

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 1780CV00105

TIMOTHY R. FONDAKOWSKI)

Plaintiff,)

v.)

PLANNING BOARD OF THE TOWN OF)
WESTHAMPTON THROUGH ITS MEMBERS MARK)
SCHWALLIE, THOMAS HATHAWAY, ROBERT)
TURNER, ROBERT DRAGON, JR., COTTON)
TREE SERVICE, INC., AND DODGE MAPLE)
GROVE FARM, LLC, HAMPSHIRE SUPERIOR)
COURT,)

Defendants.)

DEFENDANT HAMPSHIRE SUPERIOR COURT'S MOTION TO DISMISS

NOW COMES the Defendant, Hampshire Superior Court, and moves this court to dismiss it as a party from this matter for the following reasons: 1. The Hampshire Superior Court is not a properly-named defendant in an action for judicial review under G.L. c. 40, § 17; 2. It is an inherent conflict of interest for the Hampshire Superior Court to be both a named defendant and the tribunal before which this matter is to be decided; and 3. The Hampshire Superior Court is not a true adverse party to this action.

Plaintiff, Timothy R. Fondakowski, has brought this action for judicial review under G.L. c. 40A, § 17 challenging the issuance of a special permit to co-defendants, Cotton Tree Service, Inc. and Dodge Maple Grove Farm, LLC. The following is a brief background recited for the purposes of this motion only: In December 2013, co-defendants Cotton Tree Service, Inc. ("Cotton Tree") and Dodge Maple Grove Farm, LLC ("Dodge") applied to the Westhampton

Planning Board for a special permit to operate a commercial saw mill. Complaint at ¶ 25. After the application was denied, Cotton Tree and Dodge sought judicial review pursuant to G.L. c. 40A, § 17¹. *Id.* at ¶ 28, *see also* Exhibit A. On April 3, 2017 the parties to that action entered an agreement for judgment. Complaint at ¶ 30 and its Exhibit 4, *see also* Exhibit A. On May 31, 2017, the Hampshire Superior Court issued a “Judgment on Agreement of the Parties Ented (sic) by the Court Pursuant to Agreement for Entry of Judgment Special Permit Decision.” *See* Exhibit A and Complaint Exhibit 1. This action for judicial review under G.L. c. 40A, § 17 from the aggrieved-party Plaintiff followed.

1. The Hampshire Superior Court Must Be Dismissed from This Matter Because It Is an Improperly Named Party to a G.L. c. 40A, § 17 Action for Judicial Review.

Section seventeen of chapter 40A (“the Zoning Act”) provides an aggrieved person with the right to judicial review of an act of a municipal body relevant to zoning regulations. In pertinent part, G.L. c. 40A, § 17 states:

any person aggrieved by a decision of...any *special permit granting authority* ...may appeal to...the superior court department in which the land concerned is situated....”

Relevantly, the statute reads further:

If the complaint is filed by someone other than the original applicant, appellant or petitioner, such original applicant, appellant, or petitioner and all members of the board of appeals or *special permit granting authority* shall be named as parties defendant with their addresses.”

G.L. c. 40A, § 17 (emphasis added). It is noteworthy that by the statute’s own definition, a Superior Court Department is not a “special permit granting authority.”

“Special permit granting authority” shall include the board of selectmen, city council, board of appeals, planning board, or zoning administrators as

¹ *Cotton Tree Service, Inc., et al. v. Planning Board of the Town of Westhampton, et als.*; 1580CV0112; *See* Ex. A.

designated by zoning ordinance or by-law for the issuance of special permits.”

G. L. c. 40A, § 1A. Clearly, the legislative intent of judicial review under G.L. c. 40A is to review decisions of municipal bodies; however, the process does not include naming as a party-defendant any entity other than those enumerated by statute, let alone a division of the judiciary. Therefore, the Court must dismiss this action against the Hampshire Superior Court for it is not a “special permit granting authority” and is an improperly named party to this action.

2. The Hampshire Superior Court Must Be Dismissed from This Matter Due to Conflict of Interest.

Even if the Court were to assume for the sake of argument that the Hampshire Superior Court were a proper defendant to this action, the Plaintiff asserts that the Hampshire Superior Court² exceeded its authority in issuing the special permit. *See* Complaint ¶¶ 48-49. Section seventeen of chapter 40A provides the aggrieved person with the right to a “hearing *de novo* and a finding of the facts by the court.” *Pendergast v. Bd. of App. of Barnstable*, 331 Mass. 555, 558 (1954). Thus, the court proceeding is not merely limited to review of an administrative record maintained by the local zoning board. The court must:

hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require.

G.L. c. 40A, § 17. In the instant case, the underlying matter already included judicial review under G.L. c. 40A, § 17. *See* Exhibit A. Here, Plaintiff begs the Hampshire Superior Court to review, annul, and to vacate its own order. Complaint at p. 6. Asserting a cause of action against a named defendant that must also review its own actions is such an obvious conflict of interest that it warrants the Hampshire Superior Court to be dismissed as a party. Although a Superior

² Plaintiff asserts the same against the Planning Board and the Selectboard of Westhampton.

Court department can hear and review an action for judicial review under G.L. c. 40A, § 17, it need not and should not be made a party defendant to do so. Plaintiff has named the Hampshire County Superior Court as a party defendant in error, and the Hampshire Superior Court should be dismissed from this action.

3. The Hampshire Superior Court Must Be Dismissed from This Matter Because It Is Not an Adverse Party.

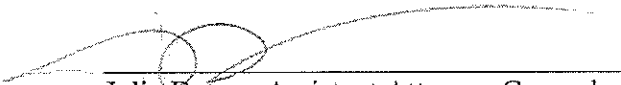
The Hampshire Superior Court's role in the underlying matter was purely adjudicatory. It is not a true adverse party to this action: it has no substantive interests at stake and no interest in the outcome. *See Silvia v. Duarte*, 421 Mass. 1007, n. 1 (1995); *Soja v. T.P. Sampson Co.*, 373 Mass. 630, 632 n. 2 (1977); *Lally v. Dorchester Div. of the Dist. Court Dept.*, 26 Mass. App. Ct. 724 (1988). Since the Hampshire Superior Court is not a true adverse party, its participation as a defendant is not needed to resolve this matter. Allowing the instant motion would in no way prejudice the true adversarial parties to this action, but would instead allow for the conservation of already limited Commonwealth resources.

For all of the foregoing reasons, the Plaintiff's complaint against the Hampshire Superior Court cannot stand and should be dismissed with prejudice pursuant to Mass. R. Civ. P. 12(b)(1).

Respectfully submitted,

HAMPSHIRE SUPERIOR COURT,
By Its Attorney,

MAURA HEALEY
ATTORNEY GENERAL



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August 9, 2017

CERTIFICATE OF SERVICE

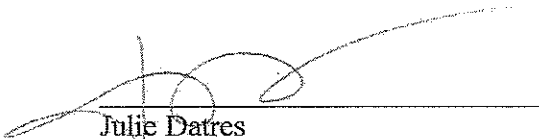
I, Julie Datres, Assistant Attorney General, hereby certify that on August 9, 2017 the foregoing *Motion to Dismiss* was served upon the parties to this matter by mailing the same via regular, first class U.S. mail, postage prepaid as follows:

Richard T. Jordan, Esq.
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Cotton Tree Service, Inc.
By its registered agent
David J. Cotton
248 Hatfield Street
Northampton, MA 01060

Dodge Maple Grove Farm, LLC
By its resident agent
David J. Cotton
736 Bridge Road
Northampton, MA 01060



Julie Datres
Assistant Attorney General

EXHIBIT A

**1580CV00112 Cotton Tree Service, Inc et al vs. Westhampton Planning Board
As member of Mark Schwallie et al**

Case Type	Real Property	Initiating Action:	Zoning Appeal, G.L. c. 40A
Case Status	Open	Status Date:	06/10/2015
File Date	06/10/2015	Case Judge:	
DCM Track:	F - Fast Track	Next Event:	

All Information Party Event Tickler Docket Disposition

Party Information

Cotton Tree Service, Inc - Plaintiff

Alias

Party Attorney

Attorney Melnik, Esq., Patrick J
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Cotton, Town Clerk, Patricia - Defendant

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Events

Date	Session	Location	Type	Event Judge	Result
08/17/2016 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Motion Hearing to Compel	Carey, Hon. Richard J	Held - Under advisement
10/06/2016 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Final Pre-Trial Conference	Mason, Hon. Mark D	Rescheduled
11/03/2016 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Pre-Trial Conference	Mason, Hon. Mark D	Rescheduled
11/30/2016 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Final Pre-Trial Conference	Carey, Hon. Richard J	Held as Scheduled
02/27/2017 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Rule 56 Hearing	Mason, Hon. Mark D	Rescheduled
03/02/2017 02:00 PM	Civil A	NTH - 3rd FL, CR 2 (SC)	Rule 56 Hearing	Mason, Hon. Mark D	Held - Under advisement
03/06/2017 09:00 AM	Civil A	NTH - 3rd FL, CR 2 (SC)	Trial Ready	Ferrara, Hon. John S	Rescheduled
04/03/2017 09:00 AM	Civil A	NTH - 3rd FL, CR 2 (SC)	Trial Ready	Rup, Hon. Mary-Lou	Canceled

Ticklers					
Tickler	Start Date	Days Due	Due Date	Completed Date	
Service	06/10/2015	90	09/08/2015	07/03/2015	
Answer	06/10/2015	120	10/08/2015	07/13/2015	
Rule 12/19/20 Served By	06/10/2015	120	10/08/2015	11/30/2016	
Rule 12/19/20 Filed By	06/10/2015	152	11/09/2015	11/30/2016	
Rule 12/19/20 Heard By	06/10/2015	180	12/07/2015	11/30/2016	
Rule 15 Served By	06/10/2015	120	10/08/2015	11/30/2016	
Rule 15 Filed By	06/10/2015	152	11/09/2015	11/30/2016	
Rule 15 Heard By	06/10/2015	180	12/07/2015	11/30/2016	
Discovery	06/10/2015	300	04/05/2016	04/03/2017	
Rule 56 Served By	06/10/2015	330	05/05/2016	11/30/2016	
Rule 56 Filed By	06/10/2015	362	06/06/2016	11/30/2016	
Final Pre-Trial Conference	06/10/2015	481	10/03/2016	11/30/2016	
Judgment	06/10/2015	730	06/09/2017	04/03/2017	
Under Advisement	08/17/2016	30	09/16/2016	08/17/2016	
Under Advisement	03/02/2017	30	04/01/2017	03/07/2017	

Docket Information		
Docket Date	Docket Text	File Ref Nbr.
06/10/2015	Original civil complaint filed.	1
06/10/2015	Civil action cover sheet filed.	2
06/10/2015	Case assigned to: DCM Track FST was added on 06/10/2015 with the following milestones:	

Docket Date	Docket Text	File Ref Nbr.
	Service Due 09/08/2015 Answer Due 10/08/2015 Rule 12/19/20 Served By Due 10/08/2015 Rule 12/19/20 Filed By Due 11/09/2015 Rule 12/19/20 Heard By Due 12/07/2015 Rule 15 Served By Due 10/08/2015 Rule 15 Filed By Due 11/09/2015 Rule 15 Heard By Due 12/07/2015 Discovery Due 04/05/2016 Rule 56 Served By Due 05/05/2016 Rule 56 Filed By Due 06/06/2016 Final Pre-Trial Conference Due 10/03/2016 Judgment Due 06/09/2017	
06/22/2015	Certificate of service of attorney or Pro Se: Patrick J Melnik, Esq.	3
07/03/2015	Service Returned for Defendant Cotton, Town Clerk, Patricia: Service made in hand;	4
07/13/2015	Received from Defendant Westhampton Planning Board As member of Mark Schwallie, Thomas Hathaway, Robert Dragon, Jr., and Robert Turner, The Planning Board and Patricia Cotton, Town Clerk: Answer to original complaint;	5
06/22/2016	Plaintiff(s) Cotton Tree Service, Inc motion filed to compel Discovery	6
06/22/2016	Cotton Tree Service, Inc's Memorandum in support of motion for an order compelling discovery	6.1
06/22/2016	Opposition to to plaintiff's motion for order compelling discovery filed by	6.2
06/22/2016	Affidavit of compliance with Superior Court Rule 9C Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Cotton Tree Service, Inc (Plaintiff)	6.3
06/22/2016	Affidavit of compliance with Superior Court Rule 9A, Superior Court Rule 9C Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Cotton Tree Service, Inc (Plaintiff)	6.4
06/22/2016	Rule 9A list of documents filed. Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Cotton Tree Service, Inc (Plaintiff)	6.5
06/22/2016	Rule 9A notice of filing: Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Maple Grove Farm, LLC (Plaintiff)	6.6
06/24/2016	Endorsement on motion to compel Discovery (#6.0): Other action taken Please schedule for hearing on a date convenient to the parties and court.	
08/17/2016	Matter taken under advisement The following event: Motion Hearing to Compel scheduled for 08/17/2016 02:00 PM has been resulted as follows: Result: Held - Under advisement	
08/18/2016	Endorsement on motion to compel Discovery (#6.0): Other action taken After hearing and consideration of the plaintiffs' motion and memorandum, as well as the defendants' opposition, the plaintiffs' motion is ALLOWED IN PART. The four members of the Planning Board shall each individually respond to plaintiffs' interrogatories numbered #1, #4 & #5. The balance of the motion is DENIED.	
09/26/2016	Plaintiff Cotton Tree Service, Inc's Joint Motion to continue / reschedule an event 10/06/2016 02:00 PM Final Pre-Trial Conference	9
09/26/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 10/06/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	

Docket Date	Docket Text	File Ref Nbr.
09/26/2016	Endorsement on Motion to continue / reschedule an event (#9.0): pre-trial conference ALLOWED by agreement. Pre-trial conference rescheduled to Nov 3, 2016 @ 2:00 pm. No further notice to issue.	
11/01/2016	Joint Pre-Trial Memorandum filed:	10
11/01/2016	Event Result: The following event: Pre-Trial Conference scheduled for 11/03/2016 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	
11/30/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 11/30/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	
11/30/2016	Pre-Trial ORDER: Trial without jury, 1-3 days. March 2017 session Copy mailed to counsel of record.	11
01/27/2017	Plaintiff Cotton Tree Service, Inc's Motion for summary judgment, MRCP 56 Partial Summary Judgment on Issue of Constructive Grant of Special Permit for failure to file a timely appeal under GL. c. 40a sec. 17.	12
01/27/2017	Cotton Tree Service, Inc's Memorandum in support of plaintiffs motion for summary judgment	12.1
01/27/2017	Plaintiff Cotton Tree Service, Inc's Joint Statement of material facts pursuant to Rule 9A(B)(5)	12.2
01/27/2017	Opposition to of Plaintiffs' motion for summary judgment filed by	12.3
01/27/2017	List of exhibits Joint appendix of exhibits for motion for summary judgment	12.4
01/27/2017	Rule 9A notice of filing Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Maple Grove Farm, LLC (Plaintiff)	12.5
01/27/2017	Affidavit of compliance with Superior Court Rule 9A. Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Cotton Tree Service, Inc (Plaintiff)	12.6
01/27/2017	Rule 9A list of documents filed. Applies To: Melnik, Esq., Patrick J (Attorney) on behalf of Cotton Tree Service, Inc (Plaintiff)	12.7
02/17/2017	Event Result: The following event: Rule 56 Hearing scheduled for 02/27/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	
02/24/2017	Plaintiff Cotton Tree Service, Inc's Motion to continue / reschedule an event 03/06/2017 09:00 AM Trial Ready	13
03/02/2017	Matter taken under advisement The following event: Rule 56 Hearing scheduled for 03/02/2017 02:00 PM has been resulted as follows: Result: Held - Under advisement	
03/06/2017	Endorsement on Motion for summary judgment, MRCP 56 (#12.0): partial on issue of constructive grant of special permit for failure to file a timely appeal DENIED See Order on back of page	
03/06/2017	Endorsement on Motion to continue / reschedule an event trial (#13.0): I have ruled on plaintiffs' motion for summary judgment this date, and it is denied. This motion is DENIED	
03/06/2017	Event Result: The following event: Trial Ready scheduled for 03/06/2017 09:00 AM has been resulted as follows:	

Docket Date	Docket Text	File Ref Nbr.
	Result: Rescheduled Reason: Joint request of parties	
03/07/2017	Plaintiffs Cotton Tree Service, Inc, Dodge Maple Grove Farm, LLC's Motion for a view	14
03/07/2017	Plaintiffs Cotton Tree Service, Inc, Dodge Maple Grove Farm, LLC's Motion in limine to allow the introduction of the special permit application, decision, and minutes of the meeting for the issuance of a special permit for a sawmill granted to Richard Tracey	15
03/07/2017	Plaintiffs Cotton Tree Service, Inc, Dodge Maple Grove Farm, LLC's Motion in limine to preclude the testimony of certain witnesses listed by the defendants on joint pre-trial memorandum.	16
03/07/2017	Plaintiffs Cotton Tree Service, Inc, Dodge Maple Grove Farm, LLC's Motion to request the court to accept certain findings made by the planning board in its decision as determinative findings	17
03/10/2017	Plaintiff Cotton Tree Service, Inc's Motion in limine to limit the evidentiary purpose of minutes of planning board hearings.	18
03/13/2017	Cotton Tree Service, Inc's MOTION for reconsideration of Court Order dated 03/06/2017 re: paper #13.0. to continue March 2017 list to April 2017 list	19
03/13/2017	Endorsement on Motion to continue / reschedule an event (#19.0): March trial list to April list ALLOWED by fax on 3/8/2017	
04/03/2017	Agreement for Judgment:	20
04/03/2017	Disposed for statistical purposes	
04/03/2017	Event Result: The following event: Trial Ready scheduled for 04/03/2017 09:00 AM has been resulted as follows: Result: Canceled Reason: Case Disposed	
05/31/2017	Plaintiff Cotton Tree Service, Inc's Motion for final judgment (to enter judgment pursuant to agreement to enter judgment)	21
05/31/2017	Endorsement on Motion for final judgment (#21.0): ALLOWED See Judgment by agreement of the parties.	
05/31/2017	Judgment. It is ORDERED and ADJUDGED:: Judgment on agreement of the parties by the court pursuant to agreement for entry of judgment	22
06/29/2017	Opposition to motion to intervene filed by Cotton Tree Service, Inc	23
06/30/2017	MOTION to Intervene as Other Interested Party filed by Timothy Fondakowski (received by fax on 6/27/2017)	24
06/30/2017	Notice of appeal filed by Timothy Fondakowski to the Special Permit Decision of the Court dated June 3, 2017.	25
	Applies To: Fondakowski, Timothy (Other interested party)	
07/03/2017	Opposition to of the Planning Board of the Town of Westhampton to emergency motion to intervene. filed by (Originally filed by fax on June 29.2017)	26
07/13/2017	Endorsement on Motion to Intervene (#24.0): DENIED See Order on Timothy Fondakowski's Motion to Intervene, #25.	
07/13/2017	ORDER: on Timothy Fondakowski's Motion to Intervene	27
08/01/2017	Timothy Fondakowski's MOTION for reconsideration of Court Order dated 07/13/2017 re: paper #27.0. Motion to Intervene and request for hearing. E'mailed to Judge Agostini.	28
08/01/2017	Opposition to ro Timothy Fondakowski;s motion for reconsideration of the denial of his motion to intervene filed by	28.1
08/01/2017	Opposition to of the Planning Board of the Townof Westhampton to Timothy Fondakowski's Motion for Reconsideratio of the denial of his motion to intervene filed by	28.2

Docket Date	Docket Text	File Ref Nbr.
08/01/2017	Rule 9A notice of filing	28.3
08/01/2017	Endorsement on Motion for reconsideration of order on Timothy Fondakowski's motion to Intervene (#28.0): DENIED (see #29 order on Timothy Fondakowski's motion for reconsideration)	
08/01/2017	ORDER: on Timothy Fondakowski's motion for reconsideration.	29

Case Disposition		
Disposition	Date	Case Judge
Disposed by Agreement / Settled	04/03/2017	

