COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS. SUPERIOR COURT
CIVIL ACTION NO. 08-843

Peter K. Frei,	)	
Plaintiff	)	
v.	)	PLAINTIFF'S OPPOSITION
	)	TO DEFENDANTS'
Town Clerk-, Planning Board-,	)	MOTION TO DISMISS
and Zoning Board of Appeals	)	
of the town of Holland,	)	
Defendants	)	

Now comes the plaintiff and opposes defendant's motion to dismiss.

The defendant's envision a case that is not before this court.

The entire argument and supporting authority offered by the defendant's is based on the notion that plaintiff is seeking to appeal a decision by the Zoning Board of Appeals (ZBA) pursuant to c.40A, s.17. Plaintiff is not doing that.

The defendants' are correct; if plaintiff would seek to appeal a decision by the Zoning Board of Appeals (ZBA) plaintiff would lack standing. Plaintiff is not an abutter. The defendants' are also correct with their claim that such an appeal would be untimely.

To prevent this opposition to be verbose, plaintiff will not address any contentions the defendants advanced based on the misconceived notion with the s.17 appeal.

Appeals of decisions by the ZBA or other permit granting authorities in general concern decisions whereby the decisions exceeded the authority of the issuing Board or authority. This court does review such appeals on equitable grounds. Permit issuing authorities have the right to vary the terms of their own bylaws or ordinances. To have standing and file an appeal you need to be an abutter or official. All cases sited by the

defendants concern cases whereby the permit issuing authority or Board varied the terms of their own bylaws or ordinances, as provided pursuant M.G.L., c.40A, s.10.

The case that in fact actually is before this court.

Plaintiff filed his complaint pursuant to c.40A, s.8 primarily as a petition for an order in mandamus; see par. 5-8 and FIRST COUNT, par. 88-91 of plaintiff's complaint. What violations are actionable pursuant to section 8 is prescribed in section 7. The procedural requirements for such actions are prescribed in section 15. Section 17 does not apply to the instant action[1].

Plaintiff filed all the documents and fulfilled all other requirements pursuant to section 15, and did so in a timely fashion. Pursuant section 15, plaintiff's petition for an order to demolish said two dwellings is "deemed to be granted" due to the ZBA's failure to act and due to the fact that no party involved filed a timely appeal under section 17 as required pursuant to section 15. Section 15 provides in part:

> The decision of the board shall be made within one hundred days after the date of the filing of a[n] […] petition, […]. Failure by the board to act within said one hundred days […] shall be deemed to be the grant of the […] petition.

The legislator used the mandatory word "shall" which leaves no wiggle room and creates a nondiscretionary mandate. The term "shall," is a term "impervious to judicial discretion," *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998). The constructive grant of plaintiff's petition to the ZBA is not pegged to any conditions; it is therefore irrelevant whether plaintiff has standing. The only question proper before this court is whether plaintiff satisfied all statutory requirements in pursuing his appeal to the ZBA.

[1] With the exception that parties notified of the constructive grant of plaintiff's petition by the plaintiff had an opportunity to file a section 17 appeal to this court pursuant to section 15.

In the alternative, the plaintiff alleges that the ZBA and the Planning Board of Holland (PBH) issued special permits that are in violation not only of the local bylaws but also of M.G.L. The ZBA and PBH granted permits that not only exceed their authority; the permits are outside the law as put in effect by the state legislator. Plaintiff's complaint does not seek review by this court on equitable grounds of a decision by the ZBA and/or PBH, plaintiff's complaint is seeking a judgment by this court on legal grounds pursuant c. 40A, s.15. to restore the rule of law.

Statute of limitation on building permits in violation of any provision of Chapter 40A is six years and ten years respectively on structures in violation of any provisions of Chapter 40A pursuant to c.40A, s.7.

The convoluted language of section 7 sets time limits of six years starting at the time a building permit is issued that is in violation of any provisions of chapter 40A during which actions can be brought before this court to enforce violations. The statute of limitation to request the removal of a structure in violation of any provisions of chapter 40A is ten years. Section 7 provides in part:

> no action, […] the effect or purpose of which is to compel the removal, […] of any structure by reason of any alleged **violation of the provisions of this chapter**, […] 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.

Plaintiff claims that the special permit issued by the ZBA is in violation of section 6 and section 9. See SECOND COUNT of plaintiff's complaint, par. 92-100.

The ZBA granted Eric Johnson a special permit[2] to "replace" a non-existing structure with a new dwelling. The dwelling built by Eric Johnson was built on a landlocked parcel that had neither access to a way nor frontage on a way, and there was no sign of any building that could be replaced. As such, the dwelling built by Eric Johnson is not only in violation of the zoning by-laws of the town of Holland as the defendants would like this court to believe, the dwelling is in violation of M.G.L. Pursuant to c.40A, s.6, a pre-existing lot is grandfathered if it has at least fifty feet of frontage, s.6, 4th par., provides in part:

> 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 […] had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

The special permit to "replace" a none-existing structure is also in violation of section 9. Section 9 does not provide local authorities to issue a special permit to "replace" a none-existing structure. These violations are actionable under section 15.

Plaintiff's complaint implicates the Planning Board of Holland (PBH) in the same way. The PBH violated section 9 of chapter 40A by granting a special permit for a common driveway. The members of the PBH endorsed an approval not required (ANR) plan subsequently submitted by Eric Johnson. Eric Johnson's ANR plan was not an ANR plan.

As stated before, the Johnson parcel has no frontage at all. To circumvent this simple fact, the Johnson's put the cart before the horse. Eric Johnson submitted his special permit application[3] for a common drive way to the PBH before he submitted his ANR application. The special permit for a common drive way could only be granted after the endorsement of his ANR to provide access to already existing lots, existing lots that

[2] Eric Johnson first applied for a building permit on 11-18-2003 that was denied by the building inspector due to lack of frontage. He then filed on 11-20-2003 an application for a variance that the ZBA treated as an application for a special permit.

[3] The defendants erroneously state in their motion that the ZBA granted the special permit to allow a common drive way when in fact the PBH issued the special permit.

have the required frontage on a public way or other way pursuant to c.41, s.81L. Instead, the ANR was endorsed by the PBH after the special permit for the common driveway was granted. The common driveway itself was supposed to provide the required frontage.

A common driveway can not provide frontage, c.41, s.81L. By granting the special permit, the members of the PBH circumvented the subdivision control law.

As stated before, plaintiff‘s complaint is not an appeal pursuant to c.40A, s.17. Section 17 would call for an order by this court on equitable grounds.

Plaintiff is an aggrieved party.

It is clear why local Board’s do have discretion to vary the terms of their own bylaws and why the right to appeal such discretionary decisions pursuant to section 17 is limited to abutters. If the ZBA allows property owner XY to build a house 10 feet closer to the property line than the bylaws allow, the only party aggrieved by this decision is his neighbor on the other side of the property line.

However, if members of local Boards abandon their oath they took to follow the rule of law every citizen or resident is an aggrieved party. The defendants’ fail to appreciate the severity of plaintiff’s allegations brought forward. Plaintiff is not alleging that the defendants’ varied the terms of their own bylaws or ordinances as they are allowed to do according to c.40A, s.10, plaintiff alleges and documents attached to his complaint prove that the special permits issued are in violation of M.G.L. Not even the Justices of the SJC have the authority to vary the terms of M.G.L.

The defendants’ failed to cite any authority that would deny a petitioner “aggrieved” status in a situation whereby a petitioner brings such a grievance to the attention of this court. The SJC opined:

> The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. *Ferrante v. Board of Appeals of Northampton*, 345 Mass. 158 at 163, (1962).

Defendants' procedural contentions.

It is ludicrous to expect plaintiff to file the form "TOWN OF HOLLAND, VARIANCE/ SPECIAL PERMIT APPLICATION" as argued by the defendants[4]; a copy of said form is attached to the defendants' motion as exhibit 2. Plaintiff did not file any applications for a Variance or Special Permit. Further more, the request to pay the fee of $ 165 to file a petition under section15 is arbitrary and also not a requirement mandated or even documented in any bylaws of the town in effect at that time. Plaintiff paid the fee in a timely fashion anyway (5-29-2008) to avoid being sidetracked by this issue after he was informed of the request (5-22-2008); see exhibit 13, attached to plaintiff's complaint.

It is time for the defendants to commit to an answer so plaintiff can file his motion for judgment on the pleadings and that this court can restore the rule of law. For the above reasons, plaintiff requests that defendants' motion to dismiss be denied.

Plaintiff pro se

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[4] The defendants' refer to the form simply as "Special Procedure form."

CERTIFICATE OF SERVICE

On this 6th day of November 2008, I certify that I forwarded via first class mail, postage prepaid, one original and one copy of the forgoing document according to Superior Court Rule 9A to the moving party:

Tani E. Sapirstein, Esq.
at Sapirstein & Sapirstein, P.C.
1350 Main St., 12 Floor
SPRINGFIELD, MA 01103

I also forwarded the same way one copy to the following parties:

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November 6, 2008

Peter K. Frei