

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11678

Suzanne Palitz, as Trustee of the 87 Main Street
Nominee Trust

Plaintiff-Appellant

v.

Jeffrey Kristal, Anthony Holand, Susan Fairbanks,
Michael Ciancio and John Guadagno, as they are
Members of the Tisbury Zoning Board of Appeals, and
Kenneth A. Barwick, as the Building Inspector and
Zoning Enforcement Officer of the Town of Tisbury

Defendants-Appellees

On Appeal from Judgment of the Land Court
in Dukes County

BRIEF OF THE ASSOCIATION TO PRESERVE
CAPE COD

AMICUS CURIAE

The Association to Preserve
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August 19, 2014

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Issues Presented

Whether endorsing a plan of lots, streets and ways "approval not required under the Subdivision Control Act" has zoning consequences and exposes any new zoning nonconformities to zoning enforcement.

Interest of Amicus

The Association to Preserve Cape Cod (APCC) seeks leave to file the accompanying brief as amicus curiae. APCC is a member-supported, nonprofit organization of more than 5,000 individual members. APCC's goal is to protect Cape Cod's environment and natural resources, which are essential for protecting human health and quality of life, and which are at the core of our coastal economy. APCC is Cape Cod's leading advocate for preserving the Cape's water resources, wetlands, natural resources, open space and way of life.

The case at bar illustrates APCC's belief that sound planning and zoning are at the heart of not only natural resource protection but also our sense of place including our identity as a community. If there are no consequences to selfish, private development decisions, we as a society will destroy the very beauty that draws us to the special places we call

home. How we undo the harm caused by shortsighted decisions is just as critical as avoiding the harm in the first instance.

With increasing frequency and cost, APCC devotes much of our energy and resources toward undoing development decisions of the past that directly and adversely impact our natural resources, our economy, our quality of life, our safety and our views and our vistas.

APCC has a 46-year history of pragmatic, science-based environmental advocacy that recognizes the implications and consequences of the community taking a back seat to poorly executed, and in the case at bar, erroneously permitted land use and development decisions. Our history has taught us that well-planned, carefully permitted development can enhance both the environment and the economy while providing private property owners reasonable protection of their investments. Sound planning, including proper understanding of the interrelationship between the Subdivision Control Act and the Zoning Enabling Act, does not inhibit private property rights; it protects those rights.

As such, APCC believes our legal and practical perspective would be of assistance to the Court.

Statement of the Case

APCC relies upon the Statement of the Case and Statement of Facts contained in the brief the Tisbury Zoning Board of Appeals.

Argument

- I. Plans endorsed approval not required in accordance with the Subdivision Control Act provide no protection from zoning enforcement against any zoning nonconformities newly created.

The adage "just because you can doesn't mean you should" succinctly sums up the case at bar. The approval not required process (ANR) defined under G.L. ch. 41 § 81L with procedures described in G.L. ch. 41 § 81P has no direct nexus with zoning. Creating a subdivision on the other hand has a direct nexus and requires full compliance with zoning. G.L. ch. 41 § 81M, Beale v. Planning Bd. of Rockland, 423 Mass. 690 (1996). This difference screams divider beware.

G.L. ch. 41 § 81L, in defining what is not a "subdivision" specifically provides "the division of a tract of land on which two or more buildings were

standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision." Thus an owner of land with multiple buildings may divide the land to create a separate lot for each building provided the owner makes an evidentiary showing that each building preexisted adoption of the Subdivision Control Law in the particular town and that road access is not illusory.

The actions of the planning board in endorsing a plan "approval not required under the Subdivision Control Act" are essentially clerical.

On first examination, the duty required of a planning board under sections 81L and 81P is ministerial in character. See Hamilton v. Planning Bd. of Beverly, 35 Mass. App. Ct. 386, 389 (1993). A plan submitted for an ANR endorsement either has the requisite frontage or it does not. In the former case, the planning board should make the ANR endorsement, thereby giving notice that the board is not concerned with the plan. Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 603 (1980). The endorsement does not purport to declare that any of the lots depicted are "buildable." Zoning, environmental, and waste disposal issues, for example, remain open to be ruled on by agencies, local or State, having jurisdiction. See, Hobbs Brook Farm Property Co. Ltd. Partnership v. Planning Bd. of Lincoln, 48 Mass. App. Ct. 403, 405 (2000).

Gates v. Planning Bd. of Dighton, 48 Mass. App. Ct. 394, 395 (2000). "A Section 81P endorsement is obviously not a declaration that these matters are in any way satisfactory to the planning board" but the presented plan simply does not meet the definition of a subdivision. Smalley, 10 Mass. App. Ct at 604.

It is important to note that this section of law defines what something is not and does not differentiate the type or use of the building, i.e. dwelling, factory, garage, barn, chicken coop or store. Moreover, as Judge Kass noted in Gates buildability (conformance with zoning), environmental, and waste disposal all remain unresolved and outside the purview of a planning board and remain fodder for the full regulatory review process. Gates, 48 Mass. App. At 395.

A basic purpose of the zoning law is "to foster the creation of conforming lots." Asack v. Board of Appeals of Westwood, 47 Mass. App. Ct. 733, 737 (1999), quoting Murphy v. Kotlik, 34 Mass. App. Ct. 410, 414 (1993), further appellate review denied 415 Mass. 1105 (1993). Moreover, one of the principles of zoning regulation is to eliminate nonconformities.

This "interpretation is also consistent with the objective underlying G.L. c. 40A § 6, of 'the eventual elimination of nonconformities in most cases.'"

Rourke v. Rothman, 64 Mass. App. Ct. 599, 605 n.8 (2005) quoting Preston v. Bd. of Appeals of Hull, 51 Mass. App. Ct. 236, 242 (2001) quoting from 1972 House Doc. No. 5009 at 39 and cases cited.

Unless there is some consideration of legality and consequences under zoning, a property owner could divide a conforming property with multiple buildings (dwelling, "a detached garage or a chicken house or woodshed" all built prior to adoption of the Subdivision Control Act) into three nonconforming properties (deficient for example in lot size, lot coverage, and/or setbacks). Citgo Petroleum Corp. 24 Mass. App. Ct. 425, 426 (1987). Such an action certainly runs afoul of the principle of fostering zoning compliance and conformity. Indeed, this is the question raised but not fully answered in Citgo Petroleum Corp. which was, if the definition of subdivision allows "a homeowner to use any detached garage, shed or other out building as a basis for unrestricted backland development". Id. at 427. Massachusetts has buildings that are more than 375

years old and many other buildings that predate the Subdivision Control Act.

There is no question that under G.L ch. 41, § 81L an owner has a right to so divide (create new lot lines) his or her property under these circumstances. The question is, how is this right balanced with the mandates of zoning for conformity and ultimately enforcement, which is an underlying purpose of zoning. Mauri v. Zoning Bd. of Appeals of Newton, 83 Mass. App. Ct. 336, 341 (2013).

The law is settled that when a planning board endorses a plan "approval not required" the only determination being made is that the plan does not depict a subdivision as defined. The Appeals Court has "held that a § 81P endorsement 'gives lots no standing under the zoning ordinance.'" Smalley, 10 Mass. App. Ct. at 603. The purpose of the 81P endorsement was intended to provide a means "to alleviate the 'difficulty encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded.'" Id. at 602 quoting 1953 House Doc. No. 2249 at 55.

It should be remembered that under the present law a plan showing lots and ways may be recorded without the approval of the

planning board if such ways are existing ways and not 'proposed ways.' So much difficulty has been encountered by registers of deeds in deciding whether a plan showing ways and lots could lawfully be recorded under this provision without the approval of the local planning board, that it seemed best to require the person who intends to record such a plan and who contends that it is not a 'subdivision' within the meaning of the law, because all of the ways shown on the plan are already existing ways, to submit it to the planning board, and if the board agrees with his contention, it can endorse on the plan a statement that approval is not required, and the plan can be recorded without more ado. Provision is made for settling the question as summarily as possible in the unlikely event that there is a disagreement over the necessity of approval.

Smalley, 10 Mass. App. Ct. at 605, n.5.

"[J]ust because a lot can be divided under this section does not mean that the resulting lots will be buildable lots under the zoning ordinance." Citgo Petroleum Corp., 24 Mass. App. Ct. at 427. The Appeals Court observed that perhaps the existence of the §81L exclusion is not widely known and no reported cases have determined the effect of the exclusion. Id. at 425.

The Appeals Court has also held that the recording of a plan depicting zoning violations is not necessarily problematic and may serve a legitimate purpose.

Nor can we say that the recording of a plan showing a zoning violation, as this one does, can serve no legitimate purpose. The recording of a plan such as the plaintiff's may be preliminary to an attempt to obtain a variance, or to buy abutting land which would bring the lot into compliance, or even to sell the nonconforming lot to an abutter and in that way bring it into compliance. In any event, nothing that we say here in any way precludes the enforcement of the zoning by-law should the recording of her plan eventuate in a violation.

Smalley, 10 Mass. App. Ct. at 604.

This Court cautioned potential §81P endorsement recipients that it cannot be said that "endorsement of a plan as not requiring subdivision approval, in accordance with G.L. c. 41 § 81P, prevents enforcement of a zoning ordinance or by-law by other authorities." Beale, 423 Mass. at 697 n. 10.

A preexisting nonconforming use or structure is one that lawfully began or lawfully existed before a zoning change became applicable with which the use or structure no longer complies, G.L. ch. 40A, § 6. The zoning illegalities at bar are neither preexisting nor somehow protected under ch. 40A § 6.

Nothing in the governing by-law, statutes, or appellate decisions interpreting their meaning, supports the conclusion that, after the town's adoption of the zoning by-law, a dwelling remaining on a lot newly created under authority of c. 41, ss 81L and 81P, acquires protected status as a preexisting

nonconforming structure under c. 40A, s 6. "The planning board's endorsement, 'approval not required,' on the plan dividing the land in question into three lots gives the lots no standing under the zoning ordinance." Gattozzi v. Director of Inspection Servs. of Melrose, 6 Mass. App. Ct. 889, 890 (1978), citing Alley v. Building Inspector of Danvers, 354 Mass. 6, 7-8 (1968).

Branagan v. Zoning Bd. of Falmouth, 75 Mass. App. Ct. 1107 (2009) (unpublished pursuant to Rule 1:28)

In essence it is the same as if Putziger moved the structures to illegal building lots and placed the historic structures on undersized lots in violation of the minimum lot size requirements as well as placing them so that they violated side and front yard requirements. The violations were freshly created when the approval not required plan was recorded in 1994. Once the plan was recorded there was neither a preexisting nonconforming lot nor a preexisting nonconforming structure on the lot.

Properties can avoid zoning enforcement action in several ways:

1. Comply with local ordinance or bylaw;
2. Have so-called grandfather protection as a preexisting nonconforming lot, use or structure; G.L. ch. 40A § 6.

3. Have protection of a special permit or zoning variance whose rights were exercised more than 10 years past; G.L. ch. 40A § 7.
4. Have protection of a building permit whose rights were exercised more than 6 years past. G.L. ch. 40A § 7. Where adequate notice of the issuance of a building permit exists, this time is reduced to 30 days. Connors v. Annino, 460 Mass. 600 (2011).

While definitive plans have protection under G.L. ch. 40A § 6 from changes to zoning laws, approval not required plans have no mention in ch. 40A. Definitive plan exemption from zoning enforcement expires.

Tsagronis V. Bd. of Appeals of Wareham, 415 Mass. 329, 332 (1993), G.L. ch. 40A § 6.¹

The lots created by the 1994 Putziger ANR plan including the structures thereon were required to comply with the then in force zoning bylaw. For the purposes of zoning enforcement the clock began running

¹ This not to say that there is not confusion and error associated. In Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland MA, 231 F. Supp. 2nd 396 (2002), the federal district court erroneously reasoned in dicta that an ANR plan did invoke a zoning freeze.

anew. The clock does not stop running unless one of the actions listed above, variance, special permit, building permit, have a clock-stopping provision. Fortunately for Palitz, the variance protects her.

Considering that ANR is not a subdivision but a ministerial act to assist registrars of deeds; that the goal of G.L. ch. 40A § 6 is zoning compliance; there are legitimate purposes of ANR plan even if zoning violations are depicted; and the lots, structures and uses do not preexist a zoning enactment; the new lots are subject to zoning enforcement.

II. Providing Section 6 protection for zoning violations created through the ANR process violates the requirement for uniformity of zoning districts.

Allowing the creation of new nonconforming lots and permitting them to exercise rights as preexisting nonconforming structures and lots violates zoning uniformity and is contrary to basic principles of zoning.

Our courts have repeatedly observed that zoning ordinances are only equitable, and only likely to succeed, if they are applied uniformly. See Amberwood Dev. Corp. v. Board of Appeals of Boxford, 65 Mass. App. Ct. 205, 212 (2005), and cases cited. Indeed,

the Legislature requires by statute that, with specified exceptions, zoning ordinances or bylaws "shall be uniform within the district for each class or kind of structures or uses permitted." G. L. c. 40A, s. 4.

Regis College v. Town of Weston, 462 Mass. 280, 291 (2012).

Uniformity provides for predictability not only for property owners but also abutters and all residents living in a particular zoning district. "[T]he uniformity requirement of s. 4 [is based] 'upon principles of equal treatment: all land in similar circumstances should be treated alike, so that "if anyone can go ahead with a certain development in a district, then so can everybody else."' " Bernstein v. Planning Bd. Of Stockbridge, 76 Mass. App. Ct. 759, 768 (2010) quoting SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107 (1984) quoting from 1 Williams, American Land Planning Law s. 16.06 (1974). Allowing properties with buildings that predate adoption of subdivision control to create new zoning nonconformities and be treated differently than other properties violates zoning uniformity. Again, it is not a zoning change

that made the property more nonconforming; it is the voluntary act of the property owner.

In the real world of Cape Cod, providing grandfather protection to lots created by the ANR process for a cottage colony challenges all notion of appropriate density and especially challenges wastewater management. More than eighty percent of Cape Cod relies on on-site septic systems, which do virtually nothing for nutrient attenuation. The majority of Cape Cod's water quality woes are tied directly to septic discharges. Patrick Cassidy, *Cape water cleanup talks going nowhere*, CAPE COD TIMES, Dec. 3, 2011 at 1. Minimum lot size justified by use of private on-site septic systems has long been accepted as an appropriate public health and safety exercise of zoning. Wilson v. Town of Sherborn, 3 Mass. App. Ct. 237 (1975).

The federal district court struggled with the issue of ANR of cottage colonies in Perotti-Cyrus v. Jensen, 2008 U.S. Dist. LEXIS 29197 (Ma. 2008) and ultimately remanded it to the Superior Court. In that case a cottage colony was divided into 6 lots via ANR endorsement. Perotti-Cyrus's unit burned down and the town refused a building permit to

reconstruct the dwelling. "There remains the issue whether plaintiff's property is lawfully in existence for year-round use. As to this, I DENY summary judgment to both parties on Count I. I decline, however, to exercise supplemental jurisdiction over this case pursuant to 28 U.S.C. s. 1367 and REMAND the case to the Barnstable Superior Court for any further proceedings on Count I." Id. at 51.²

The Branagan case posed another set of challenges for the expansion of preexisting nonconforming structures often with an unclear building history. Branagan unsuccessfully argued that, subject to the findings required by G.L. ch.40A § 6, he essentially had a right to expand the dwelling because such expansion "shall be permitted unless . . . extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." Branagan, 75 Mass. App. At 1107. This argument similar to one before the Court focuses on the use being more detrimental as opposed to the actual impacts and additional nonconformities.

² Tisbury discusses the Superior Court case in its brief at 41-42.

Since the use is not arguably changed expansion must be permitted.

Garages that have apartments added are another problematic area. Under the Palitz view an accessory garage can become a full-fledged dwelling on an undersized lot with no zoning review.

Turning seasonal vacation cottages into year round dwellings or garages into houses or cottages into mansions will be the norm if grandfather protection is granted. This is not what the legislature intended in protecting preexisting nonconforming properties, properties that at one time conformed to zoning or pre-dated zoning,, "structures or uses lawfully in existence or lawfully begun." G.L. ch.40A § 6. All of these noted evolutions will add to our critical wastewater challenge.

III. The variance protects this structure from being ordered demolished.

The ill-advised variance issued in 1995 and reportedly not appealed³ is presumed a valid zoning variance if the rights under the variance were

³ Material fact not in dispute no. 13 Land Court decision.

exercised in accordance with the statutory framework and more than 10 years have elapsed. "The variance decision does not track the statute's criteria for granting a variance, which, inter alia, require the petitioner to face a "substantial hardship" if the petition is denied. G.L. ch. 40A, § 10. The validity of the variance, however, is not before us." Mendoza v. Licensing Bd. of Fall River, 444 Mass 188, 206 n.21 (2005). The variance is not before the Court except that it protects the property owner from zoning enforcement. Any hardship substantial or otherwise was self-imposed.

The violations/nonconformities are self-inflicted. The ministerial act of the planning board made at the request of Putziger for which there was no discretion simply started the clock. "The majority properly recognize the 'well-established principle' that a property owner's self-imposed hardship cannot serve as the basis for obtaining a variance, as well as the fact that [the owner] knowingly created the nonconformity when he subdivided his property and transferred one of the newly created lots, leaving his remaining lot with insufficient frontage." Adams v.

Brolly, 46 Mass. App. Ct. 1, 8 (1998) (Laurence J. dissenting).

The additional violations, lot size, front and side setbacks, were caused by the voluntary act of Putziger creating lots which violated the existing zoning by-law in multiple respects and made the property more nonconforming. Moreover, so called grandfather protection in zoning is premised upon the notion of creating the nonconformity through the regulatory process, i.e. making something nonconforming that was previously conforming by a change in the bylaw gets grandfather protection. Here the status quo has been upset by the voluntary legal act of Putziger. Palitz, the current owner, asserts that there are no consequences of her predecessor's "legal" act and argued before the Land Court the variance in 1995 was unnecessary. Not only are there consequences but, the consequences were apparent before the voluntary act occurred.

This means two things. The house cannot be ordered demolished and there is no right to a modification of the variance or the express conditions of the variance. The 1995 variance did have conditions.

The permit granting authority may impose conditions, safeguards and limitations both of time and of use, including the continued existence of any particular structures but excluding any condition, safeguards or limitation based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner.

G.L. ch. 40A § 10.

The determination section of the 1995 variance included:

[T]here will be no change in the appearance or use of the buildings on the two properties and their relationship to adjoining properties, Therefore, desirable relief may be granted without either a substantial detriment to the public good or substantial derogation from the intent or purpose of this by-law.

The variance was recorded in Dukes County Registry of Deeds Book 664, Page 272 in 1995. The current owners acquired the property in 2007 with the variance in the chain of title. Moreover, also in the chain of title was the ANR with the following note, "[e]ndorsement is without regard to buildability or permitted occupancy, does not stay enforcement of zoning violations." AR111. Thus, Palitz had actual notice of the variance and the conditions attached as well as an unambiguous warning of potential zoning violations or hurdles. Lussier v. Zoning Bd. of

Appeals of Peabody, 447 Mass. 531, 535 (2006).

Conditions on the 1995 variance were not appealed and the continued existence and relationship to abutting properties of the particular structure was specifically addressed to any potential purchaser. While Palitz is saved from demolition by the 1995 variance⁴, she is also limited by the same variance from altering the relationship to adjoining properties. Palitz had notice of this limitation when the property was purchased.

Conclusion

For the foregoing reasons the Association to Preserve Cape Cod requests the Court:

1. Affirm the decision of the Land Court;
2. Hold that the Approval Not Required (ANR) process does not provide so-called grandfather protection in accordance with G.L. ch. 40A § 6

⁴ This also means that Palitz can rebuild the property in the precise space/location allowed by the variance or make repairs to the property to comply with the building code.

for any existing buildings and newly created lots;

3. Further hold that any new or increased nonconformities created by dividing land through the ANR process are subject to zoning enforcement action; and
4. Further hold that no hardship is established by dividing land through the ANR process that would make the property eligible for a variance (self-created).

Respectfully submitted,



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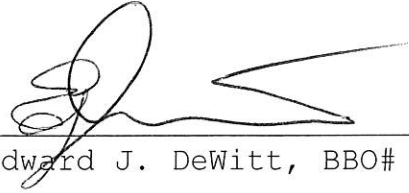
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August 19, 2014

Brief Certification

In accordance with the Mass, R. App. P 16(k) I certify
the brief complies with relevant rules for filing
briefs with the Court.

A handwritten signature in black ink, appearing to read 'Edward J. DeWitt', is written over a horizontal line.

Edward J. DeWitt, BBO# 630955

Addendum

County: **DUKES COUNTY, ss.**

Case No.: **12 MISC 471454 (KFS)**

Parties: **SUZANNE PALITZ and PETER W. FINK, TRUSTEES of the 87 MAIN STREET NOMINEE TRUST, Plaintiffs v. JEFFREY KRISTAL, ANTHONY HOLAND, SUSAN FAIRBANKS, MICHAEL CIANCIO and JOHN GUADAGNO, as they are MEMBERS OF THE TISBURY ZONING BOARD OF APPEALS and KENNETH A. BARWICK, as the BUILDING INSPECTOR and ZONING ENFORCEMENT OFFICER OF THE TOWN OF TISBURY, Defendants**

Date: **January 23, 2014**

Decision Type: **DECISION DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT TO DEFENDANTS**

Judge: **/s/ Karyn F. Scheier, Justice**

This is an appeal pursuant to G. L. c. 40A, § 17, and G. L. c. 231A, through which Plaintiffs Suzanne Palitz and Peter W. Fink, Trustees of the 87 Main Street Nominee Trust, challenge a decision of the Tisbury Zoning Board of Appeals (ZBA), whose members are Defendants. The ZBA denied Plaintiffs' request to reconstruct and expand their single-family residence, located at 87 Main Street in Tisbury (Palitz Lot or Locus), and upheld the refusal of

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the Zoning Enforcement Officer (ZEO) to issue a building permit unless Plaintiffs secured relief in the form of a variance or amended variance from the ZBA.

In early 2012, Plaintiffs sought guidance from the ZEO as to whether they could lawfully reconstruct their residence within its existing footprint, but at an increased height.[1] The existing house was constructed in approximately 1803. Tisbury adopted its first local zoning bylaws in 1959. In response to Plaintiffs, the ZEO indicated that relief in the form of an amendment to a variance issued to a prior owner in 1995 (1995 Variance) was necessary before he could issue a building permit due to zoning nonconformities at Locus. On April 10, 2012, Plaintiffs requested a reconsideration of that determination. The ZEO informed Plaintiffs via telephone he would not issue a building permit without the ZBA's approval, specifically in the form of an amended variance. On July 30, 2012, Plaintiffs applied to the ZBA for an amendment to the 1995 Variance, which was denied on September 19, 2012.

In Count I of the Complaint, filed October 10, 2012, Plaintiffs allege that the ZBA erred in finding that the proposed reconstruction would involve substantial detriment to the public good and in finding the existing structure was not a pre-existing lawful nonconforming structure. Plaintiffs also argue that the ZBA erred in concluding that language in the 1995 Variance constituted a "condition" prohibiting any future alteration in the structure's appearance. In Count II, Plaintiffs seek a declaratory judgment that the 1995 Variance permits a reconstruction of the existing structure that complies with the height requirements of the town Bylaws and that Plaintiffs may proceed with such reconstruction. Defendants filed an Answer on January 4, 2013, asserting several affirmative defenses.[2]

[1] The proposed height is within the Town of Tisbury's maximum allowed height.

[2] Defendants alleged that Plaintiffs failed to state a claim upon which relief could be granted, failed to exhaust all administrative remedies, and that all claims should be dismissed pursuant to the

applicable statute of limitations and doctrines of laches and equitable estoppel.

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Plaintiffs filed a Motion for Summary Judgment on February 2, 2013. Defendants filed a written opposition on April 5, 2013, and also requested entry of judgment in their favor as the non-moving party.[3] Plaintiffs filed a reply on April 12, 2013, and a hearing was held on April 23, 2013, at which all parties were heard. For the reasons discussed below, Plaintiffs' Motion for Summary Judgment is DENIED and judgment will enter in favor of Defendants.

The summary judgment record includes 25 exhibits in addition to the parties' briefs and submissions filed in compliance with Land Court Rule 4. The following material facts are not in dispute:

1. Plaintiffs Suzanne Palitz (Palitz) and Peter W. Fink, as Trustees of the 87 Main Street Nominee Trust, own a parcel of land in Tisbury known as and numbered 87 Main Street, f/k/a/ 99 Main Street, which is improved by a single-family residence (Palitz House).
2. The Palitz House was built in approximately 1803.
3. The house on the adjacent property at 89 Main Street (f/k/a 101 Main Street) was built in approximately 1830.
4. The Town of Tisbury first adopted local zoning bylaws in 1959, and the subdivision control law became effective in Tisbury on or after March 15, 1974.
5. In 1923, the Palitz Lot came into common ownership with two other lots (the first known as and numbered 89 Main Street, and the second known as and numbered 83 Main Street f/k/a 97 Main Street, not here in issue).
6. The three properties remained in common ownership through 1994. In 1994, Michael T. Putziger (Putziger), as trustee of the MVY Realty Trust, the then-owner of the three properties, sought to use the exception for pre-existing lots and structures set out in Section 81L of the subdivision control law to divide his land into three lots, with an existing residence on each.
7. G. L. c. 41, § 81L states that ". . . the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

[3] Pursuant to Mass. R. Civ. P. 56©.

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8. On May 4, 1994, the Tisbury Planning Board (Planning Board) endorsed the Putziger Plan as not requiring approval under the subdivision control law (ANR Endorsement), but stated that "[e]ndorsement is without regard to buildability or permitted occupancy." As shown on the plan dated April 13, 1994, entitled: "Plan of Land in Tisbury, Mass. Prepared For MVY Realty Trust Michael T. Putziger, Trustee" (Putziger Plan), the land was divided into the three lots, each with a residence thereon.

9. The Putziger Plan was recorded as Tisbury Case File No. 471 with the Dukes County Registry of Deeds on May 5, 1994.

10. As created by the Putziger Plan, the Palitz Lot and 89 Main Street each had less area than the Tisbury Zoning Bylaws then required for single-family residential lots in the zoning district where they are located. Also, the Palitz House and the house at 89 Main Street were nonconforming with respect to side and front yard requirements under the Zoning Bylaws.

11. Simultaneously with receiving the Planning Board's ANR Endorsement, Putziger conveyed one of the new lots, Lot 4, to a third party.

12. After he had conveyed Lot 4, Putziger sought variances from the ZBA for the remaining two new lots, reflecting the undersized lot areas and yards that had been created by the Putziger Plan.

13. The ZBA granted the requested variances in a decision dated January 26, 1995, recorded with the Dukes County Registry of Deeds in Book 664, at Page 272, and filed for registration with the Dukes County Land Court Registry District as Document No. 37086 on November 7, 1995 (1995 Variance).[4] Plaintiffs have provided no evidence suggesting that the 1995 Variance was ever challenged or appealed.

14. Included within the "Determination" section of the 1995 Variance is the statement:

"[t]here will be no change in the appearance or use of the buildings on the two properties and their relationship to adjoining properties. Therefore, desirable relief may be granted without either a substantial detriment to the public good or substantial derogation from the intent or purpose of this by-law."

15. Putziger conveyed the Palitz Lot to Alfred H. Williams by deed dated December 12, 1995, recorded in Book 666, at Page 543, and filed for registration as Document No. 37278.

16. Following mesne conveyances, Plaintiffs acquired the Palitz Lot by deed dated January 22, 2007, recorded in Book 1109, at Page 61, and filed as Document No. 66194.

17. By Deed dated March 9, 1995, recorded in Book 00651, at Page 200, Putziger conveyed the 89 Main Street property to Carrol L. Buress (Buress).

[4] All references to recorded instruments and registered documents are to this registry.

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18. On or about March 22, 1995, the Tisbury Building Inspector issued Building Permit No. 44407 to Buress for alterations to the single-family residence at 89 Main Street (a/k/a 101 Main Street), which were subsequently made. Buress did not obtain a new variance decision or an amendment to the 1995 Variance allowing this work.

19. On or about January 28, 1999, the Tisbury Building Inspector issued Building Permit No. 5404 to Carroll Buress for alterations to the garage at 89 Main Street. Buress did not obtain a new variance or an amended variance for work, and the proposed alteration work was never done.

20. By deed dated March 13, 2006, recorded in Book 1077, at Page 215, Buress conveyed the 89 Main Street property to the current owners, Peter Tollman and Linda Kaplan.

21. In the spring of 2012, Plaintiffs sought a building permit to reconstruct the Palitz House.[5] The resulting structure would be approximately 9.8 feet taller than the current structure and the resulting structure's height, as measured under the Zoning Bylaws, would be approximately 31 feet, less than the 35 foot maximum allowed. The resulting residence would maintain the footprint of the Palitz House.

22. The ZEO refused to issue a building permit unless the ZBA amended the 1995 Variance.

23. On July 30, 2012, Plaintiffs applied to the ZBA for a variance from the dimensional requirements in a residential district and to amend the 1995 Variance.

24. On September 19, 2012, the ZBA denied the Plaintiffs' variance application in Case No. 2127 by a five to zero vote (2012 Decision). The ZBA determined that "because the abutter to the west will have her view

eliminated and have a 31 foot high dwelling located four feet from hers . . . there will be a substantial detriment to the public good and, further, that with the added bedroom, full basement and additional third floor, the density of the neighborhood would be negatively impacted."

25. The ZBA also determined that the Plaintiffs could do many of the modifications necessary to the structure without additional variance relief. The 2012 Decision denying Plaintiffs' variance request led to the initiation of this action.

* * * *

This case is before the court pursuant to Plaintiff's Motion for Summary Judgment. "Rule 56© of the Massachusetts Rules of Civil Procedure . . . provides that a judge shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and

[5] At oral argument, both parties characterized the proposed reconstruction as a "tear down" for purposes of establishing material facts at summary judgment.

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admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Attorney General v. Bailey, 386 Mass. 367, 370-71 (1982) (citations omitted). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that the record entitles them to judgment as a matter of law. Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 711 (1991). Evidence submitted is viewed in the light most favorable to the non-moving party. Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). This case is ripe for summary judgment because the material facts are not in dispute and the case may be decided based on applicable law.

G. L. c. 40A, § 17 states: "[a]ny person aggrieved" by a zoning board of appeals decision may seek judicial review. The court "shall hear all evidence pertinent to the authority of the board or special permit granting authority and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board or special permit granting authority or make such other decree as justice and equity may require." G. L. c. 40A, § 17. As a party denied relief requested from the ZBA, Plaintiff has standing to appeal the Board's decision.

The court must give "a measure of deference" to a local board's interpretation of its own zoning bylaws and ordinances. APT Asset Mgmt., Inc. v. Bd. of Appeals of Melrose, 50 Mass. App. Ct. 133, 138 (2000); Advanced Dev. Concepts, Inc. v. Blackstone, 33 Mass. App. Ct. 228, 231 (1992). This deference is due to a local zoning board's special and unique knowledge of the "history and purpose" of its town's bylaws. Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica, 454 Mass. 374, 381 (2009) (citing Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669 (1999)). The appropriate deference to the

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board's construction is not, however, without limit. See, e.g., Needham Pastoral Counseling Ctr., Inc. v. Bd. of Appeals of Needham, 29 Mass. App. Ct. 31, 32 (1990). An incorrect interpretation of a zoning provision by a local board or building inspector is not entitled to deference. Shirley Wayside Ltd. P'ship v. Bd. of Appeals of Shirley, 461 Mass. 469, 475 (2012). The reviewing court focuses solely on the "validity but not the wisdom of the board's action." Wolfman v. Bd. of Appeals of Brookline, 15 Mass. App. Ct. 112, 119 (1983). A board's decision will not be overturned unless it is

"based on a legally untenable ground or is unreasonable, whimsical, capricious or arbitrary." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 72 (2003) (citing *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970)).

G. L. c. 41, § 81P states that an owner of land may secure from a planning board an endorsement that "approval under the subdivision control law [is] not required." To determine what qualifies for an "Approval Not Required" (ANR) Plan, one must look to G. L. c. 41, § 81L. This section exempts from the subdivision control law, among other things, the "division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing." Under this "existing building exemption," a plan may be endorsed by the local planning board as an ANR plan if it depicts the division of property into two or more parcels, with each parcel containing a structure which predates the adoption of subdivision control in that town. G. L. c. 41, § 81L.

In the instant case, the owner of three adjoining properties sought to use this exemption to divide his land into three lots, with each retaining a single-family residence. Two of the resulting lots did not comply with the Zoning Bylaws, specifically the setback and lot minimum area requirements. To address this problem, the owner secured variances from the ZBA in 1995

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for the undersized lots created by the plan. After several intervening conveyances, Plaintiffs acquired one of these undersized lots in 2007, and sought to reconstruct the existing house, adding a full basement and increasing the total height while remaining within the footprint of the existing house.

At issue now is the appropriate mechanism, if any exists, by which Plaintiffs must secure authorization to tear down and reconstruct their residence. The facts presented raise the question- are lots created under G. L. c. 41, § 81L, containing existing structures that predate local adoption of subdivision control, automatically granted "grandfathered" status under G. L. c. 40A, § 6, where, as here, they fail to conform to zoning regulations?[6] Plaintiffs allege that, because the Palitz Lot was created pursuant to G. L. c. 41, § 81L (Section 81L), and does not conform to the Bylaws, it should be treated as a pre-existing lawful, nonconforming lot. As such, the 1995 Variance should not have been required in the first place, and an amendment to that variance is not necessary. Instead, Plaintiffs argue the proper course is to pursue a "finding" under G. L. c. 40A, § 6, that their proposed reconstruction would not be substantially more detrimental to the neighborhood than the Palitz House.

Defendants counter that lots created pursuant to Section 81L are not automatically preexisting lawful nonconforming lots, and that simply because lots may be divided under this exemption does not mean they will be buildable under local zoning or, if already built upon, that structural changes will be allowed. Defendants argue that the Palitz Lot does not enjoy any grandfather protection under Section 6, and therefore requires an amended variance to permit any

[6] G. L. c. 40A, § 6 provides in relevant part: "[e]xcept as hereinafter provided, a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, . . . but shall apply to any change or substantial extension of such use, . . . 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."

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changes to the residence located there. No issues have been raised regarding the validity of the ANR Plan endorsement by the Planning Board or challenging whether the lots were properly divided under Sections 81L and 81 P. The question remains as to how to categorize those lots once divided.[7]

It is well-settled that an ANR endorsement is not an automatic "attestation of compliance with zoning requirements." *Cornell v. Bd. of Appeals of Dracut*, 453 Mass. 888, 892 (2009) (citing *Hamilton v. Planning Bd. of Beverly*, 35 Mass. App. Ct. 386, 389 (1993); *Smalley v. Planning Bd. of Harwich*, 10 Mass. App. Ct. 599, 603 (1980)). The scope of a planning board's endorsement under G. L. c. 41, § 81P is limited solely to whether or not a plan shows a subdivision. *Smalley*, 10 Mass. App. Ct. at 604. Endorsements are only withheld if the plan shows a subdivision; if a plan shows zoning violations, it may still be endorsed. *Id.*

Plaintiffs argue that, under *Citgo Petroleum Corp. v. Planning Bd. of Braintree*, 24 Mass. App. Ct. 425, 427 (1987), a property owner seeking subdivision under Section 81L is not required to secure a variance if the newly-created lots would be nonconforming. However, *Citgo* addresses only the right to an endorsement of an ANR Plan if the new lots are nonconforming with respect to zoning, and does not address how those lots may be altered or improved after the division. Plaintiffs state as much in their brief: "[i]n *Citgo*, the Appeals Court held that the [Planning Board] had no discretion to deny endorsement of a plan that met the requirements under Section 81L, even if the newly created lots would be nonconforming as to frontage." Pl.'s

[7] According to the undisputed material facts, it is unclear whether, at the time of purchase by Mr. Putziger, the lot as a whole was lawfully nonconforming. Plaintiffs argue that the original lot was lawfully nonconforming and that its status should be maintained upon its division into three individual lots under Section 81L. At oral argument, Plaintiffs' counsel stated that, although he believed evidence of the nonconformity of the entire lot was present in the record, such distinction was not material to the ultimate determination of the issue. Defendants' counsel declined to stipulate whether the larger original lot enjoyed a lawful pre-existing nonconforming status. This court is not persuaded that the status of the original lot is important to the analysis of this case. It seems that the status of the three lots created by the Putziger Plan is more important. The record indicates that from its creation on the Putziger Plan, the Palitz Lot never complied with the lot area and setback requirements of the Bylaws.

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Mem. Supp. Mot. Summ. J. (emphasis added). In contrast to *Citgo*, the prior owner of Plaintiffs' property already received an endorsement of his plan; therefore this is not an analogous situation where an endorsement was denied. In fact, the Appeals Court in *Citgo* notes that simply because a lot may be divided under the Section 81L exception does not mean that resulting lots will be buildable under zoning ordinances or bylaws. *Citgo*, 24 Mass. App. Ct. at 427; see also *Cricones v. Planning Bd. of Dracut*, 39 Mass. App.

Ct. 264, 268 (1995); *Alley v. Bldg. Inspector of Danvers*, 354 Mass. 6, 7-8 (1968) (stating that an ANR endorsement gives lots no standing under the zoning bylaws).

Case law defining the effect of an ANR endorsement on the resulting lots is less straightforward, with no binding appellate decisions expressly resolving the question presented in this case. Plaintiffs point to *Norwell-Arch, LLC v. Opdyke*, 12 LCR 208 (May 24, 2004), a Land Court decision stating that a division under Section 81L did not deprive the property owners of the resulting lots of the right to pursue a finding under G. L. c. 40A, § 6, and that a nonconforming structure may be treated as lawfully nonconforming even when the nonconformity was voluntarily created by the division. *Norwell-Arch*, 12 LCR at 208-09. However, this decision predates several later cases holding that lots created under Section 81L do not benefit from the protections afforded legal nonconforming structures under G. L. c. 40A, § 6.[8] In *Branagan v. Zoning Bd. of Falmouth*, 75 Mass. App. Ct. 1107 (2009) (unpublished opinion pursuant to Appeals Court Rule 1:28), the Appeals Court stated that "while dwellings on a newly created lot may be permitted to remain on new lots that do not meet current dimensional requirements of the zoning by-law, they may only be altered in accordance with the existing applicable statutes and by-law, not as a consequence of retaining a prior status as a preexisting,

[8] In addition, the *Norwell-Arch* court notes the "well-settled" rule that lots divided under § 81L do not automatically become buildable under the zoning ordinance. *Id.*

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nonconforming dwelling." *Id.* at 1107. The Appeals Court reached a similar conclusion (albeit in a different factual context) one year later in *Kenner v. Zoning Bd. of Appeals of Chatham*, 76 Mass App. Ct. 1110 (2010) (unpublished opinion pursuant to Appeals Court Rule 1:28), *rev'd on other grounds*, 459 Mass. 115 (2011).[9] *Kenner* held that the division of a lot created pursuant to Sections 81L and 81P that created new nonconformities would result in a zoning violation and the loss of any protection as a pre-existing nonconforming structure. *Id.* at 1110. Both cases emphasize that approval to divide property in accordance with Section 81L does not exempt the subsequently created lots from zoning requirements.

Despite the nonbinding effect of *Kenner* and *Branagan*, lower courts have applied and cited their reasoning. See *Hawthaway-Audet, et al. v. Freetown Zoning Bd. of Appeals*, Bristol Super. Ct., CA No. 2012-00088 (Nov. 5, 2012) (holding that the conveyance of a nonconforming lot, previously held in common ownership with a larger, conforming parcel under the doctrine of merger for zoning purposes, into separate ownership required a variance); *Perotti-Cyrus v. Bd. of Appeals of Sandwich*, Barnstable Super. Ct., CA No. 04-00767 (July 24, 2009) (stating that the act of conveying noncompliant lots created pursuant to Sections 81L and 81P trigger violations requiring zoning relief). Even if the original lot was legally nonconforming, the lots created on the Putziger Plan would not retain the grandfather protection of the original lot following the division. See e.g. *Branagan*, 75 Mass. App. Ct. at 1107. This result would be consistent with the line of cases under G. L. c. 40A, § 6, which holds that a lawful nonconforming lot loses its protection if altered. See *Derby Refining Co. v. City of Chelsea*, 407 Mass. 703, 714 (1990) (citations omitted) (stating that a party may alter a nonconforming use if those changes are "ordinarily and reasonably adapted" to the original use, but alterations falling outside that scope

[9] The Supreme Judicial Court ultimately reversed Kenner on standing grounds and did not reach the substantive determination of the Appeals Court decision.

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will cause the loss of Section 6 protection); Plainville Asphalt Corp. v. Town of Plainville, 83 Mass. App. Ct. 710, 715 (2013) (stating that although Section 6 protects permitted nonconforming uses, it also allows for the loss of that protection if the use is changed or extended).

As previously noted, the summary judgment record for this case fails to establish whether the original undivided lot constituted a lawful, pre-existing nonconforming lot in 1994. The record only demonstrates that the May 4, 1994 endorsement by the Planning Board of the Putziger Plan created three new lots, at least two of which were undersized and in violation of the town's area requirements and the buildings thereon were in violation of the setback requirements.

Plaintiffs urge the court to annul the ZBA's decision and remand the case for further consideration under G. L. c. 40A, § 6, with the directive that, to the extent a lot enjoys protection under Section 6 prior to a division under Sections 81L and 81P, such division would not change its status. However, an endorsement to divide property under Section 81L does not exempt the new lots from zoning requirements. See Kenner, 76 Mass. App. Ct. at 1110; Branagan, 75 Mass. App. Ct. at 1107. Plaintiffs allege this reasoning renders Section 81L superfluous and ineffective. This court disagrees, as the creation of separate improved lots through the endorsement of an ANR plan may still be useful. Smalley, 10 Mass. App. Ct. at 604.[10]

Because this court finds that the Palitz Lot created on the Putziger Plan never qualified as lawful pre-existing nonconforming lot at the time of its creation, or as a result of the granting of the 1995 Variance, remand to the ZBA for reconsideration within the context of G. L. c. 40A, § 6 is not called for in this case. The determination of a nonconforming use within the meaning of Section 6 is "not merely whether the use is lawful but how and when it became lawful." Mendes

[10] For example, an owner might use such a plan preliminary to a sale of one of the newly created lots. Id.

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v. Bd. of Appeals of Barnstable, 28 Mass. App. Ct. 527, 531 (1990). A lawful prior nonconforming lot arises when the lot (or structures) previously allowed as-of-right, is allowed to continue in existence despite the passage of a zoning provision that would otherwise render it illegal.[11]

The Palitz Lot was rendered lawful via a variance in 1995, and was not a lawful preexisting nonconforming lot. While the endorsement by the Planning Board of the Putziger Plan was a straightforward procedural action that did not require a variance prior to endorsement, a variance was necessary to cure the zoning violations affecting the Palitz Lot. That variance cannot now serve as a gateway for Plaintiffs to pursue a Section 6 finding, because "[i]t would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use." Id.; see also Star Enterprise v. Zoning Bd. of Appeals of Medford, (1991) Misc. No. 141347 (Kilborn, J.) (holding that a Section 6 finding is not possible in an action based on a variance). The criterion for a variance is demanding and makes them difficult to obtain, and uses originally approved by a variance should not later be permitted to pursue what may be more flexible and generous standards under Section 6. Mendes, 28 Mass. App. Ct. at 531-32.

Because the zoning violations depicted on the Putziger Plan became

realized once the lots were conveyed to new ownership, Mr. Putziger properly applied for and received the 1995 Variance. This provided zoning relief for the newly-created but now undersized lots. G. L. c. 40A, § 10 grants local permit-granting authorities the power to grant variances when they

". . . specifically find that owing to circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or bylaw would involve

[11] Also, the use of the lots or the structures thereon may also be changed pursuant to a finding under the procedures set forth in Section 6.

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substantial hardship, financial or otherwise, to the petitioner or applicant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or bylaw."

The party seeking the variance carries the burden of establishing that the statutory requirements have been met. 39 Joy St. Condo. Ass'n v. Bd. of Appeal of Boston, 426 Mass. 485, 488 (1998); Dion v. Bd. of Appeals of Waltham, 344 Mass. 547, 555-56 (1962). The requirements are "conjunctive, not disjunctive," so the failure to establish any of the elements is fatal. Kirkwood v. Bd. of Appeals of Rockport, 17 Mass. App. Ct. 423, 427 (1984) (citing Blackman v. Bd. of Appeals of Barnstable, 334 Mass. 446, 450 (1956)). There is no legal right or entitlement to a variance, and a permit-granting authority has broad discretion to deny it, even if evidence demonstrates it could have been granted. Kirkwood, 17 Mass. App. Ct. at 427-28; Pendergast v. Bd. of Appeals of Barnstable, 331 Mass. 555, 557 (1954).

The ZBA denied Plaintiffs' application for a variance on September 19, 2012, stating that Plaintiffs failed to meet their burden of satisfying all statutory requirements under G. L. c. 40A, § 10. The ZBA found no hardship that justified enlarging the size of the existing structure on the Palitz Lot and raising the height of the Palitz House approximately ten feet. Plaintiffs argued that the requested zoning relief was required in order to bring the existing structure into compliance with present-day building codes, but the ZBA determined that many of the changes sought could be accomplished without demolishing the structure and reconstructing a taller house. The ZBA also found that increasing the size and bulk of the dwelling would negatively impact the neighborhood's density.[12] Finally, the ZBA interpreted the 1995 Variance-for

[12] The ZBA's denial stated, in relevant part, that ". . . applicant did not prove substantial hardship, financial or otherwise, since many of the modifications necessary could be done within the existing dwelling; while the applicant claims that the circumstances still exist as laid out in the 1995 variance, there does not appear to be a continuing hardship owing to conditions of the land itself. Because the abutter to the west will have her view eliminated and have a 31 foot high dwelling located four feet from hers, the board determined that there will be a

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which Plaintiffs sought the amendment—as including a condition that there would be "no change in the appearance or use of the buildings" that also prevented Plaintiffs' proposed reconstruction.

Conditions placed on a variance must be expressly stated. *Spear v. Bd. of Appeals of Danvers*, 77 Mass. App. Ct. 220, 224 (2010). The 1995 Variance, in a section titled "Determination," states that "[t]here will be no change in the appearance or use of the buildings on the two properties and their relationship to adjoining properties. Therefore, desirable relief may be granted without either a substantial detriment to the public good, or substantial derogation from the intent or purpose of this by-law." Defendants characterize this language as an express condition that the residence remained unchanged. This court finds that the quoted language is not an express condition, but reflects the ZBA's finding of no substantial detriment. Therefore, the court determines that this quoted language does not rise to the level of an express condition, and instead referred only to the proposed minimal changes at issue under the 1995 Variance.

While the ZBA may have erroneously interpreted the 1995 Variance to include a condition, this was not the sole reason for its denial of Plaintiffs' application. The ZBA found several other reasons on which to base its denial. See *supra*, n.12. The Palitz Lot, as shown on the Putziger Plan, was noncompliant, but this cannot be categorized as a hardship relating to the land's shape, soil conditions, or topography, as required for a variance under Section 10 of the Zoning Act. This court finds that the additional reasons provided by the ZBA to support its denial, based on its findings and determinations, were not based on legally untenable grounds, and were not unreasonable, whimsical, capricious or arbitrary.[13] Variances are, by design,

substantial detriment to the public good and, further, that with the added bedroom, full basement and additional third floor, the density of the neighborhood will be negatively impacted."

[13] As one reason for their denial of the variance, the ZBA states that the proposed structure will be located four feet from an abutter's house. In the "Findings" section, the ZBA states that the proposed structure will be

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difficult to obtain with demanding statutory requirements. *Mendes*, 28 Mass. App. Ct. at 531 (citing *Gamache v. Acushnet*, 14 Mass. App. Ct. 215, 217 (1982)). Plaintiffs have failed to carry their burden that they were entitled to an amendment to the 1995 Variance, or a new variance, and a Section 6 finding is not available to them under the circumstances presented.

Accordingly, Plaintiff's Motion for Summary Judgment is DENIED, and, pursuant to Mass. R. Civ. P. 56 ©, summary judgment is GRANTED to Defendants as the non-moving party. The ZBA's decision to deny Plaintiffs' application for a variance is AFFIRMED.
Judgment to issue accordingly.
/s/ Karyn F. Scheier, Justice
January 23, 2014

located four feet from an "abutting dwelling." Defendants in their summary judgment brief describe the proposed structure's location as "four feet from the abutting property." Plaintiffs counter that the

abutting neighbor's house is approximately forty feet from the proposed structure, while her garage is the structure located nearest to the property line. The Putziger Plan (Ex. 8) depicts a "wood frame dwelling" on the Palitz Lot situated close to the abutting property line and a "wood frame garage" on the abutting property. The precise location and use of the proposed structure and the structure on the abutting property is not addressed in the Statement of Material Facts submitted by the parties.

The court notes this discrepancy, but is limited when deciding motions for summary judgment strictly to matters of law. *Albahari v. Zoning Bd. of Appeals of Brewster*, 76 Mass. App. Ct. 245, 248 (2010). To engage in fact finding at the summary judgment stage is to commit error. *Riley v. Presnell*, 409 Mass. 239, 244 (1991). While it is conceivable that the increase in the height of the proposed structure might still affect the view from the abutter's property, whether it is located four or forty feet from the abutter's dwelling, the court can make no finding of fact regarding its location based on the record presented. However, this does not change the court's ultimate decision. The ZBA's decision indicates that it also considered the increase in height of the house, and the addition of a bedroom and basement as affecting density. The ZBA also found no hardship.

Section 4. Uniform districts.

Section 4. Any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.

Districts shall be shown on a zoning map in a manner sufficient for identification. Such maps shall be part of zoning ordinances or by-laws. Assessors' or property plans may be used as the basis for zoning maps. If more than four sheets or plates are used for a zoning map, an index map showing districts in outline shall be part of the zoning map and of the zoning ordinance or by-law.

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

[Text through first paragraph as amended by 2000, 29 effective May 17, 2000. For text effective until May 17, 2000, see 1998 Edition.]

Section 6. 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. 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.

Section 7. Enforcement of zoning regulations; violations; penalties; jurisdiction of superior court.

Section 7. The inspector of buildings, building commissioner or local inspector, or if there are none, in a town, the board of selectmen, or person or board designated by local ordinance or by-law, shall be charged with the enforcement of the zoning ordinance or by-law and shall withhold a permit for the construction, alteration or moving of any building or structure if the building or structure as constructed, altered or moved would be in violation of any zoning ordinance or by-law; and no permit or license shall be granted for a new use of a building, structure or land which use would be in violation of any zoning ordinance or by-law. If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefor, within fourteen days of receipt of such request.

No local zoning law shall provide penalty of more than three hundred dollars per violation; provided, however, that nothing herein shall be construed to prohibit such laws from providing that each day such violation continues shall constitute a separate offense. No action, suit or proceeding shall be maintained in any court, nor any administrative or other action taken to recover a fine or damages or to compel the removal, alteration, or relocation of any structure or part of a structure or alteration of a structure by reason of any violation of any zoning by-law or ordinance except in accordance with the provisions of this section, section eight and section seventeen; provided, further, that if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits, no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within six years next after the commencement of the alleged violation of law; and provided, further that no action, criminal or civil, the effect or purpose of which is to compel the removal, alteration, or relocation of any structure by reason of any alleged violation of the provisions of this chapter, or any ordinance or by-law adopted thereunder, or the conditions of any variance or special permit, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within ten years next after the commencement of the alleged violation. Such notice shall include names of one or more of the owners of record, the name of the person initiating the action, and adequate identification of the structure and the alleged violation.

The superior court shall have the jurisdiction to enforce the provisions of this chapter, and any ordinances or by-laws adopted thereunder, and may restrain by injunction violations thereof.

Section 10. Variances.

Section 10. The permit granting authority shall have the power after public hearing for which notice has been given by publication and posting as provided in section eleven and by mailing to all parties in interest to grant upon appeal or upon petition with respect to particular land or structures a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. Except where local ordinances or by-laws shall expressly permit variances for use, no variance may authorize a use or activity not otherwise permitted in the district in which the land or structure is located; provided however, that such variances properly granted prior to January first, nineteen hundred and seventy-six but limited in time, may be extended on the same terms and conditions that were in effect for such variance upon said effective date.

The permit granting authority may impose conditions, safeguards and limitations both of time and of use, including the continued existence of any particular structures but excluding any condition, safeguards or limitation based upon the continued ownership of the land or structures to which the variance pertains by the applicant, petitioner or any owner.

If the rights authorized by a variance are not exercised within one year of the date of grant of such variance such rights shall lapse; provided, however, that the permit granting authority in its discretion and upon written application by the grantee of such rights may extend the time for exercise of such rights for a period not to exceed six months; and provided, further, that the application for such extension is filed with such permit granting authority prior to the expiration of such one year period. If the permit granting authority does not grant such extension within thirty days of the date of application therefor, and upon the expiration of the original one year period, such rights may be reestablished only after notice and a new hearing pursuant to the provisions of this section.

Section 81L. Definitions.

Section 81L. In construing the subdivision control law, the following words shall have the following meaning, unless a contrary intention clearly appears:-

"Applicant" shall include an owner or his agent or representative, or his assigns.

"Certified by [or endorsed by] a planning board", as applied to a plan or other instrument required or authorized by the subdivision control law to be recorded, shall mean, bearing a certification or endorsement signed by a majority of the members of a planning board, or by its chairman or clerk or any other person authorized by it to certify or endorse its approval or other action and named in a written statement to the register of deeds and recorder of the land court, signed by a majority of the board.

"Drainage", shall mean the control of surface water within the tract of land to be subdivided.

"Lot" shall mean an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings.

"Municipal service" shall mean public utilities furnished by the city or town in which a subdivision is located, such as water, sewerage, gas and electricity.

"Planning board" shall mean a planning board established under section eighty-one A, or a board of selectmen acting as a planning board under said section, or a board of survey in a city or town which has accepted the provisions of the subdivision control law as provided in section eighty-one N or corresponding provisions of earlier laws, or has been established by special law with powers of subdivision control.

"Preliminary plan" shall mean a plan of a proposed subdivision or resubdivision of land drawn on tracing paper, or a print thereof, showing (a) the subdivision name, boundaries, north point, date, scale, legend and title "Preliminary Plan"; (b) the names of the record owner and the applicant and the name of the designer, engineer or surveyor; (c) the names of all abutters, as determined from the most recent local tax list; (d) the existing and proposed lines of streets, ways, easements and any public areas within the subdivision in a general manner; (e) the proposed system of drainage, including adjacent existing natural waterways, in a general manner; (f) the approximate boundary lines of proposed lots, with approximate areas and dimensions; (g) the names, approximate location and widths of adjacent streets; (h) and the topography of the land in a general manner.

"Recorded" shall mean recorded in the registry of deeds of the county or district in which the land in question is situated, except that, as affecting registered land, it shall mean filed with the recorder of the land court.

"Register of deeds" shall mean the register of deeds of the county or district in which the land in question, or the city or town in question, is situated, and, when appropriate, shall include the recorder of the land court.

"Registered mail" shall mean registered or certified mail.

"Registry of deeds" shall mean the registry of deeds of the county or district in which the land in question is situated, and, when appropriate, shall include the land court.

"Subdivision" shall mean the division of a tract of land into two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by zoning or other ordinance or by-law, if any, of said city or town for erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lot so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision.

"Subdivision control" shall mean the power of regulating the subdivision of land granted by the subdivision control law.

Section 81M. Purpose of law.

Section 81M. The subdivision control law has been enacted for the purpose of protecting the safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may hereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and ensuring sanitary conditions in subdivisions and in proper cases parks and open areas. The powers of a planning board and of a board of appeal under the subdivision control law shall be exercised with due regard for the provision of adequate access to all of the lots in a subdivision by ways that will be safe and convenient for travel; for lessening congestion in such ways and in the adjacent public ways; for reducing danger to life and limb in the operation of motor vehicles; for securing safety in the case of fire, flood, panic and other emergencies; for insuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewerage, drainage, underground utility services, fire, police, and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; and for coordinating the ways in a subdivision with each other and with the public ways in the city or town in which it is located and with the ways in neighboring subdivisions. Such powers may also be exercised with due regard for the policy of the commonwealth to encourage the use of solar energy and protect the access to direct sunlight of solar energy systems. It is the intent of the subdivision control law that any subdivision plan filed with the planning board shall receive the approval of such board if said plan conforms to the recommendation of the board of health and to the reasonable rules and regulations of the planning board pertaining to subdivisions of land; provided, however, that such board may, when appropriate, waive, as provided for in section eighty-one R, such portions of the rules and regulations as is deemed advisable.

Section 81P. Approval of plans not subject to subdivision control law; procedure.

Section 81P. Any person wishing to cause to be recorded a plan of land situated in a city or town in which the subdivision control law is in effect, who believes that his plan does not require approval under the subdivision control law, may submit his plan to the planning board of such city or town in the manner prescribed in section eighty-one T, and, if the board finds that the plan does not require such approval, it shall forthwith, without a public hearing, endorse thereon or cause to be endorsed thereon by a person authorized by it the words "approval under the subdivision control law not required" or words of similar import with appropriate name or names signed thereto, and such endorsement shall be conclusive on all persons. Such endorsement shall not be withheld unless such plan shows a subdivision. If the board shall determine that in its opinion the plan requires approval, it shall within twenty-one days of such submittal, give written notice of its determination to the clerk of the city or town and the person submitting the plan, and such person may submit his plan for approval as provided by law and the rules and regulations of the board, or he may appeal from the determination of the board in the manner provided in section eighty-one BB. If the board fails to act upon a plan submitted under this section or fails to notify the clerk of the city or town and the person submitting the plan of its action within twenty-one days after its submission, it shall be deemed to have determined that approval under the subdivision control law is not required, and it shall forthwith make such endorsement on said plan, and on its failure to do so forthwith the city or town clerk shall issue a certificate to the same effect. The plan bearing such endorsement or the plan and such certificate, as the case may be, shall be delivered by the planning board, or in case of the certificate, by the city or town clerk, to the person submitting such plan. The planning board of a city or town which has authorized any person, other than a majority of the board, to endorse on a plan the approval of the board or to make any other certificate under the subdivision control law, shall transmit a written statement to the register of deeds and the recorder of the land court, signed by a majority of the board, giving the name of the person so authorized. *(Amended by 1987, 122.)*

The endorsement under this section may include a statement of the reason approval is not required.

