Clark Brewer, Architect **30 November 2021**
AIA - NCARB - LEED AP
262 North Main Street/12 Dolan Lane, Cohasset, MA 02025
clarkbrewer@comcast.net (781) 424-9927 cell

To: S. Woodworth Chittick, Chairman; Cohasset Zoning Board of Appeals

RE: 15 Dolan Lane (lot B) – supplemental information for 7 Dec continued special permit hearing.

ADDITIONAL INFORMATION REQUEST: At the public hearing on November 2, I was asked to follow up on discussion points, including: how the proposed project is not substantially more detrimental to the neighborhood under the special permit requirements and to provide a detailed area diagram, comparing existing to proposed areas in the front setback. I also address points raised at the hearing.

SUMMARY: The existing structures are buildings, as defined by the Cohasset Zoning Bylaw. These are also legally non-conforming buildings/structures per Massachusetts General Laws. While the existing structures are not a single family residence, the Cohasset Zoning Bylaw clarifies that the proposed and existing uses are "not substantially different" uses, as they are both allowed as of right. Moving the proposed structure farther away from the property line than existing, is the opposite of an intensification, compared to adding height on the footprint of existing structures. The proposed building area in the setback and building elevation area, have also been reduced compared to existing. The proposed setback is more conforming than over half of the houses in the neighborhood. The proposed project is eligible for a determination by the Board, under MGL 40A, section 6 and Cohasset Zoning Bylaw 300-8.7B, that the proposed project is not substantially more detrimental to the neighborhood than existing.

THE LOT CONFORMS TO ZONING: The lot was recorded in 1916 and registered by land court in 1949. The lot is conforming in all respects with the Cohasset Zoning Bylaw and is protected as an approved subdivision, with adjudicated access, on a way that predates zoning. ***see MGL 41 81FF: Application of subdivision control law on registered and unregistered land; jurisdiction of land court****… (So far as land which has been registered in the land court is affected by said law, any plan of a subdivision which has been registered or confirmed by said court before February first, nineteen hundred and fifty-two,…**shall have the same validity in all respects** as if said plan had been so approved…)* The lot exceeds current zoning area requirements by 27% and does not use 8.3 single lot exemption, for non-conforming lot size.

THE EXISTING BUILDINGS/STRUCTURES ARE LEGALLY NON-CONFORMING: The lot has been improved with existing buildings/structures that are all legally non-conforming, having been in existence for over 10 years, without notice or action. ***see MGL 40A section 7 (2016). Enforcement of zoning regulations; violations; penalties; legally nonconforming structures; notice of action; jurisdiction of superior court.*** *(…If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located or, in the case of registered land, has been filed in the registry district in which the land is located within a period of 10 years from the date the structures were erected, then the structures shall be deemed, **for zoning purposes, to be legally non-conforming structures** subject to section 6 and any local ordinance or by-law relating to non-conforming structures…)*

THE PROPOSED USE IS NOT SUBSTANTIALLY DIFFERENT FROM EXISTING USE: The existing buildings/structures are not a substantially different use from the proposed single family residence and are uses allowed as of right, see zoning bylaw, table of use regulations, single family, accessory building, boathouse, shed and detached garage are all allowed uses for Residence B district. **See zoning bylaw 2.1 definitions**, *(substantially different use: Any use that is not permitted either by right or by special permit of the Zoning Board of Appeals within the district in which the lot is located).*

RECONSTRUCTION ALLOWED: The proposed project is an alteration of existing buildings/structures. **see zoning bylaw 2.1 definitions:** *(alteration: Any construction, reconstruction, or other action resulting in a change in the structural parts or height, number of stories, size, use, or location of a building or other structure).*

BUILDING DEFINITION: Whether the existing non-conforming structures are a building, accessory building or structure, is not relevant, only deciding whether the proposed is substantially more detrimental to the neighborhood. **see zoning bylaw 2.1 definitions:** *(**Building**: Any structure or portion thereof, either temporary or permanent, having a roof or other covering forming a structure (including tents or vehicles located on private property) for the shelter of persons, animals, or property of any kind. **Building, accessory:** A detached subordinate building, the use of which is customarily incidental and subordinate to that of the principal building, and which is located on the same lot as that occupied by the principal building. **Structure:** A combination of materials combined at a fixed location to give support or shelter, such as: a bin, bridge, building, dock, fence, framework, flagpole, platform, retaining wall, reviewing stand, sign, stadium, swimming pool, tank, tennis court, tent, tower, trestle, and a tunnel. **Structure Non-conforming:** A structure lawfully existing at the effective date of this bylaw or any amendment thereto which is not in conformity with all provisions of this bylaw.)*

CASE LAW CLARIFICATION AND LEGAL OPINION/INTERPRETATION: The Appeals Court has made significant and recent clarifications to MGL chapter 40A section 6, see Comstock/2020 and Bellalta/2019 decisions. See attached.

MGL 40A SECTION 6: *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.*

ZONING BYLAW 8.7B EXTENSION AND ALTERATION. *The special permit granting authority may authorize by special permit extension of nonconforming use of a building, structure, or land, or structural alteration or enlargement of a nonconforming building, provided that the special permit granting authority finds that such extension, alteration, or enlargement: (1) Shall not be substantially more detrimental than the existing nonconforming use to the neighborhood; and (2) Shall not be injurious or dangerous to the public health or hazardous because of traffic congestion or other reason.*

FRONT SETBACK ONLY: The proposed front setback is substantially less non-conforming or more conforming, than the existing buildings/structures and the proposed project conforms with all other dimensional requirements of the zoning bylaw. No new non-conformities have been created with the special permit request.

SPECIAL PERMIT MAJOR POINT SUMMARY:

1. The existing structures are buildings and conform to the zoning bylaws definition for "building."
2. The existing and proposed uses are "as of right" and are not substantially different from each other.
3. The existing structures are "legally non-conforming" buildings, consistent with MGL 40A, section 7.
4. All of the existing structures/buildings can be considered relative to the proposed building.
5. The proposed front setback is less non-conforming than over half (57%) of neighboring houses.
6. The proposed front setback is not substantially more detrimental to the neighborhood.

ZBA DETERMINATION: A special permit determination can be made under zoning bylaw 8.7B and MGL 40A, section 6. The board need only determine if the proposed project front setback is substantially more detrimental to the neighborhood and is not injurious or dangerous to the public health, under 8.7B. Supporting points are:

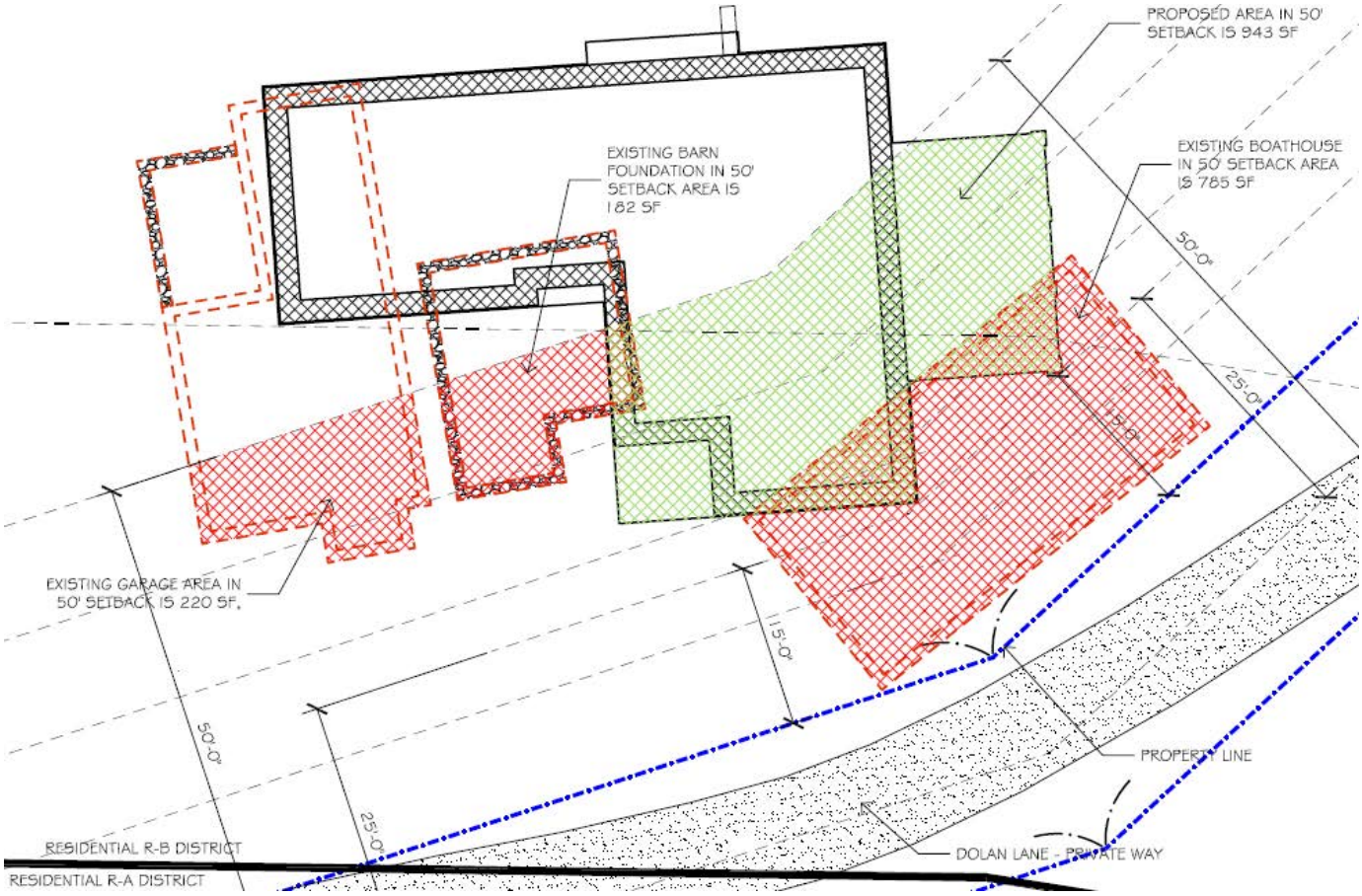
1. The project has been reviewed with neighbors for comment. See emails submitted previously.
2. The project has a relatively small RGFA of 2,700+- sf, compared to other new Cohasset houses.
3. There are 7 existing houses within 500' of the proposed project, 4 or 57%, have a front setback less than the proposed 15'-0".
4. The average density within 500' is 3.0 acres per house. The Towns' average is 2.2 acres per house.
5. The proposed project is over 350' from adjacent neighbors and isn't visible for 8+- months of the year and can't be seen from North Main Street, any time of year.
6. The proposed project is well oriented for a maximum solar gain, sustainable design and a planned "solar ready" roof.
7. The traditional exterior design and planned high quality exterior materials, will be an improvement, compared to the existing legally non-conforming structures.
8. Institute of Transportation Engineers' common trip generation rate is 1 additional peak hour trip.
9. Under 300-3.3 boundary of districts, section D, the zoning board by special permit can extend the RA boundary 200' into RB, if outside the water resources district. This would result in existing area of 826 sf in front setback, reduced by 311 sf to 515 proposed area in the setback, though the project is within the water resources district by approximately 400'.
10. The proposed front setback of 15'-0" is farther away from the property line than existing front setback, with an average building front distance of approximately 20'-0"+-.
11. The area in the 50' front setback, has been reduced by 244 sf, from 1,187 sf to 943 sf. The proposed area in the setback, has been shifted away from the property line as indicated below:
    A. 284 sf has been removed from the area 0' to 10' from the property line.
    B. 332 sf has been removed from the area 10' to 20' from the property line.
    C. 300 sf has been added to the area 20' to 30' from the property line.
    D. 68 sf has been added to the area 30' to 40' from the property line.
12. The building elevation area facing the way/street of proposed structures compared to existing structures, has been reduced by 67 sf, from 887 sf to 820 sf.

Respectfully submitted,

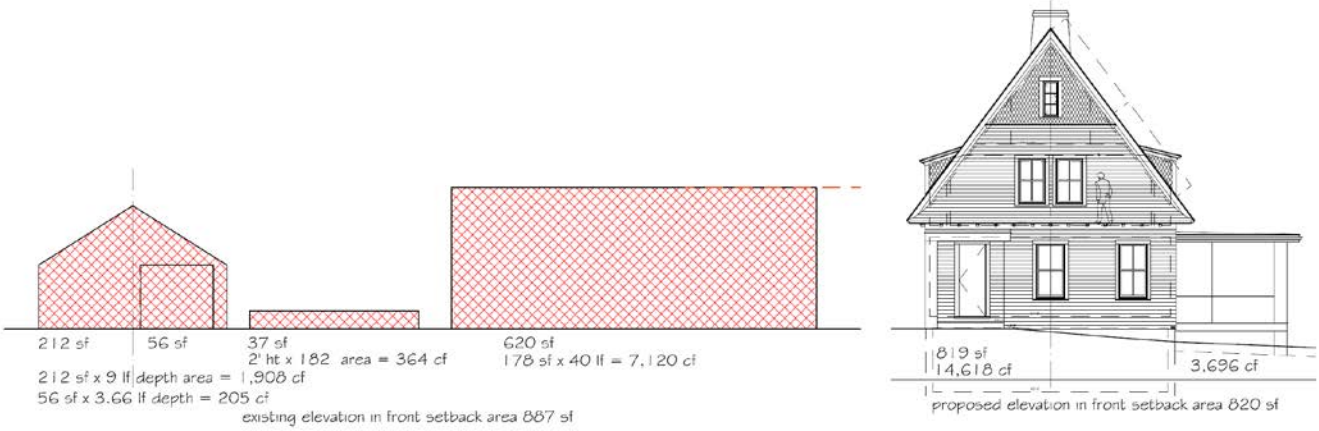
Clark H. Brewer

Attachments: *area diagrams, MGL: Chapter 40A sections 6/ 7,Chapter 41 section 81FF. Misc legal opinions and Appeals Court decisions: Comstock vs ZBA Gloucester, 2020. Bellalta vs ZBA Brookline 2019.*

PLAN AREA DIAGRAM, see #11 above



ELEVATION AREA DIAGRAM, see #12 above



MGL Chapter 40A Section 6: Existing structures, uses, or permits; certain subdivision plans; application of chapter

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 12 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.

MGL Chapter 40A Section 7: Enforcement of zoning regulations; violations; penalties; legally nonconforming structures; notice of action; 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 by-law or ordinance shall assess a penalty of more than $300 per violation; provided, however, that nothing in this section shall be construed to prohibit local zoning by-laws or ordinances from providing that each day the violation continues shall constitute a separate offense. No action, suit or proceeding shall be maintained in a court, nor an administrative action or other action taken to recover a fine or damages or to compel the removal, alteration or relocation of a structure or part of a structure because of a violation of a zoning by-law or ordinance except in accordance with this section and sections 8 and 17. If real property has been improved and used in accordance with the terms of the original building permit, no criminal or civil action intended to compel the abandonment, limitation or modification of the use allowed by the permit or the removal, alteration or relocation of a structure erected in reliance upon the permit by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 6 years of the commencement of the alleged violation. No criminal or civil action intended to compel the removal, alteration, or relocation of a structure by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter or the conditions of a variance or special permit shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or

proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 10 years of the commencement of the alleged violation.

If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located or, in the case of registered land, has been filed in the registry district in which the land is located within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures.

Notice of an action, suit or proceeding shall include the name of not less than 1 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 and the land 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.

MGL Chapter 41, Section 81FF: Application of subdivision control law on registered and unregistered land; jurisdiction of land court

Section 81FF. So far as land which has not been registered in the land court is affected by the subdivision control law, recording of the plan of a subdivision in the registry of deeds before the subdivision control law was in effect in the city or town in which the subdivision was located shall not exempt the land within such subdivision from the operation of said law except with respect to lots which had been sold and were held in ownership separate from that of the remainder of the subdivision when said law went into effect in such city or town, and to rights of way and other easements appurtenant to such lots; and plans of subdivisions which were recorded in the registry of deeds and subdivisions made without the recording of a plan after said law had gone into effect in such city or town and before February first, nineteen hundred and fifty-two, without receiving the approval of the planning board of such city or town, shall have the same validity and effect as if the subdivision control law became effective in such city or town on February first, nineteen hundred and fifty-two, as above provided.

So far as land which has been registered in the land court is affected by said law, any plan of a subdivision which has been registered or confirmed by said court before February first, nineteen hundred and fifty-two, whether the subdivision control law was in effect in the city or town in which the subdivision was located or not, and whether the plan of the subdivision was approved by the planning board or not, shall have the same validity in all respects as if said plan had been so approved, but the land court shall not register or confirm a plan of a subdivision in a city or town in which the subdivision control law is in effect which has been filed on or after February first, nineteen hundred and fifty-two, unless it has first verified the fact that the plan filed with it has been approved by the planning board, or would otherwise be entitled if it had related to unregistered land, to be recorded in the registry of deeds. The land court shall have jurisdiction in so far as affects land registered or to be registered or confirmed under chapter one hundred and eighty-five, to determine whether the subdivision control law has been complied with, and shall verify before registering or confirming any plan of land in any city or town in which the subdivision control law is in effect, that the plan filed with it is entitled to be recorded in accordance with the subdivision control law, and every plan heretofore or hereafter registered or confirmed by the land court pursuant to said chapter one hundred and eighty-five shall for the purposes of the subdivision control law be deemed to be, and shall be invested with all the rights and privileges of, a plan approved pursuant to said law. In case of conditions imposed pursuant to section eighty-one R or eighty-one U of said law, and set forth or referred to by endorsement on the plan filed with it, the land court shall cause said conditions to be set forth or referred to on the plan prepared by it therefrom for registration or confirmation, or in the decree of registration or confirmation or certificate of title issued for the land shown thereon.

Legal opinions of recent case law

Appeals Court Takes The Mystery Out Of Altering One - and Two-Family Preexisting Nonconforming Residences: No More "Grandfathering" Featured

Written by Michael J. O'Neill, Esq. McGregore & Legere, PC February 13, 2021

The decision of the Appeals Court in Henry W. Comstock, Jr., Trustee and another v. Zoning Board of Appeals of Gloucester and others, authored by Justice James Milkey, illustrates the strong protections afforded by G.L. c. 40 A, section 6 to owners of single- or two-family preexisting nonconforming residences who want to renovate their residences. They are protected by significant obstacles to neighbor opponents of such projects on account of minor issues.

The decision translates the arcane Section 6 in a way that any lawyer, land use planner, and even lay person can understand. It is a must-read for any attorney or client dealing with reconstruction or renovation of a preexisting nonconforming one- or two-family residence.

In *Comstock*, the Appeals Court addresses an application by the owner of a preexisting nonconforming residence to tear down a dilapidated free-standing garage and replace it with a new garage on the same footprint, three feet higher than the existing garage.

The Superior Court, relying on *Deadrick v. Zoning Board of Appeals of Chatham*, 85 Mass. App. Ct. 539 (2014), had issued summary judgment in favor of a neighbor opposing the project, on the grounds that the new garage created a new non-conformity because of its height and required a variance, which the owner did not have. The Appeals Court reversed, clarifying its decision in *Deadrick* and holding that the project was permitted by language in the local zoning bylaw and did not require a variance.

The decision in *Comstock* explains that, generally, preexisting nonconforming structures lose the protection provided by the statute when the structures are extended or structural changes are made to them. If the structure is a single- or two-family residence, though, the statute provides an additional layer of protection. Such structures can be modified, extended, or reconstructed as of right, so long as the extended or altered structure does not increase its nonconforming nature.

Where the changes do increase the nonconforming nature of a protected residence, however, they can still be undertaken by special permit so long as the permit granting authority finds that the proposed modification would not be substantially more detrimental to the neighborhood than is the existing nonconformity.

The protection afforded to preexisting nonconforming one- and two-family residences does have some important limits. Where the alteration or reconstruction would add an additional nonconformity (not just extension of an existing nonconformity), the owner would need a variance to allow the additional nonconformity.

In addition, according to the ruling, “Municipalities are free to adopt more forgiving rights so long as they do so explicitly.” Gloucester had adopted a zoning ordinance that affords to accessory structures the same extra level of protection afforded to single- and two-family residences. The Appeals Court

thus concluded that the freestanding garage was entitled to the same protection afforded to single and two-family residences under G. L. c. 40A, sec. 6 (often referred to as the "second except clause").

The Appeals Court in *Comstock* zeroes in on its reasoning in *Deadrick* to explain why the result in that case was necessary to prevent a gross disparity and why it is not applicable to the facts in *Comstock*. In *Deadrick* the Court held that a contrary ruling would create a gross disparity between how owners of conforming structures and nonconforming structures would be treated: an owner of an existing conforming structure could not build an addition that created a dimensional nonconformity without a variance, while an owner of a preexisting nonconforming structure could do so based merely on a finding that the change would not cause substantial detriment to the neighborhood.

Besides, *Deadrick* did not issue a final resolution of the matter but rather remanded the case to the local zoning board to determine whether the proposed new home was exempt from the height restriction and a variance therefore would not be needed.

The Gloucester zoning ordinance here included a provision that allowed owners to build accessory structures up to twelve feet high and to exceed that height through a special permit process open to owners of conforming and nonconforming structures. Owners who proceeded in this manner would not be creating a new conformity, but would be proceeding in full compliance with the provisions of the ordinance governing height.

The owners in *Comstock* had obtained a special permit from the zoning board of appeals determining that the new garage would not be more detrimental to the neighborhood. Therefore, the Appeals Court held, the owner's project to build a new garage was in full compliance with the zoning ordinance and did not need a variance.

The *Comstock* decision in footnote 1 states that it does not reach the question whether the Legislature intended that the extensive statutory protection afforded to one-and two-family residences also applies to accessory structures, and cited *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357, 362-363 (2008) as a case which touched on that issue. Stay tuned, therefore, as to garages and barns generally.

Bjorklund did far more than just touch on that issue. That decision by Justice John Greaney made a pronouncement as a matter of law that certain specified renovations to one- and two-family preexisting nonconforming residences did not increase their nonconforming nature: "Because of their small-scale nature, [those renovations] could not reasonably be found to increase the nonconforming nature of a structure, and we conclude, as a matter of law, that they would not constitute intensifications."

Concerns over the making of small-scale alterations, extensions, or structural changes to a preexisting house are illusory. Examples of such improvements could include the addition of a dormer; the addition, or enclosure, of a porch or sunroom; the addition of a one-story garage for no more than two motor vehicles; the conversion of a one-story garage for one motor vehicle to a one-story garage for two motor vehicles; and the addition of small-scale, proportional storage structures, such as sheds used to store gardening and lawn equipment, or sheds used to house swimming pool heaters and equipment." id., at 362.

Bjorklund is another must-read for any attorney dealing with issues of reconstruction or renovation of a one or two-family preexisting nonconforming residence.

The Appeals Court decision in *Comstock* adds a significant historical note, indeed an important advance in linguistic reform, separate from zoning. The Court notes in footnote 11 that the term used to refer to the protection afforded by G.L. c. 40A, sec. 6 to all structures that predate applicable zoning restrictions is commonly known in the case law and otherwise as "grandfathering." For example, see *Burke v. Zoning Board of Appeals of Harwich*, 38 Mass. App. Ct. 957, 958 (1995).

The Court describes the origins of the term "grandfather clause," which originally referred to provisions adopted by some states after the Civil War to disenfranchise African-American voters. The Court declines to use the term "grandfathering" because of its racist origins.

The open question now the subject of list serves and online forums is what term or terms will now be used in substitution for a structure or use that is "grandfathered." Candidates might include: "prior nonconforming structure/use," "protected, preexisting nonconforming structure/use," "lawfully preexisting nonconforming structure/use," or "prior lawful nonconforming structure/use." Elsewhere in the country, it is a corollary of "vested rights." We are accepting nominations!

1Appeals Court No. 19-P-1163

No Variance Necessary to Increase Preexisting Nonconformity; c. 40A § 6 Finding Sufficient Land use practitioners in Massachusetts are well aware of the "difficult and infelicitous" language of the first two sentences of G. L. c. 40A, § 6 concerning single and two-family dwellings. Feb 20, 2020 From Johnson and Borenstein LLC website:

The statute reads: 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.

The courts have repeatedly grappled with this statute, with the Supreme Judicial Court previously determining that it allows extensions and changes to preexisting conforming homes provided that "(1) the extensions or changes themselves comply with the ordinance or by-law, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures." *Rockwood v. Snow Inn Corp.*, 409 Mass. 361, 364 (1991). A question arises when the proposed change will alter or extend the non-conformity; is the existing structure entitled to protection or is a variance required from the dimensional requirements of the bylaw that the structure plus addition will not comply with?

Recently the SJC again reviewed the above language in *Bellalta v. Zoning Bd. of Appeals of Brookline*, No. SJC-12516, at *2-3 (Feb. 8, 2019) and concluded that:

"the statute requires an owner of a single- or two-family residential building with a preexisting nonconformity, who proposes a modification that is found to increase the nature of the nonconforming structure, to obtain a finding under G. L. c. 40A, § 6, that 'such change, extension or alteration shall not be substantially more detrimental that the existing nonconforming use to the neighborhood.' The statute does not require the homeowner also to obtain a variance in such circumstances."
In this case an abutter appealed a decision of the Brookline Zoning Board which granted a special permit to homeowners to allow modification of the roof of their two-family home and to add a dormer, even though doing so would increase the preexisting nonconforming floor area ratio. The Board found increasing the FAR would not be substantially more detrimental to the neighborhood than the existing home. The abutters challenged the grant of the special permit, alleging that the homeowners needed to obtain a variance because the increase in the FAR meant that the home would not comply with the zoning bylaw. The Land Court upheld the Board's issuance of a special permit, and on further appeal SJC affirmed.

The SJC's analysis focused on the "second 'except' clause" of c. 40A § 6, which affords additional protections to owners of single- and two-family preexisting nonconforming structures who seek to intensify those nonconformities. Recognizing the long-standing principle that elimination of nonconformities is desirable, the SJC also noted that construing the statute to require a variance in addition to a finding of no substantial detriment would "render it nearly impossible for the homeowners to renovate, modernize, or make any substantial improvements to an older home, particularly if those improvements would increase the nonconforming nature of the structure," and that this could "make it economically infeasible to modify a nonconforming home in any but the most minimal ways, could curtail the ability to sell such a house, and, accordingly, could result in a reduction in the amount of available affordable housing, as well as potentially reducing the town's population and the municipal tax base." *Bellalta* , at *19-20.

This eminently practical decision is based on solid statutory analysis and is consistent with a long line of case law in Massachusetts, case law which has not been disturbed by the Legislature as it has amended (or declined to amend) the statute over the years. This decision should provide some measure of relief and certainty to homeowners that they may seek to expand a preexisting nonconforming structure that will not comply with the local bylaw without the requirement to obtain a variance, which can be a lengthy, expensive, and uncertain proposition.

Bellalta: A Flowchart for the Owner of a Nonconforming Home

Posted: August 15, 2019, by Kate M. Carter

Case Focus
In Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass. 372 (2019), the Supreme Judicial Court reaffirmed the process by which a preexisting, non-conforming single- or two-family structure can be altered or expanded, clarifying the framework established by courts wrestling with the "difficult and infelicitous" language of G.L. c. 40A, Section 6 for nearly four decades. Bellalta confirmed that changes to such structures can be made by special permit without the additional need for a variance.

Section 6 regulates the application of local zoning to preexisting, nonconforming structures and uses. Its language reflects a tension between competing philosophies governing the use and development of Massachusetts land. On the one hand zoning is interested in the elimination of nonconformities. But zoning also reflects the notion that "rights once acquired by existing use or construction of buildings in general ought not to be interfered with." Opinion of the Justices, 234 Mass. 597, 606 (1920). Thus, under Section 6, a zoning ordinance or by-law 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 … to any reconstruction, extension or structural change of such structure … 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 … that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood. (Emphasis added). In two sentences, the statute (i) protects previously compliant structures and uses from the effect of subsequently enacted zoning bylaws, (ii) preserves the need to comply with zoning if one wants to change or alter a nonconforming structure or use, and (iii) creates a separate exemption for certain changes or alterations to single- and two-family structures.
In Bellalta, the SJC examined the extent of the protections afforded by the "second except clause" to owners of single- and two-family preexisting, nonconforming structures.

Underlying Facts and Procedural Posture

Defendant homeowners owned a unit in a two-unit Brookline condominium. They proposed adding a dormer to add 677 square feet of living space. The building did not comply with the floor area ratio ("FAR") – the ratio of building gross floor area to lot area – for the zoning district in which it was located. The FAR for the zoning district was 1.0. The FAR for the defendants' building was 1.14, which would increase to 1.38 with the new dormer.

After being denied a building permit, the defendants applied for, and were granted, a "Section 6 finding" by the Brookline Zoning Board of Appeal. The Board found that the proposed addition and resulting increase in FAR would not be substantially more detrimental to the neighborhood than the nonconforming structure was prior to renovation. Plaintiff abutters appealed, arguing that because Brookline's bylaw expressly prohibited FAR increases of more than 25%, defendants also needed to apply for a variance – a more difficult and narrowly-available type of zoning relief.

The "Interpretative Framework"

Beginning with Fitzsimmonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985), and culminating with Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357 (2008), the courts have established a three-step framework to analyze a homeowner's request to alter, reconstruct, extend, or change a preexisting, nonconforming, single- or two-family home. First, how does the structure violate current zoning? Second, does the proposed change intensify that non-conformity? If the answer to question two is "no", the proposed change is allowed by right, without the need for relief. Only if the answer to question two is "yes" must a homeowner apply for a finding by the local board that the proposed change will "not be substantially more detrimental than the existing nonconforming use to the neighborhood." Bellalta, 481 Mass. at 380-81.[1]

In Bellalta, the defendants argued that the new dormer would make the building more consistent with the architecture and dimensions of other buildings on the street. Moreover, the proposed addition was modest – it only increased the habitable space by 675 square feet.[2] Thus, they argued that the new dormer would not be substantially more detrimental to the neighborhood than the existing,

nonconforming building. The Board agreed, issued the Section 6 finding, and allowed the project to proceed without a variance. Bellalta, 481 Mass. at 383; see also Gale v. Zoning Board of Appeals of Gloucester, 80 Mass. App. Ct. 331 (2011).
In upholding the Board's decision not to require a variance, the Bellalta court explained that since the "second except" clause was adopted in 1975, the Legislature has amended Section 6 on multiple occasions, and never clarified the language – thereby ratifying the courts' interpretative framework. Bellalta, 481 Mass. at 383. To require the defendants to also apply for a variance would allow the Brookline bylaw to eliminate the special protections otherwise afforded preexisting, non-conforming single- or two-family structures by Section 6. Id. at 386 – 87.

Bellalta's Significance Amidst a Growing Housing Crisis
Underlying the language of Section 6, the resulting interpretative framework, and the Bellalta decision is a value judgment that *extra* effort should be taken to protect a particular segment of housing stock: single- and two-family homes. The protections afforded preexisting, nonconforming single- and two-family homes would be illusory if owners were obligated to undertake the burden of applying for a Section 6 finding *and* a variance. *Bellalta,* 481 Mass. at 383. The time and costs associated with such a process might mean that homeowners would forego the renovation and maintenance of older, "starter" homes leaving them to be torn down and replaced with new, more expensive housing. *Id.* at 384. *Bellalta's* re-affirmation of the "special protections" afforded to single- and two-family homes is particularly important amid today's housing crisis. Section 6 provides a valuable counterbalance to municipalities seeking to stifle housing production by increasing minimum lot sizes or other dimensional requirements. *Bellalta,* 481 Mass. at 384 – 85. The Section 6 process allows homeowners to make changes to accommodate evolving housing needs, without adding additional demand to an undersupplied housing market. By affirming the streamlined process by which homeowners of preexisting, nonconforming single- and two-family homes can make changes to their homes, the SJC in *Bellalta*, reaffirmed the Legislature's decision to protect single- and two-family homes. Section 6's protections will continue to play an important part in helping to address Massachusetts' growing need for more habitable living space within an increasingly expensive and diminishing pool of available land.

Kate Moran Carter is a shareholder at Dain | Torpy. She represents clients in disputes concerning the ownership, operation, development, and use of real estate.

[1] If the proposed change will create *new* nonconformities, a variance will be required.
[2] In *Bjorklund,* the SJC sanctioned certain types of improvements, without the need for a Section 6 finding, because the small-scale nature of such improvements "could not reasonably be found to increase the nonconforming nature of the structure." 450 Mass. at 362 – 63. Although the *Bellalta* court implied that the defendants' proposed dormer was the type of small-scale improvement, that would not require a Section 6 finding, the defendants had conceded that the proposed increase in FAR from 1.4 to 1.38 would increase the structure's nonconforming nature. *Bellalta,* 481 Mass. at 381 – 82

SJC Holds that Grandfathered Structures May Increase Nonconformity with Only a Finding

By Kimberly Bielan, Moriarity Troyer and Malloy llc Feb 26, 2018

Earlier this month, the Massachusetts Supreme Judicial Court ("SJC") issued a decision holding that, pursuant to the statute governing modification of grandfathered (i.e., preexisting nonconforming) structures, the dimensional nonconformities of one- and two-family residential structures may be increased upon a finding that there will be no substantial detriment to the

neighborhood. The decision is significant because the SJC explicitly determined that such structures need not obtain a variance, notwithstanding the fact that a nonconformity is being increased – that is, rendered more noncompliant with the existing zoning by-laws. The case hinges on the SJC's interpretation of what it describes to be the "difficult and infelicitous" language contained in the first paragraph of G.L. c. 40A, § 6, which is the statute governing preexisting nonconforming structures and uses in the Commonwealth.

The decision is significant because the SJC explicitly determined that such structures need not obtain a variance, notwithstanding the fact that a nonconformity is being increased – that is, rendered more noncompliant with the existing zoning by-laws.

In *Bellalta v. Zoning Board of Appeals of Brookline*, 481 Mass. 372 (2019), homeowners in Brookline sought to modify the roof of their two-family house to add a dormer. The home was on an undersized lot, and the sole preexisting dimensional nonconformity of the structure was its floor area ratio (FAR). While the zoning by-laws required an FAR no greater than 1.0, the structure's existing FAR was 1.14; the proposed addition, though modest in nature, would further increase the nonconformity to 1.38. The homeowners applied to the Zoning Board of Appeals of Brookline ("Board") for a special permit (which incorporated the finding of no substantial detriment under the local zoning by-laws), which was granted. Certain abutters to the property appealed to the Land Court pursuant to G.L. c. 40A, § 17, arguing that the homeowners were also required to obtain a variance because the modification would increase the nonconforming nature of the structure. The Land Court rejected the argument and affirmed the Board's decision granting the special permit. On appeal, the SJC granted the petition for direct appellate review.

In its decision, the Court held that "the statute requires an owner of a single- or two-family residential building with a preexisting nonconformity, who proposes a modification that is found to increase the nature of the nonconforming structure, to obtain a finding under G.L. c. 40A, § 6, that 'such change, extension or alteration shall not be substantially more detrimental tha[n] the existing nonconforming use to the neighborhood.' The statute does not require the homeowner also to obtain a variance in such circumstances." In reaching such conclusion, the SJC first analyzed the statutory framework (noting, again, that the "language of G.L. c. 40A, § 6, has been recognized as particularly abstruse") and legislative history, recognizing that the Legislature intended to afford greater protections to one- and two-family residential structures under the Zoning Act.

Accordingly, the Court endorsed the framework previously set forth by the Appeals Court in *Willard v. Bd. of Appeals of Orleans*, 25 Mass. App. Ct. 15 (1987). Under this approach, there must be an initial determination by the permitting authority to "identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in new ones." If the answer to this question is "no", then the applicant is entitled to a permit to proceed immediately with the proposed alteration. If, however, the answer to the question is "yes", then the homeowner must obtain a finding (often, but not always, incorporated into a special permit requirement in municipal zoning by-laws) that the proposed modification will not be "substantially more detrimental to the neighborhood." As the SJC stated, it is "[o]nly if a modification, extension, or reconstruction of a single- or two-family house would 'increase the nonconforming nature of said structure' [that it must] 'be submitted … for a determination by the board … .'" There is no requirement that a homeowner obtain a variance when increasing a preexisting dimensional nonconformity.

The practical implications of the *Bellalta* decision are, in some respects, confounding, and an example is likely helpful. Suppose a town's zoning by-laws require a ten (10') foot side yard setback, and there is an existing structure that is eight (8') feet from its side property line at the time the by-laws become effective. Such structure would be considered lawfully preexisting nonconforming, and the homeowner would be able to maintain the structure in its present location. Under the *Bellalta* decision, if the homeowner proposed to modify this structure, he or she could further expand into the side yard setback; that is, he or she could further encroach into the side yard and, for example, build five (5') feet from the property line upon receipt of a finding that such construction would not be substantially more detrimental to the neighborhood. At the same time, a homeowner on a neighboring property, whose structure complies with the ten (10') foot side yard setback, would not be able to expand further into the side yard. Instead, because the second homeowner's structure is compliant with the zoning by-laws as adopted, a variance would be required. The difference is substantial, as the showing for receipt of a variance is much more rigorous than for a finding.

While the *Bellalta* decision definitively answers the relief necessary for a one- or two-family preexisting nonconforming structure under G.L. c. 40A, § 6, it may incite the Legislature to finally address the difficult language contained in the first paragraph of the statute. At the same time, there are certain limitations to the decision. The holding is applicable only to single- and two-family dwellings and is inapplicable to commercial structures. In addition, the Court declined to address the issue of what relief would be necessary when there is the creation (rather than a modification, extension, or reconstruction) of a new nonconformity.

[1] As the SJC explained in Bellalta, a "preexisting nonconformity is a use or structure that lawfully existed prior to the enactment of a zoning restriction that otherwise would prohibit the use or structure." Effective November 2016, structures that have been constructed (even without benefit of a building permit or otherwise in noncompliance with applicable zoning by-laws) and not subject to an enforcement action for a period of ten (10) or more years will also be treated as preexisting nonconforming structures, entitled to the protections of G.L. c. 40A, § 6. Please click this link for more information.

HENRY W. COMSTOCK, JR., trustee, [Note 1] & another [Note 2] vs. ZONING BOARD OF APPEALS OF GLOUCESTER & others. [Note 3]

98 Mass. App. Ct. 168

May 6, 2020 - August 3, 2020

Court Below: Superior Court, Essex County

Present: Vuono, Milkey, & Desmond, JJ.

Zoning, Nonconforming use or structure, Special permit, Variance, Height restriction, Accessory building or use. Practice, Civil, Zoning appeal. Municipal Corporations, By-laws and ordinances.

In a civil action brought by the plaintiff abutter challenging the approval by a city zoning board of appeals (board) of the defendant landowners' proposal to replace a detached garage on their property within the same footprint, in which approval the board issued special permits to modify the preexisting nonconforming structure (i.e., the defendants' lot was undersized and the existing garage was located within the side-yard and front-yard setbacks) and to allow the garage to exceed the height limitation applicable to accessory buildings that do not comply with setback requirements of the principal structure, as well as approving (although questioning the necessity of) variances from the setback requirements, the Superior Court judge erred in denying the defendants' motion for summary judgment and granting summary judgment in favor of the plaintiff, where the judge erred in concluding that the defendants needed a variance for the garage to exceed the height requirement, in that the board determined that the defendants were entitled to an increased height under the separate special permit process devoted to that question [172-176], and where no variances from the setback requirements were needed and the plaintiffs made no claim that the special permits were invalid. [176-178]

CIVIL ACTION commenced in the Superior Court Department on June 29, 2017.

The case was heard by Janice W. Howe, J., on a motion for summary judgment.

Mark L. Nestor for Robert Irwin & another.

Liam T. O'Connell for the plaintiffs.

Krisna M. Basu, Assistant General Counsel, for zoning board of appeals of Gloucester.

MILKEY, J. This is a zoning dispute between the owners [Note 4] of adjacent waterfront parcels in Gloucester. On the parcel owned by the defendants Robert and Pamela Irwin, there is a residence and a detached, one-car garage. The garage is dilapidated, and in 2017, the Irwins sought local approval to tear it down and to replace it with a new garage on the same footprint. The plaintiff Walter Donovan -- whose property directly abuts the Irwins -- spoke in support of the Irwins' project at the hearing before the defendant zoning board of appeals (ZBA). On May 11, 2017, the ZBA unanimously approved the project, issuing two special permits and two variances.

Notwithstanding his initial support for the replacement of the garage, Donovan filed an action pursuant to G. L. c. 40A, § 17, challenging the ZBA's approval. A Superior Court judge granted summary judgment in Donovan's favor on the ground that the Irwins needed -- in addition to the four approvals they had received -- a variance with respect to the height of the proposed garage. In reaching her conclusion, the judge relied on our decision in Deadrick v. Zoning Bd. of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014). We reverse and take this opportunity to clarify the meaning of Deadrick. [Note 5]

Background. 1. Proposed garage. As noted, the proposed garage would have the same footprint as the existing one. That footprint is a thirteen by twenty-three foot rectangle, with the short sides lying parallel to the street and the long sides

lying parallel to the boundary between the parties' properties. The side of the garage facing Donovan's property lies approximately five feet from the property line, well short of the ten-foot side-yard setback required by the applicable zoning ordinance.

The proposed garage differs from the existing one principally with respect to the configuration of its roof. The roof of the existing garage is unusual in that its ridgeline is parallel to the short sides of the rectangle. The Irwins propose to reorient the ridgeline so that it runs parallel to the long side of the rectangle (and thus parallel to the boundary between the lots). In this manner, the gable of the garage would now face the street.

The overall height of the proposed garage would be about three feet taller than the existing garage, rising to about fifteen feet overall. [Note 6] According to the Irwins, the added height is necessary to accommodate a standard-sized garage door, a contention Donovan has not challenged. Other details about the roof are reserved for later discussion.

2. Permitting process. The existing garage is considered a preexisting nonconforming structure for two reasons: the lot is undersized and the garage lies closer to the lot boundaries than allowed under current side-yard and front-yard setback requirements. The Irwins sought two special permits to allow their proposal to go forward: one seeking to modify a preexisting nonconforming structure, and the other to allow a building that exceeded the twelve-foot height limitation applicable to accessory buildings that do not comply with the setback requirements of the principal building. [Note 7] The ZBA also treated the Irwins' application as requesting variances from applicable setback requirements, although the record is not clear that the Irwins actually had requested them. [Note 8]

No one opposed the Irwins' project at the scheduled public hearing. Three neighbors, including Donovan, spoke in favor of it. The ZBA concluded that the proposed garage would result in a significant improvement, finding as follows: the existing garage "can only be characterized as an eyesore on this otherwise well-maintained residential street," "the rebuilt garage will be thoroughly in keeping with neighborhood character, appearance and structural density . . . [and] rotating the ridgeline of the garage so that its gabled end faces the street will vastly improve its appearance." With regard to the increase in the overall height of the garage, the ZBA found that in light of the sloping nature of the site, the increased height was "necessary to allow for a normal eight foot high garage door and sufficient pitch of the roof." The ZBA also found no adverse impacts from the increased height, specifically finding "that the structure will not obstruct views or overshadow other homes . . . [or] compromise utility lines or otherwise result in adverse neighborhood impacts." On this basis, the ZBA issued both requested special permits.

The ZBA also approved variances from the otherwise applicable side-yard and front-yard setback requirements, reasoning as follows:

"The board finds that literal enforcement of the applicable provisions of the zoning ordinance would involve substantial hardship to petitioners, in that their present garage is clearly in need of replacement and the steep sloping contours of their undersized lot dictate that the new garage be sited precisely where the old one was, at the high end of the Site, close to the street. . . . The board also finds that the topographic constraints presented by this case are unique to petitioners' property and not generally applicable to their zoning district. Finally, the board finds that petitioner[s'] new garage will be consistent with neighborhood appearance and structural density."

At the same time that it allowed these variances, the ZBA questioned whether they even were necessary, commenting "that the new garage will not intrude any further into side and right front yard setbacks than the garage that it is replacing; indeed, there is some question under Deadrick whether a variance is even required."

The ZBA noted that although Donovan spoke in support of the Irwins' proposal, he did express "a concern whether the new orientation of the garage might create flooding onto his property." [Note 9] As the ZBA explained, it "dealt with this issue by requiring that a drainage plan be prepared and submitted to the Engineering Department for approval." Why this resolution did not satisfy Donovan's stated drainage concerns is not entirely clear on the limited record before us. [Note 10] In addition, tension arose over the state of the retaining wall that separated the two properties and the exact location of the boundary line. In any event, the relationship between the neighbors deteriorated, and Donovan commenced this action.

3. Trial court ruling. The Irwins moved for summary judgment. With respect to the two special permits, they argued that in light of the undisputed underlying facts, the wording of the applicable ordinance provisions, and the deference owed to

the ZBA, no serious challenge could be mounted to the ZBA's decision to issue the special permits. With respect to the variances, they argued that no variances in fact were required, so that the judge need not consider the validity of the ZBA's issuance of them. After the hearing, the judge not only denied the Irwins' motion, but also granted summary judgment in favor of Donovan. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Relying on Deadrick, the judge ruled that the Irwins needed an additional variance -- not merely a special permit -- to exceed the applicable height restriction. The judge did not reach the dispute over whether variances were needed with regard to the setback issues.

Discussion. 1. Protection offered by statute and ordinance. Section 6 of G. L. c. 40A provides a certain level of protection to all structures that predate applicable zoning restrictions. [Note 11] See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 376-377 (2019) (explaining structure of G. L. c. 40A, § 6). Generally speaking, preexisting nonconforming structures lose the protection provided by the statute when the structures are extended or structural changes are made to them. Rockwood v. Snow Inn Corp., 409 Mass. 361, 364 (1991). However, if the structure in question is a single- or two-family residence, the statute provides an additional layer of protection. Bellalta, supra. Such structures can be modified, extended, or reconstructed as of right "so long as the 'extended or altered' structure 'does not increase' its 'nonconforming nature.'" Id. at 377, quoting G. L. c. 40A, § 6. Moreover, even where the changes do increase the nonconforming nature of a protected residence, they still can be undertaken by special permit so long as the permit granting authority finds "that the proposed modification would not be 'substantially more detrimental' to the neighborhood than is the existing nonconformity." Bellalta, supra at 377-378. See Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 336-338 (2011). [Note 12]

The protection that the statute offers to preexisting nonconforming one- and two-family residences does have limits. Where the modification or reconstruction would add an additional nonconformity to existing ones, then it is not sufficient for the owner to obtain a special permit based on a finding that the change will not be substantially more detrimental to the neighborhood. Deadrick, 85 Mass. App. Ct. at 547-553. Rather, the owner would need to obtain a variance to allow the additional nonconformity. Id.

The Irwins' garage is not itself a single- or two-family residence, but instead is a freestanding structure used for an accessory purpose. Donovan argues that it therefore does not enjoy the extra layer of protection that the statute provides to single- and two-family residences. We need not resolve that issue, however, because municipalities are free to adopt more forgiving rights so long as they do so explicitly. See Marinelli v. Board of Appeals of Stoughton, 65 Mass. App. Ct. 902, 903 (2005). [Note 13] Here, the city has adopted a zoning ordinance that extends to accessory structures the same extra level of protection that applies to the single- and two-family residences that such structures serve. Section 2.4.4 of the ordinance (which exempts some projects involving prior nonconforming single- and two-family residences from the need even for a special permit) states that "the term 'single and two-family residence' shall include accessory structures to such residences." Similarly, § 2.4.3, which, inter alia, authorizes the issuance of special permits for modifications to preexisting nonconforming structures that "will not be substantially more detrimental to the neighborhood," expressly applies to the "reconstruction of a single or two-family residence or an accessory structure thereto."

2. Whether variance is needed for height. Relying on our decision in Deadrick, the judge concluded that because the proposed garage would not comply with the otherwise applicable twelve-foot height limit, the Irwins needed to secure a variance from that limit. A close examination of Deadrick reveals the flaw in that reasoning.

Deadrick, 85 Mass. App. Ct. at 540-541, involved the replacement of a preexisting nonconforming home in a coastal zoning district that had a twenty-foot height restriction. The local zoning board issued a special permit allowing the project even though it was uncontested that the new home would be more than twenty feet tall. Id. at 540. Concluding that the new home would create an additional nonconformity (a violation of the height limit), a Land Court judge ruled that the project required a variance. Id. at 540-541. We concluded that the judge's reasoning that a variance would be required would be correct if his premise were correct that the project would create an additional nonconformity. Id. at 545. Key to our reasoning was that a contrary ruling would create a gross disparity between how owners of conforming structures and owners of nonconforming structures would be treated: an owner of an existing conforming structure could not build an addition that created a dimensional nonconformity without a variance, while an owner of preexisting nonconforming structure could do so based merely on a finding that the change would not cause substantial detriment to the neighborhood. Id. at 553 (stating that such disparate treatment revealed "fallacy" of argument that variance was not required for additional nonconformity).

At the same time, however, we pointed out in Deadrick that the local zoning board had not addressed whether the proposed home would be entitled to an exemption from the height restriction. [Note 14] Id. at 545-547. If the proposal were entitled to such treatment, then the premise of the judge's ruling -- that the proposal would introduce an additional nonconformity -- would be in error. We therefore vacated the judgment and remanded the case for a determination whether the new home in fact would be bound by the height limit, or could win an exemption from it (in which case no variance would be required). Id. at 544-547, 553-554.

In the case before us, § 3.2.1 of the zoning ordinance allows owners to build accessory structures up to twelve feet high even where the structure does not comply with setback requirements. [Note 15] It also allows owners to exceed that height if they secure approval through a separate special permit process open to the owners of conforming structures and nonconforming structures alike. Those who secure approval to exceed the twelve-foot height restriction in this manner would not be creating a new nonconformity; they would be proceeding in full compliance with the provisions governing maximum building height. Just as the property owners in Deadrick would not need a variance if the local zoning board were to determine on remand that they were entitled to an exemption from the otherwise applicable height restriction there, so too the Irwins need not seek a variance from the height restriction here given that the ZBA has determined that they are entitled to increased height under the separate special permit process devoted to that question. [Note 16] Properly read, Deadrick supports the Irwins, not Donovan. The judge erred in concluding that the Irwins needed a variance for their garage to exceed twelve feet in height.

3. Whether variance is needed for setback nonconformities. Having concluded that the judge improperly granted summary judgment to Donovan, we turn to whether summary judgment should have entered in favor of the Irwins. To succeed in challenging the two special permits, Donovan would have to show that the ZBA's issuance of them was "based on a legally untenable ground, or [was] unreasonable, whimsical, capricious or arbitrary." MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970). In light of the limited nature of the Irwins' project, the uncontested benefits of replacing the dilapidated garage, and the fact that the ZBA addressed the only concerns that anyone had raised by requiring that the Irwins secure city approval of a drainage plan before constructing the proposed garage, Donovan cannot meet that burden. [Note 17] Indeed, Donovan made no claim that the special permits were invalid when he opposed the Irwins' motion for summary judgment.

Instead of contesting the special permits, Donovan focused on potentially more fertile ground: the issuance of the variances from the setback requirements. See Deadrick, 85 Mass. App. Ct. at 553 (noting that property owners seeking variance face "significantly more stringent burden"). In particular, Donovan focused on the undisputed fact that although the footprint of the proposed garage would be the same as that of the existing garage, the eaves of the reconfigured roof would extend ten additional inches into the airspace of the side yard. According to Donovan, this required the Irwins to obtain a variance from the side-yard setback, and whether the variance that the ZBA granted from that setback was valid could not be resolved in the Irwins' favor on summary judgment.

On two separate grounds, the parties contest whether the extension of the reconfigured roof a mere ten inches further into the side yard would materially exacerbate the existing nonconformity. First, the parties disagree whether under the specific wording of the ordinance, a roof overhang of less than three feet is allowed as a matter of right. [Note 18] Second, they disagree whether, in any event, the extra ten inches of intrusion is so de minimis that it could not reasonably be said to increase the garage's "nonconforming nature." Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 362-363 (2008) (enumerating examples -- such as construction of dormer -- that, as matter of law, are not deemed to increase nonconforming nature of existing home on undersized lot). [Note 19] We need not resolve either issue. That is because even if the extension of the eaves into the airspace of the side yard were deemed to increase the nonconforming nature of the garage, that increase still would not require a variance. Rather, as noted above, municipal zoning boards are empowered to issue special permits allowing the reconstruction of preexisting nonconforming residences that would increase existing nonconformities so long as they find that the reconstruction would not be substantially more detrimental to the neighborhood. [Note 20] Bellalta, 481 Mass. at 385-386; Gale, 80 Mass. App. Ct. at 336-338. The ZBA made that very finding and Donovan makes no challenge to it. As a matter of law, no variances from the setback requirements were required.

Conclusion. Because no variances were needed and Donovan made no claim during the motion proceedings that the special permits that the ZBA issued to the Irwins were invalid, the Irwins were entitled to summary judgment. Accordingly, we vacate the judgment in favor of Donovan and remand the case for the entry of judgment in favor of the Irwins.

So ordered.

FOOTNOTES

[Note 1] Of the 132 1/2 Wheeler Street Realty Trust.

[Note 2] Walter Donovan, individually and as trustee of the Walter C. Donovan Trust - 2007. Sarah Donovan was a nominal plaintiff but did not participate in the appeal.

[Note 3] Robert Irwin and Pamela Irwin.

[Note 4] Henry W. Comstock, trustee of 132 1/2 Wheeler Street Realty Trust, holds title to 132 1/2 Wheeler Street via a nominee trust that has one beneficiary, the Walter C. Donovan Trust - 2007. Walter C. Donovan is the sole trustee and sole beneficiary of the Walter C. Donovan Trust - 2007.

[Note 5] The ZBA also filed a notice of appeal even though it elected not to participate in the summary judgment proceedings. Donovan argues that the ZBA waived its right to appeal, and the ZBA counters that it should not be deemed to have waived its right to appeal where, as here, the judge ultimately resolved the case on a ground that she raised sua sponte. We need not resolve whether the ZBA's appeal is properly before us.

[Note 6] It bears noting that with the ridgeline of the garage reoriented, the height of the proposed garage on the side closest to Donovan's property would be lower than the existing garage.

[Note 7] Footnote d to § 3.2.1 of the city's zoning ordinance states: "If the accessory building complies with the front, side and rear yard setbacks for the principal building, the maximum building height for the accessory building shall be that of the principal building. If the accessory building does not comply with said setbacks, the maximum height shall be 12 feet."

[Note 8] On the preprinted form that the Irwins completed, they had checked a box indicating they were seeking special permits, but had not checked any box indicating that they were seeking a variance. The completed application did note that the garage would not comply with the current side-yard setback requirement.

[Note 9] For this reason, Donovan later characterized his position at the hearing as one of "conditional[] support[]."

[Note 10] According to Donovan's deposition testimony, the Irwins were "vague" about their specific drainage plans, and they stated they were not going to submit the required drainage plan to the city (claiming that the city engineer told them they did not have to do so). The Irwins paint a starkly different picture. By contrast, in her deposition testimony, Pamela Irwin claimed that she and her husband were forthcoming with Donovan and told him that water from the roof's gutters would be directed into a dry well on their property, and they stood ready, willing, and able to submit a drainage plan to the city. The record indicates that the drainage issues also arose in a separate proceeding before the city's conservation commission, although little detail about that proceeding has been included in the record before us.

[Note 11] Providing such protection commonly is known -- in the case law and otherwise -- as "grandfathering." We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase "grandfather clause" originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867. See Webster's Third New International Dictionary 987 (2002) (definition of "grandfather clause"); Benno C. Schmidt, Jr., Principle and Prejudice: The Supreme Court and Race in the Progressive Era, 82 Colum. L. Rev. 835 (1982).

[Note 12] It bears noting that Gale involved an increase in a setback nonconformity under the same zoning ordinance applicable here.

[Note 13] Although we do not reach the question whether the Legislature intended that the extensive statutory protection afforded to one- and two-family residences also applies to buildings that serve as accessory structures to such residences, we do note that at least one case touches on that issue. In Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 362-363 (2008), the Supreme Judicial Court set forth certain examples of "small-scale alterations, extensions, or structural changes to a preexisting house" that nevertheless could be allowed as of right because they did not increase the nonconforming nature of the residence. The addition of small storage sheds is included on that list. Id. at 362. Also included is the addition of a one-story, two-car garage, without mention of whether such a garage was attached or freestanding. Id.

[Note 14] Under the relevant zoning bylaw, a homeowner was exempted from the height restriction to the extent that the additional height was driven by the need to comply with regulations imposed by the Federal Emergency Management Agency. Deadrick, 85 Mass. App. Ct. at 544 & n.5.

[Note 15] In fact, had the proposed garage complied with the setbacks applicable to the Irwin home, it could have been as tall as that home (up to thirty feet). Because of the setback nonconformities here, the twelve-foot height limit applied.

[Note 16] The fact that the dispensation to exceed the otherwise applicable height limit came through an approval termed a "special permit" does not change the analysis. While cases such as Deadrick employ shorthand references to whether a given modification to a nonconforming structure can be made by special permit, the special permit process referenced is the one created by G. L. c. 40A, § 6, under which preexisting nonconforming single- and two-family residences may be altered in a way that increases the nature of an existing nonconformity so long as the project will not be substantially more detrimental to the neighborhood. Nothing in these cases precludes owners of preexisting nonconforming residences from making use of separate municipal, generally applicable special permit provisions that offer relief from otherwise applicable dimensional requirements.

[Note 17] As previously mentioned, see note 10, supra, Donovan has suggested that the Irwins might not comply with the requirement that they submit a drainage plan to the city's engineering department before constructing their garage. In that event, however, Donovan would have available remedies to pursue enforcement. See Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass. App. Ct. 378, 384-385 (2019) (describing abutter's ability to pursue zoning enforcement pursuant to G. L. c. 40A, §§ 7, 8, 17).

[Note 18] The ordinance defines "yard" to exclude "projections of not more than three feet into required yards for such architectural features of a building as . . . eaves." The Irwins argue that this means that eaves that overhang less than three feet do not count as intrusions into a side or front yard. Donovan argues that the definition at most allows eaves to extend three feet past the allowed setback, not three feet beyond a building that already lies well within the setback.

[Note 19] Bjorklund did not involve nonconformity with dimensional requirements such as setbacks. In Bellalta, 481 Mass. at 374, the proposed modifications would cause an incremental increase in the already nonconforming "floor area ratio" of the home. The court nevertheless questioned whether this would increase the nonconforming nature of the home, characterizing this issue as "hardly self-evident." Id. at 382. Ultimately, the court passed over this question and rested on other grounds. Id.

[Note 20] In his brief and again at oral argument, Donovan argued that the particular language of the height provisions of the ordinance provided that a preexisting nonconforming structure would lose its protected status with regard to existing setback intrusions if it obtained a special permit allowing a height of greater than twelve feet. It suffices to say that the language of the ordinance does not support such a construction.

MARIA BELLALTA & another [Note 1] vs. ZONING BOARD OF APPEALS OF BROOKLINE & others[Note 2]

481 Mass. 372 October 1, 2018 - February 8, 2019

Court Below: Land Court

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Records And Briefs:

- (1) SJC-12516 01 Appellant Bellalta Brief
- (2) SJC-12516 03 Appellee Jewhurst Brief
- (3) SJC-12516 05 Appellant Bellalta Reply Brief
- (4) SJC-12516 06 Appellee Brookline Zoning Board of Appeals Brief

SJC-12516

Zoning, Nonconforming use or structure, Special permit, Variance, Interior area of residence, Multiple dwelling, By-law. Statute, Construction.

Discussion of the statutory framework of G. L. c. 40A, § 6, regarding preexisting nonconforming lots and single or two-family structures, and of the requirement that where a proposed extension, structural change, reconstruction, or alteration would increase the nonconforming nature of such a structure, a homeowner must obtain a finding from the relevant permit granting authority that the proposed modification would not be "substantially more detrimental" to the neighborhood than is the existing nonconformity. [376-378]

Discussion of the legislative history of and case law construing the second "except" clause in G. L. c. 40A, § 6. [378-381]

The defendant homeowners were not required to obtain a variance in addition to obtaining a special permit from the town's zoning board of appeals (board) to add a dormer to a structure that was a preexisting nonconforming structure under the town's zoning bylaw, due to its floor area ratio, where, even assuming that the proposed project would have constituted an increase to the nonconforming nature of the structure, G. L. c. 40A, § 6, does not require a variance from a local bylaw (i.e., obtaining a finding of no substantial detriment to the neighborhood is all that is required), and a municipality's bylaw may not afford fewer protections to preexisting nonconforming structures or uses than does the governing statute. [381-387]

CIVIL ACTION commenced in the Land Court Department on November 18, 2016.

The case was heard by Keith C. Long, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Jeffrey P. Allen (Donald J. Gentile also present) for the plaintiffs.

Jennifer Dopazo Gilbert for Jason Jewhurst & another.

Jonathan Simpson, Associate Town Counsel, for zoning board of appeals of Brookline.

LENK, J. We once again construe the "difficult and infelicitous" language of the first two sentences of G. L. c. 40A, § 6, insofar as they concern single- or two-family residential structures. See Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55-56 (1985). These statutory provisions set forth both the exemption afforded to all legally

preexisting nonconforming structures and uses from the application of zoning ordinances and bylaws, as well as how those protections can be forfeited or retained when such nonconforming structures or uses are extended or altered. The statute also accords special protection to single- and two-family residential structures in the event that the nonconformity is altered or extended; it is the extent of that protection in the circumstances here that we clarify.

The defendant homeowners sought to modify the roof of their two-family house and to add a dormer; doing so would increase the preexisting nonconforming floor area ratio. The zoning board of appeals of Brookline (board) allowed the defendant's request for a special permit, after determining that increasing the preexisting nonconforming nature of the structure would not be substantially more detrimental to the neighborhood than the preexisting nonconforming use. The plaintiff abutters, however, challenged the board's action, contending that the statute does not exempt the defendants from compliance with municipal bylaws, and that to do so here would require the defendants to obtain a variance in addition to the special permit. The plaintiffs appealed; a Land Court judge upheld the board's action.

We conclude that the statute requires an owner of a single- or two-family residential building with a preexisting nonconformity, who proposes a modification that is found to increase the nature of the nonconforming structure, to obtain a finding under G. L. c. 40A, § 6, that "such change, extension or alteration shall not be substantially more detrimental that the existing nonconforming use to the neighborhood." The statute does not require the homeowner also to obtain a variance in such circumstances. We accordingly affirm the judgment of the Land Court.

1. Background. The material facts are not in dispute. The defendants, Jason Jewhurst and Nurit Zuker, own the second-floor condominium unit of a two-family house on Searle Avenue in Brookline. The plaintiffs, Maria Bellalta and Damon Burnard, own a house on Cypress Street that abuts the defendants' house.

The two abutting lots are located in a T-5 residential zoning district that encompasses single-family, two-family, and attached single-family houses. While many of the lots on Searle Avenue are undersized according to the Brookline zoning bylaw, the defendants' lot is the smallest; its 2,773 square feet are slightly more than one-half the minimum requirement of 5,000 square feet for a lot containing a two-family house in the T-5 zone.

As to the structure itself, the sole legal nonconformity of the defendants' house, which was in existence when they purchased the property, is the floor area ratio (FAR). [Note 3] The Town of Brookline (town) bylaw requires a maximum FAR of 1.0 for a two-family house in a T-5 zoning district, and the defendants' house has a FAR of 1.14. The proposed renovation project would convert the roof of the house from a hip roof to a gable roof and would add a dormer to the street-facing façade, thereby creating 677 square feet of additional living space on the third floor of the building. [Note 4] This project would increase the already nonconforming FAR from 1.14 to 1.38.

The defendants initially submitted their request for a building permit to the building commissioner; that application was denied. [Note 5] The defendants then submitted a request for a special permit to the board, and the board conducted a public hearing on the request. The abutting plaintiffs opposed the request for a special permit, both in writing prior to the hearing and orally at the hearing. Fifteen other neighbors submitted statements in support of the project; they viewed the proposed roofline as being consistent with the over-all design and character of the neighborhood.

Members of the town's building department and its planning board spoke at the hearing, and presented reports on their review of the project, as did the defendants' architect, who had conducted shadow studies of the effect of the proposed roof on the abutters' property. Statements and reports from town officials indicated that the majority of the houses on the street have partial or full third stories, and are taller than the defendants' existing building. Those officials also noted that the proposed project would make the defendant's house appear more consistent, both in height and in design, with the others on the street. The board unanimously determined, inter alia, that, pursuant to the requirements of section 9.05 of the bylaw, "[t]he specific site is an appropriate location for such a use, structure, or condition," and "[t]he use as developed will not adversely affect the neighborhood." Accordingly, the board found that the defendants had satisfied the requirements for issuance of a special permit. [Note 6] The defendants did not request a variance. [Note 7]

The plaintiffs commenced an action in the Land Court, pursuant to G. L. c. 40A, § 17, to challenge the board's decision. The parties agreed that the material facts were not in dispute, and filed cross motions for summary judgment. A Land Court judge denied the plaintiffs' motion and allowed the joint motion of the defendants and the board. The plaintiffs appealed to the Appeals Court, and we allowed their petition for direct appellate review.

2. Discussion. We review de novo the allowance of a motion for summary judgment, viewing the facts "in the light most favorable to the party against whom judgment entered." 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 699 (2012), citing Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4 (2010). A decision on a motion for summary judgment will be upheld if the judge "ruled on undisputed material facts and the ruling was correct as a matter of law" (citation omitted). M.P.M. Bldrs., LLC v. Dwyer, 442 Mass. 87, 89 (2004).

a. Statutory framework. In order to understand the parties' claims, some background on the statutory framework is necessary.

A preexisting nonconformity is a use or structure that lawfully existed prior to the enactment of a zoning restriction that otherwise would prohibit the use or structure. See generally G. L. c. 40A, § 6; Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317, 319 (1991). Preexisting nonconformities become protected when zoning laws change, as a result of the long-standing recognition that "rights already acquired by existing use or construction of buildings in general ought not to be interfered with." See Opinion of the Justices, 234 Mass. 597, 606 (1920).

Preexisting non-conforming lots and structures throughout the Commonwealth are protected under G. L. c. 40A, § 6. General Laws c. 40A, § 6, provides, in relevant part:

"[1] Except as hereinafter provided, a zoning ordinance or by-law 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, . . . to any reconstruction, extension or structural change of such structure and . . . 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 [2] *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 [structure or [Note 8]] use to the neighborhood" (emphasis added).

The language of G. L. c. 40A, § 6, has been recognized as particularly abstruse. See Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 20 (1987) ("The first paragraph of G. L. c. 40A, § 6 . . . contains an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter"). See, e.g., Fitzsimonds, 21 Mass. App. Ct. at 55-56. What has become known as the "first 'except' clause" of that statute affords explicit protection to the continuance of previously compliant structures and uses that are no longer compliant with subsequently enacted zoning bylaws. See G. L. c. 40A, § 6. See Willard, supra. Ordinarily, however, an extension or structural change to a preexisting nonconforming structure or use must comply with the applicable municipal bylaw. See Rockwood v. Snow Inn Corp., 409 Mass. 361, 364 (1991). The addition in 1975 of what has become known as the "second 'except' clause, "without accompanying explanation," see Willard, supra at 18, citing 1974 House Doc. No.5864, further complicated the statute's already difficult language. See, e.g., Fitzsimonds, 21 Mass. App. Ct. at 56. That clause extends additional protections to single- and two-family nonconforming structures, and allows as of right the "alteration, reconstruction, extension or structural change" of such a structure, so long as the "extended or altered" structure "does not increase" its "nonconforming nature." G. L. c. 40A, § 6. Where a proposed extension, structural change, reconstruction, or alteration would increase the "nonconforming nature" of the structure, a homeowner must obtain a finding from the relevant permit granting authority that the proposed modification would not be "substantially more detrimental" to the neighborhood than is the existing nonconformity. Id.

The plaintiffs contend that, in addition to the requirement of G. L. c. 40A, § 6, that the board find the defendants' proposed project would not be "substantially more detrimental" to the neighborhood, the defendants also are required to obtain approval from the board for a variance from the town's bylaw. Because the defendants obtained only a special permit, the plaintiffs argue that the proposed project does not meet the requirements of G. L. c. 40A, § 6. In the plaintiffs' view, the language of the statute, its legislative history, and our existing jurisprudence do not exempt single- and two-family nonconforming structures from the requirement of obtaining a variance under the town's bylaws in order to make any change that would intensify the preexisting nonconformity; the plaintiffs contend also that the requirement of a variance is in addition to obtaining a finding of no substantial detriment under G. L. c. 40A, § 6.

b. Statutory construction. "As with all matters of statutory interpretation," Commonwealth v. Mogelinski, 466 Mass. 627, 633 (2013), a court construing a zoning act must "ascertain and effectuate legislative intent," as expressed in the statutory language. See S. Singer, 3C Statutes and Statutory Construction § 77:7, at 659 (8th ed. 2018) (Singer). See also Commonwealth v. Escobar, 479 Mass. 225, 230 (2018). Where, as here, "the meaning of [the] statute is not clear from its plain language, well-established principles of statutory construction guide our interpretation" (citation omitted). Id. at 228. Specific provisions of a statute are to be "understood in the context of the statutory framework as a whole, which includes the preexisting common law, earlier versions of the same act, related enactments and case law, and the Constitution." Singer, supra at § 77:7, at 692-694. A reviewing court's interpretation "must be reasonable and supported by the . . . history of the statute." See Mogelinski, supra at 633, quoting Wright v. Collector & Treas. of Arlington, 422 Mass. 455, 457-458 (1996). Ultimately, we must "avoid any construction of statutory language which leads to an absurd result," or that otherwise would frustrate the Legislature's intent. See Singer, supra at § 77:7, at 689. See also Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013).

The crux of the issue in this appeal turns on the language of the "second 'except' clause," and the extent of the protections it affords to owners of single- and two-family preexisting nonconforming structures who seek to intensify those nonconformities. As noted, the second "except" clause had "no identifiable ancestor" in earlier versions of the zoning act, before its appearance "without accompanying explanation . . . in 1974 House Doc. No 5864" (citation omitted). Willard, 25 Mass. App. Ct. at 18. The "chief document" in the legislative history of the zoning act is a comprehensive report that was prepared by the Department of Community Affairs, which included its proposed recommendations and amendments to the act. See Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 867 & n.3 (2005) (Cordy, J., dissenting), citing Report of the Department of Community Affairs Relative to Proposed Changes and Additions to the Zoning Enabling Act, 1972 House Doc. No. 5009 at 35 (DCA report). As concerned the treatment of legally preexisting nonconformities, the DCA report recognized, on the one hand, a goal of effectuating the "eventual elimination of nonconformities in most cases." See DCA Report, supra at 39. The report also recognized, however, that, "[o]n the other hand, there is increasing awareness that the assumption it is desirable to eliminate non-conforming uses may not always be valid." See id. at 43, 45, 49, 62, 63, 65, 84 (noting constitutional and public policy reasons against eliminating property rights already acquired).

In an effort to reconcile these goals, the DCA report proposed, inter alia, a course of action that would have provided extremely limited protections for any modification of a nonconforming structure, such as recognizing only a right to "perform normal maintenance and repair" on such structures. See id. at 44. The Legislature rejected this proposal, without stated reasoning, when it instead inserted the language of the second except clause, thereby creating explicit protections for one- and two-family residential structures, and allowing increases in the nonconforming nature of such structures, upon a finding of no substantial detriment to the neighborhood. See G. L. c. 40A, § 6. [Note 9]

To ensure that the protections the Legislature intended to afford single- and two-family residential structures are appropriately enforced by permitting authorities, reviewing courts have employed a long-standing interpretive framework construing the second except clause. This framework was first discussed in 1985 in Fitzsimonds, 21 Mass. App. Ct. at 56, by Judge Benjamin Kaplan, writing for the court; elaborated upon in Willard, 25 Mass. App. Ct. at 18-22; and subsequently adopted by this court in Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 358, 362-363 (2008) (adopting reasoning of concurrence in Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 857-858 [2005] [Greaney, J., concurring]). See Deadrick v. Zoning Bd. of Appeals of Chatham, 85 Mass. App. Ct. 539, 552 (2014) ("a long line of cases, notably including Bransford and Bjorklund, have held that an alteration that intensifies an existing nonconformity in a residential structure may be authorized under the second sentence of G. L. c. 40A, § 6, upon a finding of no substantial detriment" [alteration omitted]).

Under this framework, the second except clause first requires the permit granting authority [Note 10] to make "an initial determination whether a proposed alteration of or addition to a nonconforming structure would 'increase the nonconforming nature of said structure'" (citation omitted). Willard, 25 Mass. App. Ct. at 21. This initial determination requires the permitting authority to "identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones." Id. at 21-22. "If the answer to that question is in the negative, the applicant will be entitled" to a permit to proceed with the proposed alteration. [Note 11] See id. at 22. "Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question," id. at 22, that is, whether the proposed modification would be "substantially more detrimental to the neighborhood," see id. at 21. The "Willard test should be read as prescribing an entitlement to a building permit, not a special permit or

finding, where no intensification of the nonconformity would result" (citation omitted). Bransford, 444 Mass. at 865 n.2 (Cordy, J., dissenting). See, e.g., Deadrick, 85 Mass. App. Ct. at 550 ("It is important to observe at this juncture that the second 'except' clause is directed to differentiating between those changes to nonconforming residential structures that may be made as of right, and those that require a finding of no substantial detriment under the second sentence of [G. L. c. 40A,] § 6"). Only if a modification, extension, or reconstruction of a single- or two-family house would "increase the nonconforming nature of said structure" must it "be submitted . . . for a determination by the board of the question whether it is 'substantially more detrimental than the existing nonconforming use'" pursuant to the sentence that follows the second except clause G. L. c. 40A, § 6" (citations omitted). Bransford, supra at 857-858 (Greaney, J., concurring).

c. Relief requested by the defendants. With respect to the defendants' plans to add 677 square feet of living space by adding a dormer to the third floor of their house and modifying the design of the roof, the framework first required a determination whether, and in what respect, the defendants' proposed extension would increase the nonconforming nature of the two-family structure. See Willard, 25 Mass. App. Ct. at 21-22. The board determined that the proposed project would increase the extent of the already nonconforming FAR, [Note 12] a determination that the parties did not dispute, and then proceeded to consider whether the defendants' house after modification would be substantially more detrimental to the neighborhood. Concluding that it would not, the board issued the requested zoning relief.

The board, however, did not consider whether the increase in the nonconforming FAR from 1.14 to 1.38 would increase the "nonconforming nature," G. L. c. 40A, § 6, of the defendants' property, and such a determination is hardly self-evident. At the hearing, a member of the town's building department described the requested relief as "minimal," and several members of the planning board described it as "modest." We previously observed that certain small-scale extensions, such as the addition of a dormer, a porch, a sunroom, or a two-car garage, among others, would not, as a matter of law, constitute an intensification of the nonconforming nature of a structure. Bjorklund, 450 Mass. at 362-363. "Concerns over the making of small-scale alterations, extensions, or structural changes to a preexisting house are illusory. . . . Because of their small-scale nature, the improvements mentioned could not reasonably be found to increase the nonconforming nature of a structure." Id.

As the parties have stipulated to the material facts, however, we assume, without deciding, that the proposed project, taken as a whole, would have constituted an increase to the nonconforming nature of the structure. Accordingly, we turn to the plaintiffs' contention that, because no provision of the town's zoning bylaw would have allowed the requested increase in the FAR, G. L. c. 40A, § 6, also requires that the defendants obtain a variance from the town's zoning bylaw.

d. Town's bylaw. In Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 337 (2011), the Appeals Court confronted a similar issue. There, the zoning board of appeals had granted relief allowing the proposed reconstruction of a residence that would have increased the nonconforming nature of the structure. Id. at 333. The board in that case determined that the reconstructed house, which would extend beyond the footprint of the original house, and would increase the preexisting nonconformities in the setback requirements of the city of Gloucester's zoning bylaw, would not result in a substantial detriment to the neighborhood, and allowed the homeowner's request for a special permit. Id. at 332-333. After concluding that "literal enforcement" of the zoning bylaw would create a personal and financial hardship for the property owners due to the size, shape, steep grade, and outcroppings on the property, the Gloucester board also granted the homeowners a variance. Id. at 333. The abutting homeowners challenged the board's decision in the Land Court; they argued that the issuance of the variance was in error because the request did not meet the requirements for issuance of a variance. Id. A Land Court judge held that the determination that the reconstruction would not have resulted in a substantial detriment to the neighborhood was all that was required under G. L. c. 40A, § 6. See Gale, supra at 333-334; id. at 337 (variance is not required "as an additional step when proceeding to the no substantial detriment finding under the second sentence" exception for one- and two-family houses). See also Deadrick, 85 Mass. App. Ct. at 553 (affirming that variance is not required for owners of one- and two-family properties to increase legally preexisting nonconformity). [Note 13]

We note also that, since its enactment in 1975, see St. 1975, c. 808, § 3, the Legislature has amended G. L. c. 40A, § 6, numerous times. See St. 1977, c. 829, § 3D; St. 1979, c. 106; St. 1982, c. 185; St. 1985, c. 494; St. 1986, c. 557, § 54; St. 1994, c. 60, § 67; St. 1996, c. 345, § 1; St. 2000, c. 29; St. 2000, c. 232; and St. 2016, c. 219, § 29. Presumably, the Legislature therefore has adopted the framework first described in Fitzsimonds, 21 Mass. App. Ct. at 56, and most recently discussed in detail in Gale, 80 Mass. App. Ct. 336 -337. Where a statute or provision that has been given a particular construction by the courts is reenacted "without substantial change, it is generally fair to assume the legislature is familiar with that interpretation and adopted it." See Singer, supra at § 77:7, at 711. Indeed, when the Legislature

"enacts or amends a statute, courts presume it has knowledge of . . . relevant judicial and administrative decisions, and it passed or preserved cognate laws to serve a useful and consistent purpose." Id. Where, as here, the Legislature has had considerable occasion to amend G. L. c. 40A, § 6, and repeatedly has amended the statute without changing the language at issue, we presume that it has adopted the construction of the statute upon which Massachusetts courts -- and this class of homeowners -- have relied. We leave that framework undisturbed.

Accordingly, in keeping with the Legislature's intent as it pertains to the special protections afforded one- and two-family residential structures, a variance from the local bylaw is not required by G. L. c. 40A, § 6; obtaining a finding of "no substantial detriment to the neighborhood" is all that is required. See Rockwood, 409 Mass. at 364 (single- and two-family residences are given "special protection" with regard to their existing nonconformities); Gale, 80 Mass. App. Ct. at 337 (outlining "special treatment" explicitly afforded to single- and two-family residential buildings); Dial Away Co. v. Zoning Bd. of Appeals of Auburn, 41 Mass. App. Ct. 165, 170-171 (1996) (if not for "special status" of nonconforming single and two-family residences, "the by-law would probably apply").

Indeed, given the difficulties and expense associated with obtaining a variance, as well as in obtaining a finding of no substantial detriment, construing the statute to mandate both well could render illusory the protections the Legislature intended to provide these homeowners. [Note 14] See Bransford, 444 Mass. at 870 n.7 (Cordy, J., dissenting) ("without question [the process of obtaining a special permit or variance] renders many home improvements more costly and subject to the discretionary determinations of local zoning boards"). Requiring single- and two-family homeowners to obtain both under these circumstances would render it nearly impossible for the homeowners to renovate, modernize, or make any substantial improvements to an older home, particularly if those improvements would increase the nonconforming nature of the structure. This could, as a practical matter, make it economically infeasible to modify a nonconforming home in any but the most minimal ways, could curtail the ability to sell such a house, and, accordingly, could result in a reduction in the amount of available affordable housing, as well as potentially reducing the town's population and the municipal tax base. Indeed, as noted in Bransford, 444 Mass. at 869-870 (Cordy, J., dissenting), "application of the [plaintiffs'] reasoning is not without practical consequence to the multitude of citizens who own homes in cities or towns that, at some recent point, have attempted to limit growth by increasing minimum lot sizes, often dramatically. The need to secure findings or special permits through lengthy, costly, and discretionary local zoning processes for any improvement that might increase the living space or footprint of a house might put such improvements out of reach for many homeowners. Requiring homeowners to run such an administrative gauntlet impedes and burdens the upgrade of a large part of our housing stock."

Given this, we do not think that the Legislature intended to require single- and two-family homeowners to undertake the laborious process of seeking both a special permit and a variance. To construe G. L. c. 40A, § 6, in this way would place an additional burden on this limited class of homeowners, contrary to the clear statutory intent to provide them with special protections under the second except clause. See Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375–376, (2000), citing Manning v. Boston Redevelopment Auth., 400 Mass. 444, 453 (1987) ("If a sensible construction is available, we shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results").

Finally, the plaintiffs contend that the decisions in both Gale and Deadrick were erroneous, and do not comport with this court's language in Rockwood, 409 Mass. at 364. In Rockwood, supra, the court stated in dictum that "even as to single or two-family residences, structures to which the statute appears to give special protection, the zoning ordinance or bylaw applies to a reconstruction, extension, or change that would intensify the existing nonconformities or result in additional ones" (quotations omitted). Id., quoting Willard, 25 Mass. App. Ct. at 22. Rockwood, however, involved the application of G. L. c. 40A, § 6, to a commercial inn, and accordingly did not involve the special protections from compliance with a local ordinance afforded to one- and two-family houses. Further, consistent with our holding in Bransford, 444 Mass. at 858-859, to the extent that the obiter dictum expressed in Rockwood might suggest otherwise for one- and two-family houses, it is incorrect.

The plaintiffs emphasize that no provision of the town's bylaw would permit the increase in the FAR sought here, and the defendants do not contest this assertion. [Note 15] Our prior jurisprudence, before Gale, 80 Mass. App. Ct. at 331, involved situations in which the local bylaws at issue were coextensive with the language of G. L. c. 40A, § 6, thus serving as a mere procedural implementation of the statute's requirements. See, e.g., Bjorklund, 450 Mass. at 357-358; Bransford, 444 Mass. at 855; Rockwood, 409 Mass. at 364; Willard, 25 Mass. App. Ct. at 19-20. By contrast, the town's bylaw does not contain a parallel provision implementing the language and requirements of G. L. c. 40A, § 6. Rather, section 8.02(2) of the bylaw provides that any nonconforming structure or use "may be altered, repaired, or enlarged,

except that any nonconforming condition may not be increased unless specifically provided for in a section of this By-law." To the extent that no provision of the bylaw would permit the increase in FAR that the defendants seek, a zoning variance would be required, in addition to the requisite finding of no substantial detriment under G. L. c. 40A, § 6, in order to permit a modification that would increase the "nonconforming nature" of the two-family structure.

General Laws c. 40A, § 6, however, creates a statutory requirement that "sets the floor" throughout the Commonwealth for the appropriate protections from local zoning bylaws to be afforded properties and structures protected under that statue. See Rourke v. Rothman, 448 Mass. 190, 191 n.5 (2007). As such, the statute prescribes "the minimum of tolerance that must be accorded to nonconforming uses." (citation omitted). See id. A municipality's bylaws may not afford fewer protections to preexisting nonconforming structures or uses than does the governing statute. See, e.g., Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 605 (2011), quoting Planning Bd. of Reading v. Board of Appeals of Reading, 333 Mass. 657, 660 (1956) ("It is axiomatic that '[a] by-law cannot conflict with the statute'"). The board determined as much, construing its own bylaw as prescribing only a finding of no substantial detriment in order to issue the requested zoning relief. See Plainville Asphalt Corp. v. Plainville, 83 Mass. App. Ct. 710, 713 (2013) (applying "corollary principle that statutes or bylaws dealing with the same subject should be interpreted harmoniously to effectuate a consistent body of law"). Because the governing statute and its interpretive framework do not require a variance here, a municipality's bylaw may not do so.

Judgment affirmed.

FOOTNOTES

[Note 1] Damon Burnard.

[Note 2] Jason Jewhurst and Nurit Zuker.

[Note 3] A building's floor area ratio (FAR) compares the gross floor area of the building to the area of the lot upon which it is built. See generally Institute for Local Government, Land Use and Planning: Glossary of Land Use and Planning Terms, at 24 (2010). A provision of the town of Brookline's (town's) bylaw entitled "Floor Area Ratio" provides that, "[f]or any building . . . the ratio of gross floor area to lot area shall not exceed the maximum specified in the Table of Dimensional Requirements." See Town of Brookline Planning and Community Development Dep't, Zoning By-Law, Art. V Dimensional Requirements, at § 5.20 (May 24, 2018). The table of dimensional requirements specifies that the maximum FAR for a two-family house in a T-5 residential zoning district is 1.0. Id.

[Note 4] A hip roof is a structural design in which each side of the roof slopes downward from a central ridge toward the walls of the building. With a gable roof, only two sides slope downward from a central ridge. See C. M. Harris, American Architecture: An Illustrated Encyclopedia, at 142, 174 (1998). A dormer is a structure, often containing a window, that projects vertically beyond the plane of the roof. See id. at 174.

[Note 5] The record before us does not reflect the grounds for the denial. We note, however, that section 9.05.1 of the zoning bylaw requires specific findings by the board of appeals in order to increase a nonconformity in a nonconforming structure.

[Note 6] Although the board's decision does not contain an explicit finding that the project would not be substantially more detrimental to the neighborhood than the existing structure, the Land Court judge appropriately noted that the finding is implied by the board's decision to grant the requested relief for a special permit, as well as its reference to the requirements of G. L. c. 40A, § 6. While the board made a finding under the language of the zoning bylaw that "the use as developed will not adversely affect the neighborhood," the board allowed issuance of the special permit after having heard numerous professional and lay opinions using the language that the project would not result in a "substantial detriment." Further, a finding of "no adverse effect" arguably is a much more stringent standard than a finding of "no substantial detriment." The parties properly do not dispute that the board found that the project would not result in a substantial detriment to the neighborhood.

[Note 7] A variance is a grant of relief from certain provisions in a municipality's zoning ordinance; such a deviation from the bylaw may be allowed only upon a finding that "owing to circumstances relating to the soil conditions, shape, or topography of such land or structures . . . , a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner" 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." G. L. c. 40A, § 10.

[Note 8] In Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21 (1987), the Appeals Court construed the statutory exception for extensions or alterations to nonconforming uses in G. L. c. 40A, § 6, as including nonconforming structures, in addition to nonconforming uses. Subsequent jurisprudence has continued to construe the statutory language as applicable both to nonconforming uses and structures. See, e.g., Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 857 (2005) (Greaney, J., concurring).

[Note 9] In support of their proposed reading of the statute, the plaintiffs argue the inequity of requiring, in identical circumstances, a conforming structure such as theirs to obtain a variance when a nonconforming structure need not do so. The inequity is not so apparent when one considers that conforming houses on conforming lots would not require even a special permit to undertake many modifications where, absent the statutory protections afforded one- and two-family nonconforming houses, comparable modifications would require a special permit or variance. More fundamentally, however, and as discussed supra, the Legislature chose to protect certain limited existing housing stock, as it was free to do. Not all housing stock is treated the same by the Legislature, and owners of nonconforming three-family houses, for example, might also find cause to complain in such legislative line-drawing. Perceived inequities resulting from legislative choices do not affect our construction of the statute.

[Note 10] The permit granting authority is statutorily defined as "the board of appeals or zoning administrator." See G. L. c. 40A, § 1A. The concurrence in Bransford pointed out that the initial determination "more appropriately should be conducted by the building inspector or zoning administrator" in the first instance. Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. at 858, nn.8, 9 (Greaney, J., concurring), citing M. Bobrowski, Massachusetts Land Use and Planning Law, § 6.06 (2d ed. 2002).

[Note 11] Earlier cases loosely used the term "special permit" to describe the process by which nonconforming one- and two-family homeowners can proceed with modifications or alterations to their nonconforming homes. See, e.g., Bransford, 444 Mass. at 864 n.2 (Cordy, J., dissenting). Our reference to the "permitting procedure" and the "permit granting authority" encompasses any designated process by which municipalities allow their residents to proceed with home building renovations in the ordinary course.

[Note 12] As mentioned, although the defendants in this case first sought approval for the project from the town's building commissioner pursuant to the procedures outlined in Bransford, supra at 857-858, the request was denied. As a result, the defendants submitted their application to the town's zoning board of appeals.

[Note 13] As the parties agree that in this case the question involves an increase in a preexisting nonconformity, we need not address the issue presented in Deadrick v. Zoning Bd. of Appeals of Chatham, 85 Mass. App. Ct. 539, 553 (2014), concerning the creation of a new nonconformity.

[Note 14] The burdens that an applicant must meet, both to obtain a variance and to retain it on appeal, see Kirkwood v. Board of Appeals of Rockport, 17 Mass. App. Ct. 423, 427 (1984), are significant. See, e.g., Wolfson v. Sun Oil Co., 357 Mass. 87, 89-91 (1970) (where board's findings inadequate, judge on appeal can annul issuance of variance without considering its merits); Gamache v. Acushnet, 14 Mass. App. Ct. 215, 220 (1982) (requirements for findings to support variance are "rigorous"). Although the requirements and expenses of obtaining a special permit or a finding of no substantial detriment certainly are not small hurdles, they are not of the same magnitude. See Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527, 531 (1990) (grant of variance is "grudging and restricted," while grant of special permit is "anticipated and flexible").

[Note 15] Section 8.02 of the bylaw permits an "alteration or extension" of a nonconforming use, but provides that "any increase in volume, area, or extent of the nonconforming use shall not exceed an aggregate of 25 percent during the life of the nonconformity." Section 5.22 of the bylaw, "Exceptions to Maximum Floor Area Ratio (FAR) Regulations for Residential Units," permits exceptions for additional floor area for buildings where the certificate of occupancy was issued

at least ten years previously, and provides that "[e]xterior modifications to accommodate an exterior addition or interior conversion shall include, without limitation the addition of a dormer, penthouse, cupola, windows, doors or the like." The defendants' proposed addition would result in an increase in the extent of the existing nonconforming FAR of 1.14 to an ultimate FAR that would be thirty-eight per cent higher than the permitted FAR of 1.0, and thirteen per cent higher than the maximum exception of twenty-five per cent.