in a city or town in this Commonwealth will not be deemed a "public way", or a way which a city or town has a duty to maintain from defects, unless it is shown to have become public in character in one of three ways: 1) a laying out by public authority in the manner prescribed by G.L. c. 82, §1-32; 2) prescription; or 3) prior to 1846, a dedication by the owner to public use, permanent and unequivocal, coupled with an express or implied acceptance by the public. Fenn v. Town of Middleborough,

7 Mass. App. Ct. 80, 83-84 (1979); W.D. Cowls, Inc. v. Woicekoski, 7 Mass. App. Ct. 18, 19 (1979); Witteveld at 876.

While the record before the Court fails to support a finding that, prior to 1846, Raboth Road was ever dedicated to the Town of Kingston for public use and so accepted by the public, or that it was laid out by Kingston public authorities in accordance with G.L. c. 82, §1-32 and thereafter used and maintained as a public way, the record does substantiate a determination that, for a period in excess of twenty years, at least the westerly portion of Raboth Road has been used continuously, openly, notoriously and adversely by abutters therealong, neighbors and members of the general public for purposes of accessing the general vicinities of Smelt Pond, Indian Pond and other portions of Kingston and Plymouth. I thus find and rule that such class of persons has acquired the prescriptive right to pass and repass without obstruction, by foot or by motor vehicle, over and along the westerly portion of Raboth Road. I further find that, as members of the general public, and in accordance with the Agreement for Judgment entered into by the Plaintiffs and Tonsberg on November 3, 1986, the Plaintiffs have acquired similar rights in this westerly portion of Raboth Road. I note, however, that as the extent of any easement by prescription is fixed by the use through which it is created, Lawless v. Trumbull, 343 Mass. 561, 562-563 (1962); Stucchi v. Colonna, 9 Mass. App. Ct. 851 (1980), such persons have acquired these rights in the westerly portion of Raboth Road only as such road is presently visible on the ground,

or as shown on the Plaintiffs' Definitive Plan or the Amended Tonsberg Plan. An expansion of the current uses and width of Raboth Road would most likely transcend the scope of rights which this class of individuals has acquired in the same. See Glenn v. Poole, 12 Mass. App. Ct. 292, 297 (1981). Accordingly, while I find Raboth Road to be "public" insofar as the aforesaid abutters, neighbors and members of the general public hold rights therein, I decline to find that such way is a "public way" in the Town of Kingston as described in G.L. c. 82, or one in which the Town, or any other public agency, has a duty to maintain. To hold otherwise would require the Town to make a taking of private land abutting Raboth Road, in which land the aforesaid class of persons has not necessarily acquired prescriptive rights, for the purpose of attaining the road width required for the construction and maintenance of public ways under the Kingston By-law or other pertinent regulations. Moreover, I decline to extend the ruling which I have made herein to those landowners abutting Raboth Road at its easterly end or to such other persons who have not been joined as parties in this action.

Having ruled that abutters along the westerly end of Raboth Road, neighbors and members of the general public, including the Plaintiffs, have acquired rights in that portion of Raboth Road at issue herein, Tonsberg must be required to remove, within sixty (60) days from the entry of a final judgment herein, any and all obstructions he has caused to be positioned on Raboth Road in the course of his subdivision development. While he has provided an

alternative and arguably superior way, the Plaintiffs have a right to use the way in which they have acquired rights.

2.) Subdivision access is through major wetlands. . .

The Board's second reason for disapproving the Plaintiffs' Definitive Plan is directed at the presence of wetlands along the westerly portion of High Pines Drive, where such proposed roadway meets Indian Pond Road. Although wetlands formulate a legitimate concern for appropriate local authorities in reviewing proposed subdivisions, I find the Board to have exceeded the scope of its jurisdiction in addressing the issue herein. Wetlands constitute a subject matter best reserved for the province of the local conservation commission. The Planning Board may not therefore assert the same as a ground for denying subdivision approval, even if, as here, the Board views the existence of wetlands as a situation "almost certain to be frowned upon by the Conservation Commission".

3.) Subdivision exceeds the 500 foot dead end regulation. . .

The Board's third reason for disapproving the Plaintiffs' Definitive Plan concerns what the Board perceives to be proposed dead-end subdivision streets which exceed 500 feet in length as required by Planning Board Regulation Section V.B.1.g.

A "dead-end street" is a single, continuous stretch of road open at one end and closed at the other. Sparks v. Planning Board of Westborough, 2 Mass. App. Ct. 745, 748 (1974); La Croix v.

Commonwealth, 348 Mass. 652, 653-654 (1965). Applying this definition to the subdivision streets shown on the Plaintiffs' Definitive Plan, I affirm the Board's determination as to only that stretch of unnamed road extending easterly from Raboth Road towards Continental Court and Autumn Lane (See Exhibits No. 18 and 43). I do not, however, sustain the Board's finding with respect to the remaining subdivision roads, as one entering the Plaintiffs' subdivision would be capable of exiting the same by means of either a right or left turn down one of the other proposed streets. This latter conclusion is reinforced by the finding previously rendered herein that the general public, including the Plaintiffs, has acquired the right to pass and repass, by foot or by motor vehicle, over and along the westerly portion of said Raboth Road, which portion is sufficient for these purposes.

4.) Board is unwilling to waive any Planning Board regulations for this subdivision.

Pursuant to G.L. c. 41, §81R, a Planning Board:

> may (emphasis added) in any particular case, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations. . . .

By the very language of G.L. c. 41, §81R, a Planning Board's refusal to waive strict compliance with its rules and regulations is discretionary. See Building Inspector of Burlington v. Board of Appeals of Burlington, 356 Mass. 734 (1969); McDavitt v. Planning Board of Winchester, 2 Mass. App. Ct. 806, 807 (1974);

Mac-Rich at 85-86. After considering those rules and regulations of the Kingston Planning Board which the Plaintiffs specifically request to have waived, I find there to be no abuse of discretion by the Board in its refusal with respect to the following waiver requests:

Waiver Request No. 1 - By-law Section III.B.3.o

Waiver Request No. 2 - By-law Section III.B.3.p

Waiver Request No. 3 - By-law Section III.B.3.s

Waiver Request No. 6 - By-law Section V.B, "Residential and Limited Residential Streets"

Waiver Request No. 7 - By-law Section V.4, "Sidewalks"

Waiver Request No. 8 - By-law Section V.B.5.c, "Size and Slope of Drains"

Waiver Request No. 9 - By-law Section V.9, "Fire Alarm System"

As to the Plaintiffs' remaining waiver requests, I reiterate the finding which I have made above and rule that the Kingston Conservation Commission, and not the Planning Board, is the proper local authority to address Plaintiffs' Waiver Request No. 4 concerning wetlands. I further note that the Plaintiffs' reason for requesting a waiver of the Board's minimum forty (40) foot wide right of way requirement in order to utilize a fifty (50) foot wide right of way is unclear. As the Plaintiffs' proposed right of way width surpasses the minimum accepted width, I find this waiver request to be unnecessary, and accordingly, find the Board to have exceeded its authority in failing to make a similar determination. Finally, as to Plaintiffs' Waiver Request No. 10, I find the

Rule/Regulation (By-law Section V.10, "Trees") at which such request is directed to be unreasonable and unduly burdensome, and accordingly, rule that the Board acted improperly in refusing to grant the Plaintiffs' waiver request with respect thereto.

5.) Applicant never supplied the Board with proper documentation of filing with the Board of Health

The record before the Court contains sufficient evidence that, in accordance with Planning Board Rule/Regulation III.B.2.f, the Plaintiffs submitted their Definitive Subdivision Plan to the Board of Health on December 2, 1987 and that the Town of Kingston received such Plan and related reports on that date (See Exhibit No. 9). Accordingly, I find that the Board acted improperly and exceeded its authority in asserting the Plaintiffs' failure to make such filing as a basis to its disapproval of the Definitive Plan.

6.) Applicant did not demonstrate that Indian Pond [Road] could handle the increased traffic.

A planning board's rules and regulations are enforceable only to the extent that they are comprehensive and reasonably definite, so that a developer may know in advance what may be required of him and what standards and procedures will be applied to him. See Castle Estates, Inc. v. Park and Planning Board of Medfield, 344 Mass. 329, 332-333 (1962); Independence Park, Inc. v. Board of Health of Barnstable, 25 Mass. App. Ct. 489, 493 (1988). In the instant matter, the Kingston Planning Board's Rules and Regulations are silent as to any requirement that the developer present

sufficient evidence regarding the impact which the proposed subdivision will have on traffic. The Board attempts herein to locate such a requirement within the "Purpose" section of the Kingston Planning Board's Subdivision Rules and Regulations, specifically that portion thereof referencing "the lessening of congestion". I find the Board's argument unconvincing insofar as it overextends this stated purpose of the Rules and Regulations. To follow the Board's logic would have the potential of requiring the developer to widen and reconstruct a public way, a feat beyond the ability of the developer or even the Board. Accordingly, I rule that the Board acted improperly and in excess of its authority by stating "traffic", as it pertains to Indian Pond Road, as a basis for its denial of the Plaintiffs' application for subdivision approval.

7.) Applicant did not show adequate [sight] distances at their proposed road off Indian Pond [Road].

As stated above, Planning Board Rules and Regulations must be reasonably designed to ensure that a prospective subdivider has advance notice of what will be required of him. Castle Estates at 333. The Kingston Planning Board's Subdivision Rules and Regulations make no mention of a subdivider's duty to identify sight distances. Nonetheless, however, a review of the evidence and expert testimony proffered at trial reveals that the sight distance from High Pines Drive onto Indian Pond Road, as designated on the Plaintiffs' Definitive Plan, is adequate. I thus annul this

portion of the Board's decision.

8.) Design flaws as outlined in enclosed review letter from the Board's consultant engineer.

Without specifically enumerating the design flaws which the Board's engineer found in the Plaintiffs' Definitive Plan, I find and rule that, based on the testimony of the Plaintiffs' and the Board's engineer, those matters can, and no doubt will be, resolved should the Plaintiffs elect to resubmit their Definitive Plan in accordance herewith.

In consideration of the foregoing, I rule in summary that insofar as at least one of the Board's grounds for disapproval of the Plaintiffs' Definitive Subdivision Plan is valid, the Board did not act improperly or exceed its authority in denying the Plaintiffs' application for subdivision approval. However, as the policy of the Subdivision Control Law is to encourage Planning Boards and developers to produce, by joint efforts, the most desireable development plans for the community, the Plaintiffs are entitled to resubmit their Definitive Subdivision Plan to the Board in accordance herewith. Further, having ruled herein that the Plaintiffs hold rights in Raboth Road, I find that the Defendant Tonsberg must be and hereby is required to remove, within sixty (60) days from the entry of a final judgment herein, any and all obstructions which he has caused to be placed in or upon Raboth Road in the course of his subdivision development.

The Plaintiffs and Defendants have submitted requests for findings of fact and rulings of law which I have considered. Certain of these requests are incorporated herein. I have taken no action with respect to the remainder, as I have made my own findings and rulings as to those facts and rules of law which I deem most pertinent hereto.

Judgment accordingly.

Robert V. Cauchon
Justice

Dated: September 12, 1989