

To: Nicholas Armata
From: Jonathan Ames
Date: November 13, 2020
Re: November Report

Issuing a cease-and-desist order before petitioning the Suffolk County Superior Court would be the Boston Landmark Commission's ("Commission") best course of action to better enforce local historical district bylaws. Issuing a cease-and-desist order and reacting from that point onward, rather than immediately petitioning the Superior Court for fines and enforcement, will give the Commission several advantages. First, it gives the Commission and the recipient an opportunity to amiably remedy any violation without having to immediately involve attorneys and the courts. Second, it focuses the Superior Court's discretion to enforce the cease-and-desist order without asking the Court to investigate the substantive particularities of each district bylaw. Third, should the Commission and the Boston Law Department decide to file a motion for summary judgment, the records and information regarding the cease-and-desist order's issuance and delivery will be relied upon to support summary judgment. Finally, the Superior Court will more likely look favorably upon the Commission generally if it knows that the Commission tried to remedy the situation independently without the court's involvement before involving the court and litigation and will be more likely to rule in the Commission's favor.

Cease-and-Desist Order

Section 10 of the Acts 1975, Chapter 772 ("1975 Mass. Acts") grants several different means of relief for bylaw enforcement. The first are two kinds of monetary fines, and the second is equitable relief. A single fine between fifty and five hundred dollars may be imposed on "whoever . . . undertake[s] any . . . reconstruction, restoration, exterior erection, exterior or interior replacement or alteration or demolition of any landmark" or "to any exterior architectural feature in any landmark district, architectural conservation district or protection area" without a

Certificate of Approval. 1975 Mass. Acts 1036. Additional fines between fifty and five hundred dollars may be imposed for each day the “exterior architectural feature . . . continue[s] to exist . . . after having received from the Commission appropriate notice to desist.” *Id.* Additionally, if petitioned by the Commission, the Superior Court has the authority to restrain construction, alteration, demolition, or order the removal of any architectural feature “as may be necessary or desirable” to cure a violation. *Id.* at 1037. While the language of the statute suggests that the Commission could impose these fines without requiring a petition to the Superior Court, it does not prevent the Court from including the fines in addition to any equitable relief sought.

An “appropriate notice to desist” can be made in the form of a cease-and-desist order. A cease-and-desist order should be clearly written and generally include an explanation to the recipient the bylaw they may have violated, an explanation of how their actions were violative of that bylaw, a deadline by which the recipient can remedy the violation, and an explanation of how they can appeal the cease-and-desist order. The cease-and-desist order the Superior Court at Suffolk enforced against the defendant construction company in *Ferruzzi v. E.Z. Disposal Service*, 2000 Mass. Super. LEXIS 165 (2000), had all these elements while remaining very concise. The text of that cease-and-desist order is as follows:

It has been witnessed that container trucks are DUMPING their loads on the ground, material is being separated, reloaded into containers and trucked out.

CEASE and DESIST IMMEDIATELY

Such use constitutes transporting, handling, storing and sorting of solid waste. An activity requiring site assignment by the Department of Environmental Protection as a "TRANSFER STATION."

A container company must not bring back to the site waste inside containers or even store them in registered vehicles over night. All trucks are to leave and arrive EMPTY!

The use of this site as a transfer station is prohibited by the City of Revere Revised Zoning Ordinances, Section 17.16.010 Table of Uses.

Further, according to records in the Building Department, no authorization has been asked for or given to operate a waste container company at this location. The site

is approved as "Suffolk Building Supply" a "Wholesale and Product Distribution Activity" and "Warehouse," not a waste container trucking company.

CEASE and DESIST all use of this site for any purpose other than "Wholesale and Product Distribution and Warehouse."

If you disagree my [sic] notice above you may appeal my decision to the City of Revere Zoning Board of Appeals per Massachusetts General Law, Chapter 40A, Section 8 and 15 within 30 days of this notice.

2000 Mass. Super. LEXIS at 7-9. (All emphasis in original.) The order explained that the zoning board observed the activity, the bylaw the recipient was violating, gave a demand to cease that action, and explained how the recipient could appeal the cease-and-desist order. *See Id.*

A cease-and-desist order written by the Commission particularly could explain (1) that the Landmark Commission has taken notice that the structure in question has been altered, (2) that this alteration was not approved by Certificate of Appropriateness issued by the Landmark Commission, (3) that the unauthorized alteration violates 1975 Mass. Acts 1036, (4) that the alteration in question does not fall within any exception permitted in 1975 Mass. Acts 1035, (5) order the recipient to cease and desist from continuing further with the alteration, (6) give the recipient a period of time to reverse the alteration and return the property to its lawful condition, and (7) explain that, if they choose, they may appeal the cease-and-desist order by petitioning to the Superior Court of Suffolk County within thirty days from receipt of the order, in accordance with Mass. Gen. Laws ch. 40C, § 13 and 1975 Mass. Acts 1036.

If the recipient fails to appeal within the thirty-day period or fail to remedy the violation the Commission would then be entitled to bring a claim to enforce the cease-and-desist order. If the recipient brings an action to appeal the order, the Commission could bring a counterclaim to enforce the order.

If the recipient fails to comply with the order, or fails to appeal the order within time, then the Commission would petition the Court with a complaint seeking enforcement. In

Ferruzzi, Revere's building inspector brought an action seeking declaratory and injunctive relief to enforce a cease-and-desist order against the owner of a construction-waste-facility for unlawfully operating a waste storage facility in violation of local zoning ordinances. After getting several complaints of illegal dumping and personally examining the property in question, the building inspector sent a cease-and-desist letter to the defendant on April 17, 1998. 2000 Mass. Super. LEXIS at 7. Between April of 1998 and March of 1999, the building inspector and the facility owner were in communication about the facility owner's compliance with zoning ordinances, and the building inspector would personally visit the property and observe its status. *Id.* at 9-16. During this period, the building inspector never explicitly indicated whether the facility owner was in violation of or compliance with the zoning ordinances, but would reference the original April 17 cease-and-desist order. *Id.* The inspector sent a second cease-and-desist letter on March 29, 1999, which referenced the original April 17 order and explained that the matter would be brought to the city's legal department for enforcement. *Id.* at 16-17. The building inspector conducted another physical inspection on April 14, 1999 and commenced litigation by filing for declaratory and injunctive relief to the cease-and-desist order on May 4, 1999. *Id.* at 17-18. The court found that the facility owner could not challenge the cease-and-desist order because he had failed to appeal it within the ascribed thirty-day period, that the facts were undisputed that the facility owner did not comply with the unambiguous cease-and-desist orders, and that the building inspector was not acting in bad faith. *Id.* at 20-37. As a result, the court granted the inspector's motion for summary judgment, ordered the cease-and-desist order's enforcement, and enjoined the defendant from operating the premises as a waste storage facility. *Id.* at 37-38.

The court in *Town of Eastham v. Great Bluewater Dev. Co.*, 2006 Mass. Super. LEXIS 105 (2006), granted the town's motion for summary judgment and injunctive relief against an asphalt manufacturer, preventing them from continuing their illegal commercial activity in violation of a local zoning code. Eastham's building inspector sent a cease-and-desist order to the asphalt manufacturer on May 3, 2002, ordering they stop their illegal manufacturing. 2006 Mass. Super. LEXIS at 4. The manufacturer did not appeal the May cease-and-desist order and seemed to continue to use the property in violation of zoning ordinances. *Id.* The town issued a second cease-and-desist order on October 3, 2002, explaining that "action will be taken" if the manufacturer did not comply. *Id.* The manufacturer failed to comply with, or appeal, that October order. *Id.* at 5. The town then made the manufacturer a party to litigation between the town and the previous property owner in March 2003. *Id.* The manufacturer argued that the order was not valid because their activity fit under the pre-existing non-conforming use exception of state zoning statutes, Mass. Gen. Laws ch. 40A. *Id.* at 6. The court found that because the manufacturers failed to appeal either cease-and-desist orders, they failed to exhaust all available administrative remedies and therefore could not challenge the orders' validity. *Id.* at 7-8. Because they were barred from challenging the orders' validity, the court found there was no factual issue at hand and found the town's summary judgment motion proper and granted injunctive relief. *Id.* at 11-12.

If the recipient challenges the cease-and-desist order, the Commission should seek its enforcement in the form of a counterclaim from the recipient's complaint. In *Federated Church v. Historic District Commission*, 4 Mass. L. Rep. 212 (1995), the historical commission sought enforcement of its cease-and-desist order as a counterclaim against the church's complaint that the Superior Court invalidate the order. The Edgartown Historical Commission had denied the

church's application for certification of appropriateness to replace the dilapidated clapboard with vinyl siding. *Id.* Despite the denial, the church obtained a building permit from the Edgartown building inspector to renovate the church with vinyl siding and proceeded with the renovations. *Id.* The district commission then sent a cease-and-desist letter on September 28, 1994 requiring the church to stop placing additional vinyl siding on the building and remove any existing siding by October 3, 1994. *Id.* The court found no procedural irregularities on the commission's part, that the church was not prejudiced in any way by the commission's delay in filing their decision, that the commission's rejection was neither arbitrary, capricious, nor beyond the scope of their jurisdiction, and that any wounding impact of the cease-and-desist order is essentially self-inflicted by the church. *Id.* As a result, the court dismissed the church's complaint and enforced the commission's cease-and-desist order by ordering the church to submit to the commission a plan for removing the vinyl and replacing it with clapboard to be completed by the end of that year. *Id.*

Petitioning the Superior Court

Mass. Ann. Laws ch. 40C, § 13 and 1975 Mass. Acts 1037 give the Superior Court at Suffolk County jurisdiction to hear petitions from the Boston Landmark Commission. The Commission's counsel will be able to independently draft the conventional parts of a complaint. When drafting the complaint, counsel would consider an introduction, description of the parties, statement of facts giving rise to the dispute, a statement identifying and describing the causes of action or theories of recovery that arise from the facts alleged, a request for relief, a list of the various types of relief sought, a jury demand (if desired), and a signature section containing identifying information. *Massachusetts Superior Court Civil Practice Manual* § 3.2 (Hon. Thomas P. Billings ed., 4th ed. 2017). While much the of the complaint may seem uniform and

procedural, the Commission can best aid their counsel by providing information relevant to the substantive parts of the claim, such as the statements of fact to support their claim and the relief the Commission is seeking.

Introduction

A complaint should begin with a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for relief. Mass. R. Civ. P. 8. While this introductory part of the complaint need not contain detailed factual allegations, it must state more than labels, conclusions, and a recitation of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Written like a story of events, the Landmark Commission would explain when the Commission observed the alteration, that the alteration was not accompanied by a certificate of appropriateness, that the Commission delivered a cease-and-desist order to the property owner, that the recipient failed to comply with that order or that they failed to appeal the order in the appropriate amount of time, and that 1975 Mass. Acts 1036-37 entitles the Landmark Commission to injunctive relief to enforce the order and for the imposition of fines.

Statement of Facts

This part of the complaint should concisely and directly state the material facts that give rise to the dispute. *Massachusetts Superior Court Civil Practice Manual* § 3.2.3. Here, the complaint would list the details, in numbered paragraphs, related to the Commission's observation, the unauthorized alteration of the property, when and how the cease-and-desist order was issued, and interactions between the Commission and the recipient, and the recipient's failure to comply or appeal.

Statement of Claims

This part of the complaint should incorporate the listed material facts into a legal analysis, putting forward a legal theory arguing why the Commission is entitled to relief. *Id.* at § 3.2.4. This is where the Landmark Commission might allege that the recipient made the alteration, that the alteration was not accompanied by an appropriate certificate of appropriateness, that 1975 Mass. Acts 1036 requires that alterations are accompanied by a certificate appropriateness, that the Commission issued a cease-and-desist order to prevent that unauthorized alteration's existence, that the defendant failed to comply with, or appeal, that cease-and-desist order, that Mass. Ann. Laws ch. 40C, § 13 and 1975 Mass. Acts 1037 grants the Superior Court authority to redress any violation arising under 1975 Mass. Acts 1036, and that the Commission is entitled to have the Superior Court enforce the cease-and-desist order.

Requests for Relief

Here, the complaint would list each kind of relief to which the pleader claims it is entitled. Each type of relief should be written in separate numbered paragraphs. *Id.* at § 3.2.5. In addition to listing the various types of relief requested, this section should end with the phrase “. . . such other relief as the Court deems just” so as to not limit the Court in granting relief and give the Court an opportunity to “issue such other orders for relief as may be equitable.” Mass. Ann. Laws ch. 40C, § 13. *Massachusetts Superior Court Civil Practice Manual* § 3.2.5. The type of relief the Landmark Commission will want to request is injunctive relief to enforce the cease-and-desist order. The complaint should articulate the request for injunctive relief with “precise and reasonable detail . . . the acts sought to be restrained.” Mass. R. Civ. P. 65(d). This cannot be accomplished by self-referencing other parts of the complaint. *Id.* If the language for the injunctive relief is written narrowly and specifically enough, the Court may issue an order that

tracks the language of the complaint. *Massachusetts Superior Court Civil Practice Manual* § 3.2.5. The relief sought in *Ferruzzi* was “declaratory and injunctive relief to enforce a cease-and-desist order issued to defendant . . . on April 17, 1998.” 2000 Mass. Super. LEXIS 165, 1. The relief sought in the defendant’s counterclaim in *Federated Church* was the “enforcement of the cease and desist order.” 4 Mass. L. Rep. 212 (1995). That order was articulated more clearly in the court’s holding as:

[O]rdering the Plaintiff, Federated Church, to file with the Defendant, Historic Commission for the Town of Edgartown, no later than September 1, 1995, a plan for removal of the vinyl siding on the exterior of the parish House and for replacement of that siding with clapboard or other material reasonably acceptable to the Commission no later than December 31, 1995.

Id. Additionally, 1975 Mass. Acts 1036 permits the Court to impose fines on anyone who has altered a landmark, or structure within a landmark district, without authorization, and permits that unauthorized alteration to continue each day after the cease-and-desist order was received. 1975 Mass. Acts 1036. If the Commission wishes to impose these fines, it would be requested here.

After the complaint is drafted, it must be filed with the requisite Civil Action Cover form, and any necessary entry fees, with the Suffolk County Superior Court clerk. Mass. R. Civ. P. 3. The Civil Action Cover form can be found on the Superior Court’s webpage. The current mailing and contact information for the Civil Clerk’s office for Suffolk County is:

Michael Joseph Donovan, Clerk for Civil Business
3 Pemberton Square
12th Floor
Boston, MA 02108
(617) 788-8175
suffolkcivil.clerksoffice@jud.state.ma.us

Soon thereafter, the cease-and-desist order recipient, now the defendant, would be issued a summons with a copy of the complaint. Mass. R. Civ. P. 4. The Commission's counsel, the Boston City Law Department, will then continue with the suit from thereon.

In summary, the Commission should begin any enforcement action by issuing a cease-and-desist order. If the recipient neglects order and continues to violate 1975 Mass. Acts 1036, or the recipient appeals the order, the Commission should then seek the order's enforcement through the injunctive relief the Superior Court has jurisdiction to grant.