

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket Number 2014-P-0357

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DUANE P. LANDRETH, Trustee of the Andrea Kline Truro Qualified  
Personal Residence Trust,

Plaintiff, Appellant

v.

ALAN EFROMSON, JANICE ALLEE, BERTRAM PERKEL, JOHN THORNLEY and  
NORMAN POPE as they are members of the TOWN OF TRURO ZONING  
BOARD OF APPEALS,

Defendants, Appellees

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On appeal from a judgment of the Land Court

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BRIEF OF THE ASSOCIATION TO PRESERVE  
CAPE COD

AMICUS CURIAE

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### Issues Presented

What does "proceeded with construction at his own risk" ultimately mean and who actually bears that risk.

Whether a settlement agreement has any relevance to jurisdiction especially in light of the legal certainty that illegality is occurring.

What happens to the broom crowberries.

### 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 unless properly checked humans will destroy the very beauty that draws them to the special place we call Cape Cod. 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 ecological values.

APCC has a 46-year history of pragmatic, science-based environmental advocacy that recognizes the implications and consequences of the environment 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 scenic views and vistas they crave. Environmental stewardship 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 the Statement of Facts contained in the brief of the Town of Truro Zoning Board of Appeals.

### Argument

- I. The Land Court Judge cautioned the property owners that construction was at their own risk and now they erroneously seek judicial relief to absolve themselves of all risk.

The current action is before the Court because according to the trial judge, Landreth (who now stands for the deceased Kline) is attempting to "again" establish "the legality of the residence that the Klines constructed at 25-27 Stephens Way in Truro, Massachusetts." RA476. The use of the word "again" certainly raises the issue of res judicata and finality of judgments, but ultimately one must go back to October 23, 2009 when Judge Piper "cautioned counsel for Kline that he proceeded with construction at his own risk, being fully aware of the pending challenge." Shiffenhaus v. Kline, 08 Misc. 383621 (GHP) 2 (Land Court 2010). RA051.

The baseline or what existed prior to the long and circuitous history of this series of error compounding error is critical to the real challenge



for this Court. Although putting the land in the condition that it was prior to the construction is likely impossible, it is critical that we first try and even more importantly make sure that we do not make things worse.

In the Secretary of Energy and Environmental Affairs Certificate dated August 24, 2007 the subject locus is described as:

1. A 9.36 acre parcel in which .73 acres is proposed for permanent alteration including .16 acres of impervious surface.
2. The locus contains the historical home known as the Andrew C. Cobb House, listed on the Massachusetts Inventory of Historic and Archeological Assets of the Commonwealth.
3. The site is immediately adjacent to the Edward Hopper House<sup>1</sup>, also listed on the Massachusetts

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<sup>1</sup> Edward Hopper is an iconic American painter. "Edward Hopper first visited the Cape in 1930. In 1934, he and his wife, Josephine, built a modest summer house – a classic Cape, but for a huge north-facing window. On a sand bluff, the house overlooks nothing but bearberry, broom crowberry, dune grass and an empty stretch of Fisher Beach. Over the decades, as his work developed, Hopper returned each year to this simplicity: old wooden houses in an open landscape of beach, heath and woodlot. Hopper's Truro paintings, especially from the 1930s, outline an important crossroads in his work: isolated

Inventory of Historic and Archeological Assets  
of the Commonwealth.

4. The "project site" contains *Priority and Estimated Habitat* for several rare or endangered species. These species include:  
Northern Harrier (*Circus Cyaneus*), Eastern Spadefoot Toad (*Scaphiopus holbrookii*), Eastern Box Turtle (*Terrapene Carolina*) and Broom Crowberry<sup>2</sup> (*Corema conradii*)."

Mass. Executive Office of Energy and Environmental Affairs, THE ENVIRONMENTAL MONITOR, Vol. 68, Issue 9 (Sept. 11, 2007)

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buildings in broad vistas are meditations on form and color that steer toward the abstract while remaining figurative. 'There is a specificity to what he is doing in his Truro paintings that he didn't have elsewhere,' said Carter Foster, a curator at the Whitney Museum of American Art. 'His watercolors especially remain truer to what he actually saw.'" Gregory Dicum, *Cape Cod in Edward Hopper's Light*, N.Y. Times Aug. 10, 2008, at(L)3.

<sup>2</sup> "The harsh treeless moors and grasslands are populated by tough, low plants. On moors the plants are chiefly members of the heath family: Bearberry, Broom Crowberry and Poverty Grass; in grasslands, grasses. These environments developed on the Cape as the result of fire, dry, sandy soils strong, sometimes salty winds, grazing, and logging. Today only the soils and wind remain as significant factors in plant distribution - fire, logging and grazing being generally incompatible with housing developments. As a result, grasslands and moors are much reduced their historic extent." BETH SCHWARZMAN, *THE NATURE OF CAPE COD*, 40 (2002 ed.).

In an ideal world Edward Hopper would be the judge and even the architect of restoration of the Landreth (Kline) locus. Hopper's vision of Cape Cod with its sweeping vistas, quaint structures<sup>3</sup> and fantastic light survives today largely through land and historic conservation efforts. This Hopper Cape Cod vision should be the goal of the Landreth restoration.

In Cornell v. Michaud, 79 Mass. App. Ct. 607 (2011), this Court established a reasonable rule to employ the "extreme remedy" of restoring the lot to the preconstruction status quo. As in Cornell, Kline knowingly "acted at his own peril" and his successors cannot "cure the nonconformity of his use which he did not cure prior to beginning construction." Id. at 616. Landreth cannot and did not cure the nonconformity by making a private settlement with the

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<sup>3</sup> "The disorienting thing for me is, as Gail Levin, a preeminent Hopper authority and biographer, puts it, 'In a certain way, all of the houses in Truro and Wellfleet are Hopperesque.' . . . Hopper once said: 'To me, the important thing is the sense of going on. You know how beautiful things are when you are traveling.' On the Cape he found movement and drama in the interplay of solitude, architecture and light. . . . 'If you could say it in words,' he said, 'there would be no reason to paint.'" Patricia Dempsey, *Solitude's Shore*, Washington Post, March 29, 2009, at W14. The Kline house does not qualify as Hopperesque.

aggrieved neighbors. In a zoning enforcement matter any settlement must be measured against the bylaw and consistent with zoning law. Here, there is no ambiguity in the law and no possibility of correcting the nonconformity. "Our analysis begins with the fact that, considered independently, the erection of any new building requires conformity with current zoning regulations." Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 604 (2011). As this Court found, no juxtaposition of rooms and kitchens can make the new structure conforming and the overall project "undeniably signified an expansion to the property's nonconformity." Id. at 606.

There is a final judgment with all essential and necessary parties, the town and the property owner. It is now time for restoration to commence.

II. Landreth proposes a new method of illegal contract zoning

The Zoning enabling act, G.L. ch.40A § 4 mandates that zoning districts "shall be uniform within the district for each class or kind of structures or uses permitted." Landreth now argues that private citizens through settlement agreements can enter into zoning

contracts that trump the law and create pockets of properties that are no longer uniform within the zoning district. If this is not illegal contract zoning then nothing is illegal contract zoning.

Once jurisdiction attaches a court is powerless to allow settlement that is contrary to law. A settlement that "authorizes the continuation of clearly illegal conduct" cannot be approved, but a court in approving a settlement should not in effect try the case by deciding unsettled legal questions. The courts have been reluctant to disapprove a settlement unless the alleged illegality is a "legal certainty." Sniffin v. The Prudential Insurance Co. of America, 395 Mass. 415, 422 (1985) quoting Robertson v. National Basketball Ass'n, 556 F.2d 682, 686 (2d Cir. 1977). There are no remaining legal uncertainties here. The structure is illegal and the owner was put on notice of both the legal uncertainties and the legal consequences faced when building was commenced.

Ultimately there is nothing novel, unique or even first impression about Landreth's argument. "The instant situation brings to mind Justice Kaplan's observation in Aronson v. Brookline Rent Control Bd.,

19 Mass. App. Ct. 700, 703 (1985): '[T]he history of administrative law shows [that] attacks, mounted ostensibly under the banner of 'jurisdiction,' have on occasion been used to delay, if not to abort, legitimate agency undertakings.'" Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct 737, n.2 (2000).

In many respects the case is similar to Oakham Sand and Gravel Corp. v. Town of Oakham, 54 Mass. App. Ct. 80 (2002). In Oakham a company claimed that its preexisting nonconforming status allowed it to ignore court decisions and orders. Oakham appears to provide the basis for Landreth's underlying strategy.

"Furthermore, only where the court lacks jurisdiction to make an order or where an order is transparently invalid on its face may a party ignore a court order and attempt to evade sanctions by litigating the validity of the underlying order." Id. at 87.

Unfortunately for Landreth there is jurisdiction. The Board of Appeals hearing was the result of valid court order.

It is settled law that through contract or any other means a municipality cannot bargain away or relinquish its police powers. Durand v. IDC



Bellingham, LLC, 440 Mass. 45, 53 (2003). Landreth argues that because the original complainants settled, the town must relinquish its police powers and allow a property in clear violation of the zoning district rules to remain standing. Once there was legal certainty of the illegality, the complainants were no longer essential or necessary parties to the case.<sup>4</sup> It became the duty of the town to carry out the judgment and enforce the zoning bylaw.

III. Protecting the broom crowberry is necessary for restoring the property to the preconstruction status quo.

The *Corema Conradii*, broom crowberry, is quite common at edge of higher bank just south of the lighthouse. It is now full of small green fruit, small pinhead size. It spreads from a centre, raying out and rooting every four or five inches. It forms peculiar handsome-shaped mounds, four or five feet in diameter by nine inches or a

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<sup>4</sup> Once subject matter jurisdiction attached and the town decided that this was a proper zoning enforcement matter, the complainants departure from the case would not impact subject matter jurisdiction. G.L. ch. 40A § 7 specifically speaks in terms of "maintaining" actions related to zoning violations and the necessary requirements. Moreover, once there was legal certainty of an illegality, the town had a duty to enforce thereby making the participation of the abutters also unnecessary. Had the town made its original decision in harmony with the Court, abutters would not have been necessary parties at any point in this long and circuitous litigation.



foot high, very soft springy beds to lie on,  
— a woodman's bed already spread.

BRADFORD TORREY & FRANCIS H. ALLEN, THE JOURNAL OF HENRY D.

THOREAU, Vol. VII, Chapter XI, July, 1855, 903 (1962 ed.).

Sadly broom crowberry is no longer quite common. As noted by the Secretary of Energy and Environmental Affairs, broom crowberry was a rare or endangered species under the Massachusetts Natural Heritage Program. Since the Certificate was issued broom crowberry has been de-listed but Natural Heritage continues to describe it as a vulnerable habitat. "The heathland community is considered to be vulnerable throughout its range. It has been estimated that about ninety per cent of coastal heathland in the northeastern United States has been lost since the middle of the nineteenth century." Mass. Natural Heritage and Endangered Species Program, NATURAL COMMUNITY FACT SHEET SANDPLAIN HEATHLANDS (2007).

The loss has been through small, incremental development decisions not unlike the Kline project. Much of the loss has occurred since the death of Edward Hopper in 1967. The subject locus is particularly important according to noted botanist Mario DiGregorio:

Broom crowberry is a truly rare plant, growing in very few areas of North America. . . . The lower Cape is blessed with the greatest concentrations of this species and its preservation, particularly in the lush abundance found here on the Hopper Landscape, should be a priority. Indeed, **I have never witnessed broom crowberry growing in the startling density found on this property** [emphasis in original]. To lose any part of the colony, which exhibits lovely green foliage throughout the year . . . would be extremely shortsighted and unwise.

Mario DiGregorio, HOPPER LANDSCAPE BOTANIC SURVEY REPORT, 3 (Sept. 3, 1991).

One of the purposes of the Massachusetts Endangered Species Act (MESA) is that "it prohibits human interference with certain protected species." Pepin v. Div. of Fisheries and Wildlife, 467 Mass. 210, 216 (2014). The Commonwealth determined that construction of Kline's new structure (the one subsequently found illegal by this Court) would result in a "take" of broom crowberry. As described in Pepin a finding of a "take" does not necessarily mean that construction is prohibited. "Even if the project is deemed to result in a take, the division may nonetheless issue a 'conservation and management permit,' provided there is a long-term [n]et benefit to the conservation of the impacted species." Pepin, 467 Mass. at 220 quoting 321 C.M.R. § 10.23(1). Part

of the reason for this approach is to help provide an equitable balance between the public interest "to conserve plant and animal species within the Commonwealth and to protect their habitats" with serious restrictions on private property rights. Pepin, 467 Mass. at 215.

Kline was able to obtain a conservation and management permit<sup>5</sup> in harmony with this balanced approach based upon the fact that Kline had a building permit and was exercising property rights. As subsequently determined the building permit was erroneously issued and void. However, Kline exercised his rights in accordance with the conservation and management permit and the permit became fully binding. Nothing in the conservation and management permit negated that permit if the building permit was found improperly issued. At his own risk, Kline performed the alteration of the land in accordance with his conservation and management plan permit and all of conditions became binding and enforceable through Kline's voluntary and willful exercise of those rights.

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<sup>5</sup> The conservation and management permit was recorded in the Barnstable County Registry of Deeds Book 22754, page 20 on March 14, 2008.

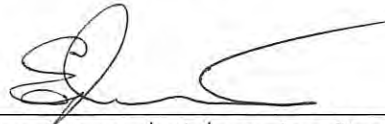
Where a property owner exercises rights under a permit despite other deficiencies, that permit is valid and enforceable. Compare, Grady v. Zoning Bd. of Appeals of Peabody, 465 Mass. 725 (2013) with Cornel v. Bd. of Appeals of Dracut, 453 Mass. 888 (2009). (exercise of rights controls validity). Consequently the terms and conditions of the conservation and management permit remain valid and fully enforceable.

Because the restoration of the property to its preconstruction status may have impacts and because the Condition 5 of the conservation management permit requires submission to the Division for approval, Landreth needs a modification of the existing permit before proceeding with demolition. While such determination is solely within the purview and discretion of the Natural Heritage program, the broom crowberry must be both protected and to maximum extent feasible restored to its pre-construction status quo. This challenging task is part of the risk incurred by proceeding with construction.

### Conclusion

For the foregoing reasons the judgment of the Land Court should be affirmed and the property should be restored to its preconstruction condition including restoration of the altered areas of broom crowberry. The conservation and management plan should remain valid and binding on the property owners.

Respectfully submitted,



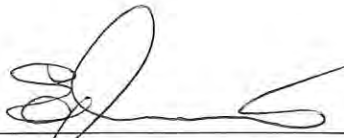
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July 8, 2014

### 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.



Edward J. DeWitt, BBO# 630955

Addendum

Order Allowing Defendant's motion for Summary Judgment, Order Denying Plaintiffs Motion for Summary Judgment.

G. L. ch. 40A § 4

G. L. ch. 40A § 7

321 C.M.R. 10.23 (1)

Land Court

County: **BARNSTABLE, ss.**

Case No.: **CASE 12 MISC 458061 (HMG)**

Parties: **DUANE P. LANDRETH, Trustee of the ANDREA KLINE TRURO QUALIFIED PERSONAL RESIDENCE TRUST Plaintiff v. ALAN FROMSON, JANICE ALLEE, BERTRAM PERKEL, JOHN THORNLEY, and NORMAN POPE as they are members of the TOWN OF TRURO ZONING BOARD OF APPEALS Defendants**

Date: **January 15, 2014**

Decision Type: **ORDER ALLOWING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ORDER DENYING PLAINTIFF'S**

**MOTION FOR SUMMARY JUDGMENT Procedural History and Background**

Judge: **/s/Grossman, J.**

This case returns to the Land Court by means of a somewhat circuitous route. Initially, the instant matter came before the Land Court as *Schiffenhaus v. Kline*, 18 LCR 223 (Misc. Case No. 383621) (Piper, J.). In that case, Lawrence Schiffenhaus, J. Anton Schiffenhaus, Alan Solomont and Susan Lewis Solomont (the original plaintiffs) had appealed, pursuant to G.L. c. 40A, s. 17, from a decision of the Truro Board of Appeals (Board). By means of that decision, the Board upheld[1] the determination of the local Building Commissioner to issue two building

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- [1] See Defendant's Summary Judgment Memorandum, p.7: After its July 21, 2008 and August 11, 2008 public hearings, the board was evenly divided-two members voted to approve the decision to issue the permits; two

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permits to Donald Kline [2] for work on the property known and numbered as 25-27 Stephens Way in Truro, Massachusetts (property / locus). Specifically, permit 08-096, issued on May 27, 2008, allowed for the conversion of a single family pre-existing nonconforming [3] residential structure into an accessory use as an "Habitable Studio." [4] Permit 08-097, issued on the same date, allowed for the construction of a new, larger single family dwelling at the locus.[5] "[T]he new home Mr. Kline proposed was a single-family structure, but in addition to the 4,800 square feet of living space on the ground floor, there were another 2,000 square feet of space in the finished area of the basement.... The house itself, now constructed, has four bedrooms and five bathrooms, and there is also a 400-square-foot garage." [6]

In granting the said Permits, the Building Commissioner "determined that the changes proposed for this property [fit] within Truro's extremely broad definition for alteration, and that determination directed me to consider and then apply Section 30, s. 30.7.B [of the Truro Zoning Bylaw] .... [W]hen I considered s. 30.7.B I saw that the new home would not 'increase the nature or extent' of the nonconforming Street or Lot Frontage... [T]herefore, I approved the applications and issued the building permits on May 27, 2008...." [7]

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members voted to disapprove that decision; and one member abstained-thus, leaving the Building commissioner's decision

- [2] In the Schiffenhaus matter, Kline was named as a defendant together with Duane P. Landreth as Trustee of the Stephens Way Nominee Trust. That role has effectively been reversed in the current litigation insofar as the named plaintiff is Duane P. Landreth, Trustee of the Andrea Kline Truro Qualified Personal Residence Trust.
- [3] According to the Building commissioner "the existing buildings and proposed buildings complied with the Bylaws' dimensional requirements and restrictions, and the 8.58 acre lot, considered alone, also complied;... the problem is Stephens Way;... its deficiency creates the frontage nonconformity..." Wingard Aff. Paragraphs 36-38.
- [4] Defined under the Zoning Bylaw as consisting "of one or more bedrooms, with or without bathroom facilities, in a building detached from the principal residence and which does not include residential cooking facilities...."
- [5] In page 24 of his decision, the Land Court Judge noted that "[a]s a result of his challenged project, Kline seeks to go from roughly 1,970 square feet of nonconforming structure, to over 8,770 square feet of nonconforming structures on the same lot with the same compliant frontage."
- [6] Affidavit of Thomas J. Wingard, Jr. (Wingard Aff.) at Paragraphs 26 and 27. Since May of 2003, Mr. Wingard has been the Building Commissioner for the Town of Truro. Wingard Aff. Paragraph (Para.) 1.



[7] Wingard Aff. Paragraphs 39-41, inclusive.

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The definition of "Alteration" is to be found in Section 10.4 of the Zoning Bylaw. It provides as follows:

Alteration. Any construction, reconstruction, or related action resulting in a change in the structural parts, heights, number of stories, exits, size, use or location of a building or other structure or any other related change.

Section 30.7.B, in turn, upon which the Building Commissioner relied, provides as follows:

B. Repairs, alterations. If the Building Commissioner determines and finds that the proposed repair, reconstruction, alteration, or structural change of a pre-existing, nonconforming single-family... residential structure will not increase the nature or extent of the nonconformity, then the Building commissioner may improve and issue a building permit for the proposed repair, reconstruction, alteration, or structural change.

The Schifffenhaus Case was decided by the Land Court on summary judgment.[8] In his decision, the Judge observed that "[n]otwithstanding the commencement of this action,[9] Kline broke ground and commenced his construction project." He observed further "that the Building Commissioner did not abuse his discretion in determining that the Kline project fits the Truro definition of an 'alteration.' " He continued as follows:

[T]he Building Commissioner was incorrect when he determined that the Kline Project [would] not produce an increase in the nonconforming nature of the existing structures on the Kline property, and the Board acted in error when it upheld his determination. Judgment will enter annulling the Decision of the Board, and remanding the case to the Board to consider pursuant to... the Truro Zoning Bylaw whether the Kline Project is an 'alteration or extension [that] will not be substantially more detrimental to the neighborhood than the existing nonconforming use or structure and that the alteration or extension will exist in harmony with the general purpose and intent of the bylaw'...."

The Court allowed plaintiffs' Motion for Summary Judgment. In so doing, it annulled the August 19, 2008 Decision of the Truro Zoning Board which had upheld the issuance of the

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[8] On September 28, 2009, Donald Kline passed away. Defendant's Summary Judgment Memorandum, p.10.

[9] Previously, the Judge had cautioned Kline's counsel that construction would proceed at Kline's own risk.

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two building permits to the Klines and remanded the case to the Board for the following purposes:

(1) for the Board to direct the Building Inspector that the building permits challenged in this action were issued by him in error, and that he must take appropriate action in light of that direction, and pending the further action of the Board required by this Judgment, and

(2) for the Board to consider, consistent with the court's decision, pursuant to Section 30.7 of the Truro Zoning Bylaw, whether the Kline Project is an "alteration or extension [that] will not be substantially more detrimental to the neighborhood than the existing nonconforming use or structure" and whether "the alteration or extension will exist in harmony with the general purpose and intent of [the] bylaw." The Board is with reasonable promptness to hold a new open public hearing for the purpose of considering this question . . . [10]

Thereafter, the parties filed cross appeals from the decision of the Land Court. In *Schifffenhaus v. Kline*, 79 Mass. App. Ct. 600 (2011) issued on May 26, 2011, the Appeals Court affirmed the Land Court's remand to the Board. It agreed with the Land Court Judge in certain respects pertinent here—first, that the original plaintiffs had standing to seek judicial review [11] and second, that the proposed changes to the Kline property significantly increased the property's nonconformity. In this respect, the Court spoke of the "magnitude of the project and multiplicity of proposed changes to the property" which "undeniably signified an expansion of the property's nonconformity." *Schifffenhaus v. Kline*, 79 Mass. App. Ct. 600, 602-03, 605-06 (2011).

The Court concluded as follows:

The judge's remand to the board is affirmed for further proceedings consistent with this opinion, and specifically subject to our determination that the project does not constitute an alteration. (emphasis added) *Id.* at 606.

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[10] *Schiffenhaus v. Kline*, No. 08 MISC 383621 (GHP) (Land Ct. 2010) (Judgment).

[11] After noting that the Land Court judge correctly determined that the original plaintiffs had standing to seek judicial review, the Appeals Court went on to discuss their ability to base a claim of aggrievement on impairment of view. The Appeals Court noted that "in the event that standing resurfaces as an issue in future proceedings, we note that the plaintiffs are not precluded as a matter of law from asserting aggrievement on this basis with a showing that they have suffered a harm specific to their property." *Schiffenhaus v. Kline*, 79 Mass. App. Ct. 600, 602-03 (2011).

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Mr. Landreth filed a petition for rehearing thereafter. Moreover, after the promulgation of the Appeals Court's decision, the private parties filed a motion to vacate on the basis that they had reached a settlement. The Town of Truro (Truro), however, objected to the motion to vacate, apparently altering its position from one of support for the property owners to one of opposition. The Appeals Court denied both the request for rehearing and the motion to vacate. The Supreme Judicial Court denied further appellate review on November 2, 2011, rendering the Appeals Court's decision final.

On remand, the Zoning Board issued a decision directing the Building Inspector to revoke the building permits. Duane Landreth, Trustee of the Andrea Kline Truro Qualified Personal Residence Trust, which holds the interests in the locus previously held by the Klines, has appealed from the Board's decision. Thus, this court finds itself again considering the legality of the residence that the Klines constructed at 25-27 Stephens Way in Truro, Massachusetts. Both parties have moved for summary judgment.

Following the Appeals Court decision, on June 17, 2011, Duane P. Landreth filed a Petition for Rehearing. Soon after the Appeals Court rendered its decision, the private parties settled their dispute. On July 6, 2011, the plaintiffs, i.e. the Schiffenhauses and Solomonts, filed a motion to vacate the remand order or alternatively, to remand the case to the Land Court for entry of dismissal. On the same date, the parties filed a stipulation regarding standing in which the plaintiffs disclaimed any aggrievement or harm as a consequence of the Kline Project.[12] Duane P. Landreth also sought further appellate review. The Appeals Court

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[12] Motion to Vacate Remand Order or, Alternatively, to Remand the Case to the Land Court for Entry of Dismissal, *Schiffenhaus v. Kline*, 79 Mass. App. Ct. 600 (2011) (2010-P-1055); Stipulation RE: Standing, *Schiffenhaus*, 79 Mass. App. Ct. 600 (2010-P-1055).

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acknowledged receipt of the motions and the stipulation. Thereafter, a docket entry was made that read in pertinent part as follows:

This case has been remanded. Papers should be filed in the proceedings below. To the extent that the motions require rulings, they are denied.

Mr. Landreth's application for further appellate review was denied by the Supreme Judicial Court. [13] Prior to the remand hearing, counsel for the original plaintiffs forwarded a letter to the Truro Zoning Board informing the Board of the settlement by the private parties and

seeking the withdrawal of the original plaintiffs' request for zoning enforcement.[14] The letter included the stipulation that the parties had previously submitted to the Appeals Court.

On December 19, 2011, the Board held a duly noticed remand hearing for the 25-27 Stephens Way property. The Board's decision read, in relevant part as follows:

[T]he Board voted that in accordance with the Massachusetts Appeals Court decision dated May 26, 2011, the Building Permits for the project at 25-27 Stephens Way (Atlas Sheet 53, Parcel 73) were issued in error. In accordance with the Judgment of the Land Court dated April 12, 2010, the Board directs the Building Inspector that the building permits challenged in this action should be revoked and that he shall take such other appropriate action that he deems necessary.[15]

It is from this decision that the current plaintiff, Duane P. Landreth as trustee of the Andrea Kline Truro Qualified Personal Residence Trust, has appealed.

#### Summary Judgment Standard

Summary judgment is appropriate when "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c). The moving party bears the burden of proving the

[13] *Schiffenhaus v. Kline*, 79 Mass. App. Ct. 600 (2011), further appellate review denied, 460 Mass. 1115 (2011).

[14] See Plaintiffs ("Pl.") Appendix ("App."), Exhibit ("Ex.") 6.

[15] Defendant's ("Def.") App., Volume ("Vol.") I, pg. 158.

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absence of controversy over material facts and that he or she deserves a judgment as a matter of law. See *Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 232 (1997). Accordingly, when acting upon motions for summary judgment, this court is to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

"The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Thus, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the . . . court demonstrates that the standard for the entry of summary judgment . . . is satisfied." *Kourouvacilis v. General Motors Corp.*, 410 Mass. at 713, quoting *Celotex Corp. v. Catrett*, 477 U.S. at 323-24. In cases where the "nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." *Id.*

A corollary to the moving party's burden is that the court is to "make all logically permissible inferences" from the facts in the non-moving party's favor. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). That said, "the right of a party facing summary decision to have the facts viewed in a favorable light . . . does not entitle that party to a favorable decision" and reliance upon mere "bald conclusions" is an inadequate means of defeating the motion. *Catlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992).

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Mass R. Civ. P. 56(c) permits the disposition of controversies if in essence there is no real dispute as to the salient facts, such that resolution of the matter depends solely upon judicial determination of a question of law. For summary judgment to enter, the undisputed facts have to be sufficient to furnish the judge with evidence upon which the key question of law might be resolved. As I find that there are no genuine issues of material fact, this matter is ripe for summary judgment.

#### Discussion

In reviewing a decision of a zoning board the court utilizes the now familiar standard to determine whether the decision was "unreasonable, whimsical, capricious or arbitrary" or "legally untenable." See *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 487 (1999). "Review of a board's decision . . . pursuant to G. L. c. 40A, § 17, involves a "peculiar" combination of de novo and deferential analyses." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, 454 Mass. 374, 381 (2009), citing *Pendergast v. Bd. of Appeals of Barnstable*, 331 Mass. 555, 558 (1954).

This court is satisfied that, given the unique facts of this matter, that the Board's decision is not legally untenable, unreasonable, whimsical, capricious, or arbitrary.

In its Memorandum in Support of Plaintiff's Motion for Summary Judgment (Plaintiff's Memorandum), the plaintiff articulates in his Statement of Issue Presented, [16] the singular issue currently before the court:

Whether the Town of Truro Zoning Board of Appeals . . . lacked jurisdiction to hold a remand hearing on December 19, 2011 and to subsequently issue a zoning decision where there was no applicant for zoning enforcement or relief before the Board and the parties who had previously sought enforcement had filed a stipulation with the Appeals Court and with the Board prior to the hearing that they were no longer aggrieved. [17]

[16] While other issues were raised in its complaint, the plaintiff has elected not to pursue them on summary judgment. The court therefore treats them as having been waived.

[17] See P. 1 of Plaintiff's Memorandum.

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And again



The sole issue here is whether the board had jurisdiction to hold a remand hearing and issue its decision of January 4, 2012. Accordingly, this is an appropriate case for summary judgment.[18]

Essentially, the plaintiff argues that the Board could not render a decision—and indeed should not have held a hearing at all on remand, because at the time of the hearing, the Schiffenhaus plaintiffs had settled their differences with the Klines and so lacked the requisite standing.

Pursuant to G.L. c. 40A, s. 17, "[a]ny person aggrieved by a decision of the board of appeals . . . may appeal to the land court department . . . ." In that event, "[t]he 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." Id. Standing is a prerequisite if one is to maintain a case in this, or any, court.

It is beyond dispute, that at the time the respective decisions were rendered by the Land Court and by the Appeals Court, each possessed the requisite subject matter jurisdiction. "A court is not ousted of jurisdiction by subsequent events -- jurisdiction once attached is not impaired by what happens later." See *O'Dea v. J.A.L. Inc.*, 30 Mass. App. Ct. 449, 453-54 (1991). "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." See *Dunn v. Clarke*, 33 U.S. (8 Pet.) 1, 3 (1834); *Lugo-Vina v. Pueblo Intl., Inc.*, 574 F.2d 41, 42 n.1 (1st Cir. 1978). Although not precisely on point, this court believes that the said principle

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[18] Id. p. 4.

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applies with equal force to the case at bar. The Appeals Court's final decision was and remains valid and binding, regardless of any settlement that may have been reached by the parties after the decision was handed down.

It is clear, moreover, given the unique circumstances that pertain herein, that the plaintiff possesses standing sufficient to vest this court with the requisite subject matter jurisdiction.

Furthermore, "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Wright Mach. Corp. v. Seaman-Andwall Corp.*, 364 Mass. 683, 688 (1974), quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). Such is the case here. Notwithstanding the remand order, the Appeals Court decision effectively brought an end to the litigation in critical respects.[19] The parties may not effectively void the decision of the Appeals Court by resolving their differences after the decision of that Court, especially so, when further appellate review had been denied.

The defendant Board argues that the issue before the court is as follows: "Can the property owner [the plaintiff] continue to violate the Town of Truro Zoning Bylaw by simply appealing his neighbors?" This court is satisfied that, in this situation, the answer is in the negative. Following the decision of the Appeals Court, the Board's earlier decision was effectively nullified. Although the Board initially deemed the new house to be an alteration, the Appeals Court remanded the case to the Board "specifically subject to [the] determination that the project does not constitute an alteration." *Schiffenhaus v. Kline*, 79 Mass. App. Ct. 600, 606 (2011) (emphasis added). Thus, the Board had incorrectly interpreted the bylaw.

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[19] By way of example, the Court finally resolved issues concerning the legality of the "alteration" and the intensification of the nonconformity.

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Following the decision of the Appeals Court, the Board had no basis to conclude that the newly constructed dwelling could, under any circumstances, constitute a legal alteration. Thus, when the Board took up the case on remand as directed by the Appeals Court, the bases on which the Building Commissioner had originally issued the building permits—first, that the construction of a new home qualified an alteration, and second, that such alteration did not increase the nature or extent of the nonconformity—had since been invalidated.

In the earlier trial court decision, it was found that while the Kline house constituted an alteration under the bylaw definition, it also increased the existing nonconformity. For its part, the Appeals Court concluded that the new Kline dwelling was not an alteration at all. Notably, the original remand order from the Land Court directing the Board to make appropriate findings, was predicated upon the notion that the construction of the Kline house was an alteration. Absent the underlying finding that the new house qualified as an alteration under the bylaw, it constituted a noncompliant structure lacking adequate frontage on Stephen's Way.

Consequently, the Board, in light of the specific order of the Appeals Court that the new dwelling was not an alteration, and the conclusion by the Land Court Judge that the building permits had been issued "in error", directed that the building permits be revoked. "On remand, a board may not ignore or disagree with the specific findings of a reviewing court after a judge has fulfilled her statutory duty to 'determine the facts.'" Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica et al., 454 Mass. 374, 389 (2009).

This court is satisfied that the action open to the Board on remand was of a highly circumscribed nature. It might reasonably be argued, in this regard, that the actions of the Board were tantamount to the "routine, nondiscretionary character that characterizes a ministerial function." See generally *Morris v. Commonwealth*, 412 Mass. 861, 865 (1992) (ministerial

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functions are those "which involve[] no exercise of discretion or judgment"); cf. *In re Northwood Properties, LLC*, 509 F.3d 15 fn. 2 (1st Cir. 2007).

The plaintiff argues that the Board should simply have refrained from any action on remand or should not have conducted a hearing at all. Such argument runs contrary to the clear language of the Appeals Court decision remanding to the board "for further proceedings consistent with this opinion, and specifically subject to our determination that the project does not constitute an alteration."

It is the view of this court that the Board had no discretion to consider the standing of the original Schiffenhaus plaintiffs on remand. The Board likewise lacked discretion to refuse to act at all, as has been argued by the plaintiff. This court believes that when undertaking, at the direction of the Appeals Court, such further proceedings, the Board was constrained to act and to act only as directed. The Board acted here in compliance and within and contemplation of the Appeals Court decision and Order. Therefore, this court sees no basis upon which to deem the Board's decision legally untenable, unreasonable, whimsical, capricious, or arbitrary.

#### Conclusion

In light of the unique circumstances pertaining herein, this court concludes that the Board was without discretion to consider the standing of the plaintiffs in the original Schiffenhaus litigation in rendering its remand decision. Therefore, summary judgment in the defendant's favor, is appropriate. Accordingly, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment is hereby ALLOWED. It is further ORDERED that the Plaintiff's Motion for Summary Judgment is hereby DENIED.

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It is further

ORDERED that the decision of the Truro Zoning Board of Appeals is hereby AFFIRMED.

Judgment to issue accordingly.  
SO ORDERED

By the court (Grossman, J.)  
/s/Grossman, J.  
Attest:

/s/Deborah J. Patterson Recorder  
January 15, 2014

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Massachusetts General Laws  
CHAPTER 40A. ZONING.

**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.

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Massachusetts General Laws  
CHAPTER 40A. ZONING.

**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.



Code of Massachusetts Regulations  
321 CMR DIVISION OF FISHERIES AND WILDLIFE / 10.00:MASSACHUSETTS ENDANGERED  
SPECIES ACT REGULATIONS

**10.23: Conservation and Management Permit**

(1) The Director may, in accordance with provisions of M.G.L. c. 131 A, s. 3, permit the Taking of a State-listed Species for conservation or management purposes provided there is a long-term Net Benefit to the conservation of the impacted species. The requirements for permitting the Take of a State-listed Species for conservation or management purposes, including a State-listed Species of Special Concern that will occur within a conservation protection zone established in a conservation plan issued by the Division pursuant to 321 CMR 10.26, are set forth in 321 CMR 10.23(2) through (5). The general permit requirements authorizing the Take of a State-listed Species of Special Concern that will occur outside of a conservation protection zone established in a conservation plan issued by the Division pursuant to 321 CMR 10.26 are set forth in 321 CMR 10.23(6). The general mitigation standards to be applied by the Director when issuing individual and general conservation and management permits are set forth in 321 CMR 10.23 (7).

(2) Except as provided in 321 CMR 10.23(6), if the Director determines that the applicant for a permit has avoided, minimized and mitigated impacts to State-listed Species consistent with the following performance standards, then the Director may issue a conservation and management permit, provided:

(a) The applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;

(b) An insignificant portion of the local population would be impacted by the Project or Activity, and;

(c) The applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species that has been approved by the Director, as provided in 321 CMR 10.23(5), and shall be carried out by the applicant.

(3) Except as provided in 321 CMR 10.23(6), if a conservation and management permit applicant is unable to demonstrate the long-term Net Benefit performance standard on the project site and the applicant has made every reasonable effort to avoid, minimize and mitigate impacts to the State-listed Species on site, then the conservation and management plan may with the approval of the Director, be designed to meet the long-term Net Benefit performance standard by providing for financial or in-kind contributions toward the development and/or the implementation of an off-site conservation recovery and protection plan for the impacted species.

(4) Except as provided in 321 CMR 10.23(6), within 30 days of the receipt of a final conservation and management plan including a review fee, the amount of which shall be determined by the commissioner of administration under the provisions of M.G.L. c. 7, s. 3B or, if a conservation and management plan has been submitted and the Project or Activity is undergoing a MEPA review, then 30 days after the issuance of a final MEPA certificate, whichever is longer, the Director shall make a determination that the submitted plan meets the performance standards and is approved, or a determination that the plan as submitted is inadequate and is denied. Failure of the Director to respond to the final conservation and management plan shall constitute approval of the submitted plan as an approved conservation and management permit. The 30 day response time may be extended for two successive 30 day periods by the Director due to circumstances beyond the control of the Division and the applicant shall be notified in writing of the extension, its period and the reason for the

