

NO. 173553

TOWN OF GLASTONBURY

VS.

E & M CONSTRUCTION CO.,
INC., ET AL.

SUPERIOR COURT

JUDICIAL DISTRICT OF
HARTFORD-NEW BRITAIN AT
HARTFORD

DECEMBER 31, 1980

MEMORANDUM OF DECISION

On May 20, 1969, Lloyd S. Moody, son of defendant Carleton S. Moody, applied to the Town Plan and Zoning Commission of Glastonbury for subdivision approval of 29 building lots on a parcel of land containing 47 acres in a Rural Residence Zone to be known as "Pine Hills." Preliminary consideration was given to the application on that day, at which time the commission "felt due regard should be given to the preservation and enhancement of natural features following contours of land." Further consideration and review of the proposed subdivision took place at subsequent meetings. After required changes were made, the subdivision was approved by the commission on September 2, 1969.

Thereafter, the subdivision road, Heritage Drive, was completed in December, 1969, by the developer in accordance with the approved layout and specifications.

During the pendency of this application before the commission, the defendants agreed to purchase the building lots upon the subdivision approval. However, they did not participate before that agency in the review and consideration of the specifications of the proposed subdivision. Following the commission's approval of the subdivision, Lloyd S. Moody conveyed the building lots to the defendants, who then commenced the construction and sale of homes in accordance with the plans on file. In the development of these lots, natural features of the land, such as topography and trees, were preserved. Only such excavation and grading took place as were necessary for the construction of these homes and driveways.

In July, 1970, the defendants began to excavate and remove earth and gravel from Lots Nos. 26, 27, 28, 29 and 30 on Heritage Drive without a permit for excavation or for the construction of homes on these lots. Upon the complaint of those who had already bought homes in the subdivision, the building inspector ordered this excavation halted. The defendant corporation then filed an application with the commission for an excavation permit "to remove the excess fill and gravel from the lots in accordance with the proposed grading plan submitted herewith," stating, further, "[t]his will allow the developer to

make efficient use of the fill and gravel available in this subdivision and will provide for more uniform lots and better grades for building purposes."

A public hearing was held on this application on October 6, 1970. At this time the commission was informed that the proposed excavation would take 3 to 4 years for completion. The town building inspector and conservation commission strongly opposed the excavation. At the conclusion of the hearing, the commission held its regular meeting, at which it rejected the application. The defendants appealed therefrom to the Court of Common Pleas, but this appeal was later dismissed for failure to prosecute the action. The defendants continued to build and sell homes in the subdivision during 1970 and 1971. By fall, 1971, there were over 20 homes occupied by purchasers. All of these homes were built in accordance with the approved subdivision plans, with the natural topography and trees being preserved.

On July 2, 1971, inspection of the site by the zoning enforcement officer after a complaint revealed that the defendants had once again begun to excavate from the building lots. A cease and desist order issued, but sporadic removal of fill and gravel continued. At about the same time the town sought to enjoin the defendants from depositing fill in another area of town. As a result of that litigation, the zoning regulations pertaining to the excavation and filling or removal of earth products in existence

since May 25, 1969, were tightened by amendments effective October 25, 1971. In the meantime the town and the defendants attempted to resolve their differences over the defendants' removal of fill and gravel from this subdivision. The town offered assistance in possible house and driveway layouts for the completion of the subdivision "without unnecessary destruction of the landscape." The defendants rejected this offer by renewing its large scale stripping and excavation operations on Saturday morning, November 13, 1971, at 6:00 a.m.

The town reacted quickly to this large scale excavation. At a special meeting of the town plan and zoning commission on November 16, 1971, the subdivision approval was temporarily suspended as to those lots for which building permits had not been issued, and "unless said Company shall appear at the next regularly scheduled meeting of this Commission with a full and satisfactory explanation of its conduct, the approval of said Subdivision shall automatically, by the terms of this resolution, be modified by limiting such approval to only those lots for which building permits have been issued, and by revoking such approval as to all other lots." Although notified of this action the defendants failed to appear at the next regular meeting of the commission held on December 7, 1971. In addition, after an order to show cause, this court on November 23, 1971, by agreement of the parties without a hearing, issued a temporary injunction against the defendants, enjoining them from excavating and

removing any earth products from Lots Nos. 28, 29 and 30, located on the east side of Heritage Drive. The town now seeks a permanent injunction, extending also to Lots Nos. 26 and 27, as well as the restoration of these five lots to their prior condition.

By counterclaim filed on September 12, 1978, the corporate defendant, E & M Construction Company, Inc., alleges that it is, and has been prior to November 23, 1971, the owner of Lots Nos. 13, 14, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30, Heritage Drive, Glastonbury. The plaintiff admits this allegation even though the corporate defendant transferred these lots to defendant Carleton S. Moody by warranty deed, dated September 23, 1976, and recorded on September 29, 1976, in the Glastonbury Land Records in volume 215, page 1148. The counterclaim alleges further that notwithstanding that the temporary injunction extends only to Lots Nos. 28, 29 and 30, the town has "refused, failed or neglected to issue building permits in accordance with the regulations of the Town and the laws of the State of Connecticut" for the other building lots remaining in the approved subdivision, namely, Lots Nos. 13, 14, 21, 22, 23, 24, 25, 26 and 27. The claim for relief, in the sole name of defendant Carleton S. Moody, seeks a "declaratory judgment that the subdivision approval granted on September 2, 1969, is and remains a valid subdivision approval and that no further action need be taken by the

defendant, Carleton S. Moody, to perfect his rights in and to said subdivision."

The town has filed three special defenses to this counter claim. First, the defendants themselves caused the stoppage of development by their intentional and continuing refusal to proceed in accordance with the approved subdivision plans and maps, and by their intentional and continuing violations of the zoning and subdivision regulations, and of the excavation and removal of earth products ordinance. Second, the defendants voluntarily ceased all activities within the subdivision, except for other violations of the **zoning**, regulations and town ordinances. Third, the defendants failed to pursue administrative and court appeals, if aggrieved by actions of the town officials or agencies.

Notwithstanding the action taken by the commission on November 16, 1971, and the existence of the temporary injunction against the defendants, the town still sought to break the impasse in development of the subdivision by negotiation. As a result, the defendants on February 15, 1972, offered an excavation-construction plan which would have allowed the additional excavation and removal of about 200,000 cubic yards of earth materials. The commission disallowed this, plan as an unacceptable excavation destructive of the natural topography and existing trees beyond that necessary for construction. It did, however,

invite an application for excavation on a smaller scale, but to this suggestion the defendants did not respond.

The stalemate resulting from these complicated facts and the respective actions and positions of the parties sets forth two issues for the resolution of the court. First, is the proposed excavation of fill and gravel prohibited by the subdivision approval of September 2, 1969? Second, what is the legal effect of the commission's revocation of subdivision approval on November 16, 1971?

The enabling statute for local control of the subdivision of land is found in General Statutes § 8-25. This provides, in pertinent part, as follows: "No subdivision of land shall be made until a plan for such subdivision has been approved by the [planning] commission Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land." Pursuant to this authority, subdivision regulations were adopted by the plaintiff prior to the "Pine Hills" application on May 20, 1969.

Similarly, the enabling statute for local control of the excavation and filling or removal of earth products is found in General Statutes § 7-148. This provides, in relevant part, that any town may, by ordinance, "regulate the filling of, or removal of soil, loam, sand or gravel from, land not in public use in the whole or in specified districts of the town, city or

borough and provide for the reestablishment of ground level and protection of the area by suitable cover." Under this authorization special zoning regulations for the "Excavation and Filling or Removal of Earth Products" were adopted by the plaintiff prior to the subdivision application.

The control of the subdivision of land is a governmental function distinct and separate from control of the excavation or filling of land. Different standards apply to the control of each, thereby demanding separate applications for each function. The converse also applies. The approval of one function does not permit the other function without a separate application and approval. It follows, therefore, that the approval of a subdivision does not allow the excavation and removal of fill or gravel, except as incidental to the construction of homes, driveways, roadways, and such other subdivision requirements as may be approved by the delegated commission. Of necessity, a subdivision has vertical, as well as horizontal, aspects. Contours of land, and natural growth thereon, such as trees, consequently are within the control of the planning commission, and unless excepted by the plans approved, must be observed as proposed or existing at the time of application.

The subdivision regulations of the plaintiff town in effect in 1969 were sufficiently clear in their requirements controlling in this respect. A topographic map had to be

submitted with the application showing contours in at least 5-foot increments, and 2-foot increments where needed to illustrate special topographical features. By necessary implication, this includes proposed, as well as retained, contours. The topographical map approved as part of the subdivision in this case did have proposed, as well as retained and existing, contours. No authority exists in the defendants to modify any of the approved contours, except as incidental in the development of their subdivision by construction thereon.

Emphasis on. this aspect of subdivision approval is found in Section II G of the subdivision regulations, entitled "NATURAL FEATURES," as follows:

"Due regard shall be given to the preservation and potential enhancement of existing natural features, large trees, scenic points and other assets of a community nature."

The defendants' claim support for their position that the contours shown in the approved subdivision plan are not controlling in the amendment to the subdivision regulations effective September 14, 1972, and admittedly enacted "to clarify the Moody situation." The amendment requires that the subdivision plan "show finish grades or a grading plan if existing contours are not to be followed." The defendants maintain that this amendment cannot "operate retroactively" upon their previously approved subdivision. By all the evidence, the sole purpose of this

amendment was not to add a new requirement to the subdivision regulations., but merely "to clarify" or make clear that such a requirement already existed, and the court so finds.

We now turn to the commission's revocation of subdivision approval on November 16, 1971. In this consideration we must distinguish between violations of excavation ordinances or regulations and violations of subdivision regulations. The excavation regulations of the town of Glastonbury are found in SS 5.5 thru 5.5.14 of the zoning regulations. The provisions for their enforcement and for violation penalties are in § 6.3 of the zoning regulations. Their enforcement is delegated to the building inspector. The criminal penalties of General Statutes 8-12 are incorporated by reference. Injunctive relief is also available in appropriate cases, as here.

Enforcement of the subdivision regulations is provided for in § VI as follows: "These regulations shall be enforced under the provisions of any ordinance enacted under 8-27, Connecticut General Statutes, Revision of 1958, as amended, or any ordinances passed under any successor or similar statute." No such ordinance has been called to the attention of the court for judicial notice. In any event, injunctive relief is available in appropriate cases, as here. However, in no event is the "panic reaction" taken by the commission on November 16, 1971, in its purported 'revocation of subdivision approval authorized by law. The commission's resolution of November 16, 1971, therefore, is hereby declared to be void and of no legal effect, and the

subdivision approval of September 2, 1969, is declared to be valid and binding in its terms on all parties concerned.

The court has viewed the premises in their present state. They cannot be allowed to remain in that condition. Yet, complete restoration to their original contours of September 2, 1969, under all the circumstances of this case would be inequitable.

In view of all the foregoing, the court hereby orders as follows:

1. Defendant Carleton S. Moody, his servants, agents, employees and subcontractors, are hereby ordered to wholly desist and refrain from excavating and removing any earth products from Lots Nos. 26, 27, 28, 29 and 30, Heritage Drive, Glastonbury, except as incidental to the construction of any home and driveway on said lots in accordance with the subdivision approval of September 2, 1969, under penalty of Ten Thousand Dollars (\$10,000.00).

2. Defendant Carleton S. Moody is hereby ordered to restore the contours of Lots Nos. 26, 27, 28, 29 and 30 in accordance with the plan prepared by the Town of Glastonbury entitled, "Gravel Bank & Lot Restoration," dated August 8, 1978, on or before December 31, 1981, under penalty of Twenty Thousand Dollars. (\$20,000.00),


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J.