

Richard J. Gallogly, Esq.  
**Rackemann, Sawyer & Brewster**

*Richard J. Gallogly is a partner of the Boston law firm of Rackemann, Sawyer & Brewster and a member of the firm's Environmental Department. Mr. Gallogly's practice includes zoning, subdivision, and environmental permitting. This column is published quarterly and focuses on noteworthy Land Court decisions.*

### **Adjoining nonconforming lots owned in common merge even if the merger does not reduce the nonconformity**

In *Bosworth v. Whiteside*, 16 LCR 686 (2008)<sup>1</sup>, plaintiff argued that his nonconforming lot was grandfathered from current frontage requirements despite the fact that it had been owned in common with an adjoining lot at the time of the adoption of a zoning amendment that caused both lots to become nonconforming. Because merger of the two lots would not have eliminated or reduced the nonconformity, plaintiff argued that the underlying purpose of G.L. c.40A, §6 would not be satisfied by the merger. Rejecting plaintiff's argument, Judge Piper found that the language of Section 6 was clear and unambiguous. As a result, he found no basis to look behind the statutory language or otherwise review the legislative intent of the merger doctrine.

The facts of this case are relatively simple. Nancy Perry acquired Lot D in 1946. Lot D was improved by a single-family residence. Lot D did not have frontage on the street; access was available over a driveway that crossed the land of others. Pursuant to the Milton Zoning Bylaw first adopted in 1938, direct frontage on a street was not required in order for a lot to be zoning-compliant. For lots that did not front on a street, frontage could be measured along any sideline of the lot.

In May 1956, Perry acquired Locus, a vacant lot that adjoins Lot D and also did not have frontage on a street. Locus was conveyed to Perry together with an easement that provided access to the Locus from the nearest public way. Pursuant to the Milton Zoning Bylaw then in effect, Locus and Lot D each complied with all zoning requirements, including frontage as then defined, and were buildable lots. On March 9, 1957, while Locus and Lot D were owned in common, the Milton Zoning Bylaw was amended so as to require the measurement of frontage along the street line. As a result of the 1957 zoning amendment, Lot D and Locus became lawfully nonconforming. Plaintiff subsequently acquired Locus, in 2003.

The Town of Milton takes the position that the two lots merged for zoning purposes because they were owned in common when the 1957 zoning amendment was enacted. In support of its argument, the Town points to the language of Section 6. While acknowledging that the two lots were owned in common, plaintiff

argues that the intent of the Legislature in adopting Section 6 was to require merger of adjoining lots under common ownership only when the merger results in the elimination or reduction of a nonconforming aspect of the lots. In this instance, the merger of Locus and Lot D did not eliminate or decrease the nonconformity as to frontage. With or without merger, neither lot has direct frontage on a street.

In his review of the parties' Motions for Partial Summary Judgment, Judge Piper noted that where the language of a statute is clear and unambiguous, case law mandates that it should be followed. "The express prohibition on extending section six's exemption to lots 'held in common ownership with any adjoining land' at the time of the zoning law change is unambiguous, and requires the court to rule that section 6 is unavailable to plaintiff." *Id.* at 689. Judge Piper also found that merger in this instance did reduce nonconformities by limiting the opportunity to build on lots that require use of private ways to gain access.

### **Subdivision approval remanded to confirm waivers**

In *Dias v. Pleissey*, 16 LCR 694 (2008), Judge Sands was asked by a group of abutters to overturn the Freetown Planning Board's decision approving a nine-lot commercial subdivision. Plaintiffs alleged that the Board's decision is inconsistent with its own regulations. Specifically, plaintiffs argue that the Board improperly granted one waiver and failed to grant two waivers that are required under the Board's regulations. Although this decision does not break any new ground, it provides a concise summary of the law governing the grant of subdivision waivers.

In his decision, Judge Sands first noted that planning boards have broad discretion to waive the requirements of their regulations where the waiver "is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." *Id.* at 698. In order to challenge a waiver successfully, "an appellant must prove that the Board acted in a manner contrary to the public interest or the intent of the Subdivision Control Law." *Id.* While a planning board is entitled to discretion in the grant of waivers, it is an abuse of discretion to grant a waiver that is inconsistent with the intent and purpose of the Subdivision Control Law, as those terms are defined in G.L. c.41, §81-M. Citing *Meyer v. Planning Board of Westport*, 29 Mass. App. Ct. 167

1. The author's law firm represented the plaintiff in the case.

(1990), Judge Sands further noted that waivers can be either express or implied. In the case of implied waivers, a planning board must demonstrate, through conduct reflected in the record, that it purposefully consents to the waiver.

Plaintiffs claimed that the Board failed to grant two waivers that are required by the regulations. In each instance, Judge Sands found that the minutes of the Board's meetings supported the conclusion that the Board consented to the required waivers. Moreover, because plaintiffs did not demonstrate that the implied waivers were inconsistent with the intent and purpose of the Subdivision Control Law, Judge Sands ruled that the Board did not abuse its discretion in granting the waivers. Plaintiffs' remaining claim was that the Board erred in granting a waiver from certain fire-protection requirements. Because there were insufficient facts to show that the Board adequately considered fire-protection issues, Judge Sands found that the waiver did not clearly satisfy the fire-safety purposes of Section 81-M of the Subdivision Control Law. Accordingly, Judge Sands remanded the matter to the Board for further findings on the issue of the adequacy of fire protection.

The lesson for the developer of a subdivision is to make sure that the list of requested waivers is complete and that each waiver is discussed and supported by findings during the public hearing process.

#### **Thirty-day appeal period for a building permit strictly enforced**

In *North Chelmsford Water District v. Coppinger*, 16 LCR 707 (2008), Judge Grossman ruled that upon receipt of notice of the issuance of a building permit, a party wishing to appeal the permit must do so within 30 days. Judge Grossman further ruled that a subsequent request for zoning enforcement does not toll the running of the appeal period.

On October 2, 2007, the North Chelmsford Water District wrote to the Chelmsford Building Inspector to complain about the construction of a concrete pad and emulsion tank at the Chelmsford Department of Public Works facility without a building permit and in violation of the Aquifer Protection District provisions. On October 31, 2007, a building permit was issued authorizing the work, which had already been completed. On November 1, 2007, the Building Inspector notified plaintiffs that a building permit had issued. On November 16, 2007, plaintiffs submitted a written request to the Building Inspector seeking revocation of the building permit. By letter dated November 30, 2007, the Building Inspector denied the request for enforcement, stating that he would not revoke the building permit. On December 11, 2007, plaintiffs filed an appeal with the Zoning Board of Appeals. The Board upheld the determination of the Building Inspector in a decision filed with the Town Clerk on March 11, 2008.

In ruling on defendant's Motion for Summary Judgment, Judge Grossman found *Gallivan v. Zoning Board of Appeals of*

*Wellesley*, 71 Mass. App. Ct. 850 (2008), controlling. The *Gallivan* court ruled that where a plaintiff has knowledge of a building permit and has a fair opportunity to appeal from the issuance of the permit, the plaintiff may not forgo that remedy in favor of a subsequent request for enforcement and appeal therefrom. In this instance, because plaintiff learned of the building permit on November 1, 2007, an appeal had to be filed by December 1, 2007. Plaintiff's appeal was filed 10 days late, on December 11, 2007.<sup>2</sup>

#### **End run around site-plan requirement in Weston fails**

In *White v. Armour*, 16 LCR 748 (2008), Judge Long ruled that a site-plan requirement that applied to single-family residences containing more than 6,000 square feet of gross floor area could not be avoided by developing the building in phases. Judge Long further ruled that the Town of Weston was not estopped from enforcing the site-plan requirements of the Zoning Bylaw despite its prior failure to do so. Finally, Judge Long upheld the site-plan bylaw requirement as a reasonable regulation and not precluded by G.L. c.40A, §3.

The Bylaw provision at issue requires site-plan review for any single-family dwelling that exceeds the greater of 3,500 gross square feet or 10 percent of the lot area up to a maximum of 6,000 gross square feet. Unfinished attics are specifically excluded from the calculation of gross floor area. In 2007, plaintiffs built a single-family dwelling containing just under 6,000 square feet. A Certificate of Occupancy was issued in September 2007. In December 2007, plaintiffs applied for a building permit to finish off some of the unfinished attic space. This new space would bring the total gross floor area of the dwelling to over 6,000 square feet. Following issuance of a building permit, an abutter appealed to the Zoning Board of Appeals. The Zoning Board voted to revoke the building permit.

In their appeal to Land Court, plaintiffs made three arguments. First, plaintiffs argued that the Bylaw does not apply to subsequent work on a house, even if that work was intended from the beginning. Second, plaintiffs argued that the town is estopped from requiring site-plan approval by past practices of its Building Inspector. Finally, the plaintiffs maintain that under G.L. c.40A, §3 the site-plan Bylaw is invalid because it unreasonably restricts the interior area of a single-family residential building and invalidly attempts to turn an as-of-right use into a discretionary use.

Judge Long rejected each of plaintiffs' arguments. With respect to whether the Bylaw allowed one to avoid site-plan review by phasing a project, Judge Long found that the intent of the Bylaw was clear and that to rule otherwise "would make the Bylaw subject to manipulation and evasion, effectively rendering in meaningless." *Id.* at 750. Judge Long next ruled that the Town was not estopped from enforcing its Bylaw. As an initial matter, Judge Long noted that the Town has "seen the light" and no longer allows landowners to phase construction to avoid the site-plan re-

2. See also *Reznik v. Armour*, 16 LCR 744 (2008).

view requirement. Moreover, even if the Town had failed to change its policy, the policy is inconsistent with the clear intent of the Bylaw. Judge Long further noted that the principles of estoppel should be used only sparingly against municipalities where to do so would negate laws intended to protect the public. Turning to plaintiffs' final argument, Judge Long cited *81 Spooner Road LLC v. Brookline*, 452 Mass. 109 (2008), for the proposition that a municipality may validly regulate floor-to-area ratio provided the effect of such regulation on the interior area of the structure is incidental. Judge Long also ruled that the Bylaw did not turn an as-of-right use into a discretionary use because the Bylaw did not require a special permit and the authority of the Planning Board was subject to the limitations set forth in *Prudential Ins. Co. of America v. Bd. of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986).

### Jurisdictional traps for the unwary

*Lowe's Home Centers, Inc. v. Planning Board of Auburn*, 16 LCR 801 (2008), provides an interesting case study of the jurisdictional issues that occasionally face landowners and developers.

Lowe's seeks to develop three adjacent lots. Under the Auburn Zoning Bylaw, the proposed project requires from the Planning Board earth-removal permits for two of the lots and site-plan approval for all three lots. The Planning Board denied all five applications. Lowe's filed appeals of each denial with the Land Court under G.L. c.40A, §17 and G.L. c.185, §3A. Simultaneously, Lowe's filed appeals of the site-plan denials with the Zoning Board of Appeals under G.L. c.40A, §8. The Zoning Board reversed the Planning Board and approved the site-plan applications. A group of abutters and the Planning Board filed separate appeals under G.L. c.40A, §17 alleging that the Zoning Board lacked jurisdiction to review the site-plan denials.

Under the Zoning Bylaw, site-plan approval is a condition precedent to the grant of a building permit. Accordingly, an application for a building permit is a jurisdictional precedent of an appeal of the site-plan denial. Because Lowe's never filed a building-permit application, Judge Sands ruled that the Zoning Board lacked jurisdiction to hear the appeals of the site-plan denials.

The abutters and the Planning Board also argued that the Land Court did not have jurisdiction to hear Lowe's appeal of the site-plan denials under G.L. c.40A, §17. The abutters and the Planning Board argue that Section 17 confers jurisdiction to parties "aggrieved by a decision of the board of appeals or any special permit granting authority." Because the Planning Board was not acting as a special-permit granting authority when evaluating the site-plan applications, the abutters claim that the Land Court is without jurisdiction.<sup>3</sup>

Judge Sands agreed that the Land Court lacks jurisdiction to hear an appeal of the site-plan denials under G.L. c.40A, §17. Nevertheless, because Lowe's appeal was also brought under G.L. c.185, §3A, which confers jurisdiction to the Land Court for developments containing 25,000 square feet or more, the matter could properly be heard by the Land Court.

Turning to the substance of the site-plan denials, Judge Sands first confirmed that the proposed use was as-of-right. However, because the Planning Board had not reviewed the site-plan applications within the framework of an as-of-right use, Judge Sands remanded the site-plan denials back to the Planning Board. Under *Prudential Ins. Co. of America v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986), the Planning Board "must analyze the Site Plan and either approve it with reasonable conditions or determine if the problems are so intractable that approval is not possible." ■

3. Abutters and the Planning Board also argue that the proper avenue for appeal to the Land Court is an action in the nature of certiorari under G.L. c.249, §4.

Judge Sands noted that such an action cannot lie since an alternative remedy is provided by G.L. c.185, §3A.

This is the last page of the Commentary section.