

CIVIL TRACKING ORDER
(STANDING ORDER 1- 88)

DOCKET NUMBER
1881CV01009

Trial Court of Massachusetts
The Superior Court



CASE NAME:

Melissa E Probst et al vs. Town of Natick Planning Board et al

Michael A. Sullivan, Clerk of Court
Middlesex County

TO: Irfan Nasrullah, Esq.
Law Office of Irfan Nasrullah
81 Main St
Hopkinton, MA 01748

COURT NAME & ADDRESS
Middlesex County Superior Court - Woburn
200 Trade Center
Woburn, MA 01801

TRACKING ORDER - A - Average

You are hereby notified that this case is on the track referenced above as per Superior Court Standing Order 1-88. The order requires that the various stages of litigation described below must be completed not later than the deadlines indicated.

STAGES OF LITIGATION

DEADLINE

	SERVED BY	FILED BY	HEARD BY
Service of process made and return filed with the Court		07/09/2018	
Response to the complaint filed (also see MRCP 12)		08/07/2018	
All motions under MRCP 12, 19, and 20	08/07/2018	09/06/2018	10/09/2018
All motions under MRCP 15	06/03/2019	07/03/2019	07/03/2019
All discovery requests and depositions served and non-expert depositions completed	03/30/2020		
All motions under MRCP 56	04/28/2020	05/28/2020	
Final pre-trial conference held and/or firm trial date set			09/25/2020
Case shall be resolved and judgment shall issue by			04/08/2021

The final pre-trial deadline is not the scheduled date of the conference. You will be notified of that date at a later time.

Counsel for plaintiff must serve this tracking order on defendant before the deadline for filing return of service.

This case is assigned to

DATE ISSUED

04/09/2018

ASSISTANT CLERK

Patricia M McCann

PHONE

(781)939-2748

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Superior Court Department
of the Trial Court
Civil Division

Civil Action No. 1881CV01009

Melissa E. Probst and
J. Barr Kenny,

Plaintiffs

v.

Planning Board, Town of Natick
Andrew Meyer, Chairman of Town
Of Natick Planning Board
Terri Evans, Planning Board Member
Glen Glater, Planning Board Member
Julian Munnich, Planning Board Member
Peter Nottonson, Planning Board Member
John Wadsworth, Planning Board Associate
Member,

Defendants

COMPLAINT

1. This is an action pursuant to M.G.L. c. 40A, §17 in which the Plaintiffs are aggrieved by a decision of the Town of Natick Planning Poard.
2. Plaintiffs are residents at 120 West Central Street, in Natick, Massachusetts.
3. The Defendant members of the Town of Natick Planning Board (hereinafter the "Board") are residents of Natick, Middlesex County, Massachusetts and their addresses are as follows:
 - a. Andrew Meyer, 31 Prescott Ave., Natick, MA
 - b. Terri Evans 73 Washington St., Natick, MA
 - c. Glen Glater 28 Reynolds Ave., Natick, MA
 - d. Julian Munnich 310 North Main St., Natick, MA

- e. John Wadsworth 1 Ridge Ave., Natick, MA
 - f. Peter Nottonson 11 Parker Court, Natick, MA
4. Plaintiffs are abutters to a proposed project located at 111 West Central Street, in Natick Massachusetts.
5. On or about March 14, 2018, the Board voted to issue a special permit relative to the proposed project at 111 West Central Street, in Natick, Massachusetts. Planning Board Member Pater Nottonson did not vote as he recused himself from the vote.
6. On May 21, 2018, the Board filed a Notice of Decision with the Town of Natick's Town clerk relative to a site plan approval and issuance of a special permit for a proposed dog park (hereinafter referred to as the "Dog Park"). The Notice of Decision and the Special Permit are attached hereto as "Exhibit A" and incorporated herein by reference.
6. The Town of Natick has promulgated zoning By-Laws relative to the development of land in the Town of Natick. As part of the Town's By-Laws, the Town developed an Aquifer Protection Overlay District (hereinafter referred to as the "APD"). The stated purpose of the APD is:
- A. To protect, preserve and maintain the existing and potential groundwater supply and recharge areas within the town;
 - B. To promote the health, safety and general welfare of the community; and
 - C. To circumscribe aquifers and aquifer recharge areas and impose conditions, where such are necessary, for enjoying uses of the underlying land.
7. Pursuant to the Town of Natick's By-Law, Section 9.2.6, the APD prohibits specific uses. One such prohibited use is enumerated in Section 9.2.6(3) is "The disposal of liquid or leachable wastes, except as permitted into subsurface waste disposal systems subject to regulation under Title 5 of the State Environmental Code". The full text of Section 9.2.6 is attached hereto as "Exhibit B" and is incorporated herein by reference.
8. The proposed Dog Park is located within the APD.
9. The Dog Park proposes to include a base of wood chips as a means of disposing of dog urine at the Park.
10. Dog urine is a liquid and leachable waste.
11. Depositing urine on a wood chip base is not an allowable method of disposal pursuant to 310 CMR 15.000, Title 5 of the State Environmental Code.
12. The Special Permit authorizing the Dog Park specifically found that the project does not propose to dispose of liquid or leachable waste. The Board determined that the

project does not include an act of disposal.

13. The Dog Park proposal does not include any method of removal of urine contaminated wood chips, and does not include an impervious surface to restrict leaching of liquid waste.

14. The Town of Natick's Board of Health (the "Board of Health") did not endorse the method of disposal of liquid or leachable waste and recommended that the project include an impervious surface to prevent leaching of such waste into the groundwater. The Board of Health wrote a letter to the Town's Conservation Commission, which was presented to the Board prior to its issuance of a special permit. A copy of the letter is attached hereto as "Exhibit C" and is incorporated herein by reference.

15. The decision of the Board exceeds the authority the Board.


16. The decision of the Board is based on a legally untenable ground.

17. The decision of the Board is unreasonable, whimsical, capricious or arbitrary.

Wherefore, Plaintiffs respectfully request the Court to annul the decision of the Town of Natick's Planning Board to issue a Special Permit and annul the Special Permit.

The Plaintiffs,
Melissa E. Probst and J. Barr Kenny,

By Their Attorney,



Irfan Nasrullah, Esq. (BBO # 628935)
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(508) 329-9327

Date: April 9, 2018

EXHIBIT A



BUILDING

PLANNING

ZONING

CONSERVATION

COMMUNITY AND ECONOMIC DEVELOPMENT

BEFORE THE NATICK PLANNING BOARD

In Re Application of:
Middlesex Path Dog Park
111 West Central Street
Natick, MA 01760

Decision: 19-18

Parcel: Assessors' Maps 42, Lot 45B
Map 42 Lot 36
Map 42 Lot 37

SPECIAL PERMIT - AQUIFER PROTECTION DISTRICT

Statement of Facts:

This decision relates to the renovations to the park at the Middlesex Path for a proposed Dog Park, including the creation of a dog park area, walking paths, and additional parking. A site plan was prepared by Waterman Design Group, 31 East Main St Westborough, MA and consists of the following drawings:

<u>Sheet</u>	<u>Title</u>	<u>Last Revision Date</u>
C1.01	Existing Conditions Plan	March 7, 2018
C2.01	Layout, Materials and Planting Plan	March 7, 2018
C3.01	Grading, Drainage and Utilities Plan	March 7, 2018
C4.01	Details	March 7, 2018
C4.02	Details	March 7, 2018
C4.03	Details	March 7, 2018
C4.04	Details	March 7, 2018
C4.05	Details	March 7, 2018
C4.06	Details	March 7, 2018

Statement of Facts of Public Hearing:

Notice of the Public Hearing by the Board on the matter of Aquifer Protection District was published in the MetroWest Daily News on February 13, 2018, and then again on February 20, 2018. Notice of the hearing was also sent to all "parties of interest" as certified by the Boards of Assessors of the Town of Natick and posted in the Town Hall as required by Chapter 40A, Section 11, Massachusetts General Laws.

The Public Hearing by the Board on the matter of Aquifer Protection District was held on February 28, 2018, continued to March 7, 2018 and March 14, 2018, when the Board voted to close the Public Hearing.

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At the public hearings, the Applicant presented testimony on behalf of the Application and comments were received from the public and Town Departments.

Reports of Town Agencies:

Board received final reports from Health Department Director, Jim White, dated December 4, 2017. Victoria Parsons, Conservation Agent and General Planner received comments via e-mail from the Town Engineer, William McDowell, on October 19, 2017. Board received reports from Victoria Parsons, Conservation Agent and General Planner, dated December 6, 2017 and January 10, 2018. A memo from Dave Gusmini was received on January 2, 2018. Such reports are retained in the files of the Board.

Findings:

After considering all of the information and materials that it has received, including the Plans, reports of the Applicant's consultants, correspondence it has received and comments made at the Public Hearing, the Board makes the following findings relative to the Applicant's compliance with the requirements of Development in the Aquifer Protection District.

A. Aquifer Protection District Section III-A.5

The purpose and intent of the Aquifer Protection District (hereinafter referred to as "APD") is to protect, preserve and maintain the existing and potential groundwater supply and recharge areas within the Town of Natick by the imposition of conditions, when necessary, for use of the underlying land.

Section III-A.5 (4) sets forth the Permitted Uses within the APD. The section states that unless prohibited by other sections of the Zoning Bylaw, the uses permitted by the underlying district, either as a matter of right or pursuant to a special permit shall continue to be permitted uses in the APD.

The parcel is located in the Residential Single A (RSA) Zoning District the Applicant has proposed to install a dog park (an Institutional/Allowed Use) and as such the proposed use is a Permitted Use under Section III-A.5 (4).

Section III-A.5 (5) sets forth the Prohibited Uses within the APD. This section provides the specific uses that are prohibited from occurring within the APD. The Board finds that the project is not considered a "Prohibited Use" under Section III-A.5 (5).

The Board specifically finds that the project is not considered to include the "disposal of liquid or leachable waste" per Section III-A.5 (5b) of the Natick Zoning Bylaws. The Board determined that:

- The project does not include an act of "disposal" (i.e. the bringing of liquid or leachable waste to the site from offsite.)
- There is no overt act to transfer, alienate, or direct the ownership of property or substance(s).
- There is no prior collection or concentration of material or substance that is brought to the site.
- There are no collection points or engineered systems by which liquid or leachable waste is being disposed of on site as part of the project.

Board finds that the sole incursion to a level below 5 feet above the existing approximate spring high water level is a specifically designed infiltration component of site drainage.

Section III-A.5 (7) sets forth the Special Procedures for the issuance of a Special Permit in the APD. The site lies within the Aquifer Protection District (APD). The APD regulation (Section III-A.5 (7), Special Procedures Regarding the Issuance of Special Permits in the APD District) requires: "...a design to maintain aquifer recharge at pre-permit amounts where the impervious surface will exceed 20% of the lot area, and a design to cleanse and filter the runoff from such impervious surfaces recharged to the aquifer..." The Board finds the design 1) does not create a condition where 20% of impervious surface area is exceeded, and 2) the design conforms to the intent of the APD.

Pursuant to Section III-A.5 (7) (d), the Board makes the following findings relative to the Applicant's proposal:

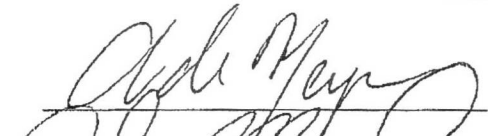
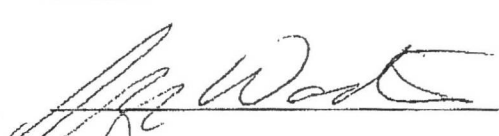
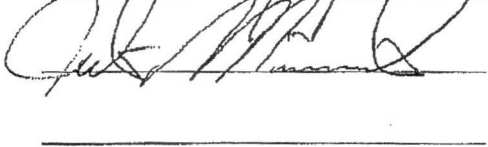
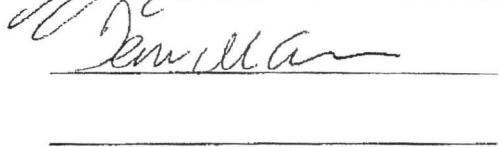
1. The parcel is located in the Residential Single A (RSA) Zoning District and the Aquifer Protection District and the proposed use is consistent with the purpose and intent of the RSA District and the APD.
2. The proposed use is appropriate to the natural topography, soils and other characteristics of the site.
3. The Applicant's proposal includes a variety of environmental remediation steps, including the installation of a groundwater monitoring well for pre-use and future testing as deemed necessary, which will benefit (and ensure no negative impact to) the Aquifer.
4. The proposed use will not have a detrimental impact on the Aquifer water supply during construction or thereafter, and such impact will be confirmed through the installation of a groundwater monitoring well for pre-use and future testing as deemed necessary.

Decision:

After deliberation and consideration of all of the foregoing, and after making the specific findings as set forth herein, the Planning Board, at its meeting on March 14, 2018, voted to **approve** the grant of a Special Permit pursuant to Section III-A.5 of the Natick Zoning By-Laws, subject to the following condition:

- The applicant shall install a groundwater monitoring well proximate to the proposed use. An initial test of the groundwater shall occur prior to the use of the site as a dog park. The monitoring well shall remain functional for future testing, as deemed necessary by the Conservation Commission or Planning Board.
- The site is subject to the Operation and Maintenance Plan approved by the Conservation Commission, dated December 2017 and which is incorporated into this Decision by reference.

NATICK PLANNING BOARD

	Yes		yes
	YES		YES

Date: March 14, 2018

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EXHIBIT B

1. Where the exact location of the boundary line of an APD is in dispute as to any parcel, the owner thereof may seek an advisory opinion from the Conservation Commission, who shall employ the services of competent professionals such as hydrogeologists or soil scientists, all at the expense of the owner. The evidence so produced shall be maintained in the records of the Town by the Conservation Commission and shall be produced, along with any other pertinent evidence, whenever the issue of location of or re-delineation of the boundary of an APD comes before a Town Agency or the Town Meeting.

9.2.4 Overlay District. The APD is an overlay district. The regulations of the APD shall supersede those of the underlying districts when more stringent.

9.2.5 Permitted Uses. Unless specifically prohibited by Section 5 hereafter, or unless a special permit is required by this Section, the uses permitted by the underlying zoning either as a matter of right or by special permit, shall continue to be permitted or allowed by special permit in the APD.

9.2.6 Prohibited Uses. In the APD District, the Board of Appeals shall not grant a variance to allow any use which is prohibited by this Section, or allow any use not permitted as a matter of right or not allowed upon the issuance of a special permit in the underlying zoning district, except that the Board of Appeals may grant variances or special permits to allow a change in use pursuant to Section 5.0.

The following uses are specifically prohibited:

1. Disposal on-site of solid wastes, other than brush and stumps;
2. Storage of petroleum or other refined petroleum products except within buildings which it will heat, and except in connection with replacement of existing tanks;
3. The disposal of liquid or leachable wastes, except as permitted into subsurface waste disposal systems subject to regulation under Title 5 of the State Environmental Code;
4. The discharge on-site of industrial process liquids;
5. Storage of road salt or other deicing chemicals, except as packaged for consumer use;
6. The depositing of snow containing road salt or other deicing chemicals on a site which has been transported from off-site;
7. The storage of uncovered manure;
8. The permanent removal or regrading of the existing soil cover resulting in a finished

grade at a level below five (5) feet above the existing spring high water level;

9. The mining of land, except as incidental to the exercise of a permitted or conditional use hereunder;

10. The storage or disposal onsite of hazardous wastes, toxic or hazardous substances, or radioactive materials;

11. Junk and salvage yards;

12. Trucking and bus terminals;

13. Heliports and airports;

14. Car washes.

9.2.7 Uses Allowed by Special Permit. The following uses are permitted upon the issuance of a special permit by the Special Permit Granting Authority ("SPGA") designated in the underlying zoning district. In the absence of such designation, the Zoning Board of Appeals shall be the SPGA for the purposes of the APD.

1. The storage and or disposal of hazardous waste, toxic or hazardous substances or radioactive materials is permitted provided that such storage and or disposals are incidental and necessary to the exercise of any permitted use or use allowed by special permit in the APD. Prior to implementation of any storage or disposal as described above, full plans insuring protection of the Town's Water Supply, for such storage and disposal, shall be submitted to the SPGA.

2. The application of fertilizers for non-domestic or non-agricultural uses provided that such applications are made in such a manner as to minimize adverse impacts on surface and groundwater due to nutrient transport, deposition and sedimentation.

3. The operation of a coin operated noncommercial laundry facility provided that the property does not utilize a septic system for any purpose, and that all waste water is discharged into a town sewage line and that no dry cleaning fluids or similar hazardous or toxic substance is discharged into the sewer system.

4. Where more than 20% of any lot is hereafter proposed to be impervious, a special permit shall be required to permit such use, on condition that water shall be recharged to the aquifer to compensate for all impervious lot coverage greater than 20%.

5. Coin operated or commercial laundries, provided that all waste water and no other fluids, are discharged into a town sewage line.

EXHIBIT C