



## **Lack of Actual Notice of Approval of Special Permit Did Not Excuse Untimely Appeal Under G.L. c. 40A, § 17**

The Massachusetts Appeals Court recently held that a city's failure to provide notice to abutters in one of the three ways required by G.L. c. 40A, § 11 does not toll the limitations period for challenging issuance of a special permit.

In *Markham v. Pittsfield Cellular Telephone Company*, defendant Pittsfield filed an application for a special permit to construct a cell tower. The city of Pittsfield scheduled a public hearing and posted notice of the hearing at city hall and in the local newspaper. The city claimed that it also sent notice to abutters by mail, but the abutters alleged that they never received such notice and did not learn of the issuance of the special permit until over two years later when construction on the tower began. The plaintiff abutters brought suit under G.L. c. 40A, § 17, challenging the special permit due to the absence of adequate notice. The Superior Court granted Pittsfield's motion for summary judgment, and plaintiffs appealed.

In upholding the grant of summary judgment, the Appeals Court largely relied on language in Section 17 which provides that challenges to the validity of any decision based on defects in "publication, mailing or posting" may only be made by a proceeding commenced within ninety days of the filing of the decision with the city clerk. By such language, the Court concluded that the Legislature "signified that it meant for the ninety-day deadline . . . to apply to cases like this one, where notice was accomplished by fewer than all three methods." The Court noted that if the Legislature had intended to require that abutters receive actual notice, it could have drafted the statute to require certified or registered mail.

The Court went on to state that "not all defects in notice . . . require a new hearing by the board." The Court also recognized that construing the statute in this manner may seem "harsh" to abutters who did not receive actual notice of the special permit, but it explained that holding otherwise would be harsh to special permit applicants, who cannot send the notices themselves and who invest considerable time and money in proceeding with construction under a permit.

This decision highlights the importance of abutters paying close attention to public notices regarding development that impacts them.

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