

Massachusetts Permit Session Jurisdiction Explained

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On February 27th, the **Massachusetts Appeals Court** again held that certain land use appeals under Mass. G.L.c. 185, §3A, cannot be brought in Housing Court – they may only be brought in Superior Court or in the permit session of the Land Court.

In ***Skawski v. Greenfield Investors Property Development, LLC***, Mass. Appeals Court Docket No. 13-P-1947, the Court held that the Housing Court did not have jurisdiction over abutters' appeal of a zoning special permit. The Greenfield Planning Board had issued a special permit for a 135,000-square-foot retail facility. The abutters elected to file their appeal in the Western Division of the Housing Court which, they contended, was an appropriate forum under the provisions of G.L.c. 40A, §17. The developer argued that since its project qualified for the Land Court's permit session, the appeal could not be heard in the Housing Court. Three and one-half years later, the Appeals Court agreed, ruling that the developer's motion to dismiss for lack of subject matter jurisdiction should have been granted. Since the time within which to bring a timely appeal has long since passed, the abutters' choice of the wrong forum is fatal to their claim.

The Streamline Permitting Act of 2006 made a number of statutory changes in an effort to expedite permitting of large development projects. Among these changes, G.L.c. 185, §3A established a separate session of the Land Court, known as the permit session. The permit session was given original jurisdiction, concurrently with the Superior Court, over appeals of any municipal, regional or state permit in cases in which "the underlying project or development involves either 25 or more dwelling units or the construction or alteration of 25,000 square feet or more of gross floor area or both."

The decision in *Skawski* is not surprising in light of the Appeals Court's earlier decision in *Buccaneer Development, Inc. v. Zoning Bd. of Appeals of Lenox*, 83 Mass. App. Ct. 40 (2012) (case commenced in the Land Court's permit session and transferred to the Western Division of the Housing Court should have been transferred back to the Land Court). What is significant about *Skawski* is that it illustrates the hazards when litigants seek what they perceive to be a convenient, but the wrong, forum. The abutters in *Skawski*, and Town Counsel in *Buccaneer Development*, apparently preferred to litigate in the Western Division of the Housing Court. In *Buccaneer Development*, transfer to the Housing Court "merely" slowed the proceedings when the case was eventually transferred back to the original forum (five years after it was commenced). In *Skawski*, filing suit in the preferred, but

wrong, forum turned out to be fatal to the abutters' claim.

In zoning appeals, as in so much of land use permitting, the success of a project or an appeal may depend upon correctly dotting the i's and crossing the t's at every step, including in the choice of forum.

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