

**BOARD OF APPEALS
TOWN OF ACTON, MASSACHUSETTS**

RE: Mark McCarthy and Claire McCarthy (“Petitioners”)
191 Nagog Hill Road
Board of Appeals Petition for Review; Petition for Finding Pursuant to G. L. c. 40A, §6;
and Petition for Variance.

PETITIONERS’ MEMORANDUM

Background

The Petitioners purchased the property at 191 Nagog Hill Road (“Locus”) on November 15, 2010, with the intention of demolishing the presently existing single-family residence on Locus and constructing a new home thereon to accommodate the Petitioners and Mr. McCarthy’s elderly parents.

Prior to the Petitioner’s purchase of Locus, Bob Young, the broker for the sellers, met with the Town Planner, Roland Bartl (“Town Planner”) and was informed that as Locus conformed to zoning when created, the Petitioners could tear down the existing home and build a larger home on Locus. Separately, the Petitioners’ broker, met with the Zoning Enforcement Officer, Scott Mutch (“ZEO”) and was informed that Locus could be built upon provided current setback requirements were met. Neither were informed by the Town Planner or the ZEO of any other limitations on reconstruction at Locus.

In reliance on the these assurances, the Petitioners purchased Locus and applied for a total demolition permit for the existing residence, which was issued on December 20, 2010. The Petitioners then applied for a building permit for the proposed new residence.

On February 14, 2011, the ZEO issued a decision entitled “Interdepartmental Communication,” (“First Decision”) denying the Petitioners’ building permit application. A copy of the First Decision is attached hereto as Exhibit A. In summary, the First Decision noted that Locus is a hammerhead lot and that the connection between the building area on Locus and Nagog Hill Road does not conform to the current minimum lot width requirement for hammerhead lots under Section 5.3.4.1 of the Acton Zoning Bylaw (“Bylaw”). The First Decision further asserted that under Section 8.3.6 “the Net floor Area’s of past and proposed dwelling structures must be identical.” The First Decision also stated: “Additionally, glancing at the plans quickly, it appears as though there are two (2) separate and independent garages proposed. . . . [Section 3.8.1.1 of the] Zoning Bylaw indicates the term “garage” to be singular in nature and, therefore, I am determining that only one (1) garage structure is permitted on the property.” The First Decision advised the Petitioners that as the construction of the new dwelling unit, the Petitioners could apply for a variance and that as to the garage issue, the Petitioners could appeal.

On March 11, 2011, after consultation with Town Counsel, the ZEO rescinded the First Decision and issued a new decision entitled “Interdepartmental Communication Revised Memo

(Rescinds and Replaces Original Memo dated February 14, 2011).” (“Second Decision”). A copy of the Second Decision is attached hereto as Exhibit B. In relevant part, the Second Decision, after consultation with Town Counsel, acknowledged that the Petitioner was entitled to proceed under G. L. c. 40A, §6, first paragraph and, therefore, added the provision which was not in the First Decision that the Petitioners could also “[s]eek a finding from the Zoning Board of Appeals that the proposed dwelling may be built upon the non-conforming lot despite Section 8.3.6 pursuant to M.G.L. c. 40A, §6, first paragraph. . . .”

Although the ZEO made no inquiry of the Petitioners as to the proposed use of the residence, the Second Decision also, for the first time, asserted that the proposed building plans created an accessory apartment in contravention of the Bylaw.

The Petitioners timely appealed the Second Decision and also advised the ZEO that the proposed guest living area was to accommodate Mr. McCarthy’s 81 year old mother, who is suffering from a combination of Parkinson’s and dementia, and 82 year old father and offered to record an appropriate covenant that Locus would not be used for an accessory apartment. It is the Petitioners’ understanding that the ZEO now agrees that there is no accessory apartment proposed. See correspondence attached hereto as Exhibit C.

Locus and Proposed Residence

As set forth above, Locus is situated at 191 Nagog Hill Road. It is a hammerhead lot containing 4.6 acres more or less and complies with all of the current dimensional requirements of the Bylaw for a hammerhead lot, except only that the connection between Nagog Hill Road and the building area on Locus is twenty (20) feet wide at its narrowest point. Therefore, although the building area on Locus has a lot width in excess of 250 feet and easily accommodates the 200 foot building square required by Section 5.3.4 of the Bylaw, Locus does not conform to the current minimum 50 foot lot width requirement of Section 5.3.4 of the Bylaw.¹ In all other respects, Locus meets the current dimensional requirements of the Bylaw.

The existing residence on Locus conforms to all of the dimensional requirements of the Bylaw. The Petitioners propose to demolish the existing residence at Locus and replace it with a new residence which, although larger than the existing residence, also will conform in all respects to the current dimensional requirements of the Bylaw. Simply stated, both the Petitioners’ proposed use and their proposed residence will conform in all respects with the Bylaw. The only non-conformity – the lot width required by Section 5.3.4 of the Bylaw as to the connection between the building area on Locus and Nagog Hill Road – will be unaffected.

The Building area is well beyond the end of a common driveway and the proposed residence is set back an additional 322.2 feet from the end of the access strip. The proposed sideline setbacks are 55.5 feet and 101.5 feet respectively and the proposed rear yard setback is 176 feet. The proposed residence will be in a heavily treed area and will not be visible from any existing buildings. See Plans attached hereto as Exhibit D. It is the Petitioners’ understanding that the neighbors are in favor of their project and believe that the proposed residence will not be

¹ At the time Locus was created, there was no lot width requirement. The 50 foot lot width requirement was adopted at the time of the May 7, 1984 recodification of the Bylaw.

more detrimental to the neighborhood than the existing house, but will in fact constitute an improvement to the neighborhood.

Incorporated within the proposed residence and not as a separate structure or structures will be one (1) one-car bay on the left end of the house and three (3) one-car bays at right end of the proposed residence. See the elevation plans attached hereto as Exhibit E.

The Petitions

A. Construction of New Residence

1. Construction is Permitted Under G. L. c. 40A, §6.

As recognized by the Second Decision, Section 8.3.6 of the Bylaw does not exclusively regulate the reconstruction of a conforming residence on a nonconforming lot. Rather, a conforming residence may be reconstructed on a nonconforming lot in accordance with the protections afforded by G. L. c. 40A, §6, first paragraph.

G. L. c. 40A, §6, first paragraph provides, in relevant part:

. . . a zoning . . . by-law . . . shall apply to any . . . reconstruction, extension or structural change of such structure . . . **except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.** Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. [Emphasis added.]

In *Bransford v. Zoning Board of Appeals of Edgartown*, 444 Mass. 853 (2005), citing and relying on *Dial Away Co. v. Zoning Bd. of Appeals of Auburn*, 41 Mass. App. Ct. 165 (1996) and *Willard v. Board of Appeals of Orleans*, 25 Mass. App. Ct. 15 (1987), the Supreme Judicial Court held that the foregoing provisions of G. L. c. 40A, §6, first paragraph, were applicable to the situation where, as here, the petitioner proposes to replace a conforming residence on a nonconforming lot with another conforming residence. See also *Bjorkland v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008). Copies of the aforereferenced cases and G. L. c. 40A, §6 are attached hereto as Exhibit F.

In *Bransford*, the Supreme Judicial Court held that G. L. c. 40A, §6, requires a two-step process when considering the reconstruction of a conforming residence on a non-conforming lot:

(a) First, the zoning administrator should identify “the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition

would intensify the existing nonconformities or result in additional ones.” See *Bransford, supra* at 858, n.8. If the zoning administrator makes the finding that the proposed reconstruction does not intensify existing nonconformities or create new nonconformities, reconstruction may proceed **as a matter of right**. *Bransford, supra* at 859.

(b) Second, and **only** if the zoning administrator determines that the proposed reconstruction would intensify the existing nonconformity or create new nonconformities, the Zoning Board of Appeals should review the matter and allow the reconstruction if it finds that the proposed reconstruction “shall not be substantially more detrimental than the existing nonconforming use [or structure] to the neighborhood.” *Bransford, supra* at 859.²

Therefore, as recognized by the Second Decision, issued after consultation with Town Counsel, the ZEO amended his First Decision to advise the Petitioners that they could seek a finding from the Board pursuant to G. L. c. 40A, §6.

In the instant case, as set forth above, the only nonconformity is the width of the land connecting the building Area at Locus with Nagog Hill Road. Unlike in *Bransford*, where the Court held that it could reasonably be found that the petitioner was intensifying the nonconformity by doubling the existing house on a substantially undersized lot (approximately 1/3rd the required area),³ the Petitioners respectfully submit that it could not reasonably be found that their proposed residence will in any way intensify the nonconformity represented by the width of the land connecting the building area at Locus to Nagog Hill Road. The proposed residence is not located within the area of nonconformity, but is situated more than 300 feet from the nearest point of nonconformity. The proposed residence is in an area that conforms to all of the present requirements of the Bylaw, including the required 200 foot building square. In short, there is no connection between the proposed residence and the nonconformity of the width of the connection between the building area and Nagog Hill Road or any proper zoning purpose served by the current lot width requirement of the Bylaw as applied to Locus.

Therefore, as the proposed residence does not intensify any existing nonconformity or create any new nonconformities, the Petitioners are entitled as a matter of right to proceed with the proposed reconstruction on Locus and no further findings under G. L. c. 40A, §6 or the Bylaw are required.

Further, even if the proposed residence intensified the nonconformity of Locus, which it does not, the Petitioners respectfully submit that it cannot reasonably be found to be

² In *Bransford*, the lot was substantially undersized (approximately 1/3 the size required) and the proponent sought to approximately double the size of the existing residence. The Supreme Judicial Court held that the zoning administrator could have reasonably concluded that although the proposed new residence would meet current setback requirements, the increased size of the residence would aggravate the nonconformity represented by the small lot size such that the matter could properly be referred to the Board of Appeals for a determination as to whether the proposed structure was substantially more detrimental to the neighborhood than the existing structure.

³ Section 8.3.2 of the Bylaw adds further protection beyond that in *Bransford* by specifying that where the reconstruction conforms to “all of the dimensional requirements of this Bylaw” such reconstruction is permitted as a matter of right.

“substantially more detrimental to the neighborhood” than the existing structure. Locus is situated in a neighborhood of six large secluded lots and is the last lot on a common driveway. The building area of Locus is approximately 1,050 feet from Nagog Hill Road and is not visible at all from Nagog Hill Road. The proposed residence contains approximately 7,597 square feet of net floor area⁴ which, because Locus contains approximately 4.6 acres, represents a floor area ratio of less than 3.8%. The proposed residence is in a secluded area surrounded on three sides by woods and is set back from the nearest residence by approximately 436 feet and is well screened from the nearest residences by existing woodlands. The lack of detriment to the neighborhood is demonstrated by the neighbors’ support of this project. In these circumstances, any contrary finding would be unreasonable. Therefore, even if the proposed reconstruction on Locus intensified any nonconformity, which it does not, the Board must nevertheless make the finding that the proposed reconstruction is not substantially more detrimental to the neighborhood than the existing structure and permit the Petitioners to proceed.

In conclusion, the Petitioners submit that the proposed new residence is permitted as a matter of right under G. L. c. 40A, §6, as it would not intensify any existing nonconformity or create any new nonconformity and because it is not more detrimental to the neighborhood than the existing structure. Therefore, pursuant to G. L. c. 40A, §6, as applied by *Bransford, supra*, the Board must permit the proposed reconstruction.

2. Construction is Permitted Under the Bylaw, Section 8.1, 8.3.1 and 8.3.2.

The rule in *Bransford* that a single family residence on a nonconforming lot may be voluntarily razed and reconstructed as a matter of right, without special permit, if the proposed new residence will not intensify existing nonconformities or create new ones, is not only codified in the Bylaw, but in fact the Bylaw provides additional protections for nonconforming lots in Sections 8.1, 8.3.1 and 8.3.2 of Bylaw, which provide, in relevant part:

8.1. Nonconforming LOTS – Any LOT which complied with the minimum . . . LOT width . . . requirements if any, in effect at the time the boundaries of the LOT were defined by recorded deed or plan, may be built upon or used for single FAMILY . . . notwithstanding the adoption of new or increased . . . LOT width . . . requirements, provided that [the requirements of Section 8.1.1, 8.1.2 and 8.1.3 are met.]

8.3.1 Continuation of Existing STRUCTURE – The requirements of Section 6 of “The Zoning Act”, Chapter 40A of the General Laws shall apply.

8.3.2 Changing a Nonconforming STRUCTURE - A nonconforming STRUCTURE may be altered, **reconstructed, extended or structurally changed provided that such alteration, reconstruction, extension or structural change conforms to all of the dimensional requirements of this Bylaw.** A vertical extension of a nonconforming BUILDING, which does not expand the BUILDING horizontally so as to violate any applicable yard requirement, shall be deemed not to increase the nonconforming nature of the BUILDING and shall not require a special permit under Section 8.3.3. [Emphasis added.]

⁴ The Second Decision overstates the size of the proposed residence at 10,000 sf.

Under Section 8.3.2 of the Bylaw⁵ where, as here, the proposed reconstruction will conform to all of the dimensional requirements of the Bylaw, it is not even necessary for the ZEO to make the first step of the analysis required by *Bransford* as to whether the proposed reconstruction will intensify any nonconformity. Rather, so long as the proposed reconstruction meets all of the dimensional requirements of the Bylaw, the proposed reconstruction is permitted as a matter of right. See *Dial Away Co. v. Zoning Bd. of Appeals of Auburn, supra* at 170-171, (where the Appeals Court interpreted an identical provision of the Auburn Zoning Bylaw to apply where a single family residence was voluntarily torn down and the petitioner proposed to rebuild despite changes in the zoning bylaws, finding that reconstruction would be permitted thereunder.⁶

Simply stated, Section 8.3.2 of the Bylaw permits the proposed reconstruction as a matter of right without any further determinations or findings under G. L. c. 40A, §6.

B. Garage

Section 3.8.1.1 of the Bylaw permits as an accessory structure in the residential districts a “private garage or carport for not more than four motor vehicles” Notwithstanding that the Petitioners are not proposing an accessory garage structure and are proposing to garage no more than four vehicles all within the proposed residence, the ZEO has interpreted the foregoing provision of the Bylaw to apply not only to garage spaces incorporated into a residence but also to limit all garage spaces in a “singular” garage, i.e., that all four permitted parking bays within the residence must be in a single garage space with no separation.

The Petitioners respectfully submit that the ZEO’s application of Section 3.8.1.1 to garage spaces incorporated within the principal residence is incorrect. Section 3.8.1.1 falls under and is a part of the Section 3.8 “**ACCESSORY USE Regulations**” of the Bylaw. The term “accessory” presupposes the existence of a permitted principal structure or use – in this case a single family residence. “An accessory use is ‘a use which is clearly incidental and customarily found with and located on the same zoning lot as the principal use to which it is related.’” *Bobrowski*, Handbook of Massachusetts Land Use and Planning Law, 12.01 (2d ed. 2002).

All of the examples listed in Section 3.8.1.1 of the Bylaw are examples of accessory structures, i.e., structures which are incidental to and customarily found on the same lot as the principal structure, not part of and incorporated into the principal structure. Even though Section 3.8.1.1, in addition to a “private garage . . . for not more than four motor vehicles,” permits (at

⁵ Contrary to the ZEO’s interpretation, Section 8.3.6 of the Bylaw does not supersede Sections 8.3.2 of the Bylaw, but rather affords additional protections for “[a] structure in single family residential USE on a nonconforming LOT, **that cannot otherwise be built on under the requirements of Section 8.1**” [Emphasis added]. In this case, the lot conforms to the requirements of Section 8.1, having (well more) than 5000 square feet of area and 50 feet of frontage required by Section 8.1.

⁶ Having decided that the proponent in that case could have rebuilt under the provisions of G. L. c. 40A, §6 and Section 8.3 of the Auburn Bylaw, the Court in *Dial Away* went on to find that as a matter of law the proponent had lost the protections of G. L. c. 40A, §6 and the Auburn Zoning Bylaw by waiting twenty years after demolishing the existing residence, a period of time which the Court found to be an abandonment as a matter of law.

least) one accessory “greenhouse, toolshed . . .” no one would say that an indoor room used for storage of tools could be called an accessory “tool shed” or a sun room could be called an accessory “greenhouse.” Similarly, a garage which is incorporated into and a part of the permitted single family residence is not an accessory “private garage” but is an integral part of the permitted single family residence.

Since at least 1949, the law in Massachusetts has been that where, as here, a garage is attached to the main building and architecturally similar to it, such garage is not an accessory building, but is a component part of the house. *Olson v. Zoning Bd. of Appeal of Attleboro*, 324 Mass. 57, 59 (1949). See also *Salkin*, 1 Am. Law. Zoning § 9:64 (5th ed. 2010). Copies of the aforesaid case and authority are attached as Exhibit G.

A plain reading of Section 3.8.1.1 of the Bylaw is that it only refers to separate accessory structures, not to internal components of the permitted principal structure. Simply stated, Section 3.8.1.1 of the Bylaw is not applicable to garage spaces incorporated into and a part of a single family residence.

The Petitioners also respectfully submit that the ZEO’s “singular” interpretation of Section 3.8.1.1 of the Bylaw is incorrect and not consistent with the historical application of that section. Examples of separate garage structures existing on the same lot as a house with a garage incorporated within the house abound not only throughout the Town but also at the immediate neighbors to Locust. A few of the many examples throughout the Town are attached hereto as Exhibit H.⁷

Further, the Petitioners respectfully submit that even if Section 3.8.1.1 were applicable, which it is not, it does not require that the parking bays must all be un-separated and in a single part of the residence. If, as is undisputed, the Bylaw permits four garage spaces, there is no proper purpose of zoning which could conceivably be served by requiring all four spaces to be abutting. This is solely a matter of the interior layout of a single family residence which may not be regulated under G. L. c. 40A, §3 [“No . . . by-law shall regulate or restrict the interior area of a single family residence . . .”].

Further, even accepting, *arguendo*, the ZEO’s ‘singular’ interpretation of the Bylaw to require all parking spaces within a single structure,⁸ there is only one structure involved in this instance and all four parking bays are accommodated within the singular structure. There is no conceivable zoning benefit to an interpretation that requires no separation between parking bays incorporated into the permitted single family residence.

⁷ The present provisions of Section 3.8.1.1 of the Bylaw were adopted with the May 7, 1984 recodification of the Bylaw. Prior thereto, the Bylaw permitted single family residences “... including garaging for not more than four private motor vehicles.”

⁸ Taken to its logical conclusion, the ZEO’s interpretation of the Bylaw would require that a house have only one garage door rather than the usual and normal arrangement of separate doors for separate parking bays. See elevation plans attached as Exhibit D.

Therefore, the Petitioners respectfully submit that the ZEO's interpretation of Section 3.8.1.1 of the Bylaw is incorrect and that the proposed garage spaces incorporated within the proposed residence are permitted under the Bylaw.

CONCLUSION

The proposed residence may be reconstructed under the provisions of G. L. c. 40A, §6, first paragraph, because it will not intensify any nonconformity and because it will not be substantially more detrimental to the neighborhood than the existing structure.

Further, under Section 8.1, 8.3.1 and 8.3.2 of the Bylaw, reconstruction may proceed as a matter of right solely because the proposed reconstruction meets all of the dimensional requirements of the Bylaw.

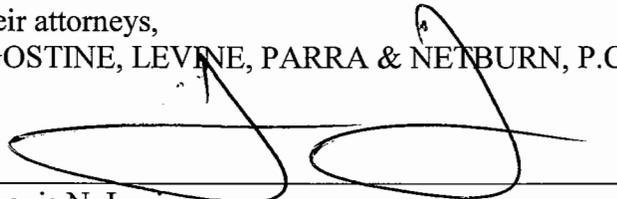
Section 3.8.1.1 of the Bylaw does not apply to the principal structure – a single family residence – and, in any event, does not require that all four proposed parking spaces within the residence be adjoining and not separated.

Therefore, the Petitioners respectfully request that the Board permit them to proceed with construction of their residence.

Thank you for your consideration of these petitions and the foregoing information.

Very truly yours,

MARK MCCARTHY AND CLAIRE MCCARTHY,
Petitioners,
By their attorneys,
D'AGOSTINE, LEVINE, PARRA & NETBURN, P.C.

By: 

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Dated: April 28, 2011

EXHIBIT A



TOWN OF ACTON
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Zoning Enforcement Officer

INTERDEPARTMENTAL COMMUNICATION

To: Town of Acton Building Department/Applicant

Date: February 14, 2011

From: Scott A. Mutch, Zoning Enforcement Officer & Assistant Town Planner

Subject: 191 Nagog Hill Road – Construct New Single Family Residence with 7 Bedrooms, 7 Full Bathrooms, 2 Half Baths, 4 Car Garage

Dear Applicant,

The Planning Department has reviewed your proposed building permit application and CAN NOT approve it at this time. The pending building permit application is seeking approval to construct a new single family residential dwelling structure in excess of 10,000 square feet in size.

Under the Town of Acton's Zoning Bylaw, the subject property is deemed to be a non-conforming hammerhead lot. The non-conformity is the result of the property not having the minimum 50'-0" lot width as required under Section 5.3.4.1. The information provided on the Plot of Land submitted as part of the building permit application indicates that the lot width (at its narrowest point) is only 20'-0". This creates the non-conforming lot issue.

Section 8.3.6 of the Zoning Bylaw sets forth the requirements for the Replacement of Single Family Dwellings. Simply stated, if a structure exists on a non-conforming lot, that structure is permitted to be demolished, but the replacement structure CAN NOT exceed the Net Floor Area of the previous structure prior to its demolition. The footprint of the new dwelling structure is not restricted to exactly having to match the previous dwelling's footprint, but the Net Floor Area's of past and proposed dwelling structures must be identical. Once the new structure is completed and a Certificate of Occupancy is issued by the Building Commissioner, a minimum of two years must elapse before any additions or new square footage is permitted to be added to the dwelling structure. In this particular instance, a total demolition permit for the previous structure was applied for December 13, 2010 and issued on December 17, 2010. The complete section of the Bylaw pertaining to this issue is as follows:

8.3.6 Replacement of Single- and Two-Family Dwellings – A STRUCTURE in single family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for single family residential USE, or rebuilt for single family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; and a STRUCTURE in two-family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for two-family residential USE, or rebuilt for two-family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; in both cases subject to the following conditions and limitations:

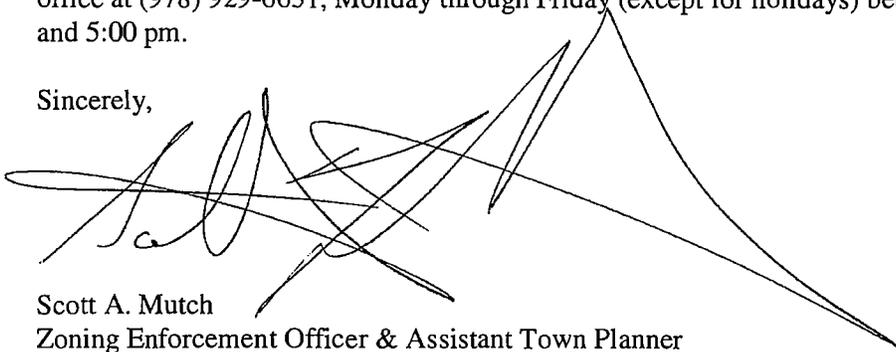
- 8.3.6.1 The replacement STRUCTURE shall not exceed the FLOOR AREA RATIO on the LOT of the STRUCTURE that existed on the LOT before it was razed or damaged.
- 8.3.6.2 The replacement STRUCTURE shall meet all minimum yard and maximum height requirements of this Bylaw.
- 8.3.6.3 In the absence of architectural and plot plans for the existing structure to be razed, the FLOOR AREA RATIO shall be determined by using the information on record at the Town of Acton Assessor's office.
- 8.3.6.4 Additions to the replacement STRUCTURE may be made after two years following the date of initial occupancy of the replacement STRUCTURE, if otherwise permissible and subject to any permits and special permits that may be required.

Additionally, glancing at the plans quickly, it appears as though there are two (2) separate and independent garages proposed. The plans identify a three (3) car garage proposed on the south side of the home and another single (1 car) garage on the north side of the dwelling. Accessory Uses permitted under Section 3.8.1.1 of the Zoning Bylaw allows for a "private garage or carport for not more than four motor vehicles...". The Zoning Bylaw indicates the term "garage" to be singular in nature and therefore, I am determining that only one (1) garage structure is permitted on the property. I CAN NOT allow or permit 2 separate and independent garage structures to exist on a single residential lot.

Based upon the above noted information, I am determining herewith that the new proposed dwelling which is to be located at 191 Nagog Hill Road, Acton, MA does not comply with the Acton Zoning Bylaw. Accordingly, I will not sign-off on or approve any building permits. With regards to the construction of the new dwelling unit, you may seek relief by filing an application to the Town of Acton's Zoning Board of Appeals requesting a variance from the above noted Bylaw requirements. You may seek relief from the multiple garage determination by filing an application to the Town of Acton's Zoning Board of Appeals requesting an appeal of this administrative decision of the Zoning Enforcement Officer. Zoning Board of Appeals information can be obtained by contacting Cheryl Frazier, Secretary to the Zoning Board of Appeals at (978) 929-6633 during regular business hours.

If you have any questions, comments or concerns regarding this matter, please feel free to contact our office at (978) 929-6631, Monday through Friday (except for holidays) between the hours of 8:00 am and 5:00 pm.

Sincerely,



Scott A. Mutch
Zoning Enforcement Officer & Assistant Town Planner

EXHIBIT B



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Zoning Enforcement Officer

INTERDEPARTMENTAL COMMUNICATION

**REVISED MEMO (Recinds and Replaces Original Memo
dated February 14, 2011)**

To: Town of Acton Building Department/Applicant

Date: March 11, 2011

From: Scott A. Mutch, Zoning Enforcement Officer & Assistant Town Planner

Subject: 191 Nagog Hill Road – Construct New Single Family Residence with 7 Bedrooms, 7 Full Bathrooms, 2 Half Baths, 4 Car Garage

Dear Applicant,

Please accept this communication as a replacement for the previously-issued memo dated February 14, 2011. That memo is null and void as of the date of this memo. This communication supersedes all information contained in the February 14th memo, and includes additional information and determinations from this Office.

The Planning Department has reviewed your proposed building permit application and CAN NOT approve it at this time. The pending building permit application is seeking approval to construct a new single family residential dwelling structure in excess of 10,000 square feet in size.

Under the Town of Acton's Zoning Bylaw, the subject property is deemed to be a non-conforming hammerhead lot. The property does not have the minimum 50'-0" lot width as required under Section 5.3.4.1 and is therefore non-conforming in that respect. The information provided on the Plot of Land submitted as part of the building permit application indicates that the lot width (at its narrowest point) is only 20'-0", creating a non-conformity.

Section 8.3.6 of the Zoning Bylaw sets forth the requirements for the Replacement of Single Family Dwellings. Simply stated, if a structure exists on a non-conforming lot, that structure is permitted to be demolished, but the replacement structure CAN NOT exceed the Net Floor Area of the previous structure prior to its demolition. The footprint of the new dwelling structure is not restricted to having to match the previous dwelling's footprint, but the Net Floor Area's of past and proposed dwelling structures must be the same, if not less. In addition, if approved, once the new structure is completed and a Certificate of Occupancy is issued by the Building Commissioner, a minimum of two years must elapse before any additions or new square footage is permitted to be added to the dwelling structure.

In this particular instance, a total demolition permit for the previous structure was applied for December 13, 2010 and issued on December 17, 2010. The complete section of the Bylaw pertaining to this issue is as follows:

- 8.3.6 Replacement of Single- and Two-Family Dwellings – A STRUCTURE in single family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for single family residential USE, or rebuilt for single family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; and a STRUCTURE in two-family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for two-family residential USE, or rebuilt for two-family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; in both cases subject to the following conditions and limitations:
- 8.3.6.1 The replacement STRUCTURE shall not exceed the FLOOR AREA RATIO on the LOT of the STRUCTURE that existed on the LOT before it was razed or damaged.
- 8.3.6.2 The replacement STRUCTURE shall meet all minimum yard and maximum height requirements of this Bylaw.
- 8.3.6.3 In the absence of architectural and plot plans for the existing structure to be razed, the FLOOR AREA RATIO shall be determined by using the information on record at the Town of Acton Assessor's office.
- 8.3.6.4 Additions to the replacement STRUCTURE may be made after two years following the date of initial occupancy of the replacement STRUCTURE, if otherwise permissible and subject to any permits and special permits that may be required.

I am aware that there has been some confusion regarding the application of Zoning Bylaw Section 8.3.6 to the proposed building plans, instead of Section 8.1. I have reviewed your counsel's materials regarding the application of Section 8.1 and, in consultation with Town Counsel, have confirmed that Section 8.3.6 was intended for precisely the circumstances proposed by this building permit. Specifically, Town Meeting approved Section 8.3.6 based on the following Summary of the Warrant Article from Town Meeting:

The zoning bylaw currently allows the restoration of structures after fire, flood, or similar disaster on lots that are nonconforming due to insufficient frontage or area, either by right if the damage amounts to 50% or less of the structure's value, or by special permit if damage exceeds 50% of the value. **The zoning bylaw does not currently allow the intentional demolition and rebuilding of structures on such nonconforming lots. This article would change this for single and two-family homes on such lots.**

It would allow their tear-down and replacement in kind. Since 2000, the Board of Appeals heard six variance petitions to allow such replacements. The cases varied. Five variances were granted. The statutory criteria for variances – hardship due to soil conditions, shape or topography – do not strictly apply to replacements after demolitions. Insufficient frontage or area by themselves cannot be considered hardship. This article would remove the zoning bylaw's barrier against demolition and replacement of single- and two-family residences on nonconforming lots, some of which may fall into disrepair after years of estate ownership and abandonment, become an eyesore in the neighborhood, pose a safety hazard, and may be cheaper to replace than to renovate. **As proposed in the article, a replacement residence would be allowed by right if it complies with applicable setback and height requirements of the zoning bylaw and, as a barrier against speculative tear-downs, if it initially is not larger than the residence it replaces.** Additions can be made later on by a home owner, just like additions can be made to existing homes on non-conforming lots. Looking only at smaller single family homes (less than 1,500 square feet in living area) as the more likely candidates for potential speculative replacements, and evaluating their lots only for area, the Planning Department found 237

such small homes on undersized lots. This represents approximately 4% of Acton's single family housing stock.

This article would also allow by right the replacement in kind of single and two-family homes after fire or natural disaster except flood, regardless of the degree of damage that occurred. (Emphasis added)

According to the Summary, Town Meeting specifically intended to regulate tear-downs on non-conforming lots under Section 8.3.6, not Section 8.1. Under this reading, Section 8.1 applies to original construction on a vacant lot but not to demolition and reconstruction of an existing structure which had become nonconforming. See *Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn*, 41 Mass.App.Ct. 165, 170 (1996) ("Considering the eventual elimination of non-conforming uses as an objective underlying zoning regulations, ... and, in particular, that of Auburn's [zoning bylaw involved in that case], we interpret § 8.1 [of the Auburn bylaw] to apply only to original construction [on a non-conforming lot].").

ADDITIONAL ZONING BYLAW NON-COMPLIANCE ITEMS

1. The building permit plans currently submitted for review, propose the creation of two (2) separate and independent garages. The plans identify a three (3) car garage proposed on the south side of the home and another single (1 car) garage on the north side of the dwelling. Accessory Uses permitted under Section 3.8.1.1 of the Zoning Bylaw allows for a "*private garage or carport for not more than four motor vehicles...*". The Zoning Bylaw indicates the term "garage" to be singular in nature and therefore, I am determining that only one (1) garage structure is permitted on the property. I CAN NOT allow or permit 2 separate and independent garage structures to exist on a single residential lot.
2. The submitted building permit plans call for the creation of a space that may function as an accessory apartment unit located on the northern side of the home where the single car garage is situated. I have determined that the proposed plans create the accessory apartment due to the following manner in which the space is configured:
 - Two (2) separate and private direct exterior entrances into the space. One labeled as "Entry" which acts as the "main entrance" and has a covered porch as part of the entrance space, and another exterior entrance door providing direct access to a rear outdoor patio and backyard space;
 - The placement of a door which can be closed so as to completely separate and keep private the accessory apartment unit from the rest of the main dwelling unit;
 - Separate direct access into the single car garage from inside the accessory apartment;
 - Private single car garage;
 - Two separate bedrooms each with private ensuite bathrooms;
 - Private washing and drying machines and;
 - An area consisting of a countertop with base and upper cabinets, a sink, dishwasher and a full height refrigerator.

All of these design elements configured as is currently depicted on the submitted building permit plans, suggest the creation of an accessory apartment unit. The Town of Acton's Zoning Bylaw permits a single family dwelling to have an accessory apartment unit provided that the accessory apartment unit satisfies very specific requirements. In this particular instance, the most restrictive requirement is the fact that a single family dwelling must have been in existence prior to January 1, 1990 in order to be permitted to have an accessory apartment unit. The specific Zoning Bylaw language of Section 3.3.2 states "A *single FAMILY Dwelling, the*

BUILDING of which was in existence on or before January 1, 1990, to be altered and used for not more than two DWELLING UNITS, the Principal Unit plus one Apartment....". Clearly, this building permit application which seeks approval to construct an entirely new dwelling unit does not satisfy the requirement of the "*BUILDING of which was in existence on or before January 1, 1990*".

Based upon the above noted information, I am determining herewith that the new proposed dwelling which is to be located at 191 Nagog Hill Road, Acton, MA does not comply with the Acton Zoning Bylaw. Accordingly, I will not sign-off on or approve any building permits.

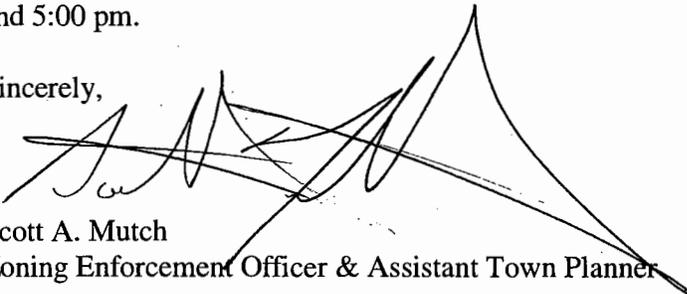
You may, of course, modify your building plans to conform to the requirements and concerns listed in this memo. I would be happy to review such plans with you at any point. In addition, if you disagree with and wish to seek relief from any of the determinations made in this memo, you may pursue any or all of the following three avenues (at your discretion):

1. Submit an application for a Petition for Review to the Zoning Board of Appeals challenging the administrative decisions of the Zoning Enforcement Officer regarding the interpretations of the Zoning Bylaw included in this memo;
2. Seek a finding from the Zoning Board of Appeals that the proposed dwelling may be built upon the non-conforming lot despite Section 8.3.6 pursuant to M.G.L. c. 40A, § 6, first paragraph, or;
3. Submit a variance application to the Zoning Board of Appeals seeking relief from the above noted Zoning Bylaw requirements.

Should you wish to exercise any one of these options, Zoning Board of Appeals information can be obtained by contacting Cheryl Frazier, Secretary to the Zoning Board of Appeals at (978) 929-6633 during regular business hours.

If you have any questions, comments or concerns regarding this matter, please feel free to contact our office at (978) 929-6631, Monday through Friday (except for holidays) between the hours of 8:00 am and 5:00 pm.

Sincerely,



Scott A. Mutch
Zoning Enforcement Officer & Assistant Town Planner

EXHIBIT C

Louis Levine

From: Roland Bartl [rbartl@acton-ma.gov]
Sent: Friday, April 01, 2011 2:41 PM
To: Louis Levine; Scott Mutch
Cc: Mark McCarthy; Jenilee Harrold
Subject: RE: 191 Nagog Hill Road
Attachments: Letter to Scott Mutch.doc; Zoning Certification.doc

Hi, Lou:

See requested changes to the zoning certification. I short, we want it as a covenant with a bit more precise references to the property and building permit. Assuming the other issues get resolved at the ZBA hearing, we want the covenant recorded before the building permit is actually issued or handed out. This would settle the question in the negative on whether or not this is an accessory apartment.

Regards -

Roland Bartl, AICP
Planning Director
472 Main Street
Acton, MA 01720
(978) 929-6631

From: Jenilee Harrold [mailto:jharrold@dlpnlaw.com]
Sent: Thursday, March 31, 2011 3:06 PM
To: Roland Bartl; Scott Mutch
Cc: Mark McCarthy
Subject: 191 Nagog Hill Road

THIS IS A MESSAGE FROM LOUIS N. LEVINE

Scott and Roland:

Per my telephone conversation with Roland yesterday, attached please find draft letter from Mark McCarthy and proposed Zoning Certification. Please confirm that the execution of these documents will resolve the apartment issue.

Thank you.

Louis N. Levine
llevine@dlpnlaw.com
www.dlpnlaw.com

4/28/2011

Jenilee Harrold, Legal Assistant
D'Agostine, Levine, Parra & Netburn, P.C.
268 Main Street
P.O. Box 2223
Acton, MA 01720
Phone: (978) 263-7777, ext. 228
Fax: (978) 264-4868
Email: jharrold@dlpnlaw.com
Website: www.dlpnlaw.com

MCCARTHY

6 Abel Jones Place
Acton, MA

April ____, 2011

Scott Mutch, ZEO
Town of Acton
472 Main Street
Acton, MA 01720

Dear Mr. Mutch:

Confirming our telephone conversation, the reason for our design of the guest area living quarters was to accommodate my 81 year old mother and 82 year old father. My mother is dying from a combination of Parkinson's and Dementia. We need two bedrooms since my father cannot be in the same room with my mother any longer and nursing care is in the room most of the time. Furthermore, I have six children, three of whom are adults and we would like them to be able to live with us.

Very truly yours,

Mark McCarthy

ZONING CERTIFICATION AND COVENANT

We, Mark McCarthy and Claire McCarthy, Husband and Wife, as Tenants by the Entirety, being the owners of the property located at 191 Nagog Hill Road, Acton, Massachusetts, by virtue of a deed recorded with Middlesex South District Registry of Deeds, Book 55861, Page 440, hereby acknowledge and agree that pursuant to the provisions of the Acton Zoning Bylaw in effect on the date hereof (“Bylaw”), the building at our aforesaid property for which we have heretofore submitted a building permit application (Building Permit # _____), shall only be used as a single family dwelling as defined in Bylaw Sections 1.3.5 and 1.3.6ⁱ and as permitted under Bylaw Section 3.3 and may not be used as a two family dwelling or as a single family dwelling with one apartment pursuant to the Bylaw in effect on the date hereof.

Executed this _____ day of _____, 2011.

Mark McCarthy

Claire McCarthy

ⁱ Section 1.3.5 defines a “DWELLING UNIT” as a “portion of a BUILDING designed as the residence of one FAMILY.” Section 1.3.6 defines a “FAMILY” as a “person or number of persons occupying a DWELLING UNIT and living as a single housekeeping unit, provided that a group of six or more persons shall not be deemed a FAMILY unless at least half of them are related by blood, marriage or adoption, including wards of the state.”

COMMONWEALTH OF MASSACHUSETTS

_____, ss. _____, 2011

Then personally appeared before me, the undersigned notary public, Mark McCarthy, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose, as aforesaid.

Notary Public
My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

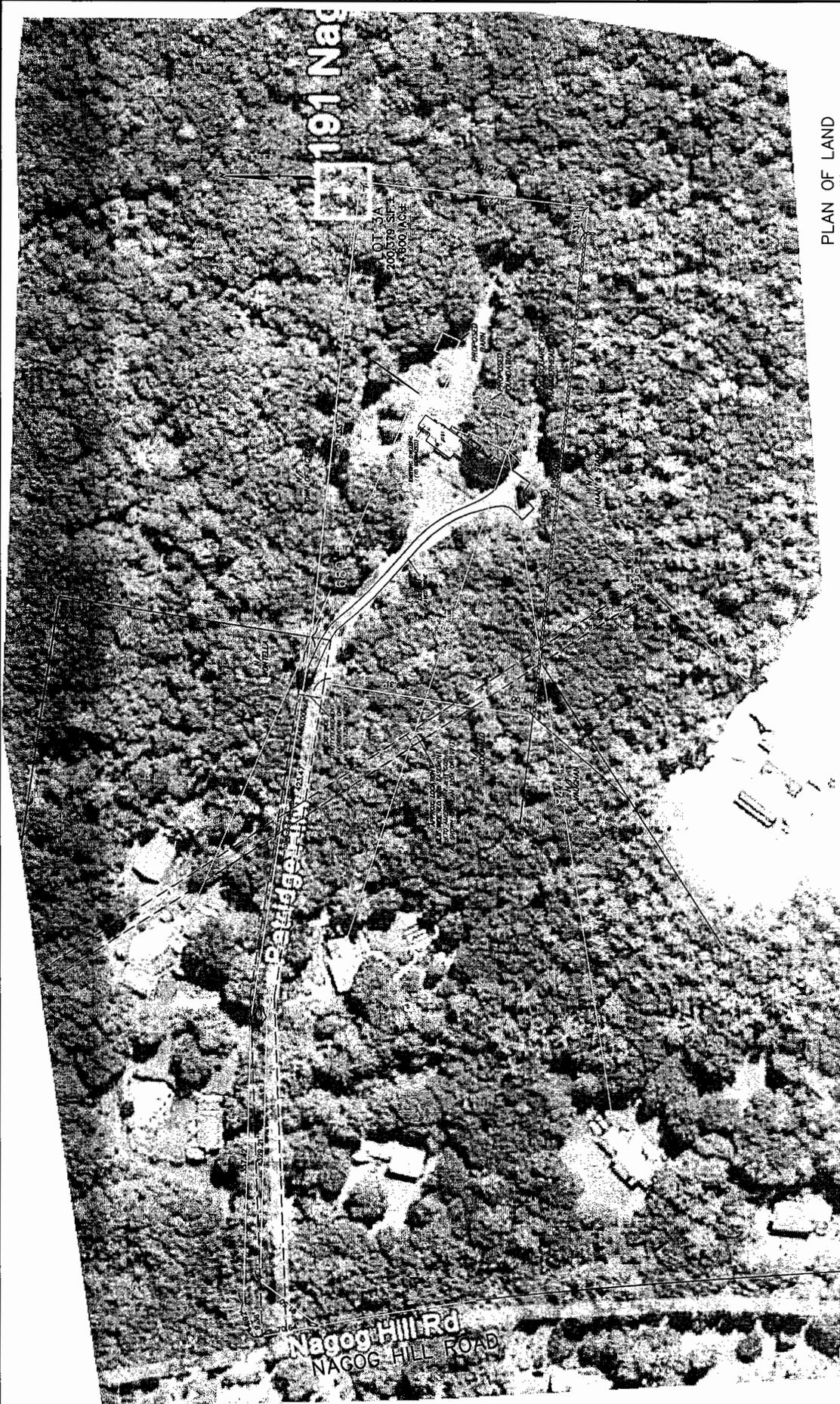
_____, ss. _____, 2011

Then personally appeared before me, the undersigned notary public, Claire McCarthy, proved to me through satisfactory evidence of identification, which was _____, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that she signed it voluntarily for its stated purpose, as aforesaid.

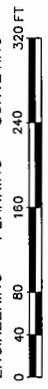
Notary Public

My Commission Expires:

EXHIBIT D

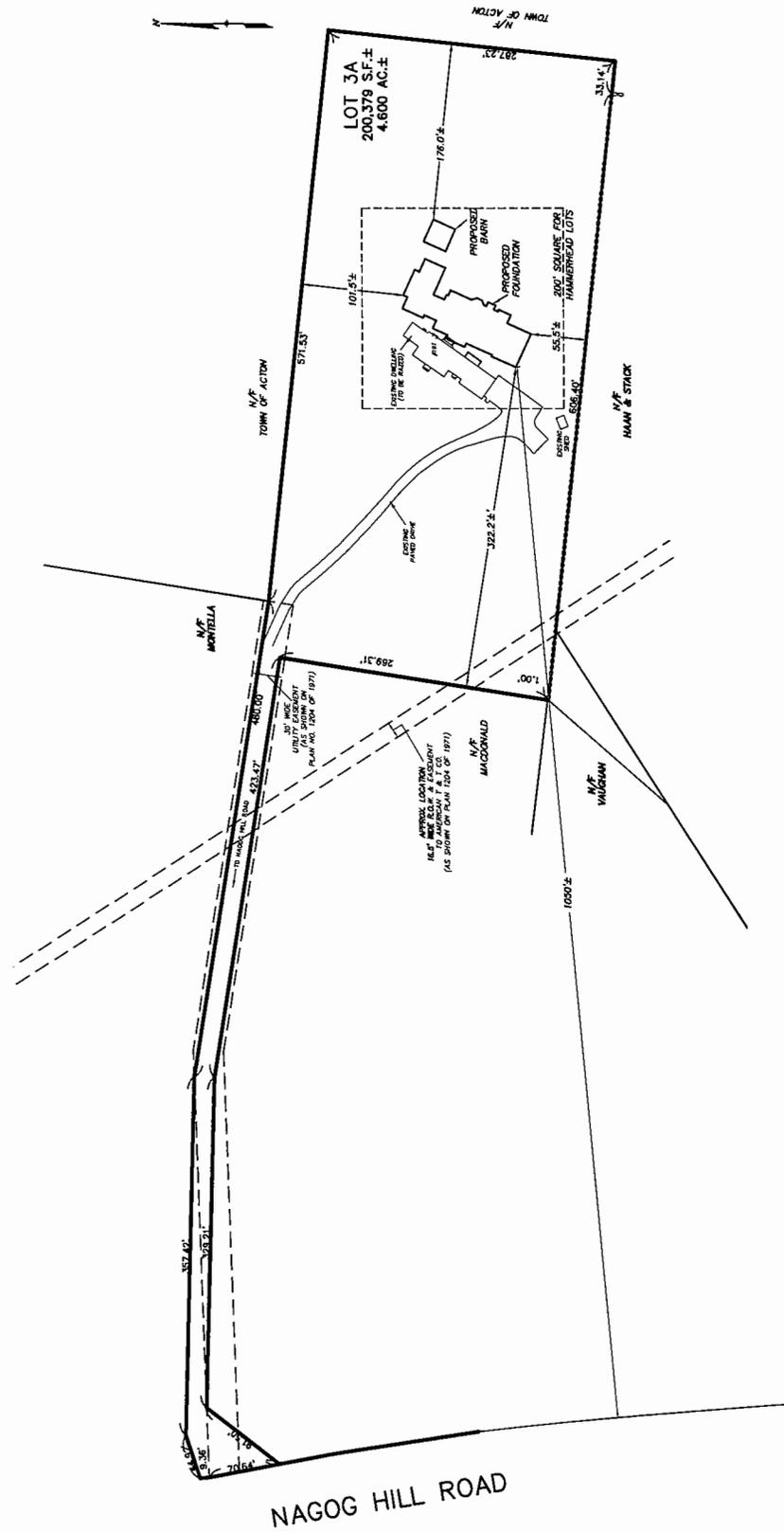


PLAN OF LAND
IN
ACTON, MASSACHUSETTS
(MIDDLESEX COUNTY)
FOR: **MCCARTHY**
SCALE: 1"=80' APRIL 27, 2011
STAMSKI AND McNARY, INC.
1000 MAIN STREET ACTON, MASSACHUSETTS
ENGINEERING - PLANNING - SURVEYING

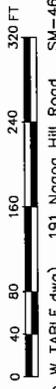


(4694plot\plan w TABLE.dwg) 191 Nagog Hill Road SM-4694

DIMENSIONAL DATA	
ZONING REQUIREMENTS (R10/B)	
MIN LOT AREA	100,000 SF
MIN LOT FRONTAGE	250 FT
MIN LOT WIDTH	50 FT
MIN FRONT YARD	45 FT
MIN SIDE & REAR YARD	20 FT
MAX BUILDING HEIGHT	36 FT
REQUIRED*	200,000 SF
PROVIDED	200,379 SF
	60 FT
	20 FT
	1,050 FT±
	55.5 FT
	SEE ARCH. PLANS
	* REQUIREMENTS FOR HAMMERHEAD LOT



PLAN OF LAND
 IN
ACTON, MASSACHUSETTS
 (MIDDLESEX COUNTY)
 FOR: **MCCARTHY**
SCALE: 1"=80' APRIL 27, 2011
STAMSKI AND MCNARY, INC.
 1000 MAIN STREET ACTON, MASSACHUSETTS
 ENGINEERING - PLANNING - SURVEYING



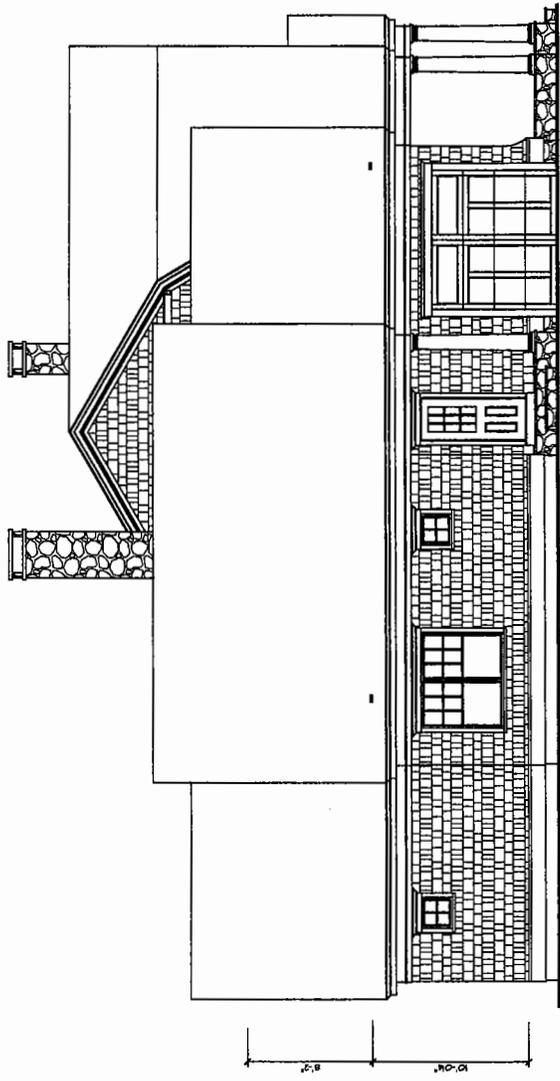
(4694)plotplan W TABLE.dwg) 191 Nagog Hill Road SM-4694

DIMENSIONAL DATA

ZONING REQUIREMENTS (R10/A)	REQUIRED	PROVIDED
MIN LOT AREA	100,000 SF	200,379 SF
MIN LOT FRONTAGE	250 FT	80 FT
MIN LOT WIDTH	50 FT	20 FT
MIN FRONT YARD	45 FT	1,050 FT±
MIN SIDE & REAR YARD	20 FT	55.5 FT
MAX BUILDING HEIGHT	36 FT	SEE ARCH. PLANS

* REQUIREMENTS FOR HAMMERHEAD LOT

EXHIBIT E

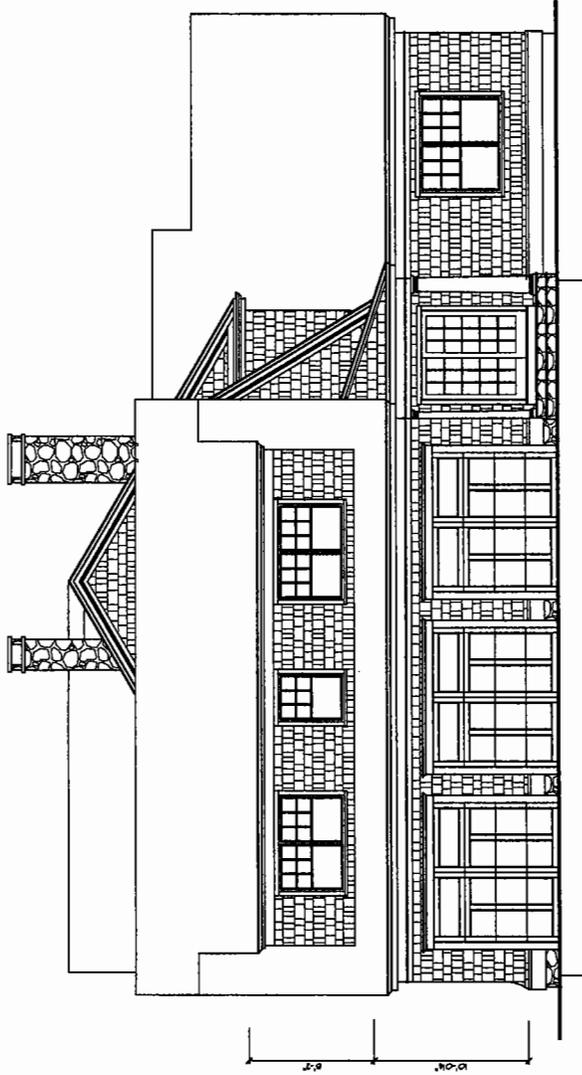


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LEFT ELEVATION
 12/16/2020 SCALE 1/8" = 1'-0"
 SHEET 2 OF 8

CLAIRE & MARK MCCARTHY
 191 NAGOG HILL ROAD
 ACTON, MA

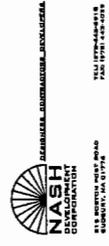




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RIGHT ELEVATION
 10/20/20
 SHEET 3 OF 8 SCALE: 1/8" = 1'-0"

CLAIRE & MARK MCCARTHY
 191 NAGOG HILL ROAD
 ACTON, MA



111 B. BENTLEY ROAD
 BOSTON, MA 02118
 TEL: 617-452-4444
 FAX: 617-452-4444

EXHIBIT F

Westlaw

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 1

▷

Supreme Judicial Court of Massachusetts,
 Suffolk.
 Thomas BRANSFORD & others ^{FN1}

FN1. Patricia Bransford and Kathryn
 Bransford.

v.
 ZONING BOARD OF APPEALS OF EDGAR-
 TOWN.

Argued April 4, 2005.
 Decided Aug. 12, 2005.

***852** *Civil actions* commenced in the Land Court Department on June 13, 2001, and February 6, 2002, respectively.

After consolidation, the case was heard by *Alexander H. Sands, J.*, on motions for summary judgment. The Supreme Judicial Court granted an application for direct appellate review.

Daniel C. Perry, New Bedford, for the plaintiffs.

****640** Ronald H. Rappaport, Edgartown, for the defendant.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, SOSMAN, & CORDY, JJ.

RESCRIPT.

On June 27, 2005, this court affirmed the ***853** judgment of the Land Court in these consolidated cases by an equally divided court. Justice Cowin took no part in the decision. Separate opinions of Justice Greaney, with whom Chief Justice Marshall and Justice Spina join, and Justice Cordy, with whom Justices Ireland and Sosman join, appear below.

GREANEY, J. (concurring, with whom MARSHALL, C.J., and SPINA, J., join).

The plaintiffs' application for direct appellate review was granted to decide whether "reconstruction" of their single-family residence, which satisfies all dimensional requirements in the town's zoning bylaw except required minimum lot area, "increase[s] the nonconforming nature of [the] structure" within the meaning of the language in that clause in G.L. c. 40A, § 6, first par. A Land Court judge concluded that, under the clause, "doubling the size of the structure on an undersized (nonconforming) lot [would] increase the nonconforming nature of the structure," thereby requiring the plaintiffs to seek a special permit. The judge also affirmed the denial, by the defendant town's zoning board of appeals (board), of the plaintiffs' application for the special permit. On this point, the judge concluded that the plaintiffs had failed to rebut the board's "determination that the increase in footprint and square footage of [their] proposed new structure is a substantial detriment to the neighborhood, or that [the] determination [was] arbitrary and capricious." I agree that the judgment should be affirmed.

The undisputed facts are as follows. In 1989, members of the Bransford family, including the plaintiff Thomas Bransford, acquired title to property located in the Katama area of Edgartown on the island of Martha's Vineyard. The property is approximately 22,125 square feet in area (about one-half acre), has approximately 125 feet of frontage on Mattakesett Way, and contained, at that time, a three-bedroom, two-story, single family residence with approximately 1,250 square feet of living area with decks on both floors and a roof deck. The property is located in the R-60 residential district.

The property was created by a subdivision plan recorded in 1973. In April, 1973, the zoning bylaw was amended to require, ***854** in the R-60 residential district, a minimum lot area ^{FN1} of one and one-half acres (65,340 square feet). A dispute exists as to when the three-bedroom, two-story residence was built on the property. The parties agree,

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 2

however, that the minimum lot area of 21,780 square feet applied when the residence was constructed and, at that time, the residence conformed to zoning bylaws.

FN1. The zoning bylaw defines “Lot Area” as follows: “The horizontal area of the lot exclusive of any area in a street or recorded way. Land under any water body, bog, swamp, wet meadow, marsh, wetland, coastal beach or coastal dune ... shall not be included in the ‘lot area’ required for zoning compliance.”

The plaintiffs twice sought a building permit to construct a new, larger single-family residence on the property that would comply with all dimensional requirements of the zoning bylaw with the exception of the minimum lot area of 65,340 square feet. The proposed new residence differed from the original by having a significantly greater interior living area (approximately**641 2,300 square feet^{FN2}), and a greater footprint^{FN3} (by 200 square feet). Additionally, the proposed new residence's height would exceed that of the former residence. In support of their applications, the plaintiffs relied on § 11.9(b) of the zoning bylaw.^{FN4} The building inspector refused to issue a building permit without prior authorization from the board. After denial of one of the applications for a building permit, the plaintiffs had the original *855 residence on the property removed (with the exception of its foundation) to another site.

FN2. The record also reflects an interior space of 2,600 square feet. The difference is immaterial.

FN3. The zoning bylaw does not regulate the “footprint” of a structure or contain a “ground coverage ratio” provision. The term “footprint,” while subject to various definitions, see, e.g., *Rogers v. Norfolk*, 432 Mass. 374, 376 n. 6, 734 N.E.2d 1143 (2000), is used here in general terms to describe the amount of land area occupied by

the house. Similarly, the term “ground coverage ratio” describes the ratio of building area to lot area on a parcel. See *Planning Bd. of Nantucket v. Board of Appeals of Nantucket*, 15 Mass.App.Ct. 733, 734, 448 N.E.2d 778 (1983).

FN4. Section 11.9(b) of the zoning bylaw provides:

“Where alteration, reconstruction, extension or structural change to a single family or two family residential structure does not increase the non-conforming nature, neither public hearing nor Special Permit from the Board of Appeals is required for said alteration, reconstruction, extension or structural change, provided it conforms to all statutory and By-Law requirements in effect when the work was done.”

The plaintiffs next filed a request for determination under G.L. c. 40A, § 6, first par., with the board, asserting that they were legally entitled to construct their proposed new residence under the second “except” clause of § 6, first par. After obtaining an opinion from town counsel, the board voted unanimously to allow reconstruction of a single-family residence on the property, but decided that, without a special permit, the residence could not exceed the footprint and square footage of the original residence.

The plaintiffs then filed an application with the board for a special permit seeking a determination pursuant to the second sentence of G.L. c. 40A, § 6, first par., and § 11.9(f)^{FN5} of the zoning bylaw, that their proposed new residence was not “substantially more detrimental to the character of the neighborhood” than the original residence. After a hearing, the application was denied, and the plaintiffs appealed from both decisions of the board to the Land Court where a judge denied the plaintiffs' motion for summary judgment and granted summary judgment to the board. This appeal

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 3

followed.

FN5. Section 11.9(f) of the zoning bylaw provides in part:

“The Special Permit Granting Authority shall have the authority to grant a special permit for the change, extension or alteration of a preexisting, nonconforming structure ... where such change, extension, alteration, or construction will not comply with the applicable provisions of the zoning bylaw; provided, however, that the Special Permit Granting Authority finds after a public hearing that other lots in the neighborhood have been previously developed by the construction of buildings or structures in such a manner as to have resulted in similar nonconformities, and that the proposed expansion, extension, alteration, or construction will not be more objectionable or substantially more detrimental to the character of the neighborhood than the original structure.”

1. The plaintiffs argue that they are entitled to construct their proposed new residence ^{FN6} because, under the second “except” ****642** clause of G.L. c. 40A, § 6, first par., the “reconstruction” will not “increase the nonconforming nature of [the] structure,” but ***856** will only result in the presence of a conforming structure on a nonconforming lot. ^{FN7} The issue is one of law, requiring no deference to the board. See *Fitchburg Hous. Auth. v. Board of Zoning Appeals of Fitchburg*, 380 Mass. 869, 871, 406 N.E.2d 1006 (1980); *Needham Pastoral Counseling Ctr., Inc. v. Board of Appeals of Needham*, 29 Mass.App.Ct. 31, 32, 557 N.E.2d 43 (1990).

FN6. The board does not argue that the plaintiffs' proposed new residence is not a “reconstruction” under G.L. c. 40A, § 6, first par.

FN7. The plaintiffs correctly do not argue

that they are entitled to reconstruct their proposed new residence pursuant to G.L. c. 40A, § 6, fourth par. (first sentence). That provision applies only to a lot not held in common ownership as reflected in the most recent instrument of record before the effective date of the zoning change, see *Adamowicz v. Ipswich*, 395 Mass. 757, 762, 481 N.E.2d 1368 (1985), and to a lot comprised of vacant land (a lot on which construction has not begun), see *Dial Away Co. v. Zoning Bd. of Appeals of Auburn*, 41 Mass.App.Ct. 165, 168, 669 N.E.2d 446 (1996). There is no dispute that the residence that the plaintiffs removed from the property existed when they (and even their immediate predecessors) purchased the property. Further, any “freeze” period that may have been applicable under G.L. c. 40A, § 6, fifth par., affording protection to certain lots formed in connection with a subdivision plan that were left undeveloped, has long expired. See *M. Bobrowski, Massachusetts Land Use and Planning Law* § 5.04 (2d ed.2002).

The relevant provisions (with the second “except” clause highlighted) are the first two sentences of G.L. c. 40A, § 6, first par.:

“Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 4

except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall *857 be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.” (Emphasis added.)

The words “structure or” appearing in the brackets in the second sentence quoted above were supplied by *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15, 21, 514 N.E.2d 369 (1987), and later noted and applied in *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 363 n. 4, 364, 566 N.E.2d 608 (1991).

While the issue here is novel, the Appeals Court has had considerable occasion to interpret the statute’s “difficult and infelicitous” language. *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass.App.Ct. 53, 55, 484 N.E.2d 113 (1985). In the *Fitzsimonds* case, the Appeals Court examined § 6, first par., and concluded that a “reconstruction” of a nonconforming **643 single-family residential structure “is legitimated under the second ‘except’ clause of the first sentence if it ‘does not increase the nonconforming nature of said structure’; otherwise (as occurs in certain events in regard to changes of other structures referred to in the language preceding the ‘except’ clause), it must be submitted to the special permit procedure of the second sentence for a determination by the board of the question whether it is ‘substantially more detrimental than the existing nonconforming use to the neighborhood.’ ” *Id.* at 56, 484 N.E.2d 113. By itself, this interpretation seems unremarkable because that is what the second “except” clause seems to say. But, the interpretation is necessarily helpful for pulling out of the convoluted language of the

statute some meaning permitting analysis of when landowners may go ahead as of right to reconstruct a dwelling and when they must seek prior approval from the permit granting authority. Left, however, was the measure by which a zoning authority or court could determine whether the reconstruction did or did not increase “the nonconforming nature of [the] structure.”

In the *Willard* case, *supra* at 18, 514 N.E.2d 369, the Appeals Court more closely examined the second “except” clause and undertook to solve the latter problem. The court first noted that the clause *858 had “no identifiable ancestor in G.L. c. 40A, as in effect prior to St.1975, c. 808, § 3,” and “made its first appearance, without accompanying explanation ... in 1974 House Doc. No. 5864.” See M. Bobrowski, *Massachusetts Land Use and Planning Law* § 6.06 (2d ed.2002). The Appeals Court then went on to state an operational measure for resolution of cases like this one by providing the following:

“[T]he second ‘except’ clause of the first paragraph of c. 40A, § 6, requires ... [^{FN8}] an initial determination whether a proposed alteration of or addition to [or reconstruction of] a nonconforming structure would ‘increase the nonconforming nature of said structure’ This part of the statute is not concerned with the use of the structure or of the land on which it is located. We think the quoted language should be read as requiring a board of appeals [^{FN9}] to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit under the second ‘except’ clause of G.L. c. 40A, § 6, and any implementing by-law. Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question illuminated in the *Fitzsimonds* case [of detriment to

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 5

the neighborhood].”

FN8. I omit the language providing that a board of appeals makes the initial determination, agreeing with one respected commentator, that this initial determination more appropriately should be conducted by the building inspector or zoning administrator. See M. Bobrowski, Massachusetts Land Use and Planning Law, *supra* at § 6.06.

FN9. See note 8, *supra*.

Willard v. Board of Appeals of Orleans, supra at 21-22, 514 N.E.2d 369.

Subsequent Appeals Court decisions have followed the *Fitzsimonds-Willard* framework. See *Dial Away Co. v. Zoning Bd. of Appeals of Auburn*, 41 Mass.App.Ct. 165, 170-171, 669 N.E.2d 446 (1996); *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455, 460, 590 N.E.2d 709 (1992). Other **644 decisions of the Appeals Court have (on different facts) also indicated that consideration of a structure's footprint *859 is a factor to consider in determining intensification. See *Goldhirsh v. McNear, supra* at 461, 590 N.E.2d 709; *Willard v. Board of Appeals of Orleans, supra* at 22, 514 N.E.2d 369; *Fitzsimonds v. Board of Appeals of Chatham, supra* at 57, 484 N.E.2d 113. In *Goldhirsh v. McNear, supra*, the Appeals Court rejected the notion that “there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint.” Several Land Court decisions brought to our attention in the briefs (which in keeping with usual practice we do not cite) have applied the framework, and have concluded that reconstruction is not permissible of right where an otherwise conforming structure lies on a nonconforming (undersized) lot. The rule to date, therefore, is simple: where an undersized lot exists, the proposed reconstruction may be allowed without special permit only if the proposed new residence does not intensify existing nonconformit-

ies.”

I agree with this body of decisional law and would adopt the rule ^{FN10} because it leads to a sensible result and advances legislative purposes with respect to zoning. See *Adamowicz v. Ipswich*, 395 Mass. 757, 760, 481 N.E.2d 1368 (1985). I have in mind here that (1) pursuant to a “unanimity of [authoritative] opinion,” “the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases,” and (2) the nonconformities contemplated in G.L. c. 40A, § 6, first par., include situations like this one where a conforming structure exists on a nonconforming lot. Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, 1972 House Doc. No. 5009 at 32, 39. See *Strazzulla v. Building Inspector of Wellesley*, 357 Mass. 694, 697, 260 N.E.2d 163 (1970), cert. denied, 400 U.S. 1004, 91 S.Ct. 568, 27 L.Ed.2d 618 (1971) (considering “eventual elimination of nonconforming uses as an objective underlying zoning regulations”); 4A N. Williams, Jr., *American Land Planning Law* 283-289 (1986) (noting that term “nonconforming use” is sometimes used generically to cover all nonconformities). While the dissenting opinion points to the freeze contained in the *860 first sentence of G.L. c. 40A, § 6, fourth par. (pertaining to vacant lots held in separate ownership, see note 7, *supra*) as evidencing a legislative intent to permit the nonconformity here, that freeze demonstrates a legislative intent to minimize substandard lots. See *Giovannucci v. Board of Appeals of Plainville*, 4 Mass.App.Ct. 239, 242, 344 N.E.2d 913 (1976), citing 8 E. McQuillin, *Municipal Corporations* § 25.71, at 189 (3d ed.1965). Had the Legislature wanted to afford greater protection to substandard lots such as the one at issue in this case, it could have expressly done so. Further, the rule would not, as the plaintiffs contend, eliminate existing residences on undersized lots. If their proposed new residence had retained the size of the original, no intensification would be present and reconstruction would have been permissible. The rule does not, as

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 6

a practical matter, make it more costly and difficult to modernize older homes.

FN10. A different conclusion is not compelled by § 11.9(b) of the zoning bylaw. See note 4, *supra*. Not only does that provision fail to qualify the words “non-conforming nature,” but it also requires that the reconstruction conform to all bylaw requirements *when the work was done*. Thus, the provision requires compliance with the minimum lot area requirement.

The rule also takes into account that a minimum lot area requirement represents **645 a proper exercise of police power, see *Simon v. Needham*, 311 Mass. 560, 562, 42 N.E.2d 516 (1942); P. Rohan, *Zoning and Land Use Controls* § 42.04[1] (2004), that serves many useful purposes. In *Simon v. Needham*, *supra* at 563, 42 N.E.2d 516, for example, the court explained:

“The establishment of a neighborhood of homes in such a way as to avoid congestion in the streets, to secure safety from fire and other dangers, to prevent overcrowding of land, to obtain adequate light, air and sunshine, and to enable it to be furnished with transportation, water, light, sewer and other public necessities, which when established would tend to improve and beautify the town and would harmonize with the natural characteristics of the locality, could be materially facilitated by a regulation that prescribed a reasonable minimum area for house lots.”

See P. Rohan, *Zoning and Land Use Controls*, *supra* (explaining minimum lot area requirements achieve population and building density controls); E.C. Yokley, *Zoning Law and Practice* § 23-9, at 23-40 (2003) (among purposes of minimum lot area requirements “are maintaining the character of low density residential neighborhoods, protecting environmentally sensitive areas, and preservation of open space”). In amending a prior *861 zoning enabling act, the Legislature suggested that objectives

of zoning regulations may include the following:

“[T]o lessen congestion in the streets; to conserve health; to secure safety from fire, flood, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land, to avoid undue concentration of population; to encourage housing for persons of all income levels; [and] to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; to conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment.”

St.1975, c. 808, § 2A. In furtherance of these legislative goals, the Legislature specifically endorsed the adoption of regulations pertaining to “areas and dimensions of land ... to be occupied or unoccupied by uses and structures, courts, yards and open spaces.” *Id.* Also, as noted in *Johnson v. Edgartown*, 425 Mass. 117, 124, 680 N.E.2d 37 (1997), “[T]here are regional and Statewide interests in the preservation of the unique quality of Martha’s Vineyard. Those interests justify the making of conservative assumptions about the consequences of land uses....” These considerations, in one fashion or another, support the need for local review of proposed reconstruction of nonconforming uses, structures, and lots, to promote conformity and to prevent land use anomalies.

The plaintiffs’ argument, that no problem exists because their nonconforming lot will remain exactly the same with the reconstructed residence, fails to appreciate the goals set forth above. The expansion of the residence’s footprint, and the expansion in living area, will, at the very least, tend to reduce the open space previously existing on the lot and to increase the density of the residential neighborhood. Creating a distinction in treatment between a nonconforming structure and a nonconforming lot is one that analytically and practically should not be made. The two concepts are intertwined and separating them would permit a landowner to circumvent valid and useful minimum

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 7

lot area requirements.

A different view of the case leads to the same result. If one *862 accepted the plaintiffs' position that the second "except" **646 clause of § 6, first par., speaks only to the nonconformities of "structures," then the entire first paragraph of § 6, read as a whole (and in that context), could be interpreted to apply only to nonconforming structures and uses. As so limited, the statute is not applicable to the plaintiffs (because there is no nonconforming structure or use on the property) and affords them no exemption. The inquiry then becomes whether a zoning bylaw provision prohibits their planned reconstruction. Under § 17.1 of the zoning bylaw, "no structure or part thereof may be erected ... except in conformance with this By-Law." Once the plaintiffs removed the original structure from the nonconforming lot, they were left with the nonconforming lot. Under the bylaw, to erect a structure in the R-60 residential district, they need, but do not have, a lot with one and one-half acres. Because the town's zoning bylaw addresses the problem by prohibiting the erection of structures in a R-60 residential district on lots of less than one and one-half acres, once the plaintiffs removed the original residence, they had no entitlement to a building permit to build a new residence.

2. The board's denial of the plaintiffs' special permit to reconstruct their proposed new residence was within its discretion. The affidavit of the board's chairman demonstrates that the board's denial, based on its conclusion that the plaintiffs' proposed residence on the undersized lot would be substantially more detrimental to the neighborhood, see G.L. c. 40A, § 6, first par. (second sentence), was not "based on a legally untenable ground, or unreasonable, whimsical, capricious or arbitrary." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass.App.Ct. 68, 72, 794 N.E.2d 1198 (2003), quoting *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639, 255 N.E.2d 347 (1970). See *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349, 356, 754 N.E.2d 101 (2001)

(stating that "[e]ven when a zoning board cites no particularized reasons or any specific evidence for its denial decision, its action will be upheld, as will that of a judge affirming that action under G.L. c. 40A, § 17, if a rational basis for the denial exists which is supported by the record"). The affidavit noted the expansion of the proposed new residence in terms of footprint, living area, and height; that the average structures in the vicinity of the plaintiffs' lot measured *863 approximately 1,800 square feet in area (significantly smaller than the area of the plaintiffs' proposed new structure); and that the area on which the plaintiffs' lot is located is flat, open terrain, with few trees or vegetation to buffer homes from each other. Inasmuch as the proper inquiry concerns the effect of "reconstruction" on "the neighborhood," the plaintiffs' reliance on statistics concerning the "national average" of living area and lot sizes of "new" homes is immaterial.

CORDY, J. (dissenting, with whom IRELAND and SOSMAN, JJ., join).

This case presents a question of statutory interpretation: does G.L. c. 40A, § 6, first par., permit a homeowner, as a matter of right, to reconstruct or renovate his residence on a nonconforming (undersized) lot, in a manner that increases its living space, height, or footprint, where the improved structure would be in conformity with all dimensional requirements in the town's zoning bylaw other than lot size? In other words, does such a reconstruction "increase the nonconforming nature" of the residence, thereby removing it from the special protections afforded single and two-family residential structures under the grandfathering or so-called second "except" clause of G.L. c. 40A, § 6, and requiring the homeowner to obtain a special **647 permit to proceed? ^{FNI} The answer to the question has important consequences for residents of established neighborhoods*864 across the Commonwealth with single- or two-family homes built on modest-sized lots (as permitted at the time of their construction) that have become nonconforming as a result of zoning changes that have increased the

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 8

minimum lot sizes for residential development in those neighborhoods. The answer of the concurrence would seem to require a special permit for any improvement that increases the living space of a grandfathered residence. Because it is my view that this answer accords far too little weight to the language of the statute, the legislative policy underlying the relevant clause, and its practical implications, I respectfully dissent.

FN1. Structures without this protection fall within the following provision of G.L. c. 40A, § 6, first par. (second sentence): “Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.” Although the statute speaks only to a “finding” by either the permit granting authority or the special permit granting authority, cities and towns may enact local legislation to provide for a special permit process, with the requirement that a supermajority of the permit granting authority approve, to generate such a “finding.” *Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury*, 409 Mass. 317, 324, 565 N.E.2d 1214 (1991).

As I would reverse the judgment of the Land Court on the ground that the second “except” clause of G.L. c. 40A, § 6, first par. (first sentence), is applicable to the plaintiffs’ proposal to reconstruct a home on their property, I would not reach the question whether there was a rational basis for the board’s denial of the special permit on the ground that the

reconstruction would be “substantially more detrimental ... to the neighborhood.” G.L. c. 40A, § 6, first par. (second sentence).

The zoning act, embodied in G.L. c. 40A, was substantially revised in 1975, St.1975, c. 808, in the wake of the 1966 passage of art. 89 of the Amendments to the Massachusetts Constitution (home rule amendment). Prior to its passage, the zoning power belonged exclusively to the State, and could be exercised by municipalities only to the extent that State law permitted them to do so. *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 50, 793 N.E.2d 359 (2003), citing *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 356-357, 294 N.E.2d 393 (1973). Through passage of the amendment, municipalities gained constitutional authority to exercise the police powers of the State, including the power to enact zoning ordinances, except in contravention of State law or other provisions of the Constitution. *Durand v. IDC Bellingham, LLC, supra* at 50, 793 N.E.2d 359, citing *Board of Appeals of Hanover v. Housing Appeals Comm., supra* at 358, 359, 294 N.E.2d 393.

Included in the zoning act of 1975, therefore, are a number of important statutory limitations on municipal power and protections for property owners, only one category of which concerns us here: the extensive protection afforded owners of single or two-family homes constructed and situated in accord with local ordinances or bylaws (zoning ordinances) in effect at the time the homes were built. Later enacted zoning ordinances have no effect on the continued use and occupancy of these residences. G.L. c. 40A, § 6, first par. (first sentence) (“a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence*865 or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law”). **648 While these homes may be deemed “nonconforming” (because they no longer conform in some respect to current local zoning require-

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 9

ments), they are not “illegal.” Indeed, local zoning ordinances do not even apply to the “alteration, reconstruction, *extension* or structural change” of such homes so long as those improvements do “not increase the[ir] nonconforming nature” (emphasis added). G.L. c. 40A, § 6, first par. (first sentence). This latter protection is unique to single- and two-family homes. See *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 364, 566 N.E.2d 608 (1991).^{FN2}

FN2. If zoning ordinances do not apply to the “alteration, reconstruction, extension or structural change” of these homes, no special permit ought to be necessary to proceed with such improvements. Insofar as an improvement requires a building permit, the building inspector must determine in the first instance whether the home is nonconforming and, if so, whether the proposed improvement would “increase” the “nature” of the nonconformity, such that the improvement would require the homeowner to obtain a finding or special permit from the local permit granting authority. See note 1, *supra*. Such determinations should be based on objective rather than subjective criteria in order to ensure that the rights protected in the State statute are not undermined in the municipalities where they were intended to apply. Decisions of the Appeals Court that adopt a contrary “framework,” 444 Mass. at 858, 832 N.E.2d at 643, relying on subjective assessments by local boards and, in effect, requiring the homeowner to secure some form of special permit for any improvement to a nonconforming structure are, in my view, inconsistent with the plain wording and purpose of the statute. See M. Bobrowski, Massachusetts Land Use and Planning Law § 6.06, at 200 (2d ed. 2002) (Bobrowski).

The Appeals Court has held that the proper arbiters of what constitutes an

“increase [in] the nonconforming nature of [a] structure” are zoning boards of appeal, which should make the determination with some measure of localized judgment. See *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455, 461, 590 N.E.2d 709 (1992) (“Whether the addition of a second level to the carriage house will intensify the nonconformity is a matter which must be determined by the board in the first instance. The fact that there will be no enlargement of the foundational footprint is but one factor to be considered in making the necessary determination or findings”); *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15, 21-22, 514 N.E.2d 369 (1987) (“We think [the clause] should be read as requiring a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit under the second ‘except’ clause.... Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question [of detriment to the neighborhood]”).

The concurrence correctly but quietly rejects some of the Appeals Court’s flawed reading of the statute, by stating that the building inspector should make the initial determination of whether a proposed reconstruction increases the nonconforming nature of a structure. 444 Mass. at 858 n.8, 832 N.E.2d at 643. See Bobrowski, *supra* at § 6.06, at 200 (Appeals Court “has jumped the gun in

assigning this initial determination to the board of appeals. The first official to review an application to extend a nonconforming residential structure will be the building inspector or zoning administrator, and her review will be under the auspices of a building permit application, not an application for a special permit or finding"). Yet the concurrence fails to acknowledge the error in the rest of the "framework" that, in essence, requires the homeowner to establish the existence of the grandfathered right through a process akin to the special permit process from which the Legislature intended to exempt the owners of single-family and two-family residences through the second "except" clause. See *id.* ("Wil-lard test should be read as prescribing an entitlement to a building permit, not a special permit or finding, where no intensification of the nonconformity would result").

*866 We have previously held that the nonconforming nature of a structure is increased**649 if it is "intensif[ied]" by the improvement or if the improvement creates an additional nonconformity. *Id.* In the present case, we deal only with the former circumstance. As to the latter, the town has a number of dimensional requirements for the construction of homes on lots (such as height and setbacks), and could indeed have (but has not) promulgated others such as "reasonable regulations concerning *the bulk ... of structures* and determining ... open space, parking and *building coverage* requirements" (emphasis added). G.L. c. 40A, § 3, second par. These regulations affect the over-all size and configuration of homes in relationship to the size and configuration of their lots, and the density of development permitted in the neighborhood. It is undisputed that the reconstructed building would conform to these requirements.

So the issue we must decide is whether the in-

crease in the size or footprint of a single- or two-family home, as a matter of law, intensifies the nature of its nonconformity when its only nonconformity is, and will continue to be, the size of its lot. I conclude that it does not. The nature of its nonconformity can be fairly described as a "[c]onforming structure on [a] nonconforming lot," as compared to a nonconforming structure on a conforming lot, a nonconforming structure on a nonconforming lot, or various other "nonconforming uses" of buildings*867 or land. Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, 1972 House Doc. No. 5009 at 35 (DCA report).^{FN3} The zoning ordinance to which the lot fails to conform has nothing to do with the size or placement of the structure on it. A 2,400 square foot structure on an undersized lot is equally as nonconforming as a 1,200 square foot structure on the same size lot. It is lot size, not building size, that is at issue. The nature of the proposed home's nonconformity will remain unchanged and unaffected by the proposed improvements. The home will be neither less nor more nonconforming.^{FN4}

FN3. Following the passage of art. 89 of the Amendments to the Massachusetts Constitution (home rule amendment), the Legislature requested that the predecessor agency to the Department of Community Affairs (DCA) conduct an investigation and propose a redrafting of the zoning enabling act. Res. 1967, c. 141. In 1972, the DCA issued a comprehensive report offering criticisms of the zoning statute and a proposed "comprehensive revision" of G.L. c. 40A. Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, 1972 House Doc. No. 5009 at 7 (DCA report). The report is the "chief document in the legislative history of the Zoning Act." Bobrowski, *supra* at § 2.03, at 38.

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 11

FN4. The concurrence asserts that allowing the reconstruction without a special permit “would permit a landowner to circumvent valid and useful minimum lot area requirements.” 444 Mass. at 861, 832 N.E.2d at 645. The concurrence also suggests that the new structure will increase the density of the neighborhood and reduce the open space previously existing on the lot, contrary to the broadly shared interest “in the preservation of the unique quality of Martha’s Vineyard.” *Id.*, quoting *Johnson v. Edgartown*, 425 Mass. 117, 124, 680 N.E.2d 37 (1997). While minimum lot area requirements are indeed “valid and useful” in the way the concurrence details, it is unclear how the plaintiffs’ proposal seeks to “circumvent” those requirements. I do not question the legitimacy of minimum lot requirements as a means of preserving open space or of limiting the density of residential neighborhoods on Martha’s Vineyard, but I do not understand how the replacement of one single-family home with another single-family home, which complies as a structure with all zoning requirements, including height limitations and mandatory setbacks, increases neighborhood density or diminishes open space in a way contrary to Edgartown’s zoning bylaw.

This conclusion is consistent with the approach taken by the Legislature, in the **650 same section of G.L. c. 40A, toward the application of zoning changes that increase minimum lot size (or “frontage, width, yard, or depth requirements”) on lots for “single and two-family residential use” that were recorded as such but not yet built upon when the zoning changes took effect. *868 G.L. c. 40A, § 6, fourth par. (first sentence). For these lots, undersized and nonconforming as they may be, the zoning changes largely do not apply.^{FN5} A home of any size (whether 2,400 or 1,200 square feet) can be built on such a lot so long as it complies with other dimensional requirements for such structures,

such as height and building coverage limitations. It would be striking indeed to conclude that the Legislature intended that the owner of a nonconforming unimproved lot would have substantially greater protections and rights than a homeowner who might want to add a dormer to a Cape Cod style house, or to enclose a porch or a garage for the purpose of adding a family room, or otherwise to improve a residence that lies on a similarly nonconforming lot.

FN5. General Laws c. 40A, § 6, fourth par. (first sentence), provides: “Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or bylaw shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.” If a lot is held in common ownership with adjacent lots, other provisions apply. G.L. c. 40A, § 6, fourth par. (second sentence).

In concluding otherwise, the concurrence relies on a view of legislative intent drawn from what it describes as the “unanimity of [authoritative] opinion [that] the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases,” citing the DCA report that was used by the General Court as a resource in fashioning the 1975 zoning act. 444 Mass. at 859, 832 N.E.2d at 644, citing DCA report, *supra* at 39. See note 3, *supra*. This is inconsistent with how the Legislature in fact acted to balance the interest in eliminating nonconformities with the rights of homeowners to improve their existing homes without the expense and uncertainty of obtaining special permits from local zoning boards.

The DCA report, while referencing the aforementioned “unanimity of opinion,” also noted the

832 N.E.2d 639
 444 Mass. 852, 832 N.E.2d 639
 (Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 12

“increasing awareness that the assumption it is desirable to eliminate non-conforming uses may not always be valid.” *Id.* at 39, 43. In fashioning its legislative recommendations, the DCA report included a number of mechanisms directed at eliminating such uses, such as *869 authorizing cities and towns to “amortiz[e]” nonconforming uses, to take nonconforming property by eminent domain, and to impose regulations to mitigate the effects of nonconforming uses and structures on their surroundings. *Id.* at 44, 45, 47. All of these proposals were rejected by the Legislature. The DCA report also proposed protecting the owners of nonconforming homes only to the extent of recognizing their right to “perform normal maintenance and repair on nonconforming structures.” *Id.* at 44. The narrowness of this protection was rejected by the Legislature as well. Instead, the Legislature added the second “except” clause to the first paragraph of § 6, an addition not recommended by the DCA and nonexistent in prior State zoning law. In so acting, the Legislature rejected the DCA report’s objective of “eventual elimination” of nonconforming residential housing, and instead sought to protect such housing by allowing homeowners to “alter[], reconstruct[], exten[d]” or “change” the structures **651 of their homes. G.L. c. 40A, § 6, first par. (first sentence). That protection should not be eviscerated by requiring homeowners to convince local zoning authorities that a proposed home improvement, which does not itself involve any further violation of the zoning ordinance, also does not—in some subjective, aesthetic sense—make an existing nonconformity more unpleasant. This deliberate and pointed action on the part of the Legislature has not been afforded appropriate weight by the concurrence in its interpretation of the statute.^{FN6}

FN6. The concurrence advances the alternative argument that the second “except” clause provides no protection for the plaintiffs at all, because it speaks only to nonconforming structures or uses and not conforming structures on nonconforming lots. 444 Mass. at 861-62, 832 N.E.2d at

645-46. As the concurrence firmly rejects such an interpretation of the clause, the argument is a poor response to the plaintiffs’ claim that the clause protects their proposal as a reconstruction that does not “increase the nonconforming nature” of the structure. The nature of the nonconformity of the plaintiffs’ house is its location on a nonconforming lot, and it is my view, as well as the view of the concurring Justices, see 444 Mass. at 861, 832 N.E.2d at 645, that the clause applies to such “nonconforming structures.”

The application of the concurrence’s reasoning is not without practical consequence to the multitude of citizens who own homes in cities or towns that, at some recent point, have attempted to limit growth by increasing minimum lot sizes, often *870 dramatically. The need to secure findings or special permits through lengthy, costly, and discretionary local zoning processes for any improvement that might increase the living space or footprint of a home may put such improvements out of reach for many homeowners.^{FN7} Requiring homeowners to run such an administrative gauntlet impedes and burdens the upgrade of a large part of our housing stock, much of which (except perhaps along the water or on the island of Martha’s Vineyard) is relatively “affordable.” I can find no evidence to support the concurrence’s conclusion that the Legislature intended such a result. Rather, all the evidence suggests the contrary, and surely the plain words of the statutory exception do not dictate or require such an outcome. For these reasons, I would reverse the judgment of the Land Court.

FN7. The concurrence insists that the “rule does not, as a practical matter, make it more costly and difficult to modernize older homes.” 444 Mass. at 860, 832 N.E.2d at 644. Yet the concurring Justices would hold that only those homeowners who opt to make changes to structures that “retain[] the size of the original,” may

832 N.E.2d 639
444 Mass. 852, 832 N.E.2d 639
(Cite as: 444 Mass. 852, 832 N.E.2d 639)

Page 13

proceed with those changes without obtaining a special permit. *Id.* The special permit process without question renders many home improvements more costly and subject to the discretionary determinations of local zoning boards of appeals, which are apparently charged in considering special permit applications with promoting “conformity” and the prevention of “land use anomalies.” 444 Mass. at 861, 832 N.E.2d at 645.

Mass.,2005.
Bransford v. Zoning Bd. of Appeals of Edgartown
444 Mass. 852, 832 N.E.2d 639

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669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 1

▷

Appeals Court of Massachusetts,
 Worcester.

DIAL AWAY CO., INC.

v.

ZONING BOARD OF APPEALS OF AUBURN.

No. 94-P-2095.

Argued Jan. 12, 1996.

Decided Aug. 21, 1996.

Twenty-three years after dwelling on undersized lot was demolished, property owner filed application to construct another dwelling. Town zoning board of appeal denied application, and owner filed suit. The Superior Court, Worcester County, Elizabeth Butler, J., found that statute and zoning by-law permitted owner to build dwelling, and town appealed. The Appeals Court, Dreben, J., held that: (1) application was governed by statutory provision dealing with reconstruction, not statute dealing with nonconforming residential lots or corresponding by-law relating to nonconforming residential lots, which was applicable only to original construction, and (2) while by-law provision dealing with abandonment of discontinued uses did not directly apply, lapse of 23 years following demolition was so significant that abandonment existed as a matter of law.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 ↪1360

414 Zoning and Planning
 414VIII Permits, Certificates, and Approvals
 414VIII(A) In General
 414k1358 Architectural and Structural
 Designs
 414k1360 k. Family or multiple dwell-
 ings. Most Cited Cases

(Formerly 414k371)

Application for building permit to erect dwelling on grandfathered, undersized lot after original dwelling had been razed was governed by statutory provision dealing with reconstruction, not provision dealing with lots for residential use or corresponding provision of zoning by-law dealing with nonconforming lots, which applied only to original construction. M.G.L.A. c. 40A, § 6, pars. 1, 4; Auburn, Mass., Zoning By-Law 8.1.

[2] Zoning and Planning 414 ↪1402

414 Zoning and Planning
 414VIII Permits, Certificates, and Approvals
 414VIII(A) In General
 414k1402 k. Particular prior or noncon-
 forming uses. Most Cited Cases
 (Formerly 414k381)

Town zoning by-law's provision for abandonment when nonconforming use was discontinued for period of two years or more did not directly apply to property owner's failure to rebuild on grandfathered, undersized lot; although construing provision to apply would promote policy of by-law as a whole, by-laws drew distinction between nonconforming lots, uses, and structures. Auburn, Mass., Zoning By-Law 8.2.4.2.

[3] Zoning and Planning 414 ↪1319

414 Zoning and Planning
 414VI Nonconforming Uses
 414k1317 Discontinuance or Abandonment
 414k1319 k. Cessation of use. Most Cited
 Cases
 (Formerly 414k381)

Lapse of 23 years between demolition of dwelling on grandfathered, undersized lot and application for permit to build another dwelling was so significant that abandonment of right to rebuild existed as a matter of law.

****446 *165** Edward P. Healy, Town Counsel,

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 2

Worcester, for defendant.

Richard T. Tucker, Worcester, for plaintiff.

Before DREBEN, GREENBERG and FLANNERY,
 JJ.

DREBEN, Justice.

The question before us is whether, under the Auburn zoning by-law, an undersized lot retains its protected character as a buildable lot twenty-three years after a nonconforming dwelling on the lot was razed. The building inspector of the town and the defendant board of appeals said no. On the plaintiff's appeal, pursuant to G.L. c. 40A, § 17, a judge of the Superior Court, on cross motions for summary judgment, ordered the defendants to issue a building permit and annulled the decision of the board of appeals denying the plaintiff a permit. We reverse.

Many of the facts are not in dispute. In 1969, the plaintiff purchased a 5,023 square foot parcel of land containing a dwelling and a garage. These structures were lawfully built *166 before 1947 (that is, they conformed to the then applicable law) when the town of Auburn amended its zoning by-law to require in residential districts a minimum lot size of 7,500 square feet. Prior to the plaintiff's purchase of the lot, its predecessor in title **447 had requested a permit to raze the dwelling,^{FN1} and, shortly after buying the property, the plaintiff had the dwelling demolished. Twenty-one years later, it obtained a permit to demolish the garage, and that structure was razed in 1990.

FN1. In its affidavit in support of its motion for summary judgment, the plaintiff averred that the building had been destroyed by a truck.

By 1993, the zoning by-law had been further amended, this time to require a minimum lot size of 10,000 square feet. The plaintiff sought a building permit to erect a single-family house on its 5,023

square foot lot, a request the building inspector denied. Thereupon, the plaintiff appealed to the zoning board of appeals and also applied for a variance.^{FN2} Noting that the lot contained only fifty percent of the now required square footage, the board affirmed the decision of the building inspector, ruling that the buildings were "abandoned" no later than 1990, and, therefore, their "grandfathered" nonconforming status ceased two years later in 1992. The board presumably relied on § 8.2.4.2 of the zoning by-law which is set out in the margin.^{FN3} The entire text of art. 8 of the by-law and the first four paragraphs of G.L. c. 40A, § 6, as in effect prior to St.1994, c. 60, § 67, are reproduced in an appendix to this opinion.

FN2. The plaintiff did not cross appeal from the denial of the variance by the board.

FN3. "8.2 *Nonconforming Uses*

.....

8.2.4 Abandonment-A nonconforming use which is abandoned shall not be resumed. A conforming [*sic*] use shall be considered abandoned:

.....

8.2.4.2. When a nonconforming use is discontinued for a period of two years or more...."

The motion judge disagreed, ruling that § 8.1 of the zoning *167 by-law and G.L. c. 40A, § 6, par. 4,^{FN4} were the governing provisions and that they permit Dial Away to use the lot for a single-family residence despite its noncompliance with the current by-law, which requires an area of 10,000 square feet and 100 feet of frontage; the lot also is deficient in frontage, having 82.9 feet. In relevant part, § 8.1 of the by-law provides:

FN4. The judge noted that it was unnecessary to determine if Dial Away complied with every requirement of c. 40A, § 6, par.

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 3

4, since, unlike other sections of the by-law, § 8.1 did not state that the requirements of § 6 “shall apply.”

“8.1 *Nonconforming Lots*-Any lot which complied with the minimum area, frontage, and lot width requirements, if any, in effect at the time the boundaries of the lot were defined by recorded deed or plan may be built upon or used for single-family residential use, notwithstanding the adoption of new or increased lot area, frontage or lot width requirements, provided that:

.....

8.1.2. The lot had at least 5,000 square feet of area and 50 feet of frontage at the time the boundaries of the lot were defined....”

Ruling that Dial Away's proposal for the single-family dwelling submitted to the building inspector and the board conformed to the conditions of §§ 8.1.1, 8.1.2, and 8.1.3, the judge held that, because the lot complied with the zoning requirements in 1944, when the property was deeded to the previous owners, § 8.1 “permits Dial Away to use the lot for a single-family residence despite current zoning by-laws....”

[1] 1. *Applicability of G.L. c. 40A, § 6, par. 1, rather than par. 4; inapplicability of § 8.1 of the by-law.* An analysis of art. 8 of the zoning by-law and of c. 40A, § 6, leads us to conclude that the judge was wrong in ruling that § 8.1 of the by-law and § 6, par. 4, of G.L. c. 40A are the applicable provisions, and that the board is correct that c. 40A, § 6, par. 1, is the controlling statute.

The first sentence of G.L. c. 40A, § 6, par. 4, reads as follows:

***168** “Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with

any adjoining land, conformed to then existing requirements and had less than the proposed ****448** requirement but at least five thousand square feet of area and fifty feet of frontage.”

In *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15, 514 N.E.2d 369 (1987), this court was also faced with the question whether the case was governed by the first or by the fourth paragraph of G.L. c. 40A, § 6. In holding that the first paragraph and not the fourth governed the construction of an addition to the nonconforming residence belonging to the plaintiff in that case, we indicated that par. 4 applies only to vacant land, pointing out that its “immediate statutory ancestor,” G.L. c. 40A, § 5A, as in effect prior to St.1975, c. 808, § 3 (a provision which did not differ materially from par. 4), “applied to original construction on vacant lots but not to alterations of existing structures which had become nonconforming, such as the one involved in this [Willard's] case.” *Id.* at 18, 514 N.E.2d 369. Similarly, here, we consider that par. 4 of c. 40A, § 6, while applying to some construction on vacant lots, does not apply to “reconstruction” of a single or two-family residential structure. Such reconstruction, as was the alteration to a single or two-family structure in *Willard*, is explicitly governed by the second “except” clause of par. 1 of § 6. *Id.* at 18-19, 514 N.E.2d 369.

The first paragraph of c. 40A, § 6, is set forth in the margin, and the second “except” clause is italicized.^{FNS} Paragraph 1, but not par. 4, addresses reconstruction. See ***169** *Planning Bd. of Reading v. Board of Appeals of Reading*, 333 Mass. 657, 661, 132 N.E.2d 386 (1956) (demolition of existing buildings and erection of a new building for the same nonconforming use not permitted where by-law contained words “alteration” and “extension” but not “reconstruction”). Cf. *Angus v. Miller*, 5 Mass.App.Ct. 470, 473, 363 N.E.2d 1349 (1977) (stress on word “rebuilt” in one part of by-law contrasted with word “enlarged” to preclude board of appeals under latter term to grant a permit for the voluntary razing of existing buildings and the con-

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 4

struction of entirely new nonconforming buildings in their place).^{FN6, FN7}

FN5. Paragraph 1 of G.L. c. 40A, § 6, in relevant part provides: “Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any *reconstruction*, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure ...*” (emphasis supplied).

FN6. We also find some support for this construction in 1972 House Doc. No. 5009, Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, at 36-37, where § 5A is referred to as applying to “undeveloped lots” that is “to lots on which construction has not yet commenced and/or no building permit has been issued at the time the ordinance or by-law is amended in such a way to create the potential of illegality through the imposition of more restrictive dimensional (and in some cases ‘use’) regulations.”

FN7. Our interpretation of G.L. c. 40A, § 6, par. 4, does not mean that the paragraph

applies only to original construction. In *Adamowicz v. Ipswich*, 395 Mass. 757, 764, 481 N.E.2d 1368 (1985), the court held that “compliance of a lot with the common ownership requirement [in § 6, par. 4] is determined by looking at the most recent instrument of record prior to the effective date of the zoning change from which the exemption is sought.” If a buyer bought vacant land (even if a building thereon had been previously demolished) and the by-law at the time of purchase permitted building on that lot, it would seem that the lot would have protection from a subsequent zoning change. The plaintiff, however, is not protected by this interpretation of par. 4 because, at the time of its purchase, the minimum lot size requirement was 7,500 feet.

An analysis of the Auburn by-law leads to the conclusion that § 8.1 also is not applicable here. Article 8 is the parallel to c. 40A, § 6, and is divided into three parts. Section 8.1, discussed earlier, relates to nonconforming *lots* and is the analog to par. 4 of § 6, c. 40A. Section 8.2 concerns nonconforming *uses*, and provides that such uses cannot be resumed if discontinued for a period of two years or more, see note 3, *supra*, and § 8.3 treats nonconforming *structures*. Section **449 8.3.1 states that the requirements of c. 40A, § 6, shall apply. Section 8.3.2 relates to changing a nonconforming structure and allows such structures to be altered, reconstructed,*170 extended, or structurally changed, provided that such alteration, reconstruction, extension, or structural change conforms to all the dimensional requirements of the by-law. Section 8.3.3 precludes rebuilding or reconstruction without a special permit if a nonconforming structure is damaged to an extent greater than fifty percent of its fair market value before it was damaged, unless reconstruction is completed within two years.

Sections 8.2 and 8.3 evidence a legislative dis-

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 5

favor of nonconformities and an intent to eliminate them where possible. In the context of these provisions, it would be anomalous indeed to construe § 8.1 to allow in perpetuity the rebuilding and demolition of dwellings on the plaintiff's undersized lot because of the happenstance that in 1944 a house was built that conformed to the then existing by-law.

“Considering the eventual elimination of nonconforming uses as an objective underlying zoning regulations,” *Dowling v. Board of Health of Chilmark*, 28 Mass.App.Ct. 547, 551, 552 N.E.2d 866 (1990) (discussing c. 40A, § 6, par 4), citing *Strazzulla v. Building Inspector of Wellesley*, 357 Mass. 694, 697, 260 N.E.2d 163 (1970), cert. denied, 400 U.S. 1004, 91 S.Ct. 568, 27 L.Ed.2d 618 (1971), and, in particular, that of Auburn's, we interpret § 8.1 to apply only to original construction.^{FN8}

FN8. Our interpretation of § 8.1 to apply only to original construction differs from our construction of par. 4, of § 6 of c. 40A, see note 7, *supra*, because the language of the by-law does not permit the construction put on the timing of the “recording” by *Adamowicz v. Ipswich*, 395 Mass. at 764, 481 N.E.2d 1368. Paragraph 4, of course, would control. *Planning Bd. of Reading v. Board of Appeals of Reading*, 333 Mass. at 660, 132 N.E.2d 386.

2. *Application of G.L. c. 40A, § 6, par. 1, to reconstruction of single and two-family residences.* Having decided that neither par. 4 of G.L. c. 40A, § 6, nor § 8.1 of the Auburn by-law supports the construction of a house in replacement for one torn down, we turn to the governing provision, par. 1 of § 6 of c. 40A, see note 5 *supra*. That paragraph, in the second *except* clause, gives special status to nonconforming single and two-family residences and allows them to be rebuilt despite changes in the zoning by-laws. *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455, 460, 590 N.E.2d 709 (1992). For these buildings, “alteration, reconstruction, ex-

ension or structural change” is permitted despite a change in the zoning by-law if such activity “does not increase the nonconforming nature of said *171 structure.” If not for this provision, § 8.3.3 of the by-law would probably apply.

[2] 3. *Abandonment.* The board, as indicated earlier, determined that the plaintiff's nonconformity had been abandoned. Although c. 40A, § 6, and art. 8 of the by-law to some degree protect nonconformities, both provide that nonconformities may be deemed abandoned in certain situations. Thus, G.L. c. 40A, § 6, par. 3, provides:

“A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.”

Nothing in par. 3 suggests that it does not apply to single and two-family residences, and we assume it is applicable to such dwellings. As we have seen, § 8.2.4.2, see note 3, *supra*, provides for abandonment of discontinued uses, and § 8.3 limits the rebuilding of nonconforming structures to two years without a special permit.

Neither § 6, par. 3, of c. 40A nor § 8.2 of the by-law specifically refer to abandonment of the right to rebuild on a nonconforming lot. Nevertheless, it is apparent that, when a building is totally demolished, the use to which it was put is necessarily discontinued. Although construction of § 8.2.4.2 to apply here would promote the policy of the by-law as a whole, our cases seem to distinguish between nonconforming uses and structures.^{FN9} Cf. *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. at 20, 514 N.E.2d 369; ***450** *Goldhirsh v. McNear*, 32 Mass.App.Ct. at 456, 590 N.E.2d 709; *Watros v. Greater Lynn Mental Health & Retardation Assoc.*, 37 Mass.App.Ct. 657, 658, 642 N.E.2d 599 (1994), *S.C.*, 421 Mass. 106, 653 N.E.2d 589 (1995). Moreover, since there is a distinction in art. 8 among nonconforming lots, uses, and structures, we are not persuaded that the two-year abandonment of use provision may be directly

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 6

applied to the failure to rebuild on an undersized lot.

FN9. The term “nonconforming use” is sometimes used generically to cover all nonconformities. See 1972 House Document No. 5009, at 35. Also cf. Williams, 4A American Planning Law c. 117, at 283-89 (1986).

[3] Abandonment, however, may be found apart from ordinance. An affidavit of the president of Dial Away states that the dwelling had been destroyed by accident when a truck ran into it and that the building was removed as it “was *172 dangerous, uninhabitable and an eye sore.” He also stated that he always intended to construct a single-family residence. The judge noted that “there is nothing in the record to contradict the assertions of Dial Away’s sole owner and president ... that he had always intended to build another single-family residence on the lot but that he decided to forestall construction until sewers were installed.” The president’s affidavit, however, acknowledged that sewers were constructed in the early 1980s, thus weakening his avowals.

“To constitute an abandonment [other than where defined by ordinance], the discontinuance of a nonconforming use [structure or lot] must result from ‘the concurrence of two factors, (1) the intent to abandon and (2) voluntary conduct, whether affirmative or negative, which carries the implication of abandonment.’ ” *Derby Ref. Co. v. Chelsea*, 407 Mass. 703, 708, 555 N.E.2d 534 (1990). The voluntary demolition of a building constitutes abandonment, *Berliner v. Feldman*, 363 Mass. 767, 772, 298 N.E.2d 153 (1973), but “[m]ere nonuse or sale of property does not, by itself, constitute an abandonment.” *Derby, supra* at 709, 555 N.E.2d 534. An involuntary demolition may permit the owner to rebuild under certain circumstances. See *Berliner, supra* at 772 & n. 5, 298 N.E.2d 153.

The record before us does not sufficiently explain the nature of the 1969 demolition to enable us

to determine whether the plaintiff was entitled to rebuild within a reasonable time. *Ibid.* Nevertheless, we consider this a case where the lapse of time following the demolition—twenty-three years—is so significant that abandonment exists as matter of law. Here, the “evidence of things done or not done ... carries the implication of abandonment ... [and] [s]upports a finding of intent, whatever the avowed state of mind of the owner....” *Dobbs v. Board of Appeals of Northampton*, 339 Mass. 684, 686-687, 162 N.E.2d 32 (1959). See *Mioduszewski v. Saugus*, 337 Mass. 140, 145, 148 N.E.2d 655 (1958) (four-year cessation “may well have fatally interrupted” nonconforming use). See also *Attorney Gen. v. Johnson*, 355 S.W.2d 305, 308 (Ky.1962) (five-year period of nonuse); *Holloway Ready Mix Co. v. Monfort*, 474 S.W.2d 80, 83 (Ky.1968) (“10-year period of nonuse as a quarry was sufficient to show an intention to abandon that use”).

The judgment is reversed, and the case is remanded to the Superior Court for the entry of judgment affirming the decision of the board of appeals.

So ordered.

*173 APPENDIX.

Article 8 of the town of Auburn zoning by-law as in effect in 1993:

“8.1 *Nonconforming Lots*-Any lot which complied with the minimum area, frontage, and lot width requirements, if any, in effect at the time the boundaries of the lot were defined by recorded deed or plan may be built upon or used for single-family residential use, notwithstanding the adoption of new or increased lot area, frontage or lot width requirements, provided that:

8.1.1 At the time of the adoption of such new or increased requirements or while building on such lot was otherwise permitted, whichever occurs later, such lot was held, and has continued to be held, in ownership separate from that of adjoining land; and

8.1.2 The lot had at least 5,000 square feet of area and 50 feet of frontage at the time the boundaries of the lot were defined; and

****451** 8.1.3 Any proposed structure is situated on the lot so as to conform with the minimum yard requirements, if any, in effect at the time the boundaries of such lot were defined. In the case where no minimum yard requirements were in effect at the time the boundaries of such lot were defined, the minimum front yard shall be 20 feet and the minimum side and rear yards shall be 10 feet.

“8.2 Nonconforming Uses

8.2.1 Continuing of Existing Use-The requirements of Section 6 of ‘The Zoning Act’, Chapter 40A of the General Laws, as amended, shall apply.

8.2.2 Changing a Nonconforming Use-A nonconforming use may be changed to another nonconforming use by special permit from the Board of Appeals provided the Board of Appeals finds that the proposed use is more or equally in harmony with the character of the neighborhood and the applicable requirements of the zoning district than the existing use.

8.2.3 Extending a Nonconforming Use-A nonconforming use may be extended in an area by special permit from the Board of Appeals.

8.2.4 Abandonment-A nonconforming use which is abandoned shall not be resumed. A conforming [*sic*] use shall be considered abandoned:

8.2.4.1 When a nonconforming use has been replaced by a conforming use; or

8.2.4.2 When a nonconforming use is discontinued for a period of two years or more; or

8.2.4.3 When a nonconforming use has been changed to another nonconforming use by special permit from the Board of Appeals.

“8.3 Nonconforming Structures

8.3.1 Continuation of Existing Structure-The requirements of Section 6 of ‘The Zoning Act’, Chapter 40A of the General Laws shall apply.

8.3.2 Changing a Nonconforming Structure-A nonconforming structure may be altered, reconstructed, extended or structurally changed ***174** provided that such alteration, reconstruction, extension or structural change conforms to all the dimensional requirements of this by-law.

8.3.3 Restoration-If a nonconforming structure is damaged by fire, flood or similar disaster to an extent greater than 50% of its fair market value before it was damaged, it may be rebuilt or reconstructed without a special permit from the Board of Appeals if such reconstruction is completed within two years. After two years, a special permit shall be required. However, no such special permit shall be granted unless the Board of Appeals finds that: (1) such rebuilding or reconstruction will not be detrimental to the neighborhood, and (2) to the extent possible the structure will be rebuilt or reconstructed in conformity with the dimensional requirements of this by-law.

*“8.4 Nonconforming Parking-*This by-law shall not be deemed to prohibit the continued use of any land or structure that is nonconforming with respect to parking requirements.”

The first four paragraphs of G.L. c. 40A, § 6, as in effect prior to St.1994, c. 60, § 67, provide:

“Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any altera-

669 N.E.2d 446
 41 Mass.App.Ct. 165, 669 N.E.2d 446
 (Cite as: 41 Mass.App.Ct. 165, 669 N.E.2d 446)

Page 8

tion of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature **452 of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to billboards, signs and other advertising devices subject to the provisions of sections twenty-nine through thirty-three, inclusive, of chapter ninety-three, and to chapter ninety-three D.

“A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.

“A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

“Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family *175 residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing

requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.”

Mass.App.Ct.,1996.
 Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn
 41 Mass.App.Ct. 165, 669 N.E.2d 446

END OF DOCUMENT

Westlaw

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 1

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Appeals Court of Massachusetts,
 Barnstable.

David B. WILLARD, trustee,
 v.
 BOARD OF APPEALS OF ORLEANS.

Argued Sept. 11, 1987.
 Decided Oct. 26, 1987.

Appeal was taken from an order of the Superior Court, Barnstable County, James J. Nixon, J., which affirmed board of appeals' denial of permit to construct addition to nonconforming structure. The Appeals Court, Grant, J., held that remand was required because of inadequacy of board's findings.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 414 ↪1315

414 Zoning and Planning
 414VI Nonconforming Uses
 414k1313 Repair, Alteration, or Reconstruction of Buildings or Structures
 414k1315 k. New buildings or structures.
 Most Cited Cases
 (Formerly 414k334)

Request to build addition within 25-foot setback to home which already violated the 25-foot setback was governed by statutory provision dealing with changes which do not increase the nonconforming nature of a structure, not by statutory provision dealing with applicability to land of newly adopted area and frontage ordinances. M.G.L.A. c. 40A, § 6.

[2] Zoning and Planning 414 ↪1359

414 Zoning and Planning
 414VIII Permits, Certificates, and Approvals

414VIII(A) In General
 414k1358 Architectural and Structural Designs
 414k1359 k. In general. Most Cited Cases
 (Formerly 414k385)

Zoning ordinance provision for change, extension, or alteration of nonconforming dwelling, rather than provision for special use permits, applied to request to add addition within 25-foot setback area to home which already violated the setback requirement.

[3] Zoning and Planning 414 ↪1315

414 Zoning and Planning
 414VI Nonconforming Uses
 414k1313 Repair, Alteration, or Reconstruction of Buildings or Structures
 414k1315 k. New buildings or structures.
 Most Cited Cases
 (Formerly 414k334)

Statutory prohibition against extensions or alterations of previously nonconforming structures unless there is a finding that the change "shall not be substantially more detrimental than the existing nonconforming use to the neighborhood" must be read as referring to an existing nonconforming structure as well as to existing nonconforming uses. M.G.L.A. c. 40A, § 6.

[4] Zoning and Planning 414 ↪1402

414 Zoning and Planning
 414VIII Permits, Certificates, and Approvals
 414VIII(A) In General
 414k1402 k. Particular prior or nonconforming uses. Most Cited Cases
 (Formerly 414k381)

Board of appeals must identify particular respect or respects in which existing structure does not conform to requirements of present bylaw and then determine whether proposed alteration or addition to structure would intensify the existing non-

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 2

conformities or result in additional ones; if the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit; only if the question is in the affirmative is there any occasion for consideration of additional questions. M.G.L.A. c. 40A, § 6.

[5] Zoning and Planning 414 ↪1724

414 Zoning and Planning

414X Judicial Review or Relief

414X(D) Determination

414k1722 Remand

414k1724 k. Directing further action

by local authority. Most Cited Cases

(Formerly 414k726)

Remand of denial of permit for addition to existing nonconforming structure was required because of inadequacies of board of appeals' findings with respect to whether the structure would be substantially more detrimental to the neighborhood than the existing structure, and with respect to what area was considered to be the "neighborhood." M.G.L.A. c. 40A, § 6.

***16 **370** Lawrence O. Spaulding, Jr., Orleans, for plaintiff.

Michael D. Ford, Town Counsel, Hyannis, for defendant.

Before ***15** GRANT, PERRETTA and SMITH, JJ.

GRANT, Justice.

In 1985 the plaintiff, in his individual capacity, ^{FN1} acquired title to a lot in Orleans with an area of some 0.8 acres and a frontage of more than 100 feet on the northerly side of Cliff Road, a private way. The lot had been in separate ownership from that of any adjoining lot since 1965. A single-family house had been constructed on the lot at least as early as 1964; one corner of the house abutted the northerly sideline of Cliff Road.^{FN2} There was no minimum setback requirement in the Orleans zoning by-law until 1972, when a twenty-five foot set-

back was established in the residential zoning district in which the plaintiff's lot is located.

FN1. The plaintiff describes himself in the complaint as the trustee of a real estate trust known as Preservation Advocacy Trust. It makes no difference for present purposes whether the locus is held by the plaintiff in his individual capacity or in a fiduciary capacity.

FN2. A small portion of that corner of the house and the associated portion of a retaining wall actually intrude into the layout of Cliff Road. Nothing in this opinion turns on either intrusion.

In 1985, following his acquisition, the plaintiff applied to the local building inspector for a permit to construct an addition to his house which would be located partly within the twenty-five foot setback. The building inspector denied the application for some reason or reasons which do not appear. The plaintiff appealed from that decision to the board of appeals and also applied to the board for a special permit authorizing the construction of the desired addition. The board, after hearing, sustained the decision of the building inspector and denied the application for a special permit. The plaintiff appealed to the Superior Court (G.L. c. 40A, § 17), which, in effect, affirmed both aspects of the board's decision. We reverse the judgment of the Superior Court and order the case remanded to the board for further proceedings.

17** 1. *The relevant statutory provision.* The first question for decision is whether this case is governed by the first ^{FN3} or by the fourth ^{FN4} paragraph of G.L. c. 40A, § 6, as *371** amended through St.1979, c. 106. Town counsel argues for the former; the ***18** plaintiff espouses the latter. There is nothing on the face of the fourth paragraph to suggest that it was intended to apply to anything but vacant land. The only reference to a building is found in the last sentence of the paragraph, which sets out one of the circumstances (not applicable

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 3

here) in which a “lot” may be “built upon.” The immediate statutory ancestor of the fourth paragraph (G.L. c. 40A, § 5A, as in effect prior to St.1975, c. 808, § 3) applied to original construction on vacant lots but not to alterations of existing structures which had become nonconforming, such as the one involved in this case. *Maynard v. Tomy*, 347 Mass. 397, 400, 198 N.E.2d 291 (1964). There is no support for the plaintiff's position in *Sturges v. Chilmark*, 380 Mass. 246, 260-261, 402 N.E.2d 1346 (1980), decided under the present fourth paragraph, in which the court was dealing with two vacant lots and the only question for decision was whether those lots were “adjoining” within the meaning of the fourth paragraph of the present § 6. The case of *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. 829, 482 N.E.2d 809 (1985), was also concerned with vacant lots.

FN3. The first paragraph of the present G.L. c. 40A, § 6, reads in relevant part as follows: “Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except* where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or

altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood ...” (emphasis supplied).

FN4. The fourth paragraph of the present G.L. c. 40A, § 6, reads: “Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 4

shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.”

[1] The portion of the first paragraph of the present § 6 with which we are concerned has no identifiable ancestor in G.L. c. 40A, as in effect prior to St.1975, c. 808, § 3. That portion made its first appearance, without accompanying explanation (see *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. at 835, 482 N.E.2d 809), in 1974 House Doc. No. 5864. To be specific, the second “except” clause of the first paragraph of § 6 is addressed to “alteration[s], reconstruction, extension[s] and structural change [s] to ... single or two-family residential structure[s],” none of which is referred to in the fourth paragraph. The second sentence of the first paragraph is specific in its references to extensions and alterations of “[p]re-existing nonconforming structures” (*Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass.App.Ct. 53, 55-56, 484 N.E.2d 113 [1985] ^{FN5}). We have no hesitancy in concluding that the portion of the first paragraph of § 6 which *19 commences with the second “except” clause sets out the statutory provisions which govern a case such as the present. Compare *Walker v. Board of Appeals of Harwich*, 388 Mass. 42, 50-52, 445 N.E.2d 141 (1983).

FN5. The *Fitzsimonds* case was not decided until more than four months after the board had acted in this case. It was decided more than eight months prior to the decision of the Superior Court and was specifically brought to the attention of the judge in the course of the trial.

[2] 2. *The relevant provision of the zoning by-law.* The next question is whether this case is governed by § 1:3-3-1 ^{FN6} or by § 6:4-3 ^{FN7} of the Orleans zoning **372 by-law. Section 1:3-3-1

makes specific reference to the present G.L. c. 40A, § 6, and reads almost directly on the language of the second “except” clause of the first paragraph of § 6, as discussed in part 1 hereof. Section 6:4-3 makes no reference to any particular section of c. 40A, but it is clear from a comparison of its language with that of § 9 of c. 40A that § 6:4-3 was intended to implement the general provisions with respect to the issuance of special permits which are found in § 9 and to apply in special permit situations not specifically covered by other sections of the by-law.^{FN8} Compare *20 *Walker v. Board of Appeals of Harwich*, 388 Mass. at 51-52, 445 N.E.2d 141. Accordingly, we hold that it is § 1:3-3-1 which governs in this case.

FN6. “Change, Extension or Alteration: As provided in Section 6 of Chapter 40A, General Laws, a nonconforming single- or two-family dwelling may be altered or extended provided that doing so does not increase the non-conforming nature of said structure. Other pre-existing, non-conforming structures or uses may be extended, altered, or changed in use on Special Permit from the Board of Appeals if the Board of Appeals finds that such extension, alteration or change will not be substantially more detrimental to the neighborhood than the existing non-conforming use. Once changed to a conforming use, no structure or land shall be permitted to revert to a non-conforming use.”

FN7. “Criteria. Special Permits may be granted when it has been found that the use involved will not be detrimental to the established or future character of the neighborhood and the Town, and when it has been found that the use involved will be in harmony with the general purpose and intent of the Bylaw and shall include consideration of each of the following:

“6:4-3-1 Adequacy of the site in terms of size for the proposed use.

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 5

“6:4-3-2 Suitability of site for proposed use.

“6:4-3-3 Impact on traffic flow and safety.

“6:4-3-4 Impact on neighborhood visual character, including views and vistas.

“6:4-3-5 Adequacy of method of sewage disposal, source of water and drainage.

“6:4-3-6 Adequacy of utilities and other public services.

“6:4-3-7 Noise and litter.”

FN8. Section 1:3-3-1 is but one of several sections of the by-law making provision for the issuance of special permits in particular circumstances. See, e.g., §§ 3:9-1-2 (shoreline zoning district), 4:3-9(b) (sidelines in VC zoning district), 5:7 (timesharing and interval ownership) and 5:11-2-3 (numbers of spaces required in off-street parking areas).

3. *The proper construction of the statute and the by-law.* The first paragraph of G.L. c. 40A, § 6 (note 3, *supra*), contains an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter. See, e.g., *O’Kane v. Board of Appeals of Hingham*, 20 Mass.App.Ct. 162, 478 N.E.2d 962 (1985), and cases cited; *Fitzsimonds v. Board of Appeals of Chatham*, 21 Mass.App.Ct. at 55-56, 484 N.E.2d 113. The first “except” clause of the statute is concerned with the application of zoning ordinances and by-laws to nonconforming “structures or uses,” to any change in or substantial extension of such a “use”, and to the alteration of such a “structure.” The second “except” clause deals with the alteration, reconstruction, extension or structural change “to [sic] a single or two-family residential structure [which] does not increase the nonconforming nature of [the] structure.” The immediately ensuing sentence speaks of not permitting extensions or alterations of “[p]re-existing non-

conforming structures or uses” unless there is a finding by the permit or special permit authority that such change, extension or alteration “*shall not be substantially more detrimental than the existing nonconforming use* to the neighborhood” (emphasis supplied).

[3] It will be noted that all the portions of the statute which have just been summarized or quoted except the portion italicized are expressly directed to nonconforming structures as well as nonconforming uses. In the present case, the existing and proposed nonconformities arise out of the position of a house on a lot of land rather than out of the use which is being or is proposed to be made of the house or of the lot on which the house is and would continue to be located. The italicized portion of the statute makes no sense in these circumstances because, as worded, it appears to contemplate a determination of whether an alteration to an existing structure would be more detrimental to the neighborhood by reference to the existing *21 residential use of the land, which would not change if the structure were altered.^{FN9} We are of opinion that this is one of those rare instances in which a court must overcome its reluctance to supply a word or words which were not employed by the Legislature (see, e.g., **373 *Murray v. Board of Appeals of Barnstable*, 22 Mass.App.Ct. 473, 479, 494 N.E.2d 1364 [1986]) in order to render a statute intelligible and so effectuate its obvious intent. Compare *Chelmsford Trailer Park, Inc. v. Chelmsford*, 393 Mass. 186, 196-197, 469 N.E.2d 1259 (1984). Accordingly, we read the concluding portion of the second sentence of the first paragraph of the present G.L. c. 40A, § 6, as follows: “shall not be substantially more detrimental than the existing nonconforming *structure or use* to the neighborhood” (emphasis supplied).

FN9. As one commentator has put it, “[T]here is an apples-compared-to-oranges problem regarding buildings in sentence two of new Section 6 in that any extension or alteration of a [nonconforming] struc-

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 6

ture depends on a demonstration to and a finding by the [permit granting authority] that the same will not be substantially more detrimental to the neighborhood than the existing nonconforming use. Presumably the Appeals Court will, at some point, instruct [permit granting authorities] how to go about comparing structures to uses.” Hays, Application of Chapter 808 to Existing Structures, Uses, Plan Variances and Permits, 22 Boston Bar J. 17, 19 (No. 4, 1978). The apples and oranges were present but not sorted out in *Tamerlane Realty Trust v. Board of Appeals of Provincetown*, 23 Mass.App.Ct. 450, 503 N.E.2d 464 (1987).

On a parity of reasoning, we think the concluding portion of the penultimate sentence of § 1:3-3-1 of the by-law (note 6, *supra*) is to be read: “will not be substantially more detrimental to the neighborhood than the existing non-conforming structure or use” (emphasis supplied).

[4] There is one more question of construction. As pointed out in *Fitzsimonds v. Board of Appeals of Chatham*, the second “except” clause of the first paragraph of c. 40A, § 6, requires a board of appeals in a case such as this one to make an initial determination whether a proposed alteration or addition to a nonconforming structure would “increase the nonconforming nature of said structure” (21 Mass.App.Ct. at 56, 484 N.E.2d 113). This part of the statute is not concerned with the use of the structure or of the land on which it is located. We think the quoted language should be read as requiring a board of appeals to identify the *22 particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit under the second “except” clause

of G.L. c. 40A, § 6, and any implementing by-law. Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question illuminated in the *Fitzsimonds* case (21 Mass.App.Ct. at 56, 484 N.E.2d 113).

[5] 4. *Shortcomings in the board's and the judge's findings.* The board found that the addition proposed in this case “would increase the nonconforming nature of the present structure.” That finding is not suspect because there was evidence in the Superior Court from which it could be found (as was agreed at the argument before us) that at least one portion of the addition would protrude beyond the footprint of the present structure.

When it came to the plaintiff's alternative request for a special permit, the board found that the proposed addition would result in increasing the height of the existing structure by nine feet ^{FN10} and that “this would interfere with the views or vistas of the surrounding property owners and be substantially more detrimental to the neighborhood and the town.” The references to the “town”, which appears in § 6:4-3 of the by-law (note 7, *supra*) but not in the first paragraph of G.L. c. 40A, § 6 (note 3, *supra*) or in § 1:3-3-1 of the by-law (note 6, *supra*), and to “views and vistas,” which appear in § 6:4-3-4 of the by-law (note 7, *supra*) but not in the statute or in § 1:3-3-1 of the by-law, strongly suggest that the board may have proceeded under the wrong special permit provisions of the by-law. See part 2 hereof. We do not say that the board, in the exercise of its discretion, could not properly consider the factors set *23 out in § 6:4-3-4 of the by-law in determining whether the proposed addition would result in a structure substantially more detrimental to the neighborhood than the existing structure (part 3 hereof). We do say that on this record it does not appear with any measure of certainty that the board proceeded under the first paragraph of c. 40A, § 6, and § 1:3-3-1 of the by-law.

FN10. The judge found that the increase would be sixteen feet. Neither the board

514 N.E.2d 369
 25 Mass.App.Ct. 15, 514 N.E.2d 369
 (Cite as: 25 Mass.App.Ct. 15, 514 N.E.2d 369)

Page 7

nor the judge made any finding that the increase in height, whatever it might be, would result in any nonconformity under the present by-law. See the *Fitzsimonds* case, 21 Mass.App.Ct. at 57, 484 N.E.2d 113.

****374** The board, in its decision, gave no indication what it considered the “neighborhood” to be. The board referred loosely to “surrounding property owners,” but we do not know whether it had in mind the owners of lots contiguous to or across Cliff Road from the plaintiff’s lot, all the fifteen owners to whom notice of the public hearing was given under G.L. c. 40A, § 11, the owners of all the other 229 lots in the subdivision which includes the plaintiff’s lot, or something else.^{FN11} There is need for clarification in this area because at the hearing in the Superior Court there was evidence of whether the top of the proposed addition would be visible from certain nearby properties and from certain public landings, some of which are undoubtedly parts of the “town” within the meaning of § 6:4-3 of the by-law but may not be parts of the “neighborhood” within the meaning of the first paragraph of c. 40A, § 6, and § 1:3-3-1 of the by-law.

FN11. The judge nowhere used the word “neighborhood.”

The judge’s findings and rulings are subject to many of the same frailties. For instance, he said in the early part of his findings that the plaintiff’s application for a special permit had been filed under § 1:3-3-1 of the by-law, and he referred to “compliance with section 6 of chapter 40A.” Somewhat later, the judge ruled (erroneously) that the issuance of a special permit of the type sought in this case is governed by § 6:4-3 of the by-law. There are additional problems. The judge found that “[t]he planned construction would be a substantial extension of the nonconforming use” and that “[t]he extensive increase in use of the lot through expansive decking will materially change the structure.” Nowhere did the judge make any finding on the

question whether the proposed addition would increase the nonconforming nature of the structure or the question*24 whether the addition would result in a structure not substantially more detrimental to the neighborhood than the existing structure.

It is clear that the judge failed to make independent findings of fact (G.L. c. 40A, § 17) on all the issues raised by the appeal to the Superior Court before determining the validity of the board’s decision. See, e.g., *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558-559, 120 N.E.2d 916 (1954); *Planning Bd. of Springfield v. Board of Appeals of Springfield*, 355 Mass. 460, 462, 245 N.E.2d 454 (1969); *Josephs v. Board of Appeals of Brookline*, 362 Mass. 290, 295, 298-300, 285 N.E.2d 436 (1972). There is nothing in the judge’s findings that can be relied on to salvage either aspect of the board’s decision.

The judgment is reversed, and the decision of the board of appeals is annulled; the case is to be remanded to the board for further proceedings consistent with this opinion; the board, after new notices under G.L. c. 40A, § 11, may reopen the hearing for the purpose of taking further evidence; the board shall render a new decision; the Superior Court may retain jurisdiction over the case; costs of appeal are not to be awarded to any party.

So ordered.

Mass.App.Ct., 1987.
Willard v. Board of Appeals of Orleans
 25 Mass.App.Ct. 15, 514 N.E.2d 369

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Westlaw

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 1

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Supreme Judicial Court of Massachusetts,
 Suffolk.

J. Stephen BJORKLUND & another,^{FN1} trustees,^{FN2}

FN1. Mark K. Winchester.

FN2. Of Diamond Development Realty Trust.

v.

ZONING BOARD OF APPEALS OF NORWELL.

Argued Dec. 4, 2007.

Decided Jan. 7, 2008.

Background: Lot owners appealed decision of the zoning board of appeals which denied their request for a finding with respect to their proposed reconstruction of their residence. After remand from the Land Court, the board determined that their proposed reconstruction would increase the nonconforming nature of the structure and would be substantially more detrimental to the neighborhood than the existing structure. Lot owners appealed, and, after consolidation, the Land Court Department, Suffolk County, Alexander H. Sands, III, J., affirmed. Lot owners appealed, and the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Holding: The Supreme Judicial Court, Greaney, J., held that proposed reconstruction required special permit.

Affirmed.

Cordy, J. dissented with opinion in which Ireland, J., joined.

West Headnotes

Zoning and Planning 414 ↪ 1402

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1402 k. Particular prior or nonconforming uses. Most Cited Cases
 (Formerly 414k394)

Lot owners' proposed reconstruction of residence on undersized lot increased the nonconforming nature of the structure such that lot owners were required to seek a special permit, although they were not required to seek a permit in order to reconstruct a house on the undersized lot, or modernize the existing house, in keeping with the existing structure's building footprint and living area; existing house was one story, contained 675 square feet of living space, and was 30 feet long along its frontage, while proposed new residence would comprise 3,600 square feet, would be at least two stories and included an attached garage, would result in an additional 900 square feet of impervious surface on the property, and would be 68 feet long along its frontage. M.G.L.A. c. 40A, § 6.

****915** Michael C. Hayes for the plaintiffs.

Robert W. Galvin, Duxbury, for the defendant.

Carl K. King, Boston, for Massachusetts Chapter of the American Planning Association, amicus curiae, submitted a brief.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, CORDY, & BOTSFORD, JJ.

GREANEY, J.

***357** This case, transferred here on our own motion, raises the issue unresolved in *Bransford v. Zoning Bd. of Appeals of Edgartown*, 444 Mass. 852, 832 N.E.2d 639 (2005) (*Bransford*)—does the proposed reconstruction of a single-family residence, which satisfies all dimensional requirements in the town's zoning bylaw except the required minimum lot size, “increase the nonconforming nature

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 2

of [the] structure” within the meaning of the language contained in the second “except” clause of ****916 *358**G.L. c. 40A, § 6, first par.? ^{FN3} In the *Bransford* case, the court was evenly divided on this issue, and the judgment of the Land Court, giving rise to that appeal, was affirmed. *Id.* at 852-853, 832 N.E.2d 639. The concurring opinion of three Justices in the *Bransford* case agreed with the conclusion of the Land Court judge that, under the second except clause, “doubling the size of the structure on an undersized (nonconforming) lot [would] increase the nonconforming nature of the structure,” thereby requiring the plaintiffs to seek a special permit. *Id.* at 853, 832 N.E.2d 639 (Greaney, J., concurring, with whom Marshall, C.J., and Spina, J., joined) (concurring opinion). Justice Cordy authored a dissenting opinion. See *id.* at 863-870, 832 N.E.2d 639 (Cordy, J., dissenting, with whom Ireland and Sosman, JJ., joined) (dissenting opinion). We now adopt the result and reasoning of the concurring opinion in the *Bransford* case and apply that opinion to this case, which involves a proposal to quintuple the size of an existing residence, a more drastic expansion than the one proposed in *Bransford*. Accordingly, we affirm the judgment of the Land Court.

FN3. General Laws c. 40A, § 6, first par., provides in pertinent part (with the second “except” clause italicized):

“Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun

after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.* Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood....” (Emphasis added.)

The bracketed phrase “structure or” appearing in the second sentence quoted above was first supplied by *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15, 21, 514 N.E.2d 369 (1987), and later noted and applied in *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 363 n. 4, 364, 566 N.E.2d 608 (1991).

***359** The background of the case is as follows. The plaintiffs own the property at 150 Prospect Street in Norwell, which is located in the residential district A. The lot size, or area, of the property consists of 34,507.6 square feet (.792 acres). Situated on the property is a one-bedroom, one-story, single-family house, and a shed. The house has 675 square feet of living space, and is thirty feet long (along its frontage). The house is set back thirty-five feet, nine inches, from the front property line.

The lot, house, and shed predate zoning in the town. Under the town's current zoning bylaw,^{FN4} a

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 3

minimum lot area of one acre (43,560 square feet), a front setback of fifty feet,^{FN5} and a side setback of twenty ***917** feet ^{FN6} are required for buildings and structures located in residential district A.^{FN7, FN8}

FN4. The parties have reproduced only portions of the zoning bylaw. These portions did not contain any definitions. It is helpful to have a complete copy of the zoning bylaw.

FN5. The zoning bylaw allows a front setback based on the averaging of the abutting yards on either side of the property.

FN6. Concerning the side setback, the zoning bylaw provides that no structure "shall be erected or placed within 20 feet of a side or back line except that with respect to a building and/or structure existing on July 7, 1955, *additions* thereto may be erected or placed within 20 feet, but not within 10 feet of a side line" (emphasis added).

FN7. Under the zoning bylaw, all lots in all districts of the town must be at least one acre.

FN8. With respect to residential districts in the town, the zoning bylaw does not regulate the "footprint," or amount of land area occupied by the house, and does not contain a "ground coverage ratio" provision, or ratio of building area to lot area on a parcel. See *Bransford v. Zoning Bd. of Appeals of Edgartown*, 444 Mass. 852, 854 n. 3, 832 N.E.2d 639 (2005) (Greaney, J., concurring, with whom Marshall, C.J., and Spina, J., joined) (defining "footprint" and "ground coverage ratio").

The plaintiffs propose to tear down the existing house and remove the shed. They plan to construct a new house, essentially a new and much larger house, that will comprise 3,600 square feet of living

space. The new house will have three bedrooms; will be either a two, or a two and one-half, story structure; and will include an attached garage for two vehicles.^{FN9} The footprint of the new house will be approximately 1,920 square feet. There will be an additional 900 square feet of impervious surface on the property to account for the proposed driveway.^{FN10} The new house ***360** will be sixty-eight feet long (along its frontage) and will have a front setback of thirty-seven feet. The placement of the house on the lot is restricted due to the existence of wetland areas on the property. The plaintiffs' proposal complies with all dimensional requirements of the bylaw with the exception of the one-acre minimum lot area requirement.^{FN11}

FN9. The garage accounts for 600 square feet of "living" area.

FN10. The plaintiffs assert that the proposed reconstruction covers only seven per cent of the lot. Neither the defendant, the zoning board of appeals of Norwell (board), nor the judge, however, made any finding on the issue of ground coverage ratio, and the plaintiffs have not substantiated their assertion with any materials in the record appendix. Even assuming the percentage is correct, a small ground coverage ratio has no bearing on the plaintiffs' inability to satisfy the minimum lot area requirement. The ratio hardly can be said to be determinative of the issue of intensification.

FN11. There was conflicting evidence at trial concerning the plaintiffs' compliance with the side setback requirement as to one of the sides of the proposed new house, see note 6, *supra*. Because the board did not contest the plaintiffs' compliance with the side setback requirement, the judge found that the requirement had been satisfied.

Prospect Street is winding with elevation changes. To the north of the plaintiffs' property are

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 4

nine homes containing an average of 2,638 square feet of living area, all located on lots that are at least one acre. To the south of the property are fourteen homes containing an average of 2,088 square feet of living area. Only one of these homes is located on a lot that is smaller than one acre, and that home has 1,472 square feet of living area. The undersized lots on Prospect Street have smaller, "rural farmhouse-type houses" located on them. The larger homes on the street are located further back from the street in comparison to the plaintiffs' proposed new house.

The plaintiffs filed a request for a finding under G.L. c. 40A, § 6, and § 1642 of the zoning bylaw^{FN12} with respect to their ****918** proposed reconstruction. The defendant, the zoning board of appeals^{*361} of Norwell (board), denied the request,^{FN13} and the plaintiffs appealed to the Land Court pursuant to G.L. c. 40A, § 17. The case was remanded to the board. The board concluded that, under G.L. c. 40A, § 6, and § 1642 of the zoning bylaw, the proposed reconstruction would increase the nonconforming nature of the structure and would be substantially more detrimental to the neighborhood than the existing structure. In its decision, the board made several findings, including the following. The impact of the length of the proposed new house (over twice the length of the original house) could not be screened or diminished because of limited available setback caused by wetlands. The height of the proposed new house would increase the impact of the structure. Due to the placement, length, and height of the proposed new house, the reconstruction would not be in keeping with the rural character and aesthetics of the neighborhood. The reconstruction would add noise and light to the neighborhood; would eliminate open space and screening; and would lead to the parking of motor vehicles along, or next to, a narrow country road, Prospect Street, all to the detriment of the neighborhood and the safety and welfare of its residents and persons using Prospect Street. The reconstruction would, because of the proposed new house's length, height, and placement, intensify and

exacerbate the present nonconformity of the property.^{FN14}

FN12. Section 1642 of the bylaw is entitled "Change, Extension, or Alteration," and reads: "As provided in G.L. c. 40A, § 6, a nonconforming single- or two-family dwelling may be altered or extended provided that doing so does not increase the nonconforming nature of said structure. Other pre-existing nonconforming structures or uses may be extended, altered, or changed in use on Special Permit from the Board of Appeals if the Board of Appeals finds that such extension, alteration, or change will not be substantially more detrimental to the neighborhood than the existing nonconforming use. Once changed to a conforming use, no structure or land shall be permitted to revert to a nonconforming use."

FN13. The plaintiffs' proposed reconstruction received approval from the local board of health and conservation commission.

FN14. The board asked the plaintiffs if they would consider constructing a house with approximately 2,000 to 2,200 square feet of living area and a reduced building width along its frontage. The board "did not receive an encouraging response."

The plaintiffs appealed from the board's decision on remand to the Land Court, and the case was consolidated with the plaintiffs' initial case. After a trial, which included taking a view of the property, the Land Court judge entered a comprehensive decision affirming the board's findings and decision. Relying on the concurring opinion in the *Bransford* case, the judge determined that the board's decision, that the proposed reconstruction would increase the nonconforming nature of the house, was based on legally tenable grounds and was otherwise proper. The judge also concluded that there was sufficient evidence to support the

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 5

board's finding *362 that the proposed reconstruction would be substantially more detrimental to the neighborhood than the existing house. Judgment entered, and this appeal followed.

The plaintiffs do not challenge the judge's determination that reconstruction of the house would result in substantial detriment to the neighborhood. The *sole issue* before us is whether the plaintiffs' proposed reconstruction increases the nonconforming nature of the structure under the second except clause of G.L. c. 40A, § 6. For the reasons stated in the concurring opinion in the *Bransford* case, we affirm the Land Court judgment. *Id.* at 853-862, 832 N.E.2d 639 (concurring opinion).

****919** We need not repeat the content of the concurring opinion in the *Bransford* case. However, some additional observations are in order. The plaintiffs do not contend that a different conclusion is compelled by § 1642 of the zoning bylaw, see note 12, *supra*. The plaintiffs did not argue below, before judgment entered, that a different provision of the zoning bylaw might exempt their property from the one acre lot area requirement. The judge did not abuse his discretion in refusing to consider the plaintiffs' new contention on a motion to reconsider the judgment. See *O'Donnell v. Bane*, 385 Mass. 114, 121, 431 N.E.2d 190 (1982). See also *Harley-Davidson Motor Co. v. Bank of New England-Old Colony, N.A.*, 897 F.2d 611, 616 (1st Cir.1990), and cases cited.

The board does not dispute that the plaintiffs could reconstruct a house on the lot, or modernize the existing house, in keeping with the existing structure's building footprint and living area. The plaintiffs cannot be compelled to remove the existing house because of the protection granted to a preexisting structure on a preexisting nonconforming lot. Concerns over the making of small-scale alterations, extensions, or structural changes to a preexisting house are illusory. Examples of such improvements could include the addition of a dormer; the addition, or enclosure, of a porch or sunroom; the addition of a one-story garage for no

more than two motor vehicles; the conversion of a one-story garage for one motor vehicle to a one-story garage for two motor vehicles; and the addition of small-scale, proportional storage structures, such as sheds used to store gardening and lawn equipment, or sheds used to house swimming pool heaters and equipment. Because of their small-scale nature, the improvements *363 mentioned could not reasonably be found to increase the nonconforming nature of a structure,^{FN15} and we conclude, as matter of law, that they would not constitute intensifications.^{FN16} More substantial improvements, or reconstructions, would require approval under the second except clause and under the terms of an existing ordinance or bylaw that will usually require findings of the type specified in § 1642 of the Norwell bylaw.

FN15. Owners intending such projects, however, are obliged, nevertheless, to seek approval by the local building inspector if required.

FN16. Indeed, counsel for the board acknowledged that such modest additions create an illusory problem under the second except clause, and that, in response, many municipalities have placed exceptions in their zoning codes permitting additions and structures of the type listed in the examples as nonintensifications.

Our decision recognizes that many municipalities do not welcome the building of structures that represent the popular trend of "mansionization." This is especially so when the structures involve reconstruction on nonconforming lots. The expansion of smaller houses into significantly larger ones decreases the availability of would-be "starter" homes in a community, perhaps excluding families of low to moderate income from neighborhoods. Municipalities may permissibly exercise their police power to attempt to limit these potential adverse effects. Doing so is consistent with the Legislature's concern for the critical need for affordable housing, see *Jepson v. Zoning Bd. of Appeals of Ipswich*, 450

878 N.E.2d 915
 450 Mass. 357, 878 N.E.2d 915
 (Cite as: 450 Mass. 357, 878 N.E.2d 915)

Page 6

Mass. 81, 95, 876 N.E.2d 820 (2007), and cases cited, and with the autonomy given local communities to determine land use issues sensibly.

The final determination, of course, is for the Legislature, if it chooses to eliminate the controversy that has arisen over the meaning of the second except clause, by changing or clarifying our decision. For **920 now, the equipoise created by the *Bransford* decision is altered to move the weight of the law to the Land Court's position as explained in the concurring opinion in *Bransford* and here.

Judgment affirmed.

CORDY, J. (dissenting, with whom Ireland, J., joins).

I agree with the court's conclusion that certain "small-scale alterations, *364 extensions, or structural changes to a preexisting house" could not reasonably be found to increase the nonconforming nature of a house whose only nonconformity is that it is located on a smaller lot than what the town's zoning bylaw now requires as a minimum for future residential development. 450 Mass. at 362, 878 N.E.2d 915, 919. I continue to disagree, however, with the court's conclusion that the reconstruction and enlargement of an existing single family residence that fully complies with current zoning and building size requirements, except minimum lot size, "increase[s] the nonconforming nature of [the] structure," such that the grandfathering provisions of G.L. c. 40A, § 6, first par., provide it no protection. 450 Mass. at note 3, 878 N.E.2d 915, 916. My disagreement with the court's reasoning is set forth in the dissenting opinion in *Bransford v. Zoning Bd. of Appeals of Edgartown*, 444 Mass. 852, 863, 832 N.E.2d 639 (2005) (*Bransford*) (Cordy, J., dissenting, with whom Ireland and Sosman, JJ., joined), and need not fully be repeated here.

It does bear repeating, however, that the size of residential structures is not regulated by minimum lot size requirements. Rather, a town may (among other things) impose setback requirements, height

restrictions, and even lot coverage ratios for this purpose, as apparently the town of Norwell does. Thus, while a preexisting residential structure that exceeds building size requirements may remain pursuant to G.L. c. 40A, § 6, first par., any attempt to alter, reconstruct, or extend the structure in a manner that would increase its size would plainly "increase the nonconforming nature of [the] structure," thereby removing such an alteration, reconstruction, or extension from the protection of the statute and requiring a special permit.

Minimum lot size requirements are, however, of a different nature. They limit the number of dwellings that can be built in a town, thereby limiting the density of the population, and most particularly the number of families who may reside there and the burden such families place on town services (such as schools, sewers, and public safety). A home on a lot that has become nonconforming because of an increase in minimum lot size is not nonconforming because of the size of the structure. The nonconformity is that there is a dwelling on the lot at all. Whether the dwelling is 675 square feet or 3,500 square feet is irrelevant to the nonconformity of its lot—the latter is as nonconforming *365 as the former. Consequently, increasing the dwelling's size (so long as permitted by current setback and other building-size requirements) cannot be said to increase a nonconformity that has nothing to do with building size. There will still be one, and only one, dwelling on the property.

For these reasons, and those regarding what I perceive to be the Legislature's intention to provide greater protection for the owners of single-family and two-family homes (as discussed in the *Bransford* dissent), I respectfully dissent from the court's interpretation of the statute to the contrary.

Mass., 2008.
 Bjorklund v. Zoning Bd. of Appeals of Norwell
 450 Mass. 357, 878 N.E.2d 915

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Effective: November 8, 2000

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

↳ Title VII. Cities, Towns and Districts (Ch. 39-49A)

↳ Chapter 40A. Zoning (Refs & Annos)

→ § 6. Existing structures, uses, or permits; certain subdivision plans; application of chapter

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the non-conforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.

A zoning ordinance or by-law shall provide that construction or operations under a building or special permit shall conform to any subsequent amendment of the ordinance or by-law unless the use or construction is commenced within a period of not more than six months after the issuance of the permit and in cases involving construction, unless such construction is continued through to completion as continuously and expeditiously as is reasonable.

A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage. Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or by-law shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred

and seventy-six, whichever is later, to a lot for single and two family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common ownership with any adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy-five feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership. The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited by the zoning ordinances or by-laws in effect in a city or town.

If a definitive plan, or a preliminary plan followed within seven months by a definitive plan, is submitted to a planning board for approval under the subdivision control law, and written notice of such submission has been given to the city or town clerk before the effective date of ordinance or by-law, the land shown on such plan shall be governed by the applicable provisions of the zoning ordinance or by-law, if any, in effect at the time of the first such submission while such plan or plans are being processed under the subdivision control law, and, if such definitive plan or an amendment thereof is finally approved, for eight years from the date of the endorsement of such approval, except in the case where such plan was submitted or submitted and approved before January first, nineteen hundred and seventy-six, for seven years from the date of the endorsement of such approval. Whether such period is eight years or seven years, it shall be extended by a period equal to the time which a city or town imposes or has imposed upon it by a state, a federal agency or a court, a moratorium on construction, the issuance of permits or utility connections.

When a plan referred to in section eighty-one P of chapter forty-one has been submitted to a planning board and written notice of such submission has been given to the city or town clerk, the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of such plan while such plan is being processed under the subdivision control law including the time required to pursue or await the determination of an appeal referred to in said section, and for a period of three years from the date of endorsement by the planning board that approval under the subdivision control law is not required, or words of similar import.

Disapproval of a plan shall not serve to terminate any rights which shall have accrued under the provisions of this section, provided an appeal from the decision disapproving said plan is made under applicable provisions of law. Such appeal shall stay, pending either (1) the conclusion of voluntary mediation proceedings and the filing of a written agreement for judgment or stipulation of dismissal, or (2) the entry of an order or decree of a court of final jurisdiction, the applicability to land shown on said plan of the provisions of any zoning ordinance or by-law which became effective after the date of submission of the plan first submitted, together with time required to comply with any such agreement or with the terms of any order or decree of the court.

In the event that any lot shown on a plan endorsed by the planning board is the subject matter of any appeal or any litigation, the exemptive provisions of this section shall be extended for a period equal to that from the date of filing of said appeal or the commencement of litigation, whichever is earlier, to the date of final disposition thereof, provided final adjudication is in favor of the owner of said lot.

The record owner of the land shall have the right, at any time, by an instrument duly recorded in the registry of deeds for the district in which the land lies, to waive the provisions of this section, in which case the ordinance or by-law then or thereafter in effect shall apply. The submission of an amended plan or of a further subdivision of all or part of the land shall not constitute such a waiver, nor shall it have the effect of further extending the applicability of the ordinance or by-law that was extended by the original submission, but, if accompanied by the waiver described above, shall have the effect of extending, but only to extent aforesaid, the ordinance or by-law made then applicable by such waiver.

CREDIT(S)

Added by St.1975, c. 808, § 3. Amended by St.1977, c. 829, § 3D; St.1979, c. 106; St.1982, c. 185; St.1985, c. 494; St.1986, c. 557, § 54; St.1994, c. 60, § 67; St.1996, c. 345, § 1; St.2000, c. 29; St.2000, c. 232.

Current through the 2010 2nd Annual Session

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EXHIBIT G

Westlaw

84 N.E.2d 544
 324 Mass. 57, 84 N.E.2d 544, 7 A.L.R.2d 591
 (Cite as: 324 Mass. 57, 84 N.E.2d 544)

Page 1

C

Supreme Judicial Court of Massachusetts, Bristol.
 OLSON et al.

v.

ZONING BOARD OF APPEAL OF ATTLE-
 BORO.

March 8, 1949.

Appeal-Superior Court, Bristol County; Lewis
 Goldberg, Judge.

Bill in equity by Robert V. Olson and another
 against the Zoning Board of Appeal of Attleboro to
 review the decision of the board denying the
 plaintiffs a building permit, to annul the decision,
 and to have inspector of buildings issue a permit to
 plaintiffs. From an adverse decree, the plaintiffs ap-
 peal.

Decree modified and, as modified, affirmed.

West Headnotes

[1] Zoning and Planning 414 ↪1359

414 Zoning and Planning
 414VIII Permits, Certificates, and Approvals
 414VIII(A) In General
 414k1358 Architectural and Structural
 Designs
 414k1359 k. In general. Most Cited
 Cases
 (Formerly 414k385, 268k621.22)

Where garage roof adjoined and was fastened
 to house, and between house and garage, but within
 roof and walls of garage, there was an area six feet
 in width and three feet in depth, paved with flag-
 stones, the garage, area paved with flagstones, and
 house constituted one "building" within meaning of
 city zoning ordinance requiring a side yard not less
 than 15 feet in width, and therefore owners were
 not entitled to a building permit to extend garage so
 that sidewall of garage would be one foot from

sideline of lot.

[2] Zoning and Planning 414 ↪1717

414 Zoning and Planning
 414X Judicial Review or Relief
 414X(D) Determination
 414k1714 Affirmative Relief from Court
 414k1717 k. Permits, certificates, and
 approvals. Most Cited Cases
 (Formerly 414k721, 268k621.57)

Judge's holding that the denial and dismissal by
 city zoning board of appeal of landowners' applica-
 tion for building permit, were within jurisdiction of
 board and that therefore board's decision should not
 be "annulled," amounted only to a finding that
 board's decision did not exceed authority of the
 board, and, to dispose of the merits, the words "and
 that no modification of it is required" would be ad-
 ded after the word "annulled". G.L.(Ter.Ed.) c. 40,
 § 30, as amended by St.1941, c. 198, §§ 1, 2 (
 M.G.L.A. c. 40A §§ 13-19, 21).

****544** Before ***57** QUA, C. J., and LUMMUS,
 RONAN, WILKINS and WILLIAMS, JJ.***58** J. W.
 McIntyre, of Attleboro, for plaintiffs.

No attorney for defendant.

WILLIAMS, Justice.

This is a bill in equity by way of appeal from
 the decision of the zoning board of appeal of the
 city of Attleboro brought under the provisions of §
 30, inserted in G.L.(Ter.Ed.) c. 40, by St.1933, c.
 269, § 1, as amended by St.1935, c. 388, and
 St.1941, c. 198, §§ 1, 2, to annul the decision of
 said board of appeal and to direct the inspector of
 buildings to issue to the plaintiffs a permit for an
 addition to their garage at 33 Ashton Road in said
 city. The plaintiffs ****545** have appealed from a de-
 cree entered by a judge of the Superior Court.

[1] From the evidence, which is reported and

84 N.E.2d 544
 324 Mass. 57, 84 N.E.2d 544, 7 A.L.R.2d 591
 (Cite as: 324 Mass. 57, 84 N.E.2d 544)

Page 2

essentially is not in dispute, it appears that the plaintiffs are the owners of a lot of land with a single family dwelling and garage thereon located in a 'single residence district' as defined by section 2 of the zoning ordinance of the city of Attleboro which became effective on February 10, 1942. The house, containing seven rooms, is of wooden construction, Dutch colonial type, is thirty-five feet wide on its front or street side, and has a depth from front to back of twenty-five feet. As one faces it from the street there is a covered porch or piazza on the end of the house to the left and a one-car garage not over one and one half stories in height on the end to the right. The house, both on the front and on the rear, as well as the garage on the front, has a double pitched or gambrel roof. The roofs are of similar design, except that, in the rear, the garage roof has a single pitch. The garage is physically joined or 'fastened' to the house. The garage is somewhat lower than the house, which is built upon a terrace, and the garage roof adjoins the house slightly below the level of the latter's second story windows. Between the house and the garage, but under and within the roof and walls of the latter, is an area six feet in width and three feet in depth paved with flagstones. At the left a door leads from this area down a few steps into the basement of the house and at the right a door opens into *59 the garage. The area has two open archways, front and back, each three feet in width. Entering the front archway from the street one passes through this archway, over the paved area, out through the rear archway and along a pathway to the kitchen door at the back of the house. This area, so described, was termed a 'breezeway' in the testimony. The plaintiffs' garage as presently located is four feet from the right side line of their lot. They desire to extend the right side of the garage three feet farther to the right, which would bring the side wall of the garage as so extended to a distance one foot from the side line of the lot. A petition filed by the plaintiffs with the inspector of buildings for a permit to make such extension was denied by the inspector as a matter of law, and on appeal the zoning board of appeal sustained the decision of the in-

spector. Section 14 of the zoning ordinance provides, 'There shall be provided on each side of every building or structure (other than an accessory building not over one and one-half (1 1/2) stories in height and not used for habitation) hereafter erected or placed upon any lot in a resident district, a side yard not less than fifteen (15) feet in width.' Section 9, paragraph B, of the same ordinance provides that the inspector of buildings, on whom is imposed the duty of executing the provisions of the ordinance, 'shall not issue any permit * * * for the construction, * * * alteration, enlargement, [or] extension * * * of any building or structure which would be in violation of any of the provisions of this ordinance.' If the garage is not an 'accessory building' but is a component part of the house, under said section 14 such extension of the garage would be a violation of the ordinance. It is the contention of the plaintiffs that the house, breezeway and garage do not constitute one building but that the garage is a separate building accessory to the house. The judge found and ruled that the plaintiffs were not entitled to a permit as a matter of right, and entered a decree 'that the decision of the zoning board of appeal of the city of Attleboro * * * was within the jurisdiction of the said zoning board of appeal; that the said *60 decision should not be, and it is not, annulled; and that the clerk of the court within thirty days of the entry of this decree send an attested copy thereof to the zoning board of appeal of the city of Attleboro and to the inspector of buildings of the city of Attleboro.' In our opinion the garage, so called breezeway and house constitute one building. We are aided in reaching this conclusion by a photograph which is in evidence. Certainly they were designed to produce a unified architectural effect. A slight analogy exists in the case of bay windows, dormer windows and piazzas which, although not within the walls nor under the roof of the house, usually **546 are considered extensions of and constituent parts of the house itself. See *Sanborn v. Rice*, 129 Mass. 387; *Bagnall v. Davies*, 140 Mass. 76, 2 N.E. 786; *Payson v. Burnham*, 141 Mass. 547, 6 N.E. 708; *Loud v. Pendergast*, 206 Mass. 122, 92 N.E. 40. The decision in

84 N.E.2d 544
324 Mass. 57, 84 N.E.2d 544, 7 A.L.R.2d 591
(Cite as: 324 Mass. 57, 84 N.E.2d 544)

H. W. Robinson Carpet Co. v. Fletcher, 315 Mass. 350, 353, 52 N.E.2d 681, where it was held that buildings on opposite sides of a driveway connected by an overhead passageway were separate buildings, depended on the construction of a lease and is not a precedent in the present case. The ruling of the judge was right.

[2] In the decision of the board of appeal after findings of fact it was stated, 'application [for the permit] is hereby denied and dismissed.' The judge in the decree entered by his order adjudged that such denial and dismissal were within the jurisdiction of the board of appeal and, therefore, its decision should not be annulled. The refusal to annul, being based on jurisdictional grounds, see *Clap v. Municipal Council of Attleboro*, 310 Mass. 605, 39 N.E.2d 431, only amounted to a finding, in the language of the statute, that the decision of the board of appeal did not 'exceed the authority of such board.' To dispose of the merits of the issues raised by the plaintiffs' bill the words 'and that no modification of it is required' should be added after the word 'annulled.' See *Lambert v. Board of Appeals of Lowell*, 295 Mass. 224, 228, 3 N.E.2d 784. As so modified the decree is affirmed with costs.

So ordered.

Mass. 1949
Olson v. Zoning Bd. of Appeal of Attleboro
324 Mass. 57, 84 N.E.2d 544, 7 A.L.R.2d 591

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Westlaw

AMLZONING § 9:64
1 Am. Law. Zoning § 9:64 (5th ed.)

Page 1

American Law of Zoning
Database updated November 2010

Patricia E. Salkin

Chapter
9. Types of Zoning Regulation
V. Height, Bulk, and Area Restrictions

References

§ 9:64. Encroachment—Porches, eaves, steps, etc—Accessory buildings

Some ordinances permit an accessory building to be constructed in the required yard space. Exception of an accessory building has been achieved by judicial construction.[1] Where various buildings, and additions to the main building, are constructed, the repetitive question is whether the new building or part is a permitted accessory or a prohibited extension and encroachment. Perhaps the most common accessory building is a garage. Absent a provision allowing accessory buildings to occupy yard space, a garage may not be erected in a required yard.[2] Where a garage is attached to the main building and architecturally similar to it, such garage is not an accessory building within that term as it is used in an ordinance permitting such accessory buildings to encroach.[3] Where an accessory garage was built in the required yard space, and later the garage was remodeled for living and the dwelling remodeled as a garage, the owner was not entitled to an occupancy permit.[4]

A carport is an addition to a dwelling, not an accessory use. Accordingly, it may not be constructed within the required yard space.[5] A Michigan court, however, reached a different result, holding that a carport is an accessory use, exempt from yard requirements imposed on “principal structures.”[6] A deck and screen, constructed on an extension of the foundation of the main dwelling, is a permissible accessory use.[7] A single-story building behind a hotel, containing sleeping rooms, is not an accessory use and may not occupy required rear yard space,[8] and an extension of a nonconforming building into required space is similarly unlawful.[9]

[FN1] An ordinance requiring a side yard of 15 feet “between the side of the house and the side lot line” does not apply to a building accessory to the principal house located within a foot of the lot line, but in the backyard. *Selectmen of Lancaster v. DeFelice*, 352 Mass. 205, 224 N.E.2d 218 (1967).

[FN2] *Conrad v. Jackson*, 107 So. 2d 369 (Fla. 1958).

[FN3] *Misuk v. Zoning Bd. of Appeals of City of Meriden*, 138 Conn. 477, 86 A.2d 180 (1952); *Village of Lake Bluff v. Horne*, 24 Ill. App. 2d 343, 164 N.E.2d 217 (2d Dist. 1960); ***Olson v. Zoning Bd. of Appeal of Attleboro*, 324 Mass. 57, 84 N.E. 2d 544, 7 A.L.R. 2d 591 (1949).**

[FN4] *Berard v. Board of Adjustment of City of St. Louis*, 138 S.W.2d 731 (Mo. Ct. App. 1940).

[FN5] *City of Cleveland v. Young*, 236 Miss. 632, 111 So. 2d 29 (1959); *Hargraves v. Young*, 3 Utah 2d 175, 280 P.2d 974 (1955).

[FN6] *Nelson v. Goddard*, 43 Mich. App. 615, 204 N.W.2d 739 (1972).

[FN7] *Van Arsdale v. Town of Provincetown*, 344 Mass. 146, 181 N.E.2d 597 (1962).

But see *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). A setback requirement under a shore land zoning ordinance was applicable to a deck that was attached to a residential house. Because it was attached to the house, the deck was considered part of the principal structure, and not an accessory structure. Employing various rules of statutory construction, the Court also concluded that the setback should be measured horizontally, as opposed to using an "over-the-ground" measurement method. "Requiring the shore land setback to be measured along the horizontal plane results in structures being placed further back from the high water mark and thereby best serves the protective purpose of the shore land setback."

[FN8] *Honigfeld v. Byrnes*, 14 N.J. 600, 103 A.2d 598 (1954).

[FN9] *City of West Helena v. Bockman*, 221 Ark. 677, 256 S.W.2d 40 (1953).

See also *Godson v. Town of Surfside*, 150 Fla. 614, 8 So. 2d 497 (1942) (cabanas); *Deer-Glen Estates v. Board of Adjustment and Appeal of Borough of Fort Lee*, 39 N.J. Super. 380, 121 A.2d 26 (App. Div. 1956) (building encroached through builder's error).

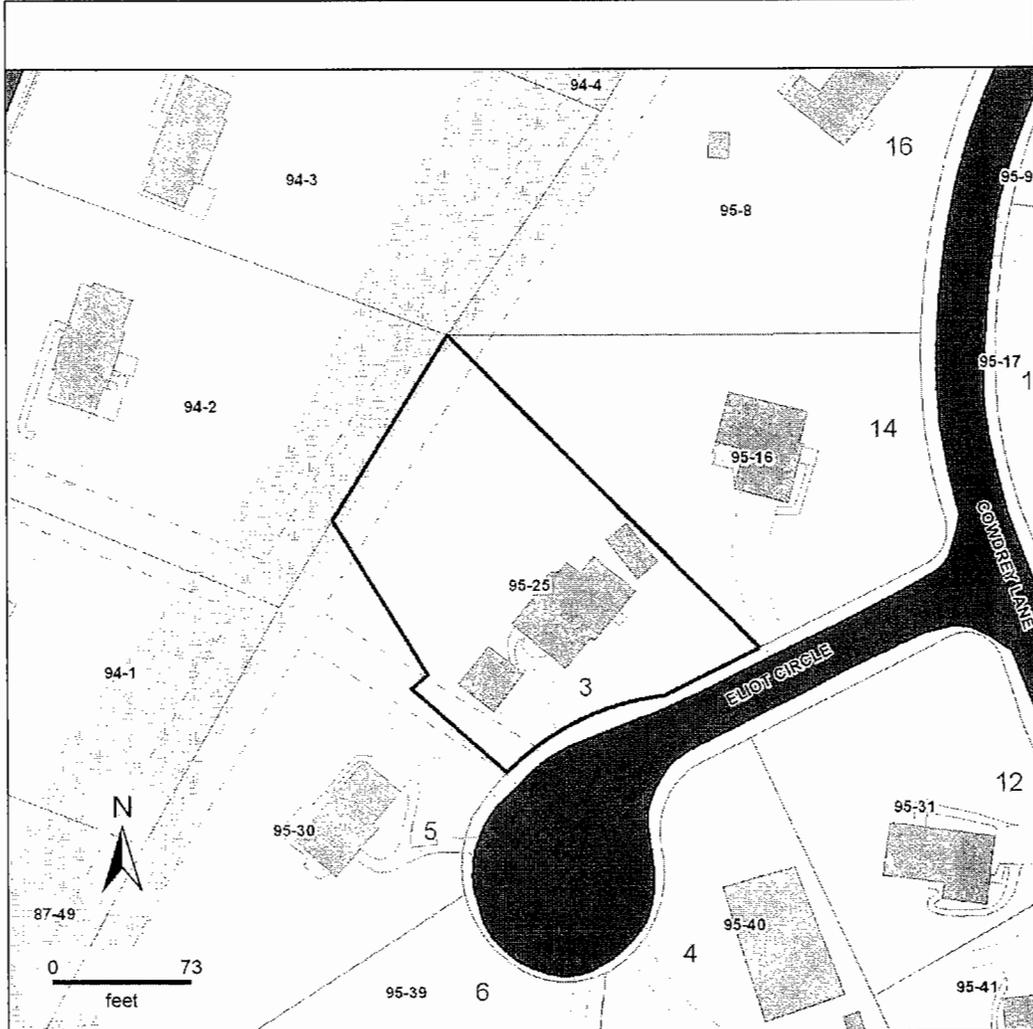
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AMLZONING § 9:64

END OF DOCUMENT

EXHIBIT H

3 ELLIOT CIRCLE

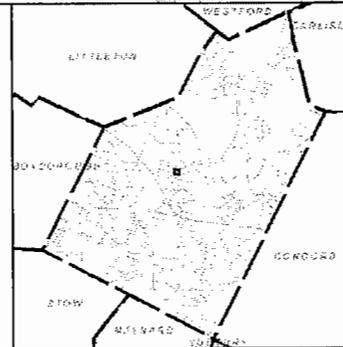


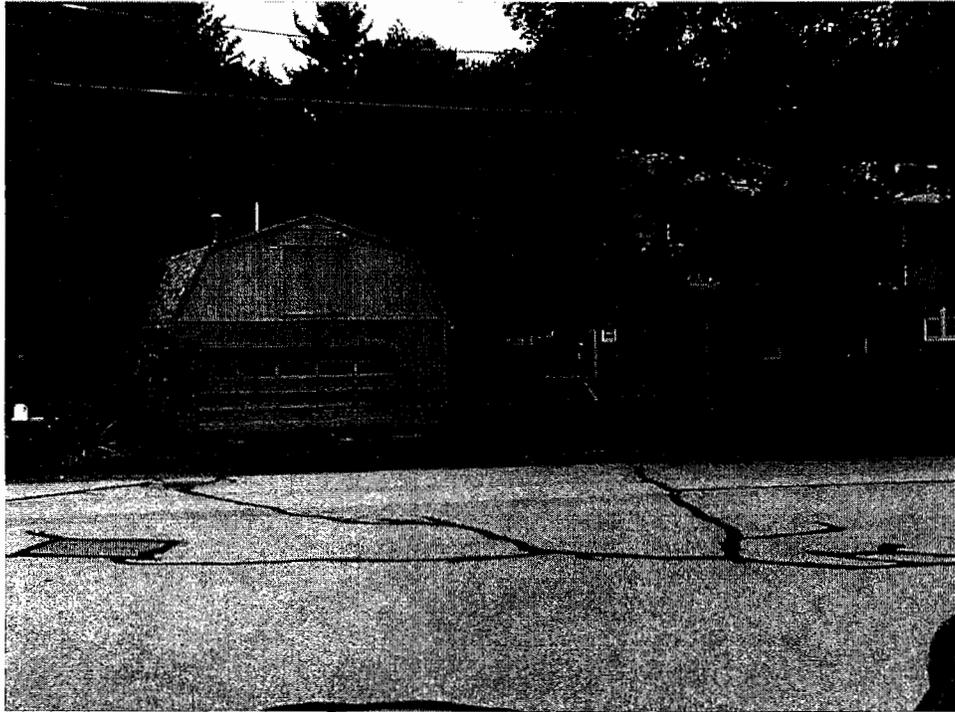
Property Information
Property ID E3-95-25
Location 3 ELIOT CIR



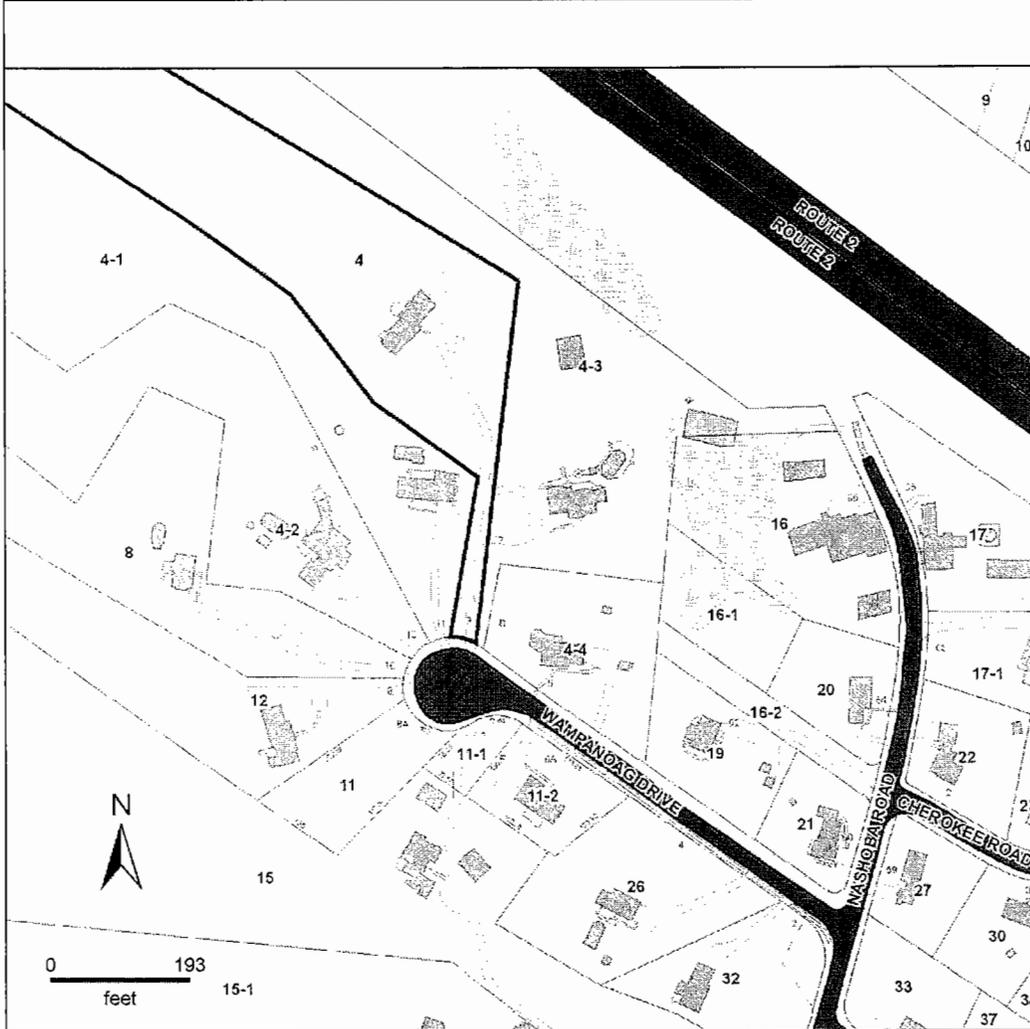
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9 WAMPANOAG DRIVE

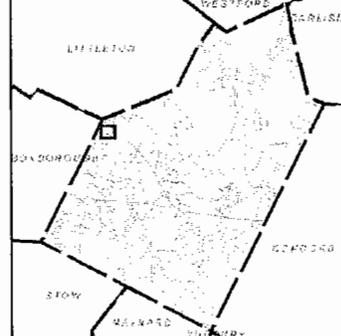


Property Information
 Property ID D2-4
 Location 9 WAMPANOAG DR



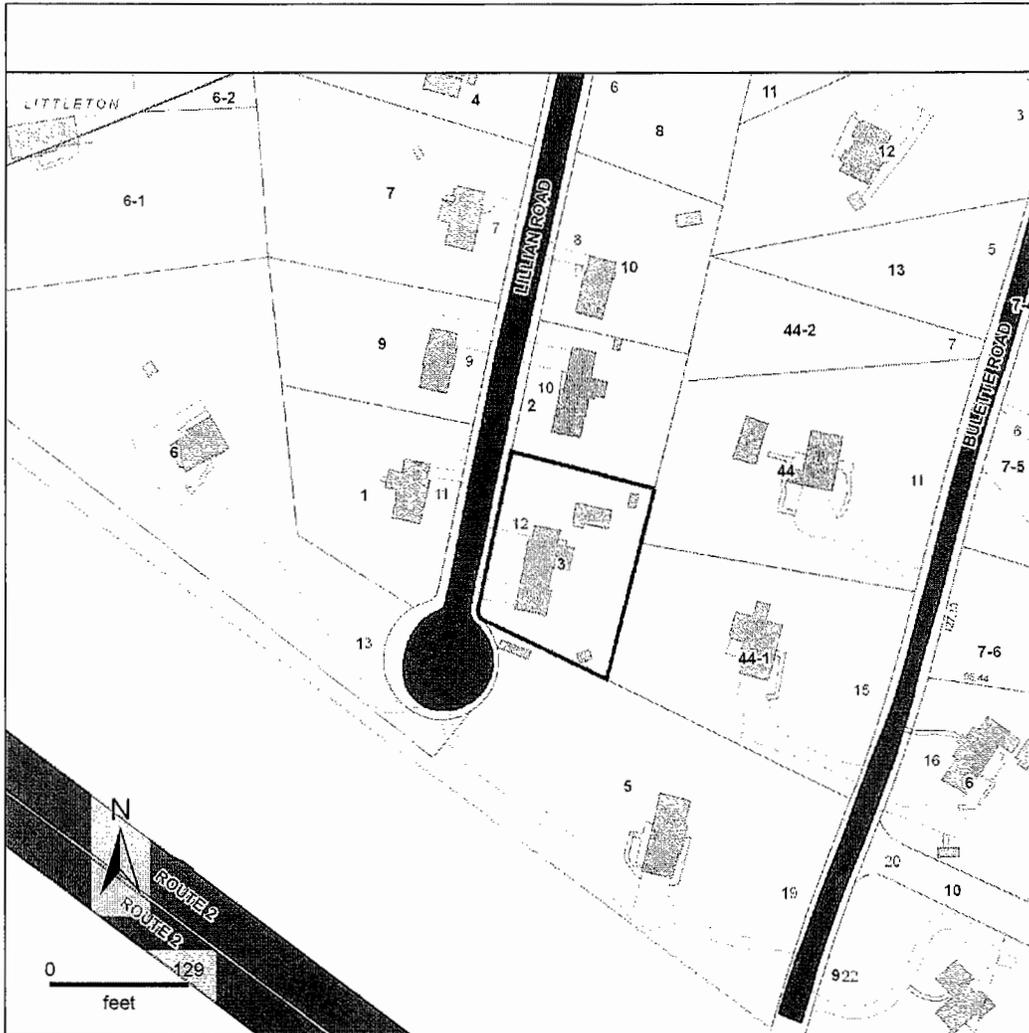
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12 LILLIAN ROAD

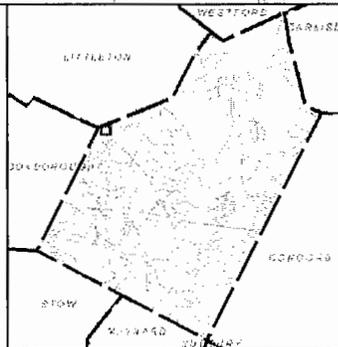


Property Information
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 Location 12 LILLIAN RD



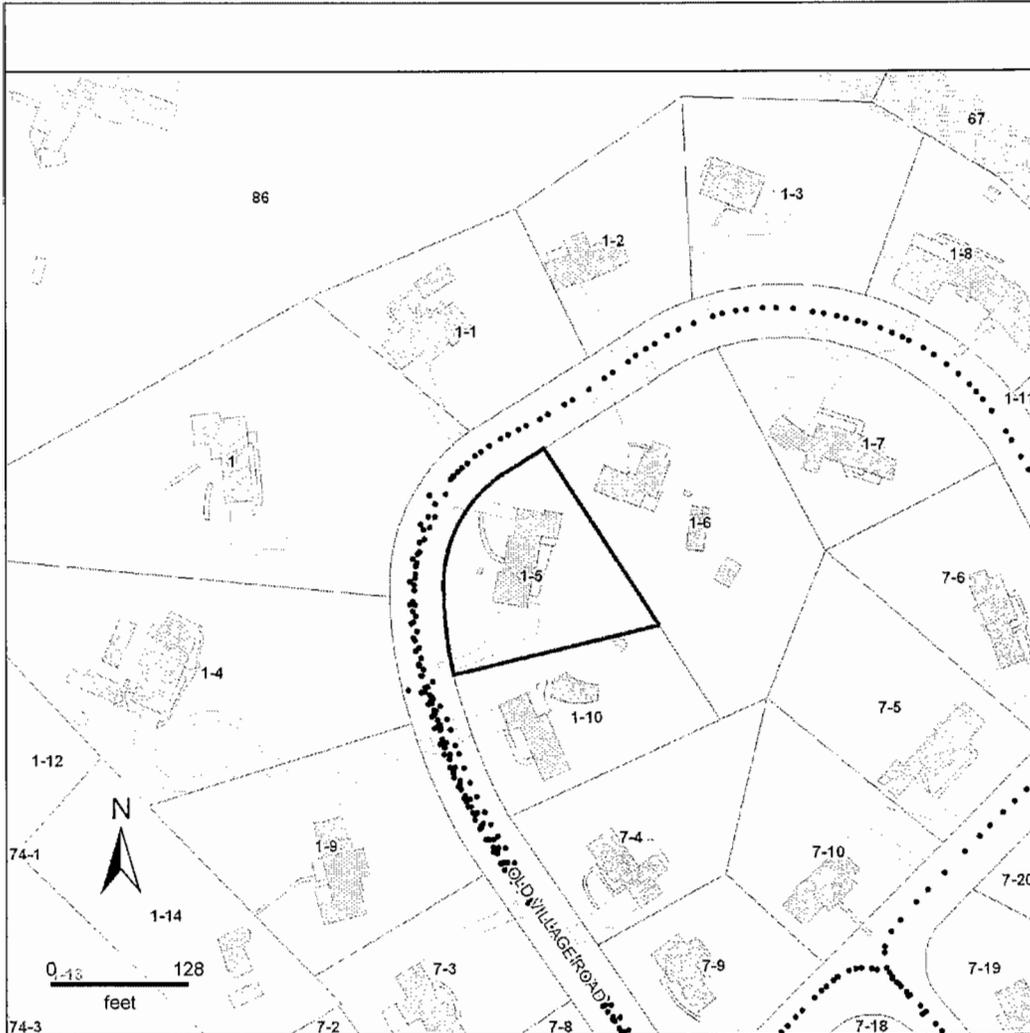
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24 OLD VILLAGE ROAD

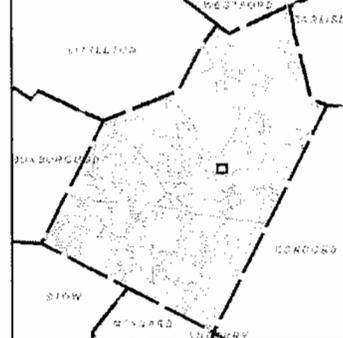


Property Information
Property ID F4-1-5
Location 24 OLD VILLAGE RD



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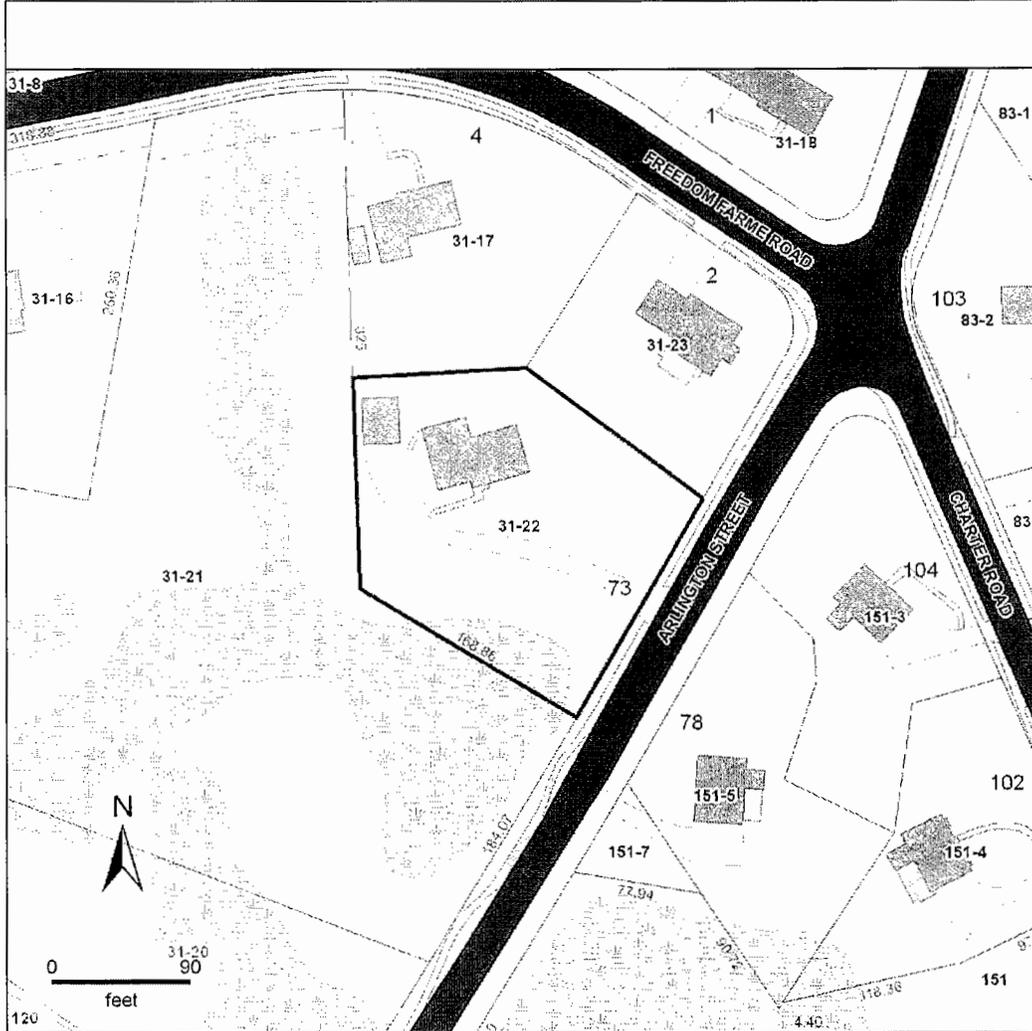
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73 ARLINGTON ST

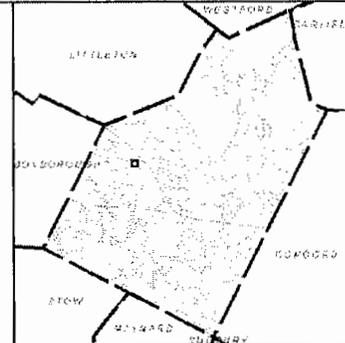


Property Information
Property ID E2-31-22
Location 73 ARLINGTON ST



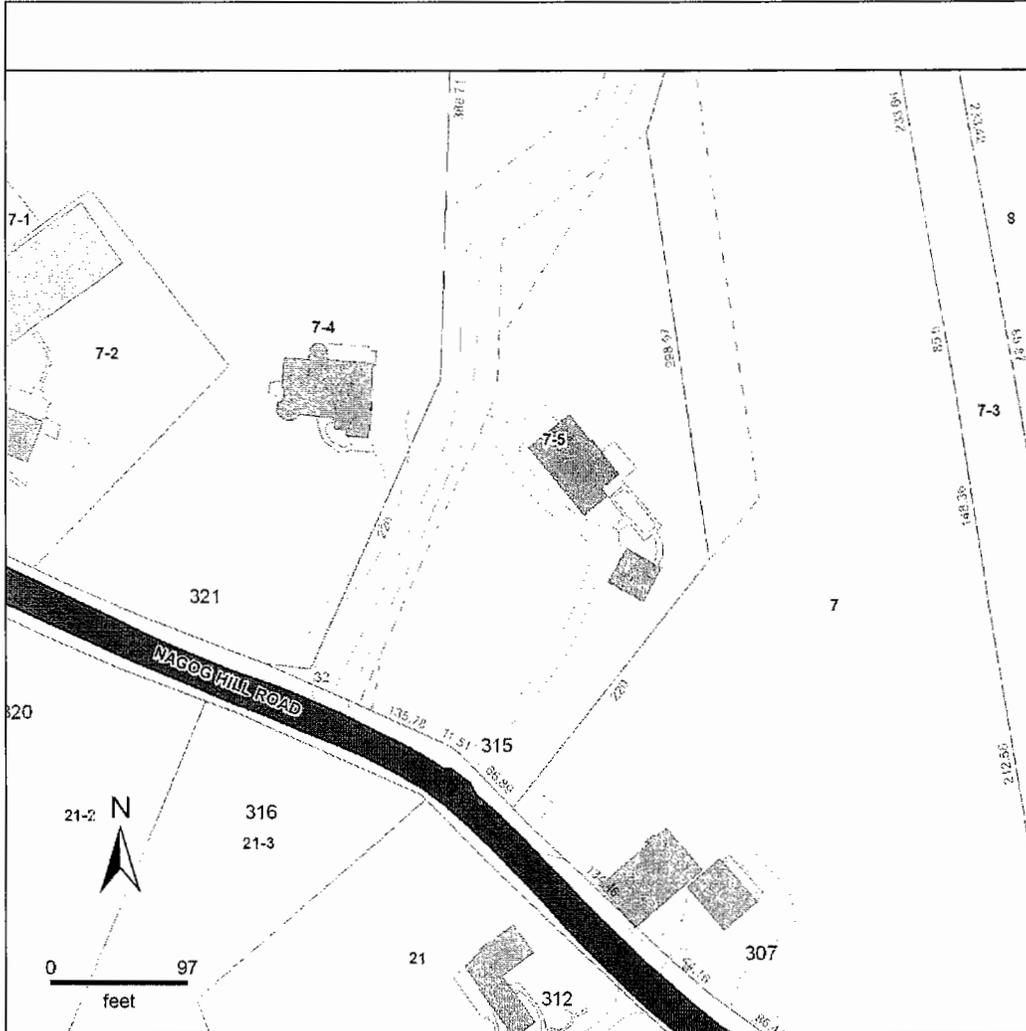
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315 Nagog Hill Road

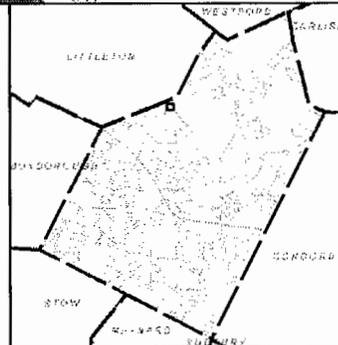


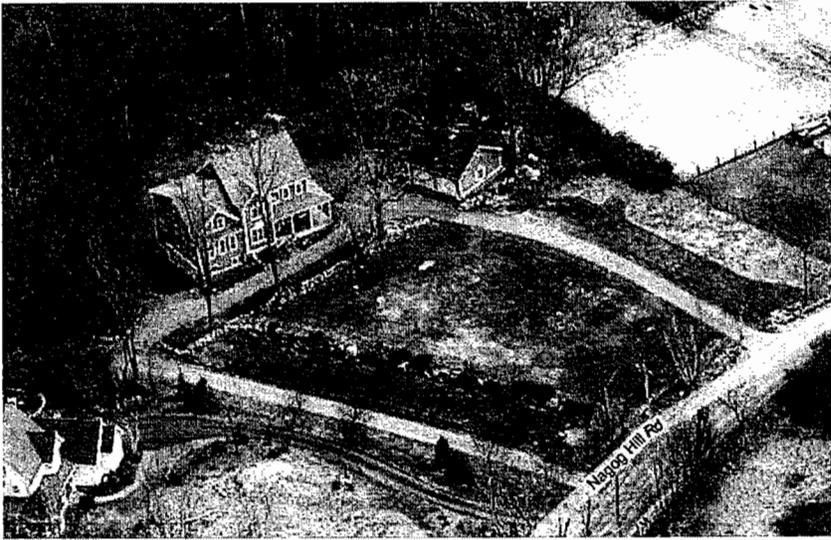
Property Information
Property ID
Location



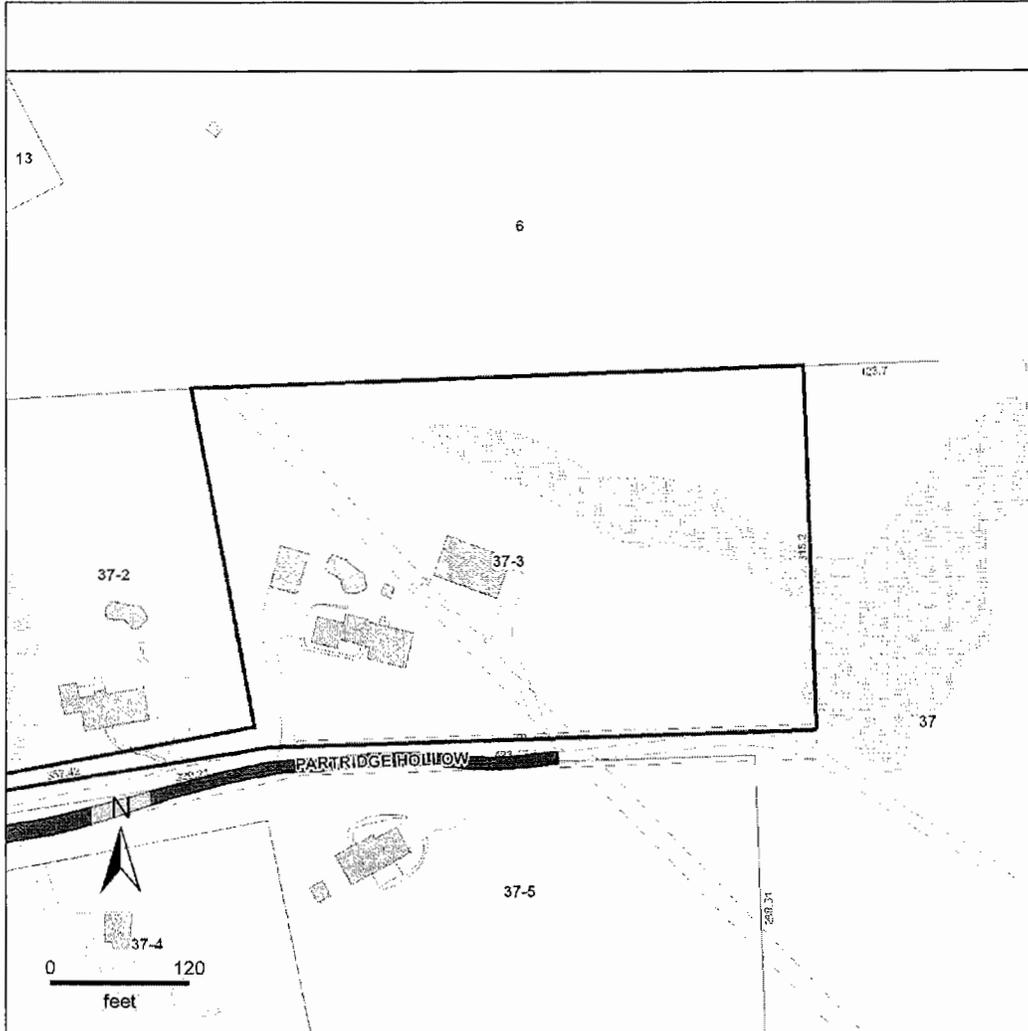
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195 Nagog Hill Road

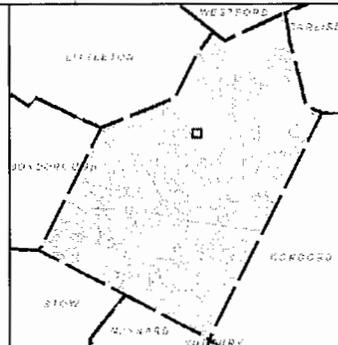


Property Information
 Property ID D4-37-3
 Location 195 NAGOG HILL RD



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23 Lincoln Drive



209 Newtown Road

