



TOWN OF ACTON
472 Main Street
Acton, Massachusetts, 01720
Telephone (978) 929-6611
Fax (978) 929-6350

Michael J. Gowing
Chairman, Board of Selectmen

August 12 2014

Acton Beacon Legal Ad Division

Below please find a copy of a legal advertisement to appear in the Acton Beacon on August 28th and September 4th, 2014.

Please bill the Town Manager's Office

Please send proof copy and tear sheet to: ltomyl@acton-ma.gov

Regards,

Lisa Tomyl
Town Manager's Office

**LEGAL NOTICE
TOWN OF ACTON
NOTICE OF HEARING**

The Acton Board of Selectmen will hold a public hearing from a continuation on September 22, 2014 at 7:20 PM in the Francis Faulkner Hearing Room in Town Hall, 472 Main Street, Acton on the application of Jacob Abraham, for a Use Special Permit #10/11/13-445, required under Sections 3.6.3 of the Acton Zoning Bylaw, for a review of an acoustic engineering report at 848 Main Street, Acton, MA 01720. The application can be inspected at Town Hall during normal business hours.

BOARD OF SELECTMEN

SEL/848 MAIN ST.
**LEGAL NOTICE
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BOARD OF SELECTMEN

AD#13183105
Acton Beacon 8/28, 9/4/14

Lisa Tomyl

From: axebros [axebros@verizon.net]
Sent: Thursday, August 28, 2014 3:01 PM
To: Board of Selectmen; Manager Department; Scott Mutch
Subject: withdrawal of permit 10/11/13-445

Jacob Abraham
Axe Brothers Tree Service

To the Board of Selectmen,
Town Manager,
and all applicable departments

I wish to officially withdraw my request for a special permit to manufacture firewood outdoors at 848 Main St, Acton Ma.

I would like to thank the selectmen and the Towns departments for their patience and consideration in this process, especially since this was the first time any permit of this sort has been applied for. Now that I know what is to be used as a potential guideline I can more easily apply for a permit in the future. I will continue to seek out spots to work within and near the Town, but in all honesty, every industrial land owner I have contacted inside Acton has stated that they are not interested in even trying to rent outdoor space because every time they have tried to further utilize their properties, the Town finds a reason to deny a permit.

Considering the attitude of the abutters, I feel even a reasonable compromise between all parties would simply lead to more complaints and wasted time for Town staff. I had truly hoped to start a dialogue to discover what may be considered as acceptable rather than accusations from their attorney. While I understand their complaints, change is inevitable throughout the Town and no person or group should be able to stop any landowner from utilizing their property for an appropriate purpose. This is especially true in business and industrial districts as the Town claims to want to build up its non residential tax base.

As the Town undergoes further development I can easily foresee similar issues arising across the Town. I hope that in the future the various Town boards and departments would look back to this particular issue as a guide to protect all surrounding properties from over-development of any type of residential use. Remember that there was considerable noise at the residences when they were built, enough that some residents were unhappy the day they moved in. This is especially true in a development such as Robbins Mill that required a special permit from the board of selectmen and could have had built in provisions to protect the residents and the neighbors had the approving board flexed its muscles.

Again, I would like to thank everyone that has been involved in this for their considerable amount of time,

-Jacob Abraham

AGREEMENT ON TIME EXTENSION

The Board of Selectmen and the Petitioner for a Special Permit

Use Special Permit
(identify type of permit)

File No. # 10/11/13 - 445

Petitioner Name: Jacob Abraham

Project Name: wood manufacturing (auditory engineer report)

Location/Address: 848 Main Street, Acton MA

hereby agree to continue the Public Hearing to

(date) September 22, 2014

(time) 7:20 pm

and to extend the legally required time limit in which the Board of Selectmen must render a decision to 90 days following the date of the hearing continuance stated above.

Signed this (date) August 11, 2014


Board of Selectmen


Petitioner

This agreement must be filed with the Office of the Acton Town Clerk.

RECEIVED

AUG 12 2014

TOWN CLERK
ACTON

AGREEMENT ON TIME EXTENSION

The Board of Selectmen and the Petitioner for a Special Permit

Use Special Permit
(identify type of permit)

File No. #10/11/13 - 445

Petitioner Name: Jacob Abraham - Axe Brothers

Project Name: wood manufacturing (acoustic readings)

Location/Address: 848 Main Street

hereby agree to continue the Public Hearing to

(date) August 11, 2014

(time) 8:00 pm

and to extend the legally required time limit in which the Board of Selectmen must render a decision to 90 days following the date of the hearing continuance stated above.

Signed this (date) 6/23/14


Board of Selectmen


Petitioner

This agreement must be filed with the Office of the Acton Town Clerk.

RECEIVED
JUN 24 2014
TOWN CLERK
ACTON

Lisa Tomyl

From: Scott Mutch
Sent: Wednesday, August 06, 2014 11:33 AM
To: Lisa Tomyl
Subject: FW: Official Revised Request for Quotes

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
Town of Acton
Planning Department
472 Main Street
Acton, MA 01720
Tel: (978) 929-6631
Fax: (978) 929-6340
Email: planning@acton-ma.gov
Website: www.acton-ma.gov

From: Scott Mutch
Sent: Wednesday, July 16, 2014 11:12 AM
To: 'axebros'
Subject: RE: Official Revised Request for Quotes

Jake,

The Board of Selectmen were specifically looking to discuss the findings of the sound analysis at the August 11, 2014 hearing, so without the data collection being completed and the Engineer's analysis and report in front of the BoS to review and discuss, I'm not sure there would be any interest in further discussing your USE Special Permit at that time. If your schedule does not allow for the facilitation of the sound study to be conducted and completed in sufficient time prior to the Aug. 11, 2014 hearing, you need to contact Lisa Tomyl in the Town Manager's office and seek a continuance of your hearing.

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
Town of Acton
Planning Department
472 Main Street
Acton, MA 01720
Tel: (978) 929-6631
Fax: (978) 929-6340
Email: planning@acton-ma.gov
Website: www.acton-ma.gov

From: axebros [<mailto:axebros@verizon.net>]
Sent: Tuesday, July 15, 2014 3:42 PM

To: Scott Mutch
Subject: RE: Official Revised Request for Quotes

Mr. Mutch, I cannot work with this schedule as I am too busy working elsewhere. Considering the Towns attorneys opinion, it may be wise to wait until after the site plan is completed. If the activity is to be moved elsewhere on site I would have that determination before the testing was done, and it would only change 1,000 sq ft. on the site-plan. Even if the survey is not completed by 8/11 there are still many things to be discussed with the Board.

Jacob Abraham
Axe Brothers Tree Service
978-263-9961

From: Scott Mutch [<mailto:smutch@acton-ma.gov>]
Sent: Tuesday, July 15, 2014 1:51 PM
To: 'axebros'
Subject: Official Revised Request for Quotes

Jake,

Good afternoon. Please find attached a copy of the Revised Request for Quotes which should have all of the corrections which you pointed out yesterday. I spoke with the sound engineer last night and based on everyone's schedules and the Board of Selectmen's wish to have the noise study report/analysis in advance of their August 11, 2014 meeting, the sound engineer would like to install the monitors this coming Friday (July 18, 2014) and have you complete at least 2 (two) full cycles of the wood processing operations also this Friday, July 18, 2014 beginning at approximately 12:00pm noon. The sound monitors would then be left in place for the better portion of the following week gathering information, which exceeds the Request's requirements. Could you please let me know as soon as possible if the revised amount is still acceptable to you.

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
Town of Acton
Planning Department
472 Main Street
Acton, MA 01720
Tel: (978) 929-6631
Fax: (978) 929-6340
Email: planning@acton-ma.gov
Website: www.acton-ma.gov

RECEIVED

AUG 7 2014

TOWN CLERK
ACTON



James A. Vevone
jvevone@sederlaw.com
Telephone: (508) 757-7721 ext.106
Facsimile: (508) 798-1863

August 7, 2014

**Via Electronic Mail to bos@acton-ma.gov
and Hand Delivery**

Mr. Michael Gowing, Chairman
Board of Selectmen
Acton Town Hall
472 Main Street
Acton, MA 01720

Re: Application for a Special Permit Number 10/11/13 - 445 (the "Application") for outdoor manufacture of firewood (the "Project") at the property located at 848 Main Street, Acton (Assessor's Map C5, Parcel 39) (the "Property") by the Applicant, Jacob Abraham ("Mr. Abraham")

Dear Mr. Gowing:

I am writing to express my concern about the lack of review guidelines for the sound study of the Project that the Board has requested (the "Study"). Mr. Abraham has consulted this firm with respect to the Application and, in particular, the scope of the Study pursuant to a Request for Quotes dated June 24, 2014.

Mr. Abraham hereby requests that the Board: (i) specify acceptable Project decibel limits; and, (ii) refine the scope of the Study so that it complies with the Massachusetts Department of Environmental Protection ("DEP") Noise Control Regulations, 310 CMR 7.10, and the DEP's Noise Pollution Policy Interpretation (the "DEP Interpretation").

The Property is located in the Small Manufacturing (SM) Industrial District. Pursuant to Section 3.6.3 of the Town of Acton Zoning Bylaw (the "Zoning Bylaw"), outdoor manufacturing requires the issuance of a special permit by the Board of Selectmen as the Special Permit Granting Authority. The Zoning Bylaw does not specify criteria for the issuance of an outdoor manufacturing special permit in the SM zoning district. Thus, the discretion of the Board is limited by *M.G.L. c. 40A* (the "Zoning Act") and the laws related thereto.

Massachusetts law requires the Board to act reasonably. *See, Vazza Properties, Inc. v. City Council of Woburn*, 1 Mass.App.Ct. 308 (1973). If an applicant meets the requirements of the Zoning Bylaw and there is no valid ground for denial of the application, the special permit

should be issued. *See, Murphy v. Zoning Bd. of Appeals of Lawrence*, 2 Mass.App.Ct. 876 (1974).

The scope of the Board's requested Study imposes an unnecessary burden on Mr. Abraham with no way for him to evaluate the standard the Board intends to use in reviewing the Study results. The Board has requested that the Study consist of measurements of both ambient sound and sound with the Project activity in at least three (3) locations for a period of eleven (11) hours for five (5) consecutive days. The DEP recommended sound analysis examinations take measurements at the source's property line and nearest residence or other sensitive receptor. Also, these examinations do not run for the length of time requested by the Board. Furthermore, as described below, the Board has not specified the intent of the requested Study.

The Board has not specified what it will consider an acceptable decibel level. As you are aware, the DEP Noise Control Regulations, 310 CMR 7.00, as interpreted by the DEP Interpretation, prohibit sound levels exceeding ten (10) decibels above the ambient sound levels. The DEP is tasked with regulating air pollution pursuant to *M.G.L. c.111 §§142A-M*. The Board is not bound by the DEP standard in issuing a special permit; however, the DEP standard, which was developed over many years by an agency tasked with regulating such matters, should be given deference. In any event, the decibel limit imposed by the Board must be reasonable.

The review of any special permit requires an analysis of the proposed use with respect to the zoning district and the neighborhood. In this matter, the Project is appropriate for a SM zoning district. Abutting the Property is a milling operation. Northeast of the Property on Main Street is a shooting range. The Project proposed by Mr. Abraham is consistent with these other uses.

To limit the use of the Property to higher standards than others in the zoning district would be singling out the Property and Mr. Abraham for differential treatment, which is not permissible under the Zoning Act. It is well-established under the case law in Massachusetts that there must be uniformity within districts for each class or kind of structures or uses permitted. *See, SCIT, Inc. v. Planning Board of Braintree*, 19 Mass.App.Ct. 101 (1984). This is particularly true in this situation, where the only challenge to the Application is posed by a residential property that required a special permit to be constructed in the SM zoning district.

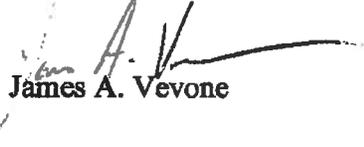
Mr. Abraham requests that the Board: (i) specify parameters as to acceptable Project decibel limits within the regulations promulgated by the DEP; and, (ii) refine the scope of the Study to be in accordance with such DEP regulations.



Town of Acton
Board of Selectmen
August 7, 2014
Page -3-

Thank you for your attention in this matter.

Sincerely,



James A. Vevone

cc: Scott Mutch, Zoning Enforcement Officer (via electronic mail to smutch@acton-ma.gov)
Mr. Jacob Abraham



August 11, 2014

**BY ELECTRONIC MAIL: cjoyce@acton-ma.gov
AND FIRST CLASS MAIL**

Acton Board of Selectmen
Acton Town Hall
472 Main St.
Acton, MA 01720

Re: 848 Main Street, Acton – Special Permit Application

Dear Members of the Board:

As you may recall, this firm represents neighbors and abutters to the proposed wood processing operation located at 848 Main Street in Acton, on land identified as Assessor's Map C5, Parcel 39 (the "Project Site"). I just became aware of a letter filed with the Board of Selectmen (the "Board") on August 7, 2014 by Attorney James Vevone on behalf of the Applicant Jacob Abraham.¹ In the letter, Abraham objects, for the first time, to the scope of the sound study, alleging, among other things, that the Board has not established objective criteria by which to measure the noise emanating from the proposed wood processing operation. These objections are untimely, and in any event, irrelevant.

Background

This application for a special permit under Section 10.3 of the Zoning Bylaw was filed on October 11, 2014, and continued for several months at the Applicant's request. Finally, on May 19, 2014, the Board heard testimony from the Applicant and the general public, and voted, sensibly, to collect sound data from the proposed wood processing operation. The Applicant did not object to this, and the Board selected a local acoustical consulting firm to perform this evaluation, Cavanaugh Tocci Associates ("CTA"). At a continued hearing on June 23, 2014, the Board determined that ambient noise data should be collected over a period of about five days, to create a reliable baseline by which to compare the noise generated by the wood operation. Again, the Applicant agreed with this approach, and the Board requested a revised quote from CTA to cover this additional data collection. The revised fee estimate from CTA is \$5,500, only \$500 higher than CTA's original quote on June 23, 2014, which was not objected to.

^{1/} The letter was not uploaded to the Town's website until Friday, August 8th, at 3:45 PM.

CTA provided the revised quote to the Zoning Enforcement Officer Scott Mutch on July 14, 2015, and Mr. Mutch forwarded it to the Applicant on July 15, 2014, requesting that data collection begin that week in order for the study to be completed by tonight's hearing. Mr. Abraham wrote back, indicating that he was "too busy working elsewhere," and stated his desire to wait until after the Board issues a decision on the parallel site plan special permit application that was filed contemporaneously by the property owner.

As you may recall, I have consistently objected to the Board treating this application as merely one for a "use" special permit under Section 10.3 of the Zoning Bylaw, rather than as a site plan special permit application under Section 10.4. The Table of Uses in the Zoning Bylaw is unambiguous in mandating that the proposed use of the subject property is only permissible through a site plan special permit. I have also expressed concern that the Board has been reviewing the parallel site plan special permit application filed by "Acorn Deck House Company," last February in isolation of this "use" special permit application. Board members have repeatedly informed my clients that the Board would not be considering the proposed wood processing operation in connection with the site plan application. I understand that the Board approved the site plan on July 28, 2014 without any consideration of the impacts of the wood processing operation, including whether the operation can actually be confined to a 3,000 square foot area as shown on the site plan, which we strongly dispute.

In a memorandum dated June 20, 2014, your Town Counsel seemed to agree with my opinion that the wood processing operation cannot be allowed absent a site plan special permit under Section 10.4. It is unclear to me and my clients whether your approval of the site plan special permit on July 28th was intended to constitute the required site plan special permit for the wood processing operation, or whether the approval only addresses other zoning nonconformity issues that had been previously raised concerning the subject property. If it is the latter, the Board should be applying the criteria of Section 10.4 to this application. If it is the former, we would respectfully suggest that the Board's evaluation of the proposed site plan fell well short of its obligations under Section 10.4 of the Bylaw with regards to the wood operation.

Abraham's Objections to the Sound Study

On the eve of the public hearing at which CTA's report was to be presented and discussed, the Applicant is now complaining about the scope of the sound study. The Applicant has not deposited the necessary funds to conduct the study (\$5,500). These objections are untimely, and unsupported by the law governing the issuance of special permits.

First, this hearing has been open for 10 months, delayed solely by the actions (or, more aptly, inaction) of the Applicant. The Board has been more than generous in allowing multiple continuances to accommodate the Applicant's unpreparedness. At some point, the burden imposed on interested parties to continuously monitor the Board's public hearing calendar and to attend public hearings at which little is accomplished must be considered, not to mention the burden on the Board and municipal employees to keep this application open. Applicants for zoning relief bear the burden to prosecute their applications, if not efficiently then with at least

some degree of interest. The Land Court recently recognized the right of a zoning board to dismiss an application with prejudice, where an applicant refuses to pay a peer review expense, such as the \$5,500 fee imposed here. See; *Tsinzo v. Carter*, Land Ct. Misc. No. 448457 (July 16, 2013 (Long, J)), copy attached.

Substantively, the Applicant's objections to the sound study are meritless. Contrary to Attorney Vevone's implication, the Board is under no obligation to set a bright line noise standard, akin to the state DEP standard prohibiting noise increases of more than 10 dBA. The governing standard of review of this special permit application is either Section 10.3 or 10.4 of the Zoning Bylaw, depending on how the Board is treating this application, as discussed above. Under G.L. c. 40A, §9, zoning bylaws must "provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits," but the standards "need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 638 (1970). Notably, the Supreme Judicial Court from very early in the history of the state's Zoning Act has given municipal considerable leeway in this regard, finding an ordinance that instructed the zoning board to consider only "the effects upon the neighborhood and the City at large" to be adequate. *Burnham v. Bd. of Appeals of Gloucester*, 333 Mass. 114, 118 (1955).

In *SCIT, Inc. v. Planning Bd. of Braintree*, cited by Attorney Vevone in his letter, the Court was concerned with the uniformity of regulation within the same zoning district, holding that a municipality may not subject all uses within the same zoning district to a special permit requirement. Neither Section 10.3 or 10.4 violates this principle – there are several uses allowed as of right in the SM zoning district, and several that are permitted only by special permit (some by site plan special permit, others by a simple special permit). Both sections set reasonable, objective criteria for the Board to apply to special permit applications.

It is entirely reasonable for a zoning board to request the collection of data relevant to a specific special permit criterion, so that it can evaluate whether the project satisfies that criterion. Neither Section 10.3 nor 10.4 specifically addresses noise. Rather, the Bylaw uses more broad language, requiring the proposed use to be not "detrimental or injurious to the neighborhood," and that protects the neighborhood from "offensive uses," and from "adverse effects on the natural environment."² The Board has determined, correctly, that the proposed wood operation has the potential to be detrimental or injurious to the neighborhood by the noise it will generate cutting and splitting logs into firewood, and shuffling this wood around the site. The purpose of the sound study is to provide a predictive measure of that noise, which the Board can then consider in determining whether the noise will be detrimental, offensive or injurious. The purpose of the study is not to measure the predicted noise against some bright line standard, which would dictate the fate of the application. In fact, if the Board attempted to create such a standard through the course of this hearing rather than through the statutory bylaw amendment

^{2/} Noise impacts are considered *environmental* impacts, hence their regulation by the state Department of Environmental Protection.

Acton Board of Selectmen
August 11, 2014
Page 4

process, and used that standard to deny this application, its decision would be vulnerable to judicial challenge.

In conclusion, the Applicant had ample opportunity to challenge the Board's decision to engage an acoustical consultant, and instead had assented to the sound study both verbally during the Board's public hearing and in writing through emails to Mr. Mutch. His late objections to the study are untimely, and in any event, irrelevant under common law governing the issuance of special permits under the Zoning Act. The Board should deny this application tonight, for failure to deposit the peer review fees that were requested on July 15, 2014, and the Applicant's unequivocal position that he will not cooperate with this sound study.

Thank you for your attention to this matter.

Very truly yours,


Daniel C. Hill

Enc.

cc: Scott Mutch, Zoning Enforcement Officer
Clients



5 of 6 DOCUMENTS

**PETER TSINZO v. THOMAS CARTER, GARY ILACQUA, DAVID PESSIA,
ORLANDO DIGIAM PIETRO and ROBERT J. O'REGAN as Members of the
STOUGHTON ZONING BOARD OF APPEALS**

11 MISC 448457

MASSACHUSETTS LAND COURT

21 LCR 383; 2013 Mass. LCR LEXIS 97

July 16, 2013, Decided

PRIOR HISTORY: *Graber v. Epro*, 2010 Mass. LCR LEXIS 26 (2010)

HEADNOTES

Dismissal of Zoning Appeal-Failure to Pay ZBA Consultant Fees-Collateral Estoppel.

SYLLABUS

Justice Keith C. Long ruled that a Stoughton landowner could not challenge the validity of a 1998 variance because the Land Court had already adjudicated the matter and ruled further that the ZBA quite properly dismissed his appeal when he refused to pay the Board's legal consultant a fee to research the possibility of rescinding the variance.

COUNSEL: Richard L. Wainwright, Esq., Wainwright, Wainwright, Brockton, MA, for Plaintiff.

Ilana M. Quirk, Esq., Kopelman & Paige, PC., Boston, MA, for Defendant.

JUDGES: [****1**] Keith C. Long, Justice.

OPINION BY: Keith C. Long

OPINION

[*383] MEMORANDUM AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

Plaintiff Peter Tsinzo owns the property at 50 Barnes Road in Stoughton. Its house required a variance from the Zoning Board (the lot lacked sufficient frontage under the then-applicable by-law), and one of the conditions to that variance (the "1998 variance") was a prohibition on further subdivision of the lot.¹ No appeal was taken. Mr. Tsinzo has since tried to remove that condition on three occasions.

¹ More precisely, the condition stated that "this will be a single lot." Variance (Mar. 23, 1998).

His first attempt was by application to the Zoning Board, which granted a new variance allowing a two-lot subdivision (the "2007 variance").² That new variance, however, was appealed to the Land Court by abutters and, at their request and without objection from Mr. Tsinzo, was annulled. *Graber v. Epro*, 18 LCR 18, 19-20 (2010). This left the 1998 variance and its "no subdivision" condition in place.

² The 2007 variance was actually two variances, one for each of the subdivided lots.

Mr. Tsinzo's second attempt was by application to the Planning Board for subdivision approval, which was granted [****2**] by that board. That decision too, however, was appealed, and was reversed on the ground that the Planning Board had no authority to remove the "no subdivision" condition imposed by the Zoning Board in the 1998 variance -- the operative regulation by virtue of the annulment of the 2007 variance. *Graber*, 18 LCR at 20.

This case concerns his third attempt. In an application to the Zoning Board, Mr. Tsinzo requested that the 1998 variance be rescinded, contending (1) it had never been recorded, and (2) for that reason, never went into effect.³ When the Board expressed uncertainty over whether it had the authority to rescind the variance in the circumstances of this case, Mr. Tsinzo (through counsel) requested that the Board obtain an opinion from Town Counsel. Under Rule 15 of the Board's General Rules, an applicant may be required to pay the costs for a consultant, and the Board requested Mr. Tsinzo to post a \$1500 retainer towards that cost. Mr. Tsinzo refused and, on instructions of his counsel, walked out of the hearing room.⁴ The Board then voted to dismiss his rescission request, with prejudice, for failure to prosecute. Mr. Tsinzo appealed that decision to this court.

³ *But see Graber v. Epro*, 18 LCR at 20; [**3] *Grady v. Zoning Board of Appeals of Peabody*, 465 Mass. 725, 991 N.E.2d 1060 (slip op. 2013), both discussed below.

⁴ According to Mr. Tsinzo's complaint, his counsel's exact words were, "We're outta here." Complaint at 2, ¶14 (May 9, 2011). To the extent Mr. Tsinzo makes arguments based on other exchanges at the Board hearings, those arguments are **STRICKEN**. Mr. Tsinzo was directed to submit a transcript of the hearing prepared by a certified court reporter, if he wished to make such arguments but, despite that order and more than adequate time, has never done so.

The parties have now cross-moved for judgment on the pleadings. For the reasons set forth below Mr. Tsinzo's motion is **DENIED** and the Board's motion is **ALLOWED**. Mr. Tsinzo's appeal is **DISMISSED, WITH PREJUDICE**.

Standard of Review

Motions for judgments on the pleadings are governed by *Mass. R. Civ. P. 12(c)*. "A defendant's *rule 12(c)* motion is actually a motion to dismiss that argues that the complaint fails to state a claim upon which relief can be granted." *Jarosz v. Palmer*, 436 Mass. 526, 529, 766 N.E.2d 482 (2002) (internal citations and quotations omitted). Thus, in ruling on the motion, the factual allegations of the complaint, [**4] as well as all reasonable inferences that may be drawn from those allegations, are taken as true. *See Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45, 809 N.E.2d 1017 (2004); *Fairnery v. Savogran Co.*, 422 Mass. 469, 470, 664 N.E.2d 5 (1996); *Eyal v. Helen* [*384] *Broadcasting Corp.*, 411 Mass. 426, 429, 583 N.E.2d 228 (1991). Documents either attached to or referenced in the complaint may also be considered, as well as facts and doc-

uments of which judicial notice may be taken.⁵ The court then "looks beyond the conclusory allegations in the complaint and focuses on whether the factual allegations plausibly suggest an entitlement to relief." *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676, 940 N.E.2d 413 (2011) (internal citations and quotations omitted).

⁵ In addition to the well-pleaded factual allegations contained in the complaint, *Rule 12* permits the court to take into consideration matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint. *Schaer v. Brandeis University*, 432 Mass. 474, 477-78, 735 N.E.2d 373 (2000). *See also Jarosz v. Palmer*, 436 Mass. 526, 529-30, 766 N.E.2d 482 (2002); *Jackson v. Longcope*, 394 Mass. 577, 580 n.2, 476 N.E.2d 617 (1985). Moreover, a *Rule 12* evaluation properly can include the entirety of documents [**5] integral to, referenced in, or explicitly relied upon in the complaint, even if they were not attached. *See, e.g. Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4, 809 N.E.2d 1017 (2004) "Where, as here, the plaintiff had notice of . . . documents and relied on them in the complaint, the attachment of such documents to a motion to dismiss does not convert the motion to one for summary judgment."); *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991). If there is a conflict between the complaint's allegations and the documents, the documents control. *See Ng Bros. Construction Inc. v. Cranney*, 436 Mass. 638, 647-48, 766 N.E.2d 864 (2002).

The facts recited above and in the discussion section below are in accordance with that standard.

Discussion

Mr. Tsinzo contends that the Board's denial of his application for rescission of the 1998 variance was arbitrary and capricious because its request for a consultant fee was criminal extortion under *G.L. c. 265, §25* and bribery under *G.L. c. 271, §39*. He [**6] also seeks an affirmative judgment declaring the 1998 variance void because it was never recorded. I find no merit in either argument.

The Challenge to the Validity of the 1998 Variance

The Supreme Judicial Court's recent decision in *Grady v. Zoning Board of Appeals of Peabody*, *supra* holds that the failure [to] timely to record a variance does not automatically make it ineffective or cause it to lapse. "Substantial reliance" and an absence of prejudice to

those who challenge it can suffice to uphold it. *Id.* Such reliance and absence of prejudice may well exist here. But I need not and do not decide these issues because Mr. Tsinzo's challenge to the 1998 variance is clearly barred by issue preclusion.

"To defend successfully on the ground of issue preclusion, the defendant must establish that the issue of fact sought to be foreclosed actually was litigated and determined in a prior action between the parties or their privies, and that the determination was essential to the decision in the prior action." *Heacock v. Heacock*, 402 Mass. 21, 25, 520 N.E.2d 151 (1988). The present case satisfies all of these requirements. The Land Court (Trombly, J.) previously held that the 1998 variance existed and remained in [**7] effect. *See Graber*, 18 LCR at 20 ("I rule that the condition of the 1998 Variance is binding on the Planning Board"). Both Mr. Tsinzo and the Board were parties to that case, and its holding that the 1998 variance had binding effect was essential to the judgment. In the present case, Mr. Tsinzo claims that the 1998 variance is invalid because it was not properly recorded. This is simply a new legal theory and, under the principles of *res judicata*, parties may not re-argue the same claim based on different legal theories in subsequent litigation. *Heacock*, 402 Mass. at 23. Mr. Tsinzo's challenge to the validity of the 1998 variance thus fails.

The Challenge to the Fee Requirement

Mr. Tsinzo's second claim -- that the Board's decision to reject his application because he refused to pay the required consultant's fee was invalid and/or arbitrary and capricious -- also fails. Even though framed as an allegation of criminal conduct, it is more properly understood as a challenge to the validity and application of a Zoning Board rule and I construe it as such. *See Mass. R. Civ. P. 8(f)* ("All pleadings shall be so construed as to do substantial justice."). The Board required that Mr. Tsinzo pay [**8] a fee to the town, not to themselves personally, so that it could engage Town Counsel pursuant to *G.L. c.44, § 53G*. There is nothing in the record suggesting that this requirement was criminal in nature. Accordingly, the court's inquiry focuses on its validity.

A zoning board of appeals may require that an applicant pay a reasonable fee into escrow so that it may engage outside consultation. *G.L. c.44, § 53G*. If an applicant refuses to pay the required fee, then the Zoning Board may deny relief for that reason alone. *See General Rules of the Zoning Board of Appeals* at 6. By law, the Board must allow applicants to make an administrative appeal of its selection of an outside consultant. *G.L. c.44, § 53G*. However, the grounds for appeal are limited to the consultant being unqualified or having a conflict of interest. *Id.*

On March 17, 2011, Mr. Tsinzo assented to the selection of Town Counsel as an outside consultant. On April 7, 2011, the Zoning Board informed Mr. Tsinzo that it had not conferred with Town Counsel because he had not paid the required fee. Mr. Tsinzo then refused to pay and left the meeting without presenting his application for relief. Mr. Tsinzo and his attorney, Mr. Wainwright, [**9] never argued that Town Counsel might have a conflict of interest or was unqualified to give the requested opinion. They never argued that a \$1500 retainer, refundable to the extent not used, was an unreasonable fee. Accordingly, the Board denied the requested relief for failure to prosecute. *See Decision on Petition of Peter Tsinzo* ("Petitioner was requested to post a \$1,500 retainer for the Board to obtain a legal opinion, with any unused portion of the retainer to be refunded. The Petitioner's counsel refused, and then instructed the petitioner to walk out of the hearing room with him. Accordingly, on April 26, 2011 it was VOTED UNANIMOUSLY to adopt this decision dismissing the application with prejudice") (emphasis included). The Board's General Rule on consultants' fees is expressly authorized by *G.L. c. 44, §53G* and valid thereunder. Because the Board gave Mr. Tsinzo an opportunity to appeal the selection of Town Counsel as [**385] a consultant, it followed its General Rules at all times and validly denied Mr. Tsinzo's application for failure to prosecute.

Conclusion

For the foregoing reasons. Mr. Tsinzo's complaint and all claims therein are **DISMISSED IN THEIR ENTIRETY, WITH PREJUDICE.**

Judgment [**10] shall enter accordingly.

SO ORDERED.

By the court (Long, J.)

Dated: 16 July 2013

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in the LCR.]

JUDGMENT

For the reasons set forth in the court's Memorandum and Order on the Parties' Cross-Motions for Judgment on the Pleadings of this date, the plaintiff's complaint and all claims therein are **DISMISSED IN THEIR ENTIRETY, WITH PREJUDICE.**

SO ORDERED.

By the court (Long, J.)

Dated: 16 July 2013