

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss

MISCELLANEOUS CASE  
NO. 17 MISC 000366 (RBF)

WINCHESTER BOAT CLUB, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
ZONING BOARD OF APPEALS OF	)
WINCHESTER, LAWRENCE BEALS, JOAN E.	)
LANGSAM, RICHARD L. SAMPSON, JR.,	)
DOROTHY R. SIMBOLI, JONATHAN GYORY	)
and KEVIN SARNEY, members of the ZONING	)
BOARD OF APPEALS OF WINCHESTER,	)
	)
Defendants,	)
	)
and	)
	)
KATHLEEN HO, CHERYL NORSWORTHY,	)
RICHARD NORSWORTHY, TIMOTHY	)
O'DONNELL, STEPHANIE SARNEY, and	)
KEVIN SARNEY, individually,	)
	)
Intervenor Defendants.	)
	)
	)

**MEMORANDUM AND ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

When an application for a special permit is constructively granted, just what is the special permit that is granted? In this case, the question is what uses are within the scope of a special permit, constructively granted in 1991 (the 1991 Permit), where the application requested "outdoor recreational use" in a residential zone without providing further specifics about the

applicant's intentions. Plaintiff Winchester Boat Club, Inc. (the Boat Club) seeks a judgment annulling the decision by defendant Zoning Board of Appeals of Winchester (the Board) denying the Boat Club's second application for a special permit to construct a pavilion in its open lot (Lot A). Alternatively, the Boat Club seeks an annulment of the Board's decision that they could not rely on the 1991 Permit as a basis for constructing their desired pavilion. The Board denies that the constructively granted special permit on Lot A includes a right to construct a pavilion, and denies that its refusal to grant an additional special permit for the purpose of constructing the pavilion was unlawful. The Boat Club has moved for summary judgment. The Board and the intervenor defendants oppose. As discussed more fully below, when viewed in light of the record before the Board and the findings in a prior Land Court case, the constructive grant of the 1991 Permit did not include a pavilion structure among its allowed uses. As a result, the Boat Club's motion for summary judgment is denied.

### **Procedural History**

On September 12, 2016, the Plaintiff filed a Complaint in Middlesex Superior Court pursuant to G.L. c. 40A §17, appealing the decision of the Winchester Zoning Board of Appeals that a new special permit is required to construct the Plaintiff's requested pavilion, and that the Plaintiff's application for a new special permit for said construction is denied. Plaintiff moved to remove the case to the Land Court on January 12, 2017. This unopposed motion was allowed, and Judge Haggerty of the Middlesex Superior Court filed an Order of Removal to Land Court on January 23, 2017. On February 8, 2017, upon further consideration, Judge Haggerty filed an Order to Vacate the Order of Removal to Land Court previously allowed.

On April 18, 2017, the parties filed Plaintiff's Motion for Summary Judgment and Request for Hearing, Plaintiff's Memorandum of Law in Support of its Motion for Summary

Judgment, Defendants' Opposition to Motion for Summary Judgment, a Consolidated Statement of Facts (SOF), and a Joint Appendix (App.) which contains affidavits of Kathryn Scholl (Scholl Aff.), Michael A. Pustizzi (Pustizzi Aff.), John M. Connolly (Connolly Aff.), and Janine Viarella (Viarella Aff.). On May 5, 2017, the parties filed a Joint Motion to Transfer to the Land Court. This Motion was allowed on June 1, 2017 by Judge Hogan. On June 20, 2017, the Court made an endorsement on Judge Hogan's allowance of the Joint Motion to Transfer indicating that the allowance was in error and was vacated because only the Chief Justice of the Trial Court has the authority to transfer a zoning appeal to the Land Court. On June 21, 2017, the Chief Justice of the Trial Court filed an Order to transfer this matter from the Middlesex Superior Court to the Land Court Department. On July 6, 2017, the present case was transferred to the Land Court pursuant to G.L. c. 211B, § 9.

On July 13, 2017, Kathleen Ho, Cheryl Norsworthy, Richard Norsworthy, Timothy O'Donnell, Stephanie Sarnie, and Kevin Sarney (the Intervenor Defendants) filed a Motion to Intervene (Mot. to Intervene), seeking to intervene as a party defendants to the present case. The Boat Club filed a Memorandum of Law in Opposition to Motion of Abutters to Intervene on July 18, 2017. A hearing on Plaintiff's Motion for Summary Judgment was held on July 20, 2017. The Motion of Abutters to Intervene was allowed on July 26, 2017, pursuant to the Court's Memorandum and Order Allowing Motion to Intervene. The Intervenor Defendants subsequently filed an Opposition to Plaintiff's Motion for Summary Judgment (Int. Opp. Mot.) on August 7, 2017, to which Plaintiff filed a Response on August 14, 2017 (Pl. Resp. to Int. Opp. Mot.). The Court took the motion under advisement. This Memorandum and Order follows.

### Summary Judgment Standard

Generally, summary judgment may be entered if the “pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the court draws “all logically permissible inferences” from the facts in favor of the non-moving party. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). “Summary judgment is appropriate when, ‘viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.’” *Regis College v. Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

### Undisputed Facts

Based on the pleadings and the documents submitted with Plaintiff’s Motion for Summary Judgment and the Oppositions thereto of Defendants and Intervenor Defendants, the following facts are undisputed or deemed admitted:

1. The Boat Club is a Massachusetts non-profit corporation located at 65 Cambridge Street, Winchester, MA 01890. SOF ¶ 1.
2. The Boat Club provides education and summer recreation to its members and their children. SOF ¶ 2.
3. The Board is the special permit granting authority of the Town of Winchester (Town), under G.L. c. 40A, and the individual defendants are the members of the Board. SOF ¶ 3.
4. The Intervenor Defendants own and reside on properties located in the same zoning district, under the Winchester Zoning By-Law (Bylaw), as the subject parcels owned by

the Boat Club, and each of their respective properties abuts or lies within three hundred feet of those parcels. Mot. to Intervene ¶¶ 1-4.

5. The Boat Club owns real property extending from Cambridge Street, at two locations, to Everett Avenue, partially bordering Upper Mystic Lake in Winchester, Massachusetts. The Boat Club's property consists of two contiguous parcels, referred to here as the Clubhouse Parcel and the Open Space Parcel. The Open Space Parcel has an area of approximately 68,000 square feet. A 15,069 square foot portion of the Open Space Parcel, referred to Lot A, is the subject of this appeal. A plan showing both parcels is attached as Exhibit A. SOF ¶ 4; App. Exh. A.

6. The Open Space Parcel is in a residential "B" zoning district under the Bylaw, also known as a "RDB" district. SOF ¶ 5.

7. In 1990, the Boat Club held an option to purchase Lot A of the Open Space Parcel from John A. Caruso and Susan L. Caruso. SOF ¶ 18; App. Exh. R.

8. On August 20, 1990, the Boat Club applied for a special permit to use Lot A for what it proposed to be "outdoor recreational use" in accordance with § 4.4 (14) of the Bylaw. SOF ¶ 20; App. Exh. L.

9. In 1990, the Bylaw required special permit applicants to submit a written application stating the section of the Bylaw under which the special permit is sought and the grounds on which the special permit is requested. It required the Board to consider "whether the proposed use would adversely affect the health, safety, and welfare of the community," and to make findings showing satisfactory compliance with seven (7) factors in deciding a special permit application: (a) ingress and egress, (b) off-street parking and the economic effects of the special permit on adjoining properties, (c) refuse collection, (d) screening and buffering, (e) signs,

(f) required yards and open space, and (g) general compatibility with adjacent properties. SOF ¶ 65; App. Exh. FF.

10. This application was verbally denied by the Board without prejudice. SOF ¶ 21, App. Exh. M.

11. On October 19, 1990, the Boat Club again applied for a special permit to use Lot A for "outdoor recreational use" which would be "in accordance with Zoning By-Law Section 4.4(14)." At the time of the application, the Bylaw provided that property in an RDB district could be used for "country club, sporting grounds, or other predominantly outdoor recreational use, excluding any use conducted as gainful business," with a special permit. SOF ¶¶ 6, 19, 22; App. Exh. C.

12. On or about November 19, 1990, the Board held a public hearing at which the Boat Club submitted a written brief describing its intentions for the proposed use of Lot A. The brief stated:

[T]he purpose in acquiring the land adjacent to the club is to add lake frontage to its present lot as a [b]uffer against impending residential development... [and] to add open green space to its property...The club plans to make space on [Lot A] which is suited to people sitting and enjoying the lake view...Additional space is also needed to carry out some of our outdoor activities such as picnics and children's play activities.

The brief continued: "By maintaining an unspoiled lake frontage for scenic enjoyment, the petitioner's acquisition will greatly enhance not only its members' enjoyment, but the adjoining neighbors and other property owners." SOF ¶¶ 23-24; App. Exh. Q.

13. The written brief also stated that the "Yards and Open Space" criterion of the special permit factors was not relevant "insofar as petitioners[sic] acquisition of the subject property will increase open space available to the community." SOF ¶ 25, App. Exh. Q.

14. The Boat Club's site plan, also known as the "Plan of Land" dated August 16, 1990, did not show any proposed improvements or structures. SOF ¶ 26.

15. The Board voted 2-1 to grant the Boat Club's special permit. This vote did not meet the required unanimous vote in favor and amounted to a denial. SOF ¶ 27.

16. The Board failed to timely file its written decision with the Town Clerk, and therefore the 1991 Permit was constructively granted. SOF ¶¶ 31-32; App. Ex. E.

17. The Board issued a written decision on February 20, 1991, beyond the required time for filing with the Town Clerk. The decision stated:

The petitioner seeks to use...Lot A to provide more open green space for sitting and enjoying the view of the other end of the upper Mystic Lake, a view which is not available from the present site. The area will also be used for picnics and other outdoor recreational activities for young children.

SOF ¶ 28; App. Ex. R.

18. In its written decision denying the 1991 Permit, the Board stated that the criterion of "Required Yards and Open Space" was not relevant, as this was a "proposal for outdoor recreational use." It also stated that "[p]reservation of open space and unobstructed view of the lake may enhance the value of adjacent property," under the "Economic" criterion. SOF ¶¶ 29-30; App. Ex. R.

19. The Boat Club appealed the Board's denial to the Land Court and also sought a declaratory judgment confirming that its application was constructively granted. SOF ¶ 33; App. Ex. S; *Winchester Boat Club, Inc. v. Town of Winchester*, Land Ct., Misc. Case No. 159205, slip op. at 1-2, 1992 WL 12151112 (Oct. 8, 1992) (1992 Land Court Decision).

20. Abutters appealed the constructive grant of the special permit to the Middlesex Superior Court in Civil Action No. 91-1649 and argued that the constructive grant was unlawful, arbitrary, and capricious. SOF ¶ 34; App. Exh. T.

21. Judge Sullivan of the Land Court was “designated as a Superior Court Justice to hear the Superior Court action together with the Land Court action.” 1992 Land Court Decision, slip op. at 1-2.

22. At some time between the Boat Club’s application for the 1991 Permit and the decision of the Land Court in the appeal of the constructive grant, the Boat Club acquired title to the entirety of the Open Space Parcel, consisting of Lots A and B. Pl. Resp. to Int. Opp. Mot. p. 3; SOF ¶ 37.

23. On October 8, 1992, Judge Sullivan upheld the constructive grant of the 1991 Permit and found that the Boat Club intended to use Lot A to “increase the green component of the Boat Club's holdings, add to the open space in the neighborhood,” and “provide room for recreational activities of youngsters.” SOF ¶¶ 7, 35-36. The decision, referring to Lot A, also noted that “[o]nly about one-quarter of the [Open Space Parcel] is entitled to the benefit of the special permit.” 1992 Land Court Decision, slip op. at 4 n. 1.

24. In April 1994, the Boat Club applied for a special permit to use Lot B for “outdoor recreational use” which would be “in accordance with Zoning By-Law Section 4.4 (14).” SOF ¶ 38; App. Exhs. O, U.

25. The Boat Club submitted a memorandum to accompany this application, which stated: “The proposed use for this land is for outdoor recreational activities – such as, picnics, volleyball, [and] children's land games.” SOF ¶¶ 39-40; App. Exh. V.



26. The Boat Club's 1994 Memorandum acknowledged under its explanation of the "Yards and Other Open Space" criterion that:

By keeping the land open as proposed, a natural buffer exists and would allow an open view from Everett Avenue to the Mystic Lakes...The approval...does not allow the Club unfettered discretion in the use of this property. Any changes in the property would require future approval by the Board of Appeal.

SOF ¶ 41; App. Exh. V.

27. The Board issued its decision (the 1994 Board Decision) in October 1994 granting this special permit (Petition No. 3021) subject to conditions, including the condition (the structures condition) stating:

The existing shed...shall be removed. No boat storage racks shall be installed on the land. There shall be a pedestrian bridge constructed over the brook on Lot A. No other structures (other than the gate) are proposed or approved as part of this Special Permit.

SOF ¶¶ 42-43; App. Exh. W.

28. The Board found that the "only structures...proposed...are a pedestrian bridge... and a gate," and under the "Yards and Open Space" criterion, it found that "[b]ecause the application is to permit outdoor recreational use, there is abundant yard and open space."

SOF ¶¶ 44-45; App. Exh. W.

29. The Boat Club appealed the 1994 Decision to the Land Court, alleging, among other things, that the structures condition exceeded the Board's authority by requiring "that the existing shed be removed and not replaced, as plaintiff otherwise has a right to do upon its own land." SOF ¶¶ 46-47; App. Exh. X.

30. The Boat Club and Board filed a stipulation in that appeal (the 1996 Stipulation), which stated in part:

11. The conditions of the special permit issued in Decision No. 3021 shall be modified as follows:

(a) Decision No. 3021 does not prohibit the construction of a storage shed on a subject parcel provided such structure conforms to dimensional requirements of zoning and any other requirements of state law and the Winchester zoning by-law.

(b) Nothing in Decision No. 3021 may be construed as restricting the ability of the boat club in the future to apply for appropriate permits to make improvements on any of its land...

13. The only issue to be decided by the Court in this matter is whether the portion of condition (4) of the special permit which prohibits bicycle and pedestrian access from Everett Avenue to land of the plaintiff exceeds the authority of the board.

SOF ¶ 48; App. Exh. Y.

31. The parties also stipulated that the part of the 1994 Board Decision requiring "landscaping or other work on" Lot A be annulled "because [Lot] A was not within the scope of the special permit application." SOF ¶ 49; App. Exh. Y.

32. The 1996 Stipulation was incorporated in part by the Land Court. SOF ¶ 50.

33. The 1996 Stipulation left the remaining issue of bicycle and pedestrian access to the Land Court. The Land Court decided that the Board exceeded its authority in prohibiting bicycle and pedestrian access across the Open Space Parcel, annulled the 1994 Board Decision, and remanded the case to the Board for further proceedings. SOF ¶¶ 51-52; App. Exh. Z; *Winchester Boat Club, Inc. v. Matarese*, 5 LCR 41, 42-43 (1997).

34. On remand, the Boat Club submitted a proposed amended decision which included the following conditions:

(9) The existing shed...shall be removed. No boat storage racks shall be installed on the land. There shall be a pedestrian bridge constructed over the brook on Lot A. No other structures (other than the gate) are proposed or approved as part of this Special Permit.

(10) This decision does not prohibit the construction of a storage shed on a subject parcel provided such structure conforms to the dimensional requirements of zoning and any other requirements of state law and the Winchester zoning by-law. This decision may not be construed as restricting the ability of the boat club in the future to apply for appropriate permits to make improvements on any of its land.

SOF ¶ 53; App. Exh. AA.

35. On April 16, 1997, the Board issued an amended decision granting Petition 3021 (the 1997 Amended Decision), which the Boat Club did not appeal. When the Board considered the Boat Club's proposed amended decision, it did not adopt the Boat Club's proposed paragraph (10). As a result, the language of the original structures condition remained unchanged.

SOF ¶¶ 54-57; App. Exh. BB.

36. On or about March 31, 2016, after consultation with and at the direction of the Winchester Building Commissioner, the Boat Club applied for a special permit to construct a pavilion on Lot A (the Pavilion). SOF ¶¶ 8, 58; App. Exhs. CC, DD.

37. In its application, the Boat Club stated: "By making the foregoing application, the applicant does not waive, and specifically reserves its right to claim that no additional special permit relating to 'outdoor recreational use' is required in order to use the pavilion" on Lot A.

SOF ¶ 9; App. Exh. EE.

38. The application also stated that "[a]n existing special permit (granted in 1991, and amended in 1997) has already approved 'outdoor recreational use' at this location," and, further, that those decisions "granted a special permit...at this location (but...did not contemplate the pavilion)." SOF ¶¶ 60-61; App. Exhs. CC, EE.

39. The originally proposed Pavilion is at least 960 square feet, and has a surrounding porch of at least 838 square feet, a light-admitting cupola, and storage lockers. SOF ¶ 10.

40. The Boat Club proposed to use the Pavilion from April to October each year to conduct formal classes in boating and sailing, and for storage of nautical gear such as rudders and oars. The Pavilion would not have running water, plumbing, heating, or air conditioning, and it would comply with applicable setback and dimensional requirements. SOF ¶ 11.

41. The special permit application was considered by the Board during hearings conducted on May 16, June 7, and July 12, 2016. SOF ¶ 12.

42. On or about July 12, 2016, the Boat Club submitted an alternative, scaled-down pavilion design. SOF ¶ 13.

43. On August 24, 2016, the Board filed a written decision with the Town Clerk denying the special permit for the Pavilion. SOF ¶¶ 14, 62; App. Exh. J.

44. In its written decision, the Board concluded that the Boat Club was required to obtain a new special permit or an amendment to the 1991 Permit to construct the Pavilion, and also denied, without prejudice, a new special permit for the Boat Club to construct the Pavilion. SOF ¶¶ 15-16, 63; App. Exh. J.

45. The Boat Club appealed the Board's decision to require a new or amended special permit to construct the Pavilion and the Board's decision to deny a new special permit without prejudice. SOF ¶ 17; App. Exh. K.

### **Discussion**

Constructive grants of applications, appeals, or petitions, arising under G.L. c. 40A, §§ 9, 15, are "of the relief sought." *Capone v. Zoning Bd. of Fitchburg*, 389 Mass. 617, 621 (1983). A constructive grant for failure of the permit granting authority to perform statutorily required actions under G.L. c. 40A, § 9, is a grant of the special permit. The question raised by the Boat Club's motion for summary judgment is the scope of the Boat Club's constructively granted 1991

Permit—is it broad enough to authorize the construction of the Pavilion on Lot A? It is the Boat Club’s position that the scope of the 1991 Permit is determined solely by what was stated in the application, namely, a request for a special permit for “outdoor recreational use,” allowed by special permit under Bylaw § 4.4(14). The Boat Club argues that the use of the Pavilion for its intended purposes, namely instructional classes on sailing, boating, and swimming, and to store nautical gear, would be part and parcel of the outdoor recreational use of Lot A requested in the application and constructively approved under the 1991 Permit. The Board argues that the scope of the 1991 Permit should be determined by the written brief submitted by the Boat Club to the Board, which described the proposed use as a buffer and as passive recreation—in other words, uses far more limited in scope than the proposed Pavilion. Alternatively, the Board argues that the post-1992 special permit proceedings, including the 1994 Decision, 1996 Stipulation, and the 1997 Amended Decision, require the Boat Club to obtain a special permit for the Pavilion.

The Boat Club cites *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188 (2005), to support its contention that only the application itself defines the scope of the special permit that could be constructively granted, arguing that the 1991 Permit application stands in the place of a written decision and the constructive grant may not incorporate any qualifications, limitations, or conditions resulting from supplemental information provided at the public hearing. While *Mendoza* does support the proposition that conditions and representations discussed at a public hearing, but not incorporated into a written decision, do not bind the applicant, *id.* at 205, that rule does not apply to the constructive grant of a special permit. In the case of a constructive permit, there is no written decision and therefore no assertion that the applicant is bound by conditions that are not in the written decision.

On the contrary, the Boat Club's argument that it was conferred broad, unrestricted rights under the 1991 Permit conflicts with the principle that "a too vaguely worded application' to the board may not be susceptible of 'being constructively granted.'" *Cameron v. Bd. of Appeals of Yarmouth*, 23 Mass. App. Ct. 144, 148 (1986), quoting *DiGiovanni v. Bd. of Appeals of Rockport*, 19 Mass. App. Ct. 339, 345 (1985). The application only restates the broad category of uses allowed by Bylaw § 4.4(14). To determine just what the Boat Club was asking the Board to approve and, therefore, what was constructively granted, it is necessary to look to what the Boat Club told the Board it specifically wanted to do with Lot A. At the public hearing held on the 1991 Permit application the Boat Club provided a written brief enumerating its desired uses of Lot A. It is undisputed that the Boat Club's brief stated:

[T]he purpose in acquiring the land adjacent to the club is to add lake frontage to its present lot as a [b]uffer against impending residential development... [and] to add open green space to its property...The club plans to make space on [Lot A] which is suited to people sitting and enjoying the lake view...Additional space is also needed to carry out some of our outdoor activities such as picnics and children's play activities.

The brief continued: "By maintaining an unspoiled lake frontage for scenic enjoyment, the petitioner's acquisition will greatly enhance not only its members' enjoyment, but the adjoining neighbors and other property owners." SOF ¶¶ 23-24; App. Exh. Q. As set forth in the brief, the Boat Club sought a special permit for open, passive recreational uses. If the Board had granted the requested special permit, these are the uses it would have allowed. Therefore, these are the uses that were allowed by the constructive grant of the special permit. None of these uses included the Pavilion or the construction of any similar structure. In other words, the Boat Club's intention at the time of the constructive grant did not include the construction of any structure similar to the Pavilion and the 1991 Permit therefore did not allow such a use.

Moreover, the scope and validity of the 1991 Permit has already been considered in the related Superior Court and Land Court actions. The conclusion reached by Judge Sullivan in those cases was that the constructively granted 1991 Permit was valid. The validity of the 1991 Permit, considered as though the constructive grant was an affirmative action of the Board, was determined based on the evidence of the proposed use described in the court proceedings. The findings in the 1992 Land Court Decision set out definitively the Boat Club's intended uses under the 1991 Permit. These uses did not include any structure, and nowhere in the court's findings is there evidence that the proceedings considered the propriety of a structure such as the Pavilion when determining the validity of the 1991 Permit. 1992 Land Court Decision, slip op. at 4-8. The validity and scope of the 1991 Permit has already been considered by Judge Sullivan, acting as a justice of both the Superior Court and the Land Court. Further adjudication of the scope of the 1991 Permit is barred by principles of res judicata and collateral estoppel. See *TLT Const. Corp. v. A. Anthony Tappe and Assocs., Inc.*, 48 Mass. App. Ct. 1, 4-5 (1999) ("The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation on all matters that were or should have been adjudicated in the action... The doctrine of issue preclusion prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies.") The validity of the 1991 Permit was determined based on the evidence of the proposed use, which did not at that time include the construction of the Pavilion.

The scope of the 1991 Permit is limited to those uses proposed in the brief and found by the court in the 1992 Land Court Decision. The 1991 Permit does not grant the Boat Club the right to build the Pavilion

**Conclusion**

For the foregoing reasons, the Plaintiff's Motion for Summary Judgment is **DENIED**.

**SO ORDERED.**



By the Court (Foster, J.)

Attest:

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Deborah J. Patterson, Recorder

Dated: December 27, 2017

A TRUE COPY

ATTEST:

*Deborah J. Patterson*  
RECORDER



# EXHIBIT A



