COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PLYMOUTH, ss. FAR NO._____

Appeals Court No. 2020-P-0647

THOMAS F. WILLIAMS, Individually and as Trustee of the River Realty Trust, Appellant

v.

THE NORWELL BOARD OF APPEALS and LOIS S. BARBOUR, PHILIP Y. BROWN, MICHAEL KIERNAN, THOMAS P. HARRISON, and DAVID TURNER, as they are Members of the Board of Appeals of the Town of Norwell, and WILLIAM MCCAULEY, MAURA A. LAUREAU & GREGORY T. LAUREAU and RICHARD THORNTON & DEBORAH THORNTON, Appellees

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APPLICATION FOR FURTHER APPELLATE REVIEW

APPLICATION OF THE APPELLEES IN THE COURT OF APPEALS ACTION, GREGORY AND MAURA LAREAU

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(1) REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, the Defendants, Gregory and Maura Lareau, who were the Appellees before the Massachusetts Court of Appeals (collectively, "**Lareau**"), respectfully request that this Honorable Court grant further appellate review of the Appeals Court's opinion issued in this case on July 19, 2021 (attached hereto as Attachment A). As grounds hereto, Lareau states that further appellate review is necessitated by substantial reasons affecting the public interest and the interests of justice, as discussed below.

(2) STATEMENT OF PRIOR PROCEEDINGS

On January 11, 2013, following trial, the Massachusetts Land Court (Hon. J. Cutler) issued a decision in Williams v. Norwell Board of Appeals & Others, 10 MISC 419885 (2013). The said 2013 trial decision dismissed the plaintiff's, Williams ("**Williams**"), G.L. Ch. 40A, Section 17 appeal of the Norwell Board of Appeals' Decision (the "**2009 ZBA Decision**") in overturning the issuance of a building permit to Williams on the basis that the lot in question did not enjoy separate protection under the fourth paragraph of G.L. Ch. 40A, Section 6.

On September 11, 2014, the Court of Appeals issued a Memorandum and Order Pursuant to Rule 1:28 (Court of Appeals No. 13-P-438), Williams v. Board of Appeals of Norwell, et al., 86 Mass. App. Ct. 1111 (2014) (the "**2014 Appeals Court Decision**") (attached hereto as Attachment B), which vacated the Land Court's 2013 trial judgment and remanded the case to the Land Court for further proceedings consistent with the Court of Appeals' said Memorandum and Order.

On June 21, 2016, the Land Court (Hon. J. Cutler) issued an Order of Remand After Rescript (the "**Remand Order**") (attached hereto as Attachment C), remanding the case to the Norwell Board of Appeals (the "**Board**") to determine the ultimate issue of whether the plaintiff's property enjoyed separate lot protection under the fourth paragraph of G.L. Ch. 40A, Section 6.

On October 20, 2016, following remand, the Board filed a "Findings and Decision" with the Norwell Town Clerk (the "**Decision on Remand**") which determined that Lot 62 qualifies for separate lot protection.

On November 8, 2016, Lareau appealed the Board's Decision on Remand. Summary judgment motions were filed at two junctures in this action. In 2017, the Land Court (Hon. J. Cutler) denied the parties' cross

motions for summary judgment. Following Hon. J. Cutler's retirement, the case was re-assigned to Hon. J. Roberts. In 2019, the parties filed a second round of motions for summary judgment. On February 4, 2020, the Land Court issued a "Memorandum of Decision and Order Denying Plaintiff's Motion for Summary Judgment and Allowing the Lareau Defendants' Motion for Summary Judgment" and a Judgment (collectively, the "**2020 MSJ Decision**") which annulled the Board's Decision on Remand and annulled the said building permit.

On July 19, 2021, a separate panel of the Court of Appeals from that which adjudicated the 2014 Appeals Court Decision issued a "Memorandum and Order Pursuant to Rule 23.0" (the "**2021 Appeals Court Decision**"), which concluded that the 2020 MSJ Decision "exceeded the scope of the judge's authority on remand", and reversed the 2020 MSJ Decision. No party has filed a motion seeking reconsideration or modification of the 2021 Appeals Court Decision.

(3) SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

The 2009 Zoning Decision analyzed whether the subject property met the criteria set out in the first sentence of the fourth paragraph of G.L. Ch. 40A, Section 6, which required that the subject lot met the

"then existing requirements" prior to the zoning change that rendered the lot noncompliant, and have at least fifty feet of "frontage." However, the said statute does not define "frontage." Accordingly, the analysis in the 2009 Zoning Decision focused on whether the subject property met the "then existing requirements" and had at least fifty feet of "frontage". At trial, since there was no statutory definition or local regulation of "frontage" in effect when the lot was created, the Land Court utilized the current zoning bylaw definition of "frontage" and "street or way" in effect in 2009. Using the 2009 definition, the Board determined that an adequacy determination of the road by the Planning Board was required before a building permit could issue.

Despite no reference in the initial 2009 zoning decision to any prior bylaw, at the trial before the Land Court, Williams, for the first time, produced a zoning bylaw dated 1942, and, thus, the parties stipulated that it was in effect at the time that the subject property was created in 1948. As indicated above, the 2013 Land Court trial decision construed the 1942 Zoning Bylaw to ascertain the "then existing requirements" when the lot was created in 1948, and

determined that it did not contain a "frontage" requirement. Since there was no requirement when the lot was created, the Land Court made specific reference to, and applied, the principles set forth in Marinelli v. Bd. Appeals of Stoughton, 440 Mass. 255 (2003), which it determined required that the 2009 zoning bylaw definitions of "frontage" and "street or way" govern in situations where no local bylaw regulation was in place at the time of the creation of the subject lot.

However, on appeal, the 2014 Appeals Court Decision determined that, even though the 1942 Zoning Bylaw did not contain a requirement or definition of "frontage", the Land Court's conclusion was "based on incorrect subsidiary findings" because the definition of "width" in the 1942 Zoning Bylaw "effectively operates as a frontage requirement." The Court of Appeals further ruled as follows:

> "In considering whether the locus met the 'then existing requirements' in 1948, the board will need to consider whether the locus met the then existing frontage requirement, in circumstances where the definition of way in effect when the locus was created included a passage, the deed described an existing right of way to the public way, and the existing right of way was shown on the plan crossing the locus for more than one hundred feet."

On that basis, the Appeals Court vacated the trial court judgment and remanded the matter to the Land Court "for further proceedings consistent with this memorandum and order."

Thereafter, the Land Court subsequently issued its Order of Remand (Attachment C hereto). Consistent with the Court of Appeals decision, the trial court's Order of Remand charged, in pertinent part, as follows:

> "[t]he ZBA shall review both the evidence presented at the hearing on the original appeal and any new evidence presented at the public hearing on the remanded appeal, and shall determine whether Lot 62 qualifies for separate lot protection under G.L. c. 40A, §6, ¶4 in that it met the then-applicable zoning requirements for residential building lot frontage when it was created by deed in 1948. Such determination shall be made in light of the then existing Zoning By-law definition of the term "way" as including a "passage," and the Appeal's Court's conclusions that the 1948 deed for Lot 62 "described the existing right of way of the public way and the existing right of way was shown on the plan crossing [Lot 62] for more than one hundred feet."
>
> *(emphasis added.)*

At the remanded public hearing, the Board of Appeals did review new evidence, which new evidence, in part, is identified in Paragraphs 79 and 80 on pages 5 and 6 of the Decision on Remand. That newly discovered evidence directly led to three specific

findings, Finding Nos. 12, 13, and 14 in the Decision on Remand, as follows:

"12. Contrary to what the parties believed and indicated to the Land Court and was then incorporated into the appeal, the Town of Norwell did adopt a zoning bylaw as early as 1942; however, during the Remand Hearing process, Board member, David Turner, a former moderator and selectman recalled that the early zoning bylaws were the subject of a lawsuit that invalidated the zoning bylaws prior to creation of the lot in 1948. Mr. Turner researched the issue and located a copy of the judgment of the Land Court invalidating the prior zoning bylaws from 1947. See Land Court Decision (Courtney, J.) In the matter of Herbert A. Lincoln v. Inhabitants of the Town of Norwell, Docket No. 9746 (MISC) dated January 16, 1947 (invalidating Norwell Zoning Bylaws).

13. Norwell did not enact a new zoning bylaw until 1951, which said bylaw became effective after approval of the Attorney General in 1952.

14. As a consequence, at the time of the creation of the subject property there was no existing zoning bylaw governing the requirements for a parcel to be buildable."

In the "Order Denying Cross-Motions for Summary Judgment" Justice Cutler expressly found that "[t]here was no Zoning By-law in effect in Norwell in 1948, when Lot 62 was created". Moreover, Justice Cutler addressed, and promptly *exercised discretion* by denying, Williams' "law of the case" doctrine argument as follows:

> "Although Williams does not contest this fact [that there was no Zoning By-law in effect in Norwell in 1948, when Lot 62 was created] he does argue under a "law of the case theory" that the 1942 Zoning By-law

> nevertheless must be treated as having been in effect in 1948. ***I reject this proposition and find that it is undisputed that there was no zoning by-law in effect in 1948 when Lot 62 was created.*** Williams briefly argues that the 1942 By-law should still apply because the parties had previously agreed to this at trial, and both the trial judge and the Appeals Court relied upon the 1942 By-law as the one in effect when Lot 62 was created. This argument is unavailing. As the Appeals Court vacated this court's trial decision, no final judgment has yet entered, and this court is free to "reconsider a case, an issue, or a question of fact or law." *Com. v. Charles, 466 Mass. 63, 83-84 (2013)*. It is therefore appropriate to take into consideration the newly presented and uncontested information that the 1942 By-law was not, in fact, in force and effect in 1948. Declining to apply the invalidated 1942 By-law and, instead, reconsidering the Lot 62 zoning status on the basis that there was no "then existing" local frontage requirement in 1948, is entirely consistent with the Appeals Court's directive that "in considering whether the locus met the "then existing requirements" in 1948, the board will need to consider whether the locus met the then existing zoning requirement."
>
> (emphasis added).

Subsequently, in connection with a second motion for summary judgment, Justice Roberts also considered Williams' argument, and exercised her discretion in denying the so-called 'law of case doctrine'. In her 2020 judgment, Justice Roberts ruled as follows:

> "In an attempt to avoid the conclusion that Lot 62 lacks the necessary 50 feet of frontage, Mr. Williams first argues that, based on the law of the case doctrine, the provisions of the 1942 ZBL, not those from 1959 or 2009, apply. As interpreted by the appeals court, those provisions include the requirement of 100 feet of frontage along a way, with a way defined as including a "passage."

> Presumably, Mr. Williams contends that, under the 1942 ZBL, 100 feet of frontage along a passage, of which Stony Brook Lane would be an example, suffices. This argument fails for a number of reasons.
>
> First, this court (Cutler, J.) previously rejected this argument in its Order Denying Cross-Motions For Summary Judgment. ***Second, if inclined to reconsider, this court (Roberts, J.) would reach the same result.*** Here, application of the 1942 ZBL was the result of a stipulation of the parties as to its applicability, not any decision of this or the appellate court, and that stipulation was clearly erroneous. Finally, the Appeals Court did not conclude that 100 feet of frontage along Stony Brook Lane complied with the 1942 ZBL but instead deferred in the first instance to the ZBA, an analysis that the ZBA did not undertake, so that there is no "decided issue" regarding the applicability of the 1942 ZBL to Lot 62 to which the law of the case doctrine might apply."

In the 2021 Appeals Court Decision from which Lareau herein applies for further review, the Appeals Court determined that the Land Court judge's 2020 MSJ Decision annulling the Board's Decision on Remand exceeded the scope of the judge's authority on remand; essentially that the judge "should not have reevaluated the question whether the 1942 zoning bylaws provided the appropriate reference for determining the lot's 'frontage'." Therefore, the Court reasoned, it was unnecessary to reach the question of how to define the term "frontage" in G.L. Ch. 40A, Section 6 in the case were there are no

zoning bylaws to consult as of the time the locus was created. Nonetheless, the panel of the Appeals Court in a footnote indicated that "we do not agree that Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003) requires us to define frontage pursuant to [zoning bylaw definitions adopted subsequent to the creation of the subject lot]."

(4) STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

Further appellate review is sought with respect to the following points:

(A) Did the Court of Appeals err in not providing deference to the local Board's determination based on newly discovered evidence that the 1942 Zoning Bylaw had been invalidated prior to the creation of the subject property?

(b) Did the Court of Appeals err in concluding that the decision of the trial court to reject a clearly erroneous stipulation exceeded the scope of the judge's authority on remand?

(c) Did the Court of Appeals err in failing to apply the "case doctrine" standard set forth by the Supreme Judicial Court in King v. Driscoll, 424

Mass. 1 (1996), especially since judgment in this case had never become final?

(d) Did the Court of Appeals err in disagreeing that the precedent established by the Supreme Judicial Court in Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003), did not require it to define frontage pursuant to zoning bylaw definitions adopted subsequent to the creation of the subject lot?

(5) BRIEF STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

The interests of justice **do not include** the judiciary's application of a statutory regulation it knew had been invalidated in order to determine the essential issue of a case. The Land Court's Remand Order was entirely consistent with the 2014 Court of Appeals Decision.

The 2009 ZBA Decision was appealed and then remanded; it never become final. On remand, it was the *Board*, not the Land Court, that considered whether the subject property met the "then existing requirements" of "frontage" (as it was charged to do).

The Land Court properly gave deference to the Board's special knowledge of its bylaws, which the

Board discovered during a remanded public hearing. It has long been held that when a court reviews under G.L. Ch. 40A, § 17 a board's decision, the court must defer to the board's "special knowledge of 'the history and purpose of its town's zoning bylaw'" and be mindful of "'local control over community planning.'" Wendy's Old Fashioned Hamburgers, 454 Mass. 374 (2009), *quoting* Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669, 715 N.E.2d 470 (1999), and Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 73, 794 N.E.2d 1198 (2003).

The public interest would not be served, and manifest injustice would result, if local boards are encouraged to ignore the proper regulation and, in this case, the fact that the prior bylaws had been invalidated. This Application for Further Appellate Review is fundamentally about protecting against the erosion of the right of a municipality to determine which of its regulations apply, and thereafter to construe, its own regulations. In fact, as a quasi-judicial entity, the Board was bound by the final decision of the Land Court in 1947 which invalidated the 1942 zoning bylaw.

The Land Court, in two separate summary judgment decisions by two separate judges, applied the principles of the "case doctrine" and exercised discretion to apply the interests of justice; it followed the law and gave deference to the local Board when presented with new evidence in a situation where the initial decision had not become final, all in order to avoid a manifestly unjust result.

In King v. Driscoll, 424 Mass. 1, 8 (1996), the appeals court remanded various counts and affirmed the trial court's judgment as to the count in question. When the remanded decision was appealed the defendant argued that the Court of Appeals should revisit its prior affirmance of the count which had been determined and was not an issue on remand. In declining to reconsider its previous ruling, the Court of Appeals cited the "law of case" doctrine, indicating its reluctance to "reopen" an issue "once decided" *unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.* Id. at 7-8 (emphasis added.)

The clearly erroneous error, a stipulation (not an adjudication) that the 1942 zoning bylaws were in effect in 1948, which was simply accepted and not otherwise substantively determined by the trial court or the Court of Appeals in the 2014 Appeals Court Decision, was properly corrected before manifest injustice set-in and before the case became final. It is axiomatic that the interests of justice mandate that that's the way it should be.

Yet, knowing of the invalidation of the 1942 bylaw, and understanding that the issue is a threshold issue in the case, the Court of Appeals, without walking through an analysis of the "case doctrine" set forth in King v. Driscoll, 424 Mass. 1, 8 (1996), ensured that the proper law would not apply.

"[U]nder the law of the case doctrine, a second judge does have the power until final judgment to rule differently from the first judge on 'an issue or a question of fact or law once decided' in order to reach a just result." *Catalano v. First Essex Sav. Bank*, 37 Mass.App.Ct. 377, 384, 639 N.E.2d 1113 (1994), *quoting Goulet v. Whitin Machine Works, Inc.*, 399 Mass. 547 (1987). Without any question, the Board was correct that there was, in fact, no bylaw in

effect at the time of the creation of the lot. The entire purpose of the allowing an exception to the "law of case" doctrine is to "reach a just result." Catalano, supra.

Additionally, in the 2021 Appeals Court Decision the Court did not reach the question of how to define the term "frontage" in G.L. Ch. 40A, Section 6 if there were no zoning bylaws to consult as of the time the locus was created. While it did not reach that question, he Court of Appeals did clearly indicate that "we do not agree that Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003), requires us to define frontage pursuant to [zoning bylaw definitions adopted subsequent to the creation of the subject lot.]" This is a foreseeable fact pattern given that these lots were vacant when local bylaws are adopted, and is a paramount question when construing whether lots "met the then existing requirements" and are to be given protection under the fourth paragraph of G.L. Ch. 40a, Section 6; the public interest would be served if the Supreme Judicial Court were to clarify the proper analysis.

In this case, Justice Roberts cited Marinelli v. Bd. of Appeals of Stoughton, 440 Mass. 255, 262 (2003)

as providing that the Zoning Act does not define "frontage", and that the SJC requires that the Land Court look to the applicable town bylaw for a definition. See, Marinelli, *supra,* at 262. Here, due to the invalidation of the 1942 bylaw, there was no bylaw to apply. Since G.L. Ch. 40A, Section 6 protects against "increases in . . . frontage" of a zoning ordinance or bylaw for lots having at least fifty feet of frontage (or 75 feet for lots held in common ownership), of course Courts are to look to the definition of that word in the local bylaw, whether that be the version of the bylaw that first rendered the lot nonconforming, or the current bylaw. That is because even if the lot met the "then existing requirements" the statute still requires it to have a certain amount of minimum "frontage".

In addition to confirming the "case doctrine" and the deference owed to local boards in interpreting their own bylaws, accepting this Application for Further Appellate Review is also an opportunity for the Court to clarify the meaning behind the Marinelli precedent in this regard.

GREGORY T. and MAURA A. LAREAU,
By their attorney,

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Dated: August 6, 2021

(6) RULE 16(K) CERTIFICATION

I, Jeffrey A. De Lisi, hereby certify PURSUANT TO RULE 16(k) of the Massachusetts Rules of Appellate Procedure that the foregoing Application for Further Appellate Review brief complies with the rules of Court that pertain to said Applications, and the length limits conform as the brief statement above contains 5 pages and 1103 words. Compliance with the applicable length limit of Rule 20 was ascertained by using monospaced (Couier) 12-point font (10 character per inch).

SIGNED UNDER THE PAINS AND PENALTIES OF PREJURY THIS 6th DAY OF AUGUST, 2021.

/S/Jeffrey A. De Lisi

(7) CERTIFICATE OF SERVIXCE

I, Jeffrey A. De Lisi, Esq., certify that, on this 6th day of August, 2021, I served the foregoing Application for Further Appellate Review, in Thomas F. Williams vs. Board of Appeals of Norwell & Others, Mass. App. Ct. Docket No. 20-P-647, on all parties who are registered for electronic service through the electronic filing system and will serve all other active parties conventionally.

SIGNED UNDER THE PAINS AND PENALTIES OF PREJURY THIS 6th DAY OF AUGUST, 2021.

/S/Jeffrey A. De Lisi

ADDENDUM TO TABLE OF CONTENTS

ATTACHMENT A

Thomas F. Williams vs. Board of Appeals of Norwell & Others,
Mass. App. Ct. Docket No. 20-P-647
(issued July 19, 20201)

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-647

THOMAS F. WILLIAMS[1]

vs.

BOARD OF APPEALS OF NORWELL & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In this appeal, we consider for the second time the question whether an undeveloped parcel of land in Norwell, which was created by a plan recorded in 1948 (locus or property), is protected as buildable under G. L. c. 40A, § 6, fourth par.

Plaintiff Thomas F. Williams seeks to construct a single-family home on the property. Apparent neighbors Maura A. Laureau and Gregory T. Laureau oppose construction. The parties apparently agree that the property is not buildable under Norwell's current zoning bylaws. However, Williams contends that the property is protected as buildable pursuant to G. L. c. 40A, § 6, fourth par., which "is concerned with protecting a once valid lot from being rendered unbuildable for residential

[1] Individually and as trustee of the River Realty Trust.

[2] Maura A. Laureau and Gregory T. Laureau.

purposes, assuming the lot meets modest minimum area . . . and frontage . . . requirements" (citation omitted). Rourke v. Rothman, 448 Mass. 190, 197 (2007). A property must meet three requirements to qualify for protection under § 6: that it "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." G. L. c. 40A, § 6, fourth par. The Laureaus concede that the locus meets two of those requirements but contend that the locus lacks the fifty feet of frontage necessary to meet the third requirement.

Williams argues that Stony Brook Lane, an existing private lane, provides the necessary frontage. In 2014, a panel of this court considered that contention. See Williams v. Board of Appeals of Norwell, 86 Mass. App. Ct. 1111 (2014). The panel concluded: (1) that the deed creating the locus described a right of way that crosses the locus for more than one hundred feet; and (2) that "[t]here was no evidence that 'the existing right of way' referred to in 1948 was anywhere other than [Stony Brook Lane,] the traveled way that exists today." Id. The panel remanded the case so that the board of appeals (board) could decide, in the first instance, whether the locus met the frontage requirements of Norwell's 1942 zoning bylaws, which

bylaws the parties had stipulated were in effect when the locus was created in 1948. Id.

On remand, the board determined that the locus met the requirements for protection as a preexisting nonconforming lot, and affirmed the issuance of a building permit to construct a home on the property. The Laureaus sought review of the board's decision in the Land Court by filing a "complaint after remand." The Laureaus abandoned the position that they had previously taken in both the Land Court and the Appeals Court that the locus was not buildable when it was created in 1948 because it did not comply with the frontage requirements in the 1942 bylaws. They instead argued that the locus became unbuildable sometime after 1948, because Stony Brook Lane does not qualify as "frontage" under the frontage definitions in Norwell's 1955 and 1959 zoning bylaws.

Acting on cross-motions for summary judgment, a Land Court judge annulled the board's decision. The judge found that there were no zoning bylaws in effect in Norwell at the time the locus was created because a 1947 Land Court decision had invalidated the 1942 zoning bylaws. Thus, rather than following the Appeals Court panel's instructions to determine whether the locus met the frontage requirements of the 1942 bylaws, the judge instead determined whether the locus had at least fifty feet of "frontage" as that term is defined in Norwell's 1955, 1959, and

2009 zoning bylaws. The judge concluded that Stony Brook Lane did not meet the definition of "frontage" in those bylaws because there are no documents showing planning board "approval of Stony Brook Lane as it abuts [the locus]." We reverse.

On remand, a trial court judge must follow the terms of an appellate court's decision as to matters addressed in that decision. See City Coal Co. of Springfield, Inc. v. Noonan, 434 Mass. 709, 710–711 (2001). The appellate court's instructions become "the governing 'law of the case' and should not [be] reconsidered by the remand judge." Id. at 712 (vacating portion of judgment that exceeded trial judge's authority by reconsidering issue that appellate court already decided). See also Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939) ("The general proposition which moved [the trial court] -- that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid at rest -- is indisputable"). That is true even if the trial court judge disagrees with the appellate court's decision or believes that the appellate court reached an incorrect result. See MacDonald v. MacDonald, 407 Mass. 196, 202–203 (1990) (where Supreme Judicial Court had already decided that opposing party did not have right to raise attorney's misrepresentation, trial judge had no discretion to consider issue).

Here, the Appeals Court panel's instructions on remand were to determine whether the locus met the frontage requirements of the 1942 zoning bylaws. Based upon those instructions, the judge should not have reevaluated the question whether the 1942 zoning bylaws provided the appropriate reference for determining the lot's "frontage." The Appeals Court panel had already ruled that the 1942 bylaws provided the relevant standard (and indeed, the parties had stipulated that those bylaws were in effect in 1948). Thus, the judge's analysis of that issue, while well-intended, was improper. It follows that it was improper for the judge to annul the board's decision based upon the judge's interpretation of the requirements of the 1955, 1959, and 2009 zoning bylaws.[3]

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[3] The judge's opinion assumes that, because the Land Court ruled the 1942 bylaws invalid in a 1947 decision, the 1942 bylaws should simply be ignored as a possible source for defining "frontage" when the lot was created in 1948. That result is far from self-evident. The 1947 Land Court decision ruled that the town had not followed the proper statutory procedure in adopting the bylaws; it did not find fault with the bylaws' definition of frontage. The 1942 bylaws are, at the least, evidence as to what the town of Norwell considered "frontage" as of 1948. Cf. Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019), quoting S. Singer, 3C Statutes and Statutory Construction § 77:7, at 692-694 (8th ed. 2018) ("Specific provisions of a statute are to be 'understood in the context of the statutory framework as a whole, which includes . . . earlier versions of the same act'").

Nor is it self-evident that the Norwell bylaws were conclusively rendered "invalid" as a result of the 1947 Land Court decision. That decision was a trial court decision. There is nothing in the record regarding subsequent events --

Given our conclusion that the judge should have determined the adequacy of the locus's frontage using the 1942 bylaws, we need not reach the question how to define the term "frontage" in c. 40A if there were no zoning bylaws to consult as of the time the locus was created.[4] We think it unlikely, however, that frontage should be defined as the judge did here -- by reference to bylaws passed many years after the creation[5] of a lot. The purpose of c. 40A, § 6 is to "protect landowners' expectations of being able to build on once-valid lots." Rourke, 448 Mass. at 197. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378 (2019) (specific statutory provisions "are to be understood in the context of the statutory framework as a whole," and "[a] reviewing court's interpretation must be reasonable and supported . . . by the history of the statute"

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for example, whether the decision was appealed -- and accordingly the status of the bylaws as of the time the lot was created in 1948 is not clear.

[4] We also do not decide whether the judge correctly concluded that it was the 1959 zoning bylaws that rendered the locus unbuildable.

[5] We do not agree that Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003), requires us to define frontage pursuant to the definitions in the 1955, 1959, or 2009 zoning bylaws. In Marinelli, the Supreme Judicial Court looked to define the term "frontage" in c. 40A by reference to the "applicable" bylaws of the town in which the lot was situated. Id. at 262. Marinelli did not address how to determine which version of a town's zoning bylaws should be deemed "applicable" to a particular lot, or what should be done if the lot in question predates the adoption of any zoning bylaws in a municipality.

[quotations and citations omitted]). Accordingly, the question of what constitutes frontage under § 6 generally should be decided with reference to the time a lot was created. Applying zoning definitions from bylaws adopted years later can lead to the result that a property that was buildable when created could be rendered unbuildable based upon subsequent frontage definitions. See Priore v. Sawyer, 30 Mass. App. Ct. 943, 943 (1991) (confirming that section 6's protections apply to lots that predate adoption of zoning bylaws in municipality). Indeed, that is what happened in this case, where the judge concluded that the 1955, 1959, and 2009 zoning bylaws imposed a requirement that Williams produce plans showing that the right of way crossing the locus had been approved by the planning board, an entity that did not come into existence until several years after the recording of the plans creating the locus.

Based upon the foregoing, we conclude that the Land Court

judge's decision annulling the board's October 20, 2016 decision exceeded the scope of the judge's authority on remand.

Judgment reversed.

By the Court (Meade, Englander & Grant, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: July 19, 2021.

[6] The panelists are listed in order of seniority.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 20-P-647

THOMAS F. WILLIAMS

vs.

BOARD OF APPEALS OF NORWELL & others.

Pending in the Land Court

Ordered, that the following entry be made on the docket:

Judgment reversed.

By the Court,

Joseph F. Stanton, Clerk

Date July 19, 2021.

ATTACHMENT B

Thomas F. Williams vs. Board of Appeals of Norwell & Others,
Mass. App. Ct. Docket No. 13-P-438,
86 Mass. App. Ct. 1111 (2014)

Williams v. Board of Appeals of Norwell

Appeals Court of Massachusetts

September 11, 2014, Entered

13-P-438

Reporter
2014 Mass. App. Unpub. LEXIS 975 *; 86 Mass. App. Ct. 1111; 16 N.E.3d 524

THOMAS F. WILLIAMS[1] *vs.* BOARD OF APPEALS OF NORWELL & others.[2]

Subsequent History: Summary judgment granted by, Decision reached on appeal by, Judgment entered by *Williams v. Norwell Bd. of Appeals, 2020 Mass. LCR LEXIS 20 (Feb. 4, 2020)*

Prior History: *Williams v. Norwell Bd. of Appeals, 2013 Mass. LCR LEXIS 17 (Jan. 11, 2013)*

Core Terms

locus, frontage, right of way, by-law, zoning, deed, public way, building permit, existing right, feet

Judges: **[*1]** Cohen, Brown & Rubin, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue in this case is whether the board of appeals of Norwell (board) properly revoked a building permit granted by the building inspector to the plaintiff for construction of a single-family residence on his property (locus or property). Created in 1948, the locus consists of 2.076 acres and is described as being subject to and having rights in an "existing right of way" that proceeds across the lower one-third of the locus for well over one hundred feet and continues westerly to the public way. A portion of the right of way is shown on a plan recorded with the deed but the exact route to the public way is not shown. The plaintiff testified that he has used what is now known as "Stony Brook Lane," which is in the same general area as the right of way described in the deed, to access the property for some sixty years. Similarly, the building inspector testified that he traveled over Stony Brook Lane to access the property, found it adequate, and granted a building permit relying on Stony Brook Lane for frontage.

Apparent neighbors appealed to the board. The board rejected the plaintiff's argument that the locus met the "then **[*2]** existing" zoning requirements when the locus was created in 1948 and, therefore, remains buildable pursuant to the grandfathering protection contained in *G. L. c. 40A, § 6*, fourth par., first sentence, inserted by St. 1975, c. 808, § 3. The board erroneously concluded that the protections of *§ 6* expired five years following adoption of the ordinance or by-law increasing

[1] Individually and as trustee of the River Realty Trust.

[2] William McCauley, Maura A. Laureau, Gregory T. Laureau, Richard Thornton, and Deborah Thornton.

dimensional requirements.[3] Therefore, it concluded that the current zoning by-law requirements apply, and that the current definition of "frontage" requires an adequacy determination by the planning board where an owner proposes to rely for frontage on a way that preexisted the adoption of the zoning by-law. Concluding it was premature to issue a building permit in the absence of an adequacy determination, the board revoked the building permit.

The plaintiff appealed to the Land Court claiming that the provisions of G. L. c. 40A, § 6, fourth par., first sentence, apply and preserve the buildable status of the locus. The judge concluded that § 6 does not apply because in 1948, when the locus was created, the zoning by-law did not **[*3]** define frontage or have a frontage requirement and in the absence of a prior definition, adoption of an adequacy requirement is not an "increase" in frontage from which the provisions of § 6 provide protection. The judge also found that there was inadequate proof that the right of way either exists on the ground or crosses the locus. The judge affirmed the revocation of the building permit.

Discussion. Because fifty feet of frontage is a requirement even if the protections of G. L. c. 40A, § 6, apply to the locus, we first consider the judge's findings that the plaintiff did not meet his burden of proving that the right of way referred to in the deed (i) exists on the ground, (ii) abuts or crosses the locus, or (iii) is contiguous with Shady Brook Lane. We conclude there is no basis in the record for the judge's findings. The right of way was described in the deed as "existing" and was shown on the 1948 plan as crossing the locus for well over one hundred feet. Neither the building inspector nor the board disputed that the right of way existed on the ground or was contiguous with Shady Brook Lane. The plaintiff testified that he has been traveling the same route over what is now Shady Brook Lane from the **[*4]** public way to the locus since the 1960's and that there are no other routes. The building inspector also traveled over Shady Brook Lane to the locus and observed others doing the same. Shady Brook Lane appears on current assessors' maps and is shown as extending past the locus. No abutters testified. No one testified that the right of way was or was intended to be in a different location. There was no evidence that "the existing right of way" referred to in 1948 was anywhere other than the traveled way that exists today.[4]

The right of way to the public way is described in the **[*5]** 1948 deed only as proceeding in a "general westerly direction." That the right of way historically was not referred to as Shady Brook Lane is largely irrelevant.[5] So far as the record reveals, what is now referred to as Shady Brook Lane provides access from the locus to the public way, in a general westerly direction, and there is no evidence that it is not consistent with the existing right of way referred to in the 1948 deed. Accordingly, we conclude that the judge's findings that the right of way either independently or as part of Shady Brook Lane exists on the ground; does not cross the locus; and is inconsistent with the right of way described in the 1948 deed, are unsupported by the record and clearly erroneous.

It is necessary, therefore, to turn to the plaintiff's argument that the grandfather provisions of G. L. c. 40A, § 6,[6] apply such that the requirements of the 1942 zoning by-law apply to the locus and it retains its buildable status. The judge found, and the parties agree, that the 1942 zoning by-law **[*6]** was in effect in 1948 when the locus was created and had a 20,000 square foot area requirement and a one hundred foot width requirement for residential lots. The lot width was

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[3] So far as it appears from the record, the board erroneously applied the second sentence of § 6, fourth par., instead of the first sentence.

[4] The judge's suggestion that the right of way intersects the northwest corner of the locus, and therefore cannot be the same as the existing Shady Brook Lane, is incorrect. The right of way is shown on the plan as crossing the locus from southeast to southwest and enters the grantor's remaining property at the grantor's southeast corner. While there is some difference between the 1948 plan and the assessors' map as to the direction the right of way takes at the distal, eastern end of the locus, that discrepancy bears little relevance to the issue at hand as it is well past the one hundred feet of frontage required.

[5] Similarly, the building inspector's uncontroverted testimony that lots are not given street addresses until a foundation is poured, explains why the locus does not have a Shady Brook Lane address.

[6] The first sentence of the fourth par. of § 6 provides that "[a]ny increase in area, frontage, width, yard, or depth requirements or 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."

to "be measured at the way line or the set back line." An exception to the width requirement, referred to as a frontage requirement by the drafters, was contained in the next sentence of the 1942 by-law.[7] In addition, the term "way" was defined in the 1942 zoning by-law as "a passage, street, road, or bridge, public or private."

Whether *§ 6* provides protection for the locus turns on a determination whether the locus met the requirements of the by-law when the locus was created in 1948. Because the board erroneously concluded that the protections of *§ 6* expired five years after the revisions to the by-law were adopted, it did not seriously consider whether the locus met the "then existing requirements" when it was created in 1948. Since we owe deference to the board's reasonable interpretation of its own by-law, we think the board should pass on that issue in the first instance. See *Hoffman v. Board of Zoning Appeal of Cambridge, 74 Mass. App. Ct. 804, 814, 910 N.E.2d 965 (2009)*.

While it is true, as the judge noted, that she could have affirmed for other reasons, her conclusion that the 1942 by-law contained no frontage requirement fails to take into account that the width requirement of one hundred feet effectively operates as a frontage requirement. That **[*8]** the drafters of the provision intended this requirement as a frontage requirement is evident by the immediately following exception from what is referred to as the frontage requirement. See note 7, *supra*. Thus, the judge's conclusion that the current definition of frontage applies to the locus was based on incorrect subsidiary findings. In considering whether the locus met the "then existing requirements" in 1948, the board will need to consider whether the locus met the then existing frontage requirement, in circumstances where the definition of way in effect when the locus was created included a passage, the deed described an existing right of way to the public way, and the existing right of way was shown on the plan crossing the locus for more than one hundred feet.[8]

Finally, the plaintiff claims he was unfairly surprised by the judge's consideration of his legal rights over the full length of the way to the public way. It is true that zoning authorities generally are not arbiters of title. See *Brady v. City Council of Gloucester, 59 Mass. App. Ct. 691, 696-697, 797 N.E.2d 479 (2003)*. Here, the board specifically concluded that it did not have jurisdiction over the title issue. Nonetheless, we have recognized **[*9]** that "permit-granting authorities . . . may find it necessary to address questions of ownership in the course of their work." *Id. at 697*. "Where encumbrances on title do not impair the applicant's rights to prosecute the proposed development, denial on that basis is not warranted. . . . But when an ownership issue adversely and substantially affects the development or use of the proposed project, the reviewing board need not ignore that reality."[9] *Ibid*. In any future proceedings, should a party with proper standing raise the issue of the plaintiff's legal right to use the full length of the right of way, the plaintiff will not be able to claim surprise.

The judgment is vacated and the case is remanded to the Land Court for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Cohen, Brown & Rubin, JJ.),

Entered: September 11, 2014.

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[7] That sentence provides as follows: "This section shall not apply to any lot which at the time of this Zoning By-Law becomes effective, is narrower at the way or is of lesser area than the **[*7]** specifications herein provided, but only one dwelling may be erected on a lot containing less than 20,000 square feet, or having a frontage of less than 100 feet, if such a lot was recorded . . . at the time of the adoption of this by-law." Since the locus was created after 1942, the plaintiff correctly does not argue that this exception applies to the locus.

[8] The judge found that the locus met all of the other *G. L. c. 40A, § 6*, criteria.

[9] We note that some towns require frontage on ways over which the locus enjoys legal and actual access. The zoning by-law here has no such requirement.

ATTACHMENT C

Order of Remand After Rescript

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

PLYMOUTH, SS

10 MISC 419885 (JCC)

THOMAS F. WILLIAMS, Individually and as Trustee of the River Realty Trust,

Plaintiff,

v.

THE NORWELL BOARD OF APPEALS and LOIS S. BARBOUR, PHILIP Y. BROWN, MICHAEL KIERNAN, THOMAS P. HARRISON, and DAVID TURNER, as they are Members of the Board of Appeals of the Town of Norwell, and WILLIAM MCCAULEY, MAURA A. & GREGORY T. LAUREAU and RICHARD & DEBORAH THORNTON,

Defendants.

ORDER OF REMAND AFTER RESCRIPT

The central issue in this case is whether the Plaintiff's lot has sufficient "frontage" to qualify the lot for the so-called "separate lot" protections contained in the first sentence of G.L. c. 40A, § 6, ¶ 4. Plaintiff Thomas F. Williams, Trustee of the River Realty Trust, owns a 2.076 acre parcel of land in the Town of Norwell, identified by the Norwell Assessors as Lot 62. Williams appealed under G.L. c. 40A, § 17 from the December 21, 2009 decision of the Defendant Norwell Zoning Board of Appeals ("ZBA") which overturned the issuance of a building permit for the construction of a single-family dwelling on Lot 62. The ZBA had concluded that the building permit was issued prematurely because the Planning Board had not yet made a frontage adequacy determination, as required under the current Norwell Zoning By-law. Williams contends that the ZBA's decision is incorrect as a matter of law because Lot 62 is protected under the fourth paragraph of G.L. c. 40A, § 6 from application of current Zoning By-law requirements, including the current requirement that private way frontage is subject to an adequacy determination by the Planning Board.

Following a trial in this matter, the court dismissed Plaintiff's §17 appeal on January 11, 2013, after concluding that the Plaintiff had failed to prove that Lot 62 qualifies for separate lot protection under § 6, ¶ 4. Plaintiff appealed, and on September 11, 2014, the Appeals Court issued a rescript Memorandum and Order in Appeal No. 2013-P-0438, vacating the judgment of

dismissal and remanding the case to this court for further proceedings consistent with said Memorandum and Order (the "Appeals Court Decision"). Notably, the Appeals Court determined that the ZBA should be given an opportunity to consider, in the first instance, whether or not the Plaintiff's lot met the frontage requirements of the Norwell Zoning By-law in 1948 when Lot 62 was created and, in particular, "whether the locus met the then existing frontage requirement in the circumstances where the definition of way in effect when the locus was created included a passage, the deed described the existing right of way to the public way, and the existing right of way was shown on the plan crossing the locus for more than one hundred feet."

By Order of this court, dated November 7, 2014, the Plaintiff was required to file and serve, by December 1, 2014, a proposed order of remand to the ZBA "consistent with the Appeals Court Decision." The Order allowed the Defendants to notify the court of its agreement with the Plaintiff's proposed order of remand or to file and serve a statement proposing changes thereto which they believed to more closely conform to the Memorandum and Decision of the Appeals Court within 14 days after service of the Plaintiff's proposed remand order. Plaintiff, however, failed to file and serve a proposed remand order by December 1, 2014 as required. Instead, on January 23, 2015, Plaintiff inexplicably filed a "Motion for Issuance of a Remand Order or Scheduling of Status Conference."

Following a telephone conference with counsel on February 11, 2015, the Court modified the November 7, 2014 Order by extending the deadline for the Plaintiff to file and serve its proposed order of remand to February 25, 2015, and by extending the Defendants' deadline for accepting or rejecting the Plaintiff's proposal to March 17, 2015. The Plaintiff once again missed the deadline, and on March 2, 2015, the Plaintiff filed an Assented to Motion for Extension of Time from February 25, 2015 to March 19, 2015. The Assented to Motion, which also sought a corresponding extension of the Defendants' deadline for responses to April 7, 2015, was allowed on March 3, 2015.

On March 19, 2015, Plaintiff filed a "Motion for Issuance of Remand Order in Accordance with the Guidance of the Massachusetts Appeals Court Decision," together with a proposed order that would have required the ZBA to "reinstate" the building permit for Lot 62. On April 7, 2015, the Defendant Norwell ZBA filed its opposition to the Plaintiff's proposed remand order on the grounds that it would not result in a meaningful remand, and does not accurately or objectively reflect the Appeals Court's directions. The ZBA filed its own motion and proposed order on April 7, 2015. Also, on April 7, 2015, the Individual Defendants filed their opposition to the Plaintiff's proposed order on similar grounds, and also submitted their own motion and proposed order. The Plaintiff filed no oppositions to either of the Defendants' proposed orders. Although more than a year has elapsed, none of the parties have marked their motions for a hearing. Therefore, the court has decided the matter on the papers, pursuant to Land Court Rule 6.

After review of the parties' respective, proposed orders, the court has determined it necessary to DENY the parties' motions as presented,[1] and instead issue the following Order of Remand:

It is hereby **ORDERED** that, based upon the Appeals Court rescript in Thomas F. Williams v. Board of Appeals of Norwell, 13-P-438 (September 11, 2014), this court has determined that the matter shall be remanded to the ZBA for further proceedings. Said proceedings are to be conducted in accordance with the following requirements:

1. The ZBA shall schedule and notice a public hearing, to be held within 45 days following the date of this Order of Remand, for the purposes of reconsidering its 2009 decision on the appeal from the issuance of a building permit for the Plaintiff's lot ("Lot 62"), in light of the findings and directives as set forth in the Appeals Court rescript.

2. The ZBA shall publish, post and send notice of the public hearing on the remanded appeal from the issuance of the building permit, in accordance with the requirements set forth in G.L. c. 40A, §11. The ZBA shall also send notice of the public hearing to all counsel of record in this case.

3. In considering the remanded appeal, the ZBA shall review both the evidence presented at the hearing on the original appeal and any new evidence presented at the public hearing on the remanded appeal, and shall determine whether Lot 62 qualifies for separate lot protection under G.L. c. 40A, §6, ¶4 in that it met the then-applicable zoning requirements for residential building lot frontage when it was created by deed in 1948.[2] Such determination shall be made in light of the then existing Zoning By-law definition of the term "way" as including a "passage," and the Appeals' Court's conclusions that the 1948 deed for Lot 62 "described the existing right of way to the public way and the existing right of way was shown on the plan [referenced in the 1948 deed] crossing [Lot 62] for more than one hundred feet."

4. Since frontage necessarily implies access to a public way, the ZBA may also consider whether the Plaintiff has the legal right to use the full length of the "existing way" described in the 1948 deed creating Lot 62 to access the nearest public way, provided the legal access issue is raised by a person with standing to do so.

5. No later than 30 days after the close of the public hearing, or on such later date as the ZBA and Plaintiff may agree upon in writing or that this court may allow on motion for good cause shown, the ZBA shall render, and file with the Norwell Town Clerk, a new

[1] Although the Defendant ZBA's proposed order is more consistent with the Appeals Court's Decision than either the Plaintiff's or the Individual Defendants' proposals, it too requires some modification.

[2] This court has previously determined that Lot 62 has not been held in common ownership since its creation, has remained vacant since its creation and, that it met and exceeded the minimum area and lot width requirements for a residential building lot when it was created. These findings were not disturbed by the Appeals Court.

decision either affirming the grant of the building permit for Lot 62 or revoking the building permit on the basis of its further consideration. The ZBA shall also cause a copy of said decision to be filed in the Land Court under the docket number for the instant action, 10 MISC 4198859 (JCC).

6. The court shall retain jurisdiction over this matter both for purposes of enforcing the terms and conditions of this Order of Remand, and for purposes of hearing any subsequent appeals by Plaintiff or by any of the Individual Defendants in this case. Any appeal of the ZBA's decision after remand by Plaintiff or by any of the Individual Defendants must be made in accordance with G.L. c. 40A, §17, and shall be filed with the Land Court under the docket number for the instant action as a Complaint after Remand.

SO ORDERED.

By the court (Cutler, C.J.)

Attest:

Deborah J. Patterson, Recorder

Dated: June 21, 2016

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER