COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

_____

No. _____

_____

THOMAS M. MONTGOMERY, MARGOT MONTGOMERY, JOAN HOYT, PHILIP HOYT, BARRY BERMAN, and PEGGY McCARTHY BERMAN

Plaintiffs/Appellees

vs.

BOARD OF SELECTMEN OF NANTUCKET, NANTUCKET HISTORIC DISTRICT COMMISSION, and MICHAEL MAITINO

Defendants

JEFFERY KASCHULUK and WEST BAY DEVELOPMENT, INC.

Defendants/Appellants

_____

PLAINTIFFS'/APPELLEES' APPLICATION FOR FURTHER APPELLATE REVIEW

_____

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April 3, 2019

Request

Thomas M. Montgomery, Margot Montgomery, Joan Hoyt, Philip Hoyt, Barry Berman, and Peggy McCarthy Berman (the "Neighbors"), the prevailing parties in the superior court, request leave to obtain further appellate review in *Montgomery v. Board of Selectmen of Nantucket*, Appeals Court No. 17-P-1432, Slip op. (March 14, 2019). The Appeals Court's decision detrimentally alters the appellate regime established by this Court in *Gumley v. Board of Selectmen of Nantucket*, 371 Mass. 718 (1977) for municipal and judicial review of decisions under a special act of the legislature intended to preserve the historic and architectural character of Nantucket Island. Ch. 395 of the Acts of 1970, An Act Establishing An Historic District Commission For The Town Of Nantucket And Establishing Nantucket Island As The Historic District (the "HDC Act").[1]

This application is founded upon substantial reasons affecting the public interest and the interests of justice. At issue is not simply the preservation of a contributing structure on a property that the judge found was one of the most significant historical properties in Nantucket. What is also at issue is the carefully calibrated process that the legislature crafted, and that this Court mandated in *Gumley*, to adjudicate historic preservation decisions in Nantucket. Nantucket is a federally designated National Historic Landmark that the National Trust for

[1] A copy of the HDC Act is in Addendum A.

Historic Preservation placed on its list of America's 11 Most Endangered Historic Places.

Prior Proceedings

A seasoned Nantucket real estate developer bought a historic property on a historic street in the old historic core of Nantucket, hoping to develop it. The developer sought permission under the HDC Act to remove a barn from the property that was a contributing element of the historic district, but Nantucket's Historic District Commission ("HDC") denied permission, issuing a decision (HDC 1) with detailed findings on the historical and architectural significance of the street, the property, and the barn, and the detriment to each if the barn were removed. The developer appealed HDC 1 to the Board of Selectmen as provided in the HDC Act.

Rather than vote on whether to affirm or annul HDC 1, and without making any finding that HDC 1 was legally untenable or an abuse of the HDC's discretion, the board voted 4-1 to remand it, without at that time stating a purpose for the remand. After the vote, in its written decision (BOS 1) the board stated: "Although the Board did not specify instructions to the HDC in its remand order, the HDC should consider [certain matters] raised by the selectmen during the hearing." BOS 1 also noted how one selectman encouraged the parties to settle their differences.

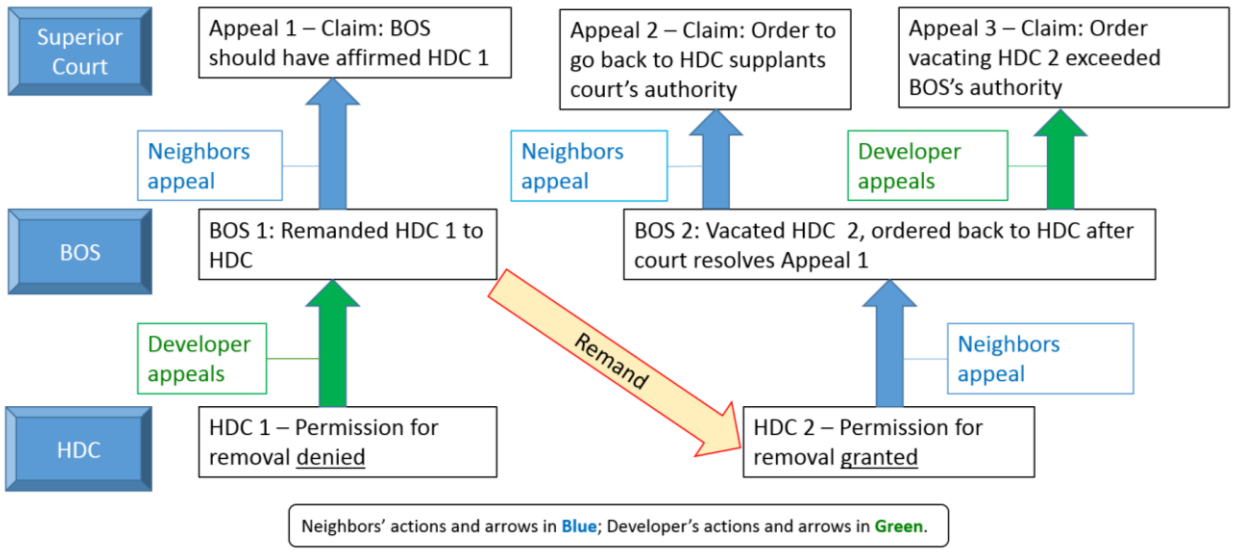
As provided for in the HDC Act, the Neighbors appealed BOS 1 to the superior court for a trial de novo. Within days after that appeal was filed, a differently constituted HDC held the remand hearing and voted 3-2 to issue HDC 2, approving the developer's request to remove the barn and making findings squarely contrary to those in HDC 1.[2]

The Neighbors appealed HDC 2 to the board, as provided in the HDC Act. On that appeal, the board issued a 2-1 decision (BOS 2), setting aside HDC 2 pending resolution of the Neighbors' appeal in the superior court. The BOS 2 decision noted "concern [over] ... whether the original remand decision of the Board may have involved the Board's substitution of its judgment for the judgment of the HDC members rather than a decision whether the HDC decision was arbitrary and capricious." The BOS 2 decision also stated that, after receiving the superior court's decision in the Neighbors' appeal, the HDC should both follow the court's ruling and also "revisit the application." *Id.*

As provided in the HDC Act, the Neighbors appealed to the superior court the part of BOS 2 that directed the HDC to revisit the application after the pending superior court appeal. The developer took his own appeal to the superior court, appealing the part of BOS 2 that set aside HDC 2.

[2] A table showing the findings in HDC 1 and the contrary findings in HDC 2 is in Addendum B to this application.

The following chart shows the procedural history to that point:



The three superior court appeals were consolidated. After a four-day trial, the judge affirmed HDC 1, finding that it was legally tenable, within the HDC's discretion, and supported by the evidence. The judge therefore found that the board's remand of HDC 1 was improper, and thus vacated BOS 1, HDC 2, and BOS 2.[3]

The developer appealed the superior court judgment, claiming mainly that the Neighbors lacked standing. The Appeals Court resolved that issue in the Neighbors' favor.

As a second appellate issue, even though the board found nothing improper in HDC 1, the developer claimed that the board had discretion to remand HDC 1 to

[3] A copy of the judge's decision is in Addendum C.

the HDC, that the board's remand nullified HDC 1 and mooted the Neighbors' appeal from BOS 1,[4] and that the board had no discretion to vacate HDC 2.

In its decision, the Appeals Court questioned whether BOS 1 and BOS 2 were even appealable, but decided that "reaching the merits is the prudent course of action." Slip op. p. 19-20.[5]

The Appeals Court correctly noted that, under *Gumley*, (a) the decision of the HDC "cannot be disturbed by the board or by the court unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary," (b) the HDC has "a substantial measure of discretionary power," and (c) on review, "the board does not have the same discretionary power as the commission." Slip op. 20-21.

Still, with no finding by either the board or the judge that HDC 1 was legally untenable or unreasonable, whimsical, capricious, or arbitrary, and despite the judge's conclusion that HDC 1 was sufficient in law on its face and supported by substantial evidence, the Appeals Court held that "it was within the board's discretion [on the developer's appeal from HDC 1] to remand the application to the commission to consider additional facts to inform its deliberations, to provide

[4] The developer claimed that the Neighbors' appeal was moot because the remand order made HDC 1 "a nullity." Appellant's Brief p. 46.

[5] A copy of the slip opinion is in Addendum D.

additional explanation, and thus to ensure a decision that is not arbitrary or capricious." Slip op. 21-22. The Appeals Court then affirmed BOS 1, but cited no precedent for the board's discretionary power to remand HDC 1 or nullify it. Instead, the Appeals Court approved of the remand because of "the possibility" that the HDC "may have taken inconsistent positions on similar proposals" at other properties. Slip op. 22.

Turning to HDC 2, the Appeals Court noted several irregularities in how HDC 2 came about and, on that basis, affirmed the part of BOS 2 that set aside HDC 2. Slip op. 22-23. But then, the Appeals Court fashioned a remedy that neither side sought: remanding the matter to the HDC to give the HDC "one more opportunity" to decide the application. Slip op. 23.

The Neighbors moved for reconsideration or modification, which the Appeals Court denied.

Statement of Facts

The Neighbors incorporate the facts found by the judge. *See* Addendum C.

Points On Which Further Appellate Review Is Sought

The Neighbors seek further appellate review to address these questions:

(a) May the Nantucket Select Board remand, and thereby nullify, an HDC decision without finding that the HDC decision is legally untenable, unreasonable, arbitrary, whimsical, or capricious?

(b) Is such a remand order unreviewable in the superior court?

(c) Does the superior court lack authority to reinstate an HDC decision that it finds to be lawful if the board set it aside through a remand order?

(d) May the Appeals Court set aside the judge's equitable remedy and substitute its own discretion in fashioning a different remedy?

Why Further Appellate Review Is Appropriate

Historic Preservation

Historic preservation in Nantucket and how the HDC Act operates are matters of such great public importance that when the roles of the HDC, the board, and the superior court first arose in *Gumley*, this Court took direct appellate review on its own motion. *Gumley*, 371 Mass. at 721.

The Appeals Court decision undermines legislative intent and this Court's *Gumley* decision by giving Nantucket's Select Board significant discretion—not given by statute—over preservation decisions by the HDC. It also leaves architecturally and historically significant properties on Nantucket more vulnerable to removal or demolition by private developers.

The Department of the Interior has designated all of Nantucket as a National Historic Landmark. EAI 211-29, EAII 35, TA 197, 199.[6] Yet the National Park

[6] EA (Exhibits Appendix), TA (Transcript Appendix), and PA (Pleadings Appendix) are references to the record appendix.

Service found Nantucket threatened by "politicization" leading to preservation decisions "generally incompatible with the historic character of the Landmark" and "eroding the quality of architectural design." EAII 149. When the National Trust for Historic Preservation placed Nantucket on its list of America's 11 Most Endangered Historic Places, it noted "an upsurge in the destructive practices of 'teardowns' and 'gut rehabs,' ... [which] are dramatically altering the heritage, cultural landscape, and quality of community life on the island." *Id.* The Appeals Court's decision threatens to intensify the politicization of the preservation process and further the detrimental alteration of Nantucket's historic and architectural character.

The Statutory Scheme

The HDC Act created two unique appellate tiers for reviewing an HDC decision: one at the board, one at the superior court. The HDC Act is silent on what evidence the board considers but mandates a trial de novo in the superior court. It has no language explaining the board's authority but empowers the superior court, after finding facts, to "annul such decision if found to exceed the authority of such Board, or ... remand the case for further action by the Commission *or make such other decree as justice and equity may require*." HDC Act § 12.

Gumley addressed the statutory scheme. It held that, in acting on applications for certificates of appropriateness, the HDC has a "substantial measure

of discretionary power," *Gumley*, 371 Mass. at 723, that applicants have no "absolute right to the certificates they seek," and that the HDC "is not compelled to grant the certificates." *Id.* at 724.

Gumley made clear that, on appeal to the board, the board has little, if any, discretion. It held that the HDC Act "is not to be taken as transferring [the HDC's] discretionary power to the board." *Id.* at 723. More particularly, it held that the board's powers do not include the "broad powers" given to zoning boards of appeal. *Id*. at 723. Those powers—the ones the board lacks—were described in *Smith v. Building Comm'r of Brookline*, 367 Mass. 765, 772 (1975), cited in *Gumley*. *Smith* described them as the power to reverse, affirm in whole or in part, modify, "make such order or decision as ought to be made," and "*all the powers of the officer from whom the appeal is taken*." *Id*.

To leave no doubt about how high a bar a challenger to an HDC decision must overcome, *Gumley* held that an HDC decision "cannot be *disturbed* either by *the board* or by the court unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *Gumley*, 371 Mass. at 724 (emphasis added). The board's role was simply to "confine the power of the HDC within authorized limits, or to prevent its abuse, for example, by decisions based on peculiar individual tastes." *Id.* at 723.

The HDC Act § 12 allows any party aggrieved by a board decision to appeal

to the superior court, "sitting in equity," where the court:

> shall hear all pertinent evidence and determine the facts and, upon the facts so determined, annul such decision if found to exceed the authority of such Board, or may remand the case for further action by the Commission *or make such other decree as justice and equity may require*. The foregoing remedy *shall be exclusive*, but the parties shall have all rights of appeal and exception as in other equity cases.

The Appeals Court's Error And Its Consequences

In the superior court, the judge took evidence de novo and concluded that HDC 1 was not based on a legally untenable ground, nor was it unreasonable, whimsical, capricious, or arbitrary. Thus, the board was not to have disturbed HDC 1, *Gumley*, 371 Mass. at 724, much less nullify it through a remand order. The judge therefore reinstated HDC 1 and annulled BOS 1, HDC 2, and BOS 2.

The Appeals Court, however, took a different approach, not the one mandated in *Gumley*. Citing two cases decided under Chapter 30A (the Administrative Procedure Act),[7] the Appeals Court suggested that the board's remand order was a non-appealable interlocutory order. Slip op. at 19-20. It nonetheless decided to reach the merits due to "unusual circumstances," *id*. at 20,

[7] In one, *Wrentham v. West Wrentham Village*, LLC, 451 Mass. 511 (2008), the superior court appeal was held premature because the agency had not yet decided the case on the merits. *Id*. at 514. *Wrentham* does not apply here because the board was reviewing a matter that the HDC had already decided on the merits. The other was *East Longmeadow v. State Advisory Comm'n.*, 17 Mass. App. Ct. 939 (1983), where the superior court appeal was held premature because administrative remedies had not been exhausted. *Id*. at 940.

and then affirmed the remand order as "within the board's discretion," *id.* at 21, despite that the board did not find HDC 1 to be unlawful and that the judge found HDC 1 to be sufficient in law on its face and supported by substantial evidence.

This was error because the Appeals Court considered the issue to be whether the *board* acted within its discretion, instead of whether HDC 1 was within the *HDC's* discretion. *Gumley* makes the propriety of the board's action depend on the validity of the *HDC's* decision, not on whether the board acted within its own discretion. 371 Mass. at 724.

The Appeals Court erroneously treated an appeal under the HDC Act like an appeal under Chapter 30A. Hornbook law is that, in an administrative law appeal, the intermediate appellate agency has the same authority as the primary agency that made the initial decision. *Lopez-Cardona v. Secretary of Health & Human Services*, 747 F.2d 1081, 1083 (1st Cir. 1984), citing 3 Davis Administrative Law Treatise § 14:19 (1980). Not so in an appeal to the board under the HDC Act, where *Gumley* held that the board lacks the HDC's discretion. 371 Mass. at 723.

And a Chapter 30A appeal to the superior court is confined to the administrative record, while appeals to the superior court under the HDC Act are trials de novo. Thus, when an administrative record is still being developed in a Chapter 30A proceeding, an appeal to the superior court is premature. But under the HDC Act, after the HDC has already rendered a merits-based decision that the

board disturbs, the superior court takes its own evidence. Once the HDC issues a decision, no further record development needs to occur at the HDC for the superior court appeal.

Assuming without conceding that *Gumley* allows the board to remand a decision for an "additional explanation" of the HDC's reasons, it is very different for the board—without finding that the HDC overstepped its bounds—to remand to the HDC to "consider additional facts" and decide the application anew. If the board had that power, it could keep remanding to the HDC—immune from accountability in the superior court—until the HDC finally produced a decision the board liked, using this procedural device to circumvent *Gumley*'s prohibition against the board substituting its discretion for the HDC's.

The Appeals Court decision seems to give the board a new, powerful, and potentially unreviewable tool to use whenever it disagrees with an HDC decision: simply remand it for further consideration. Under the Appeals Court decision, such an order can serve a gatekeeping function, preventing aggrieved parties from securing superior court review. This is a dangerous alteration of the protective regime that the legislature created for Nantucket's historic and architectural assets and which this Court implemented in *Gumley*.

Allocation of Equitable Powers

Further appellate review should be granted for another reason: to reinforce

the role of the superior court under the HDC Act. After a trial de novo, the judge made findings, not disputed on appeal, contradicting those on which HDC 2 was grounded, but showing that HDC 1 was legally tenable and not an abuse of discretion. *See* Addendum C. Thus, HDC 2—grounded on findings irreconcilably conflicting with the judge's and those in HDC 1—cannot be sustained.

An appeal to the superior court under the HDC Act is an action "in equity." HDC Act § 12. Statutorily, the judge's decision is the "exclusive remedy," subject only to rights of appeal and exception as in other equity cases. *Id*. In reviewing a judge's imposition of equitable remedies, appellate courts apply an abuse of discretion standard. *Demoulas v. Demoulas*, 428 Mass. 555, 589 (1998). They cannot substitute their discretion for the judge's, but may only disturb the judge's remedy if "no conscientious judge, acting intelligently, could honestly have taken the view expressed by [the judge]." *Brandao v. DoCanto*, 80 Mass. App. Ct. 151, 158 (2011).

In matters of public interest, courts of equity have great latitude in granting relief. *Caputo v. Bd. of Appeals of Somerville*, 330 Mass. 107, 112 (1953). The judge may adopt all necessary, reasonable, and lawful means to accomplish the objects intended and "adapt the decree finally entered to the needs of the case in order to adjust correctly the rights of the parties." *Reilly v. Local 589, Amalgamated Transit Union*, 51 Mass. App. Ct. 1105, 2001 WL 360244, at *3

(2001) (Rule 1:28 unpublished decision). See *Commonwealth v. DeCotis*, 366 Mass. 234, 245 (1974) (court's equity power permits court to fashion decrees to remedy wrong complained of and to make decree effective).

Because the HDC Act empowers the judge to "make such other decree as justice and equity may require," it was well within her equitable power to affirm HDC 1 and leave it intact, remedying the wrong she found. As she did not abuse her discretion, her remedy controls and should have been affirmed. Instead, the Appeals Court thought that the fairer outcome would be to give the HDC yet another opportunity to consider the application, essentially giving the developer another opportunity to seek permission before another newly constituted HDC, as if HDC 1 had never existed.[8] Further appellate review should be granted to make clear that, absent an abuse of the judge's discretion, appellate courts should not substitute their discretion for what the judge deems to be the appropriate equitable

[8] The Appeals Court was concerned about the "possibility" that the HDC might have treated this developer differently from others. Slip op. 22. The developer raised the issue of disparate treatment in the superior court, but the judge excluded the evidence as irrelevant. PA 197-201, T 65-76. *See Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 477 (1991) (whether evidence is relevant is "addressed to the sound discretion of the trial judge"); *Passanessi v. C. J. Maney Co.*, 340 Mass. 599, 602-03 (1960) (trial judge can exclude evidence of allegedly similar circumstances; judge is in best position to determine relevancy and whether the evidence will unduly prolong trial with disputes over collateral issues). The developer neither made an offer of proof at trial nor briefed the issue on appeal, thus waiving it. *General Mills, Inc. v. Comm'r of Revenue*, 440 Mass. 154, 167 n.7 (2003).

remedy under the Act.

Conclusion

For the reasons above, leave to obtain further appellate review should be granted.

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April 3, 2019

Certificate of Compliance

Pursuant to Mass. R. App. P. 16(k) and 27.1 (b), I certify that this application complies with the form and length required by Rule 27.1 (b). Compliance was ascertained by using Microsoft Word, Times New Roman proportionally spaced font at 14 points. The number of non-excluded words counted by Microsoft Word in the section of this application headed "Why Further Appellate Review Is Appropriate" is 1983, inclusive of footnotes.

/s/ Kenneth R. Berman

Certificate of Service

I certify that on April 3, 2019, I filed this motion for reconsideration or modification through efileMA, the Massachusetts Court System Electronic Filing Service Provider, which served it on the following registered counsel of record: Jonathan W. Fitch (counsel for the non-municipal defendants), Sarah F. Alger (co-

counsel for the Neighbors), and George X. Pucci (counsel for the municipal defendants).

/s/ Kenneth R. Berman

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Addendum A

§ A301-4

Historic District Commission.

ACTS, 1970. CHAP. 395

AS AMENDED BY ACTS: 1972, CHAP. 708; 1984, CHAP. 300; 1985, CHAP. 291; 1987, CHAP. 735; 1989, CHAP. 333; 1990, CHAP. 314; 1998, CHAP. 193; 2000, CHAP. 57; 2002, CHAP. 90; 2010, CHAP. 8; 2014, CHAP. 338

AN ACT ESTABLISHING AN HISTORIC DISTRICT COMMISSION FOR THE TOWN OF NANTUCKET AND ESTABLISHING NANTUCKET ISLAND AS THE HISTORIC DISTRICT

Be it enacted, etc., as follows:

SECTION 1. Chapter 601 of the Acts of 1955 is hereby repealed and the Historic Districts Commission is hereby abolished.

SECTION 2. The purpose of this Act is to promote the general welfare of the inhabitants of the Town of Nantucket through the preservation and protection of historic buildings, places and districts of historic interest through the development of an appropriate setting for these buildings, places and districts and through the benefits resulting to the economy of Nantucket in developing and maintaining its vacation-travel industry through the promotion of these historic associations.

SECTION 2A. For purposes of this Act, the following words shall have the following meanings:

"Altered" shall include the words rebuilt, reconstructed, rehabilitated, remodeled, renovated and restored.

"Building," a combination of materials forming a shelter for persons, animals or property.

"Commission," the Nantucket Historic District Commission, acting as the Historic District Commission.

"Constructed" shall include the words built, erected, installed, enlarged, and moved.

"Exterior architectural features," such portions of the exterior of a building or structure, including the size and shape of proposed buildings and structures described in subsection (b) of section 9, as are open to view from a beach, a public way, a traveled way, a street or way shown on a land court plan or shown on a plan recorded in the Registry of Deeds, a proprietor's road, a street or way shown on a plan approved and endorsed in accordance with the Subdivision Control Law, a public park or a public body of water, and shall include but not be limited to, the architectural style and general arrangement and setting thereof; the kind, color and texture of exterior building materials; the color of paint or other materials applied to windows, doors, lights, signs, trim, gutters, leaders, louvers, vents, exterior surfaces and type and style of roofs, porches, decks, staircases, steps, balconies, roof walks and other appurtenant exterior fixtures. **[Amended by St. 2000, Ch. 57]**

"Razed," includes the words destroyed, demolished and removed.

"Structure," a combination of materials other than a building, including, but not limited to a vending machine, sign, fence, wall, terrace, walk or driveway. **[Amended by St. 1998, Ch. 193]**

SECTION 3. There is hereby established in the Town of Nantucket an Historic District Commission consisting of five (5) unpaid members who shall be resident taxpayers of the Town of Nantucket, to be appointed by the Selectmen. The Historic District Commission shall have the powers and authority and perform all the duties as hereinafter enumerated and provided. All 5 members shall be elected for rotating 3-year terms at the annual town election each year. Vacancies occurring in the Commission, other than by expiration of term of office, shall be filled by appointment by the Selectmen, but such appointment shall be only for the unexpired portion of the term of the member replaced. **[Amended by St. 2014, Ch. 338; St. 2016, Ch. 2[1]]**

The Chairman of the Historic District Commission may designate an associate member to sit on the Commission in case of absence, inability to act or conflict of interest on the part of any member thereof or in the event of a vacancy on the Commission until said vacancy is filled in the manner provided herein. Three such associate members shall be appointed by the board of selectmen in accordance with section 3.4(a)(3) of the charter of the town of Nantucket for

rotating 3-year terms. Vacancies in said office shall be filled by the board of selectmen for the remainder of the unexpired term. **[Amended by St. 2014, Ch. 338]**
The members of the commission shall be exempt from subsections (a) and (c) of section 17 of chapter 268A of the General Laws. **[Amended by St. 1998, Ch. 193; St. 2002, Ch. 90]**
SECTION 4. There is hereby established in the Town of Nantucket an Historic Nantucket District, which shall include the land and waters comprising the Town of Nantucket.
SECTION 5. (a) No building or structure shall be constructed or altered within the Nantucket Historic District in any way that affects its exterior architectural features unless and until either:
(1) An application for a building permit shall first have been approved as to exterior architectural features, which approval shall be evidenced by a certificate of appropriateness issued by the Commission; or
(2) The Commission first issues a certificate of nonapplicability with respect to such alteration or construction,
(b) No building permit for construction or alteration of a building or structure within the Historic Nantucket District shall be issued by the Building Inspector until and unless the applicant has first obtained the applicable certificate from the Commission. No occupancy permit shall be issued by the Building Inspector with respect to any building or structure in the Nantucket Historic District unless and until the Building Inspector receives a written certification from the Historic District Commission that:
(1) The building or structure has been constructed or altered in compliance with the terms of the certificate of appropriateness issued therefor; or
(2) A certificate of nonapplicability has been issued for the construction or alteration.
(c) Nothing in this Act shall be construed to prevent the ordinary maintenance, repair or replacement of any exterior architectural feature within the Nantucket Historic District which does not involve a change in design, material, color or the outward appearance thereof; nor to prevent the meeting of requirements certified by a duly authorized public officer to be necessary for public safety because of an unsafe or dangerous condition, nor to prevent landscaping with plants, trees and shrubs.
SECTION 6. No building or structure within the Historic Nantucket District shall be razed without first obtaining a permit approved by the Historic District Commission, and said Commission shall be empowered to refuse such a permit for any building or structure of such architectural or historic interest, the removal of which in the opinion of said Commission would be detrimental to the public interest of the Town of Nantucket or the Village of Siasconset.
SECTION 7. The erection or display of an occupational or other sign exceeding two (2) feet in length and six (6) inches in width or the erection or display of more than one (1) such sign, irrespective of size, on any lot, building or structure located within the Historic Nantucket District must be approved in advance by the Historic District Commission. Evidence of such approval shall be a certificate of appropriateness issued by said Commission.
SECTION 8. The Historic District Commission shall elect its Chairman and Vice Chairman. The Commission shall meet within ten (10) days of the receipt of an application for a certificate of appropriateness or permit for removal and at such other times as the Commission may determine or upon call of the Chairman or of any two (2) members. It shall keep a permanent record of its resolutions, transactions and determinations and may make such rules and regulations consistent with this Act as may appear desirable and necessary. It may hold public or private hearings as it may deem advisable. It may incur expenses necessary to the carrying on of its work within the amount of its annual appropriation. The Commission shall make and publish rules and regulations adopting or establishing guidelines for exterior architectural features and establishing procedures for the processing of applications and conduct of hearings. The Commission may establish such fees with respect to applications and hearings as it deems necessary and appropriate to defray its expenses. **[Amended by St. 2010, Ch. 8]**
SECTION 9. (a) It shall be the function and the duty of the Historic District Commission to pass upon the appropriateness of exterior architectural features of buildings and structures hereafter

to be erected, reconstructed, altered or restored within the Historic Nantucket District wherever such exterior features are subject to view from a beach, public way, public park, public body of water, traveled way, a street or way shown on a land court plan, or shown on a plan recorded in the registry of deeds, a proprietors road or a street or way shown on a plan approved and endorsed in accordance with the Subdivision Control Law. All plans, elevations and other information deemed necessary by the Commission to determine the appropriateness of the exterior features to be passed upon shall be made available to the Commission by the applicant. It shall also be the duty of the Commission to pass the removal of any building within said districts as set forth in Section 6 and the erection or display of occupational or other signs as set forth under Section 7.

(b) The Historic District Commission, in passing upon appropriateness of exterior architectural features in any case, shall keep in mind the purposes set forth in Section 2 and shall consider, among other things, the general design, arrangement, texture, material and color of the building or structure in question, the location on the lot and the relation of such factors to similar features of buildings and structures in the immediate surroundings and the position of such building or structure in relation to the street or public way and to other buildings and structures. In the case of new construction or additions to existing buildings or structures, the Historic District Commission shall consider the appropriateness of the size and shape of the building or structures both in relation to the land area upon which the building or structure is situated and buildings and structures in the vicinity, and the commission may in appropriate cases impose dimensional and setback requirements in addition to those required by applicable by-law. **[Amended by St. 2000, Ch. 57]**

(c) The Historic District Commission shall not consider interior arrangement or building features not subject to public view. The commission shall not make any recommendations or requirements except for the purpose of preventing developments incongruous to the historic aspects of the surroundings and the Historic Nantucket District. **[Amended by St. 2000, Ch. 57]**

(d) In case of disapproval, the Commission shall state its reasons therefor in writing, and it may make recommendations to the applicant with respect to appropriateness of design, arrangement, texture, material, color and the like of the building or structure involved.

(e) Upon approval of the plans, the Commission shall cause a certificate of appropriateness, dated and signed by the Chairman, to be issued to the applicant or affixed to the plans.

(f) If the Commission shall fail to take final action in any case within sixty (60) days after receipt of any application for a certificate of appropriateness or a permit for removal, the case shall be deemed to be approved except where mutual agreement has been reached for an extension of the time limits.

(g) The Commission shall have, in addition to the powers, authority and duties granted it by this Act, such other ancillary, enforcement or investigative powers, authority and duties as may be delegated or assigned to it from time to time by vote of an Annual or Special Town Meeting of the Town of Nantucket.

SECTION 10. Any person who violates any of the provisions of this Act shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $10 nor more than $500, which shall be forfeited to the use of the town. Each day that a violation continues to exist shall constitute a separate offense.

(a) It shall be a violation of this Act for any person to construct or alter a building or structure without having first obtained from the Commission a certificate of applicability or a certificate of nonapplicability; for any person to raze any building or structure without having first obtained from the Commission a permit for such razing; for any person to construct or alter a building or structure in any way which is inconsistent with or contrary to the terms of the certificate of approval issued for such building or structure; or for any person to knowingly submit false, fraudulent or misleading information to the Commission in connection with any application.

SECTION 10A. It shall be a violation of this Act for any person to construct or alter a building or structure without having first obtained from the Commission a certificate of applicability or a

certificate of nonapplicability; for any person to raze any building or structure without having first obtained from the Commission a permit for such razing; for any person to construct or alter a building or structure in any way which is inconsistent with or contrary to the terms of the certificate of approval issued for such building or structure; or for any person to knowingly submit false, fraudulent or misleading information to the Commission in connection with any application.

SECTION 11. Appeals may be taken to the Board of Selectmen by any person aggrieved by the ruling of the Historic District Commission. The Board of Selectmen shall hear and act upon such appeals promptly, and the decision of the Board shall be as determined by a majority vote of the members of the Board. Such appeals shall be taken within ten (10) days of the filing by the Commission of its certificate of determination with the Clerk of the Town of Nantucket, and written notice of such appeal shall be given by the appealing party to the Commission at the time such appeal is taken.

SECTION 12. Any person or the Historic District Commission, aggrieved by a decision of the Board of Selectmen, may appeal to the Superior Court sitting in equity for the County of Nantucket, provided that such appeal is filed in said Court within 15 days after such decision is recorded. The appealing party or parties shall, at the time of filing such appeal, give notice thereof to all persons who were parties to the appeal to the Board of Selectmen, by causing to be delivered to such parties a copy of the complaint and written notice of the filing thereof. The Court shall hear all pertinent evidence and determine the facts and, upon the facts so determined, annul such decision if found to exceed the authority of such Board, or may remand the case for further action by the Commission or make such other decree as justice and equity may require. The foregoing remedy shall be exclusive, but the parties shall have all rights of appeal and exception as in other equity cases.

Costs shall not be allowed against the Historic District Commission or the Board of Selectmen unless it shall appear to the Court that the Commission or the Board, in making the decision appealed from, acted with gross negligence, in bad faith or with malice.

Costs shall not be allowed against the party appealing from the decision of the Historic District Commission or the Board of Selectmen unless it shall appear to the Court that said appellant or appellants acted in bad faith or with malice in making the appeal to the Court.

SECTION 13. The Superior Court, sitting in equity for Nantucket County, shall have jurisdiction to enforce the provisions of this Act and the certificates, permits, determinations, rulings and regulations issued pursuant thereto and may, upon petition of the Commission, restrain by injunction violations thereof; and, without limitation, such court may order the removal of any building, structure or exterior architectural feature constructed in violation of this Act or the substantial restoration of any building, structure or exterior architectural feature altered or razed in violation of this Act and may issue such other orders for relief as may be equitable.

SECTION 14. In case any section, paragraph or part of this Act be for any reason declared invalid or held unconstitutional by any court of last resort, every other section, paragraph or part shall continue in full force and effect.

SECTION 15. This Act shall take effect upon its acceptance by the voters of the Town of Nantucket at an Annual Town Meeting or any meeting duly called for the purpose.

February 27, 1990

[1]

Editor's Note: Section 2 of this enactment provided that "an incumbent member of the Historic District Commission appointed or elected pursuant to section 3 of chapter 395 of the acts of 1970, as amended, shall continue to serve in that capacity until the expiration of the incumbent's term or until the incumbent sooner vacates the office, after which the election of members shall proceed in accordance with section 1."

Addendum B

29 North Liberty Street
HDC Decisions Compared

Findings In HDC 1 (PAI 86-87)	Findings in HDC 2 (EAII 153-54)
The ancillary structure has become an important part of the historical context and streetscape of the area. The design of the structure is sensitive to the architectural designs of the 18th and 19th Century. The ancillary structure is reminiscent of the original ancillary structure that would have been historically a barn that would have supported the dwelling on the same lot.	The only value added by the subject structure is that it is very well designed to complement the historic structures nearby. However, this fact does not render the structure itself as architecturally or historically significant.
This building is considered Contributing per the National Historic Landmark status of Nantucket as updated in 2011 with the ancillary structure important due to its setting and impact on the streetscape.	The 1989 historic structures survey states that the structure is noncontributing.
The loss of small structures, particularly in the core district, is changing the streetscape. The removal of this ancillary structure would permanently and detrimentally alter an important streetscape in the Old Historic District as well as the historic character of the neighborhood, for no apparent purpose. The HDC finds that removal of the existing ancillary structure from the subject lot to another location on the island outside of the Old Historic District, would negatively impact the	Removal would not negatively impact the historic character of the neighborhood, the historic value of the significant remaining structure or streetscape.

Findings In HDC 1 (PAI 86-87)	Findings in HDC 2 (EAII 153-54)
historic character of the neighborhood, the historic value of the existing remaining structure and the streetscape.	
The existing ancillary structure has historic architectural value and together with the shop and existing dwelling comprises a unique collection and is reminiscent of the historic development of properties on the periphery of the downtown area.	The existing ancillary structure has no historically significant architectural value and is not of a unique design or siting.
The HDC supports the argument that said removal would create a "missing tooth" situation.	The HDC does not support the argument that said removal would create a "missing tooth" situation.
Having that area of the lot be vacant would destroy the streetscape and be out of context with the neighborhood.	Having that area of the lot be vacant, or for that matter contain a new structure, would not destroy the streetscape.... Removal would not create a situation that would be out of context with the neighborhood.

Addendum C

#49

COMMONWEALTH OF MASSACHUSETTS

NANTUCKET, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2015CV00003

BARRY H. BERMAN, PEGGY MCCARTHY BERMAN, JOAN M. HOYT, PHILIP HOYT, MARGOT S. MONTGOMERY, and THOMAS M. MONTGOMERY,
Plaintiffs

vs.

BOARD OF SELECTMEN OF NANTUCKET, JEFFREY KASCHULUK, Individually and as Trustee of THE NANTICUT REALTY TRUST, MICHAEL J. MAITINO, THE NANTUCKET HISTORIC DISTRICT COMMISSION and WESTBAY DEVELOPMENT, INC.,
Defendants

CIVIL ACTION
NO. 2015CV00018

BARRY BERMAN, PEGGY MCCARTHY BERMAN, JOAN M. HOYT, PHILIP HOYT, MARGOT S. MONTGOMERY, and THOMAS M. MONTGOMERY,
Plaintiffs

vs.

THE BOARD OF SELECTMEN OF NANTUCKET, THE NANTUCKET DISTRICT COMMISSION, JEFFREY KASCHULUK, Individually and as Trustee of THE NANTICUT REALTY TRUST, MICHAEL J. MAITINO and WESTBAY DEVELOPMENT, INC.,
Defendants

CIVIL ACTION
NO. 2015CV00019

JEFFREY KASCHULUK, Individually and as Trustee of THE NANTICUT REALTY TRUST, MICHAEL J. MAITINO and WESTBAY DEVELOPMENT INC.,
Plaintiffs

vs.

BARRY H. BERMAN, PEGGY MCCARTHY BERMAN, JOAN M. HOYT, PHILIP HOYT, MARGOT S. MONTGOMERY, THOMAS M. MONTGOMERY and THE NANTUCKET HISTORIC DISTRICT COMMISSION,
Defendants

FILED
MAR 07 2017
NANTUCKET SUPERIOR COURT CLERK

FINDINGS OF FACTS, RULINGS OF LAW AND ORDER OF JUDGMENT

The Plaintiffs, all of whom own homes on North Liberty Street, in the Old and Historic District, colloquially referred to as the "Core," in the Town of Nantucket, seek judgment in their favor and against the municipal Defendants, the Board of Selectmen of Nantucket (the "BOS") and the Nantucket Historic District Commission (the "HDC"). The first group of Plaintiffs, which consist of the Montgomery's, Berman's, and Hoyt's also seek judgment against the Defendants, Jeffrey Kaschuluk ("Mr. Kaschuluk") the current owner of 29 North Liberty Street in Nantucket, Mr. Kaschuluk's development company, Westbay Development, Inc. ("Westbay"), and Michael J. Maitino ("Mr. Maitino").

No jury claim having been asserted, this case was tried before the undersigned without a jury over the course of five days, commencing on November 9, 2016. Closing arguments were delivered on December 19, 2016 and the matter taken under advisement. The parties presented written requests for findings of fact and rulings of law before and after the trial concluded. For the reasons stated herein, judgment is to enter for the Plaintiffs, the Montgomery's, Berman's, and Hoyt's.

FINDINGS OF FACT

I accept all of the agreed upon facts, at least to the extent that the Defendants raise no specific designation of "dispute," in the Plaintiffs', the Montgomery's, Berman's, and Hoyt's November 10, 2016 Proposed Findings of Fact (Paper # 42).

The structure at issue (hereinafter "the Barn") is located at 29 North Liberty Street in Nantucket. North Liberty Street is located in the Old and Historic Nantucket District, one of the

two historic districts established in 1955, referred to as "the Core" or "the Town." It is the second oldest street in Nantucket, though initially it was likely a meandering cart path. The Barn is sited between two of the oldest structures in Nantucket, both of which date back to the 1700's[1] and belonged to Seth Ray, an early Nantucket settler: the Seth Ray House and the Seth Ray Cooper Shop, where Seth Ray built barrels to store whale oil.[2]

I heard testimony, which I credit, about the typical Quaker architectural style characteristic of structures built in Nantucket in the late 1700's. The Seth Ray House is indicative of this style. For its age, the Seth Ray House, at two and one half to three stories, is a very tall building with dormer windows. The Seth Ray House also has a very distinctive barn-like gambrel roof. The entire structure and architecture of the Barn, particularly its gambrel roof, is very complementary of the Seth Ray House. When then-property owner Mr. Maitino built the Barn in or around 1972, he built it to be in accord with the architecture and integrity of the Seth Ray House. The Barn is a very good example of a more recent building that appears to have historical character.[3]

Exhibit 11 shows three other structures (two of which may be connected, though not the lean-to on the left) on the property close to where the Barn is currently located from the 1800s. As mentioned above, the Barn is on the same property as both the Seth Ray House and the Valmartino Antique Shop, which appears to date back to 1939.[4] The Seth Ray House and the Seth Ray Cooper Shop are still situated on their original locations from the 1700's. All of these

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[1] The Seth Ray Gambrel House was built in the "mid-1700's." (Ex. 10, the Nantucket Data Sheet, at p. 2-001667).

[2] From 1740 to 1840, Nantucket "was the world's leading whaling port." (Ex. 29).

[3] The Montgomery house is another one of those; even though it was built in 1996, one would not realize that from looking at the exterior of their home. It is exemplary of the style of recent buildings with historical character.

[4] Although not entirely clear, it appears that the Antique Shop was built in 1939. (Ex. 10, the Nantucket Data Sheet, at p. 2-001667).

structures are designated in Exhibit 10, the Nantucket Data Sheet dated September 9, 2011, with the letter "C" signifying status as "Contributing Structures." Both the Barn and the Seth Ray Cooper Shop located at 27 North Liberty Street are also designated separately as a "Contributing Structure."[5]

The Seth Ray Cooper Shop, now a residence, is depicted in the bottom left-hand photo of Exhibit 13. It is significant in terms of style and historical context. The Seth Ray House is missing its medallion, a historic plaque which serves as an indication of the historical significance of that home. When Mr. Maitino sold and moved out of state, he removed and took the medallion. A medallion still remains on the Seth Ray Cooper Shop.

During the view, I observed the Barn's interior. There was no visual indication that it was in any way structurally insufficient. As is the case with most if not all properties, if not properly cared for, they may well over decades become decrepit, just from lack of care and maintenance. Nothing indicated that the Barn was in anyway close to or approaching that. There were at least two sawhorses there that had a lot of lumber on them. I did not notice any shifting, shakiness or any sign for concern stemming from the floor of the Barn supporting the weight of the lumber.

The Barn, although relatively tall at two stories, is not a large structure. It is certainly not as tall as most two story homes; it would not house a kitchen/living/dining area and two bedrooms and bath on one level, unless of very small size. I find that it is a "small structure," and therefore, I accept the HDC's conclusion that the loss of small structures, such as this Barn, is changing the North Liberty streetscape. (Ex. 19, at ¶ 8).

I accept the testimony of Jascin Leonardo-Finger ("Ms. Finger"), the Deputy Director and Curator of the Mariah Mitchell Association. Ms. Finger has been employed there for thirty years

[5] See Ex. 10, the Nantucket Data Sheet at p. 2-001667.

and oversees the maintenance of over twelve properties. She is well educated, holding both a Bachelor and Master of Arts degree in History. Ms. Finger developed the Four Centuries Tour of Nantucket for the Nantucket Historic Association, to which she belongs. That tour starts on Main Street in Nantucket and ends at the Seth Ray House. The Seth Ray properties are very unusual, even for Nantucket. She and the other architectural historian tour guides discuss the structures on the Seth Ray properties and the relationship between the House, the Barn, and the Cooper Shop to explain how Seth Ray and other early Nantucket settlers lived in close proximity to their work, often with adjacent multiple buildings on their property. (Ex. 2, top photo).

Pursuant to "Building with Nantucket in Mind: Guidelines for Protecting the Historic Architecture and Landscape of Nantucket Island," the official design guidelines manual of the HDC, defines "Contributing Structures" as "ones adjudged to add the historic district's sense of time, place and historic development, and their more esteemed cousins—buildings listed on the National Register of Historic Places or those that may be candidates for this status—are the most carefully protected designations." Ex. 7, p. 21. A "Non-Contributing Structure" is defined as "a building which is not an intrusion but does not add to a historic district's sense of time, place, and historic development. A structure deemed an intrusion is so because it lacks compatibility with its surrounding buildings in the historic district, detracting rather than adding or merely conforming to the scene of which it is a part." *Id.*

The Barn is not an "intrusion." At worst, the Barn could be considered Non-Contributing. However, relying in large measure on Ex. 10's designation of the Barn as a Contributing Structure, as well as Ms. Finger's testimony explaining how early Nantucket settlers lived, and Mr. Mays' testimony "that the Barn is important to the character of the area on terms of scale, character, massing, and placement," I find that the Barn is a Contributing Structure.

The Barn, aesthetically pleasing and architecturally complementary to the Seth Ray House, also contributes to the historic fabric of North Liberty Street. It evinces how settlers once lived with several structures on their property to support their lives. Removing the barn would "white wash,"[6] substantially alter the history of the property and the streetscape and would eliminate views of how buildings, including secondary structures, related to each other on a single property hundreds of years ago. I accept Ms. Finger's testimony that losing secondary structures such as the Barn has an adverse affect to the extent that it diminishes the architectural history and its presentation, on Nantucket, as well as in the historic district.

Even if an architectural preservationist looking closely at the Barn would not think it was from the same period as the Seth Ray House, the Barn is a very good likeness to the Seth Ray House in terms of its architecture and integrity. The tall Barn, with its gambrel roof, shingling, and two-story (or larger) door with wood trim and detail, appears to be from a much earlier time period. In sum, the Barn contributes to the historic fabric of North Liberty Street. It was specifically built with respect for and appreciation of the time period of the Seth Ray House and to be visually pleasing with the architecture of the Seth Ray House. That Barn contributes to the historical context and streetscape area of North Liberty Street in that area.

The Barn depicted in Exhibit 4 cannot be seen in Exhibit 5 due to its setback from the street, which shows, in the far left corner of the photograph, the Antique Shop, then the Seth Ray House; the Seth Ray Cooper Shop, now a home, is the ivy covered house. These four structures

[6] Because the Barn was built in 1972, it does not qualify as "Significant" in its own right under the National Park Service's National Historic Landmarks Program, which does not consider properties built within the past fifty years eligible for National Registration. (Ex. 28). Nor would it appear at first glance to qualify as a "Significant Structure" which Building with Nantucket in Mind Guidelines defines as "any building on the island 50 years or older which is either: 1) associated with one or more historic figures or events, or with broad island architectural, cultural, political, economic or social history; or 2) is historically or architecturally significant either by itself or in context with other buildings, in terms of period, style, method of building construction or association with a noted architect or builder." (Ex. 7, at p. 21). Nevertheless, the Barn is a Contributing Structure per Exhibit 10.

are fairly close together, the Barn being the farthest away from the street. These four structures at 27 and 29 North Liberty are closer together when you are there than they appear in the pictures.

Nantucket received its first designation as a national historic landmark in 1976 when the Town of Nantucket and the Village of Sconset received that designation. There is no question but that the Seth Ray House is not only a beautiful building, but is "significant," even on Nantucket. The National Trust for Historic Preservation ("Trust Preservation") placed Nantucket on its 2000 list of "America's 11 Most Endangered Historic Places." (Ex. 28). That Trust Preservation noted that "an upsurge in the destructive practices of 'tear downs' and 'gut rehabs,' along with the inappropriate sizing and siting of new homes, are dramatically altering the heritage, cultural landscape and quality of community life on the island," notwithstanding Nantucket's long history of commitment to preservation. (*Id.*).[7] Even Ray Pohl ("Mr. Pohl"), the Defendants' expert and HDC member in 2014-2015, described the Seth Ray House as "individually significant" which to him means it is "irreplaceable to Nantucket like the Three Brick Structures."[8] Those three homes are also irreplaceable and a very important part of the historic fabric in the historic Town of Nantucket. I accept that the Seth Ray House with at least one other structure, the Barn[9] on that property and adjacent to the historic Seth Ray Cooper Shop are, as a group, equally important with the Three Brick Structures.

I accept the Plaintiffs', the Montgomery's, Berman's, and Hoyt's proposed fact no. 142. While a building may not be considered "Contributing" at an early point in its existence, a building may attain such status in an area over time, and therefore, later become a Contributing

[7] This loss is another substantial reason why the HDC should be allowed, if not required, to consider development proposals in their entirety, rather than piecemeal.

[8] The Three Brick Structures are three original, older, historic, separate brick homes, at the top and right hand side (as one approaches from the harbor) of Main Street beyond that beautiful historic bank.

[9] I express no opinion concerning the Valmartino Antique Shop.

Structure. I accept so much of Mr. May's testimony as would apply to the Barn, which Mr. Kaschuluk's attorneys refer to as a garage, even though it is labeled in Exhibit 10 as a "Barn". A Contributing Structure as defined in Exhibit 7 and as listed in Exhibit 10, is a structure which "add(s) (to) the historic district's sense of time, place, and historic development. . . ." Ex. 7, p.21. The placement of the Barn, and the manner in which it was built by Mr. Maitino, complements the Seth Ray House, documents the history of how people lived in the 1700's, thus making the barn itself a contributing structure to the harmonious streetscape of North Liberty Street where the Plaintiffs' homes are.

Based on all the evidence that I have heard and seen and, in large measure relying on Exhibit 10, Mr. May's and Ms. Finger's testimony, the Barn at issue substantially contributes to the views and historic nature of the Seth Ray House and properties.

I know none were pointed out to me, but I just do not remember seeing any other barns in the Town of Nantucket. Before this trial started, I had served there twice, each for a two-week period. Not knowing that Barns were in my future on Nantucket, I never went out looking for any. The absence of what was an important and necessary ingredient in an older community such as Nantucket is an additional factor that is important when one is considering national historic landmarks and the public's interest in them.

Through Mr. Kaschuluk and Westbay did not own the properties in mid-2014, he and Mr. Maitino had executed a P&S agreement for both 27 and 29 North Liberty Street. In mid-2014 Mr. Kaschuluk applied to the HDC in anticipation of developing the properties, which included a request for permission to move the Barn to an ancillary site outside of the Core and, in a separate application, to demolish the Valmantino Antique Shop ("the Original HDC Application"). On June 10, 2014 and July 3, 2014, the HDC held a public hearing on Mr. Kaschuluk's Original

HDC Application. Concerned about the reaction at the hearing to his plan, Mr. Kaschuluk withdrew the Original HDC Application at the hearing's conclusion.

Mr. Maitino then applied to the HDC on August 28, 2014 for a certificate of appropriateness to move the Barn to 12 Bartlett Road, an area outside of the Old Historic District. He claimed that the Barn was built in 1975 and that it was non-contributing as the "survey (is) incorrect." (Ex. 19). On November 13, 2014, the HDC voted 3-2 to deny Mr. Maitino's application ("HDC I"). (Ex. 19). John McLaughlin (Mr. McLaughlin"), Ms. Finger, and Abigail Camp ("Ms. Camp") voted in favor of the decision to deny removal and Chairman Linda F. Williams ("Ms. Williams") and Mr. Pohl, an architect who later became the Defendants' expert in this action, opposed. (*Id.* at p. 3).

Earlier that day, Ms. Williams did not appear impartial. (Ex. 52). She initiated, at 8:33 A.M. on the morning of the HDC hearing, an inquiry to Mr. Kaschuluk and his attorney. Calling herself "Czarinalinda" in her personal email address, she asked them, "Do you have a strategy for tonight?" To clarify, *the Chair of the HDC* is asking this on the day of the hearing. She then went on for an entire, single spaced page, making suggestions and providing advice concerning his "project." Mr. Kaschuluk responds at 8:57 A.M., asking: "How can we temper the attitude at the beginning of the meeting to start on an even keel basis?" He had a legitimate question. Even if he knew Ms. Williams just from the length of time he had worked in Nantucket, he should have been asking it of his lawyers, and not of the Chair. But the Chair has already expressed her opinion, making substantive suggestions to the real applicant. Though Mr. Maitino was the named applicant, that was clearly only on paper; Mr. Kaschuluk was the real applicant, as the Chair well knew.

Although he had already signed a P&S agreement to buy Mr. Maitino's property, it is entirely improper for Mr. Kaschuluk to be receiving an advisory opinion or dicta from someone who is going to be, allegedly fairly and impartially, voting at the public hearing twelve hours later. This is a problem which is further compounded after Mr. Maitino files an appeal with the BOS pursuant to § 11 of the Act on the grounds that HDC I was arbitrary, capricious and exceeded the authority of the HDC. (Ex. 46). Rather than voting to affirm or annul the HDC I decision, the BOS on January 21, 2015 voted 4-1 to remand the matter to the HDC and "encouraged the parties [] to engage in a cooperative effort to resolve their differences so that further appeals [were] not necessary" ("BOS I"). (*Id.*, at p. 3). The BOS I decision, (Ex. 46), dated January 21, 2015 "remanded to the HDC for a further hearing consistent with this decision." The BOS decision reflects further that after presentations and discussion, "[a]ll parties agreed and Town Counsel confirmed, that the proper standard for judging the proposed removal . . . is whether removal (of the Barn) . . . is 'detrimental to the public interest.'" Two Selectman made statements questioning the HDC's decision, one of whom believed the HDC's decision was "arbitrary and capricious." One of those two Selectman asked for Town Counsel's opinion concerning other alleged permitted removals of comparable structures. After Town Counsel expressed his opinion, two other Selectman "expressed difficulty with the concept of overturning the HDC's denial as 'arbitrary and capricious' based upon the record before them, and noted that the Board must be careful not to substitute its judgment for that of the HDC." The Board then moved to remand without "specify(ing) instructions to the HDC" except that "the HDC should consider the foregoing issues, questions and comments raised" during the BOS hearing. The fifth Selectman, one who had not yet expressed anything, "encouraged the parties . . . to engage in a

cooperative effort to resolve their differences. . . ." The Neighbors then filed an appeal in the Superior Court (1575CV00003) from this BOS I decision.

Once BOS I issued on January 21, 2015, the HDC again considered on February 15, 2015, Mr. Maitino's application to remove the Barn. Ms. Finger, an elected Associate Member of the HDC, had participated in and voted with the majority on Ex. 19, the HDC I decision. The only votes in favor of removal in HDC I were cast by Williams and Pohl. Ms. Finger was the Senior Associate Member present when HDC again considered Mr. Maitino's application on February 15, 2015.

There are generally two or three Associate Members on the HDC who can attend and vote when necessary if there are an insufficient number of full members present (due to absence, recusal, etc.). The general practice for the Chair was to appoint the Associate Members, (who had been elected to their positions) by rotating in order of seniority. Ms. Finger was the most senior elected Associate Member present and should, according to the Chair's usual practice, have been appointed. Instead, at the meeting the Chair Linda Williams told Ms. Finger she "cannot sit" and appointed another Associate Member, Abby Camp, contrary to the Chair's usual, standard practice.

During that February 12, 2015 public hearing per the Board's remand order, another full member Diane Coombs ("Ms. Coombs") participated and thereafter, the HDC "incorporate[ed] the previous record [from HDC I] into th[e] record by a unanimous vote." (Ex. 30, at p. 2). At the close of the hearing, the HDC voted to approve Mr. Maitino's application to remove the Barn by a 3-2 vote. (HDC II Ex. 30). Ms. Williams, Mr. Pohl and Ms. Camp (Ms. Williams'[10] choice

[10] That Ms. Williams deviated from her standard practice in appointing Ms. Camp is more than troubling. It should not need to be said that appointments as a voting member ought to be made randomly and not orchestrated to achieve any particular outcome. No evidence revealed why Ms. Camp changed her opinion about the removal of the barn from HDC I to HDC II.

without following her usual practice) voted in favor of the decision to allow the barn to be removed and Mr. McLaughlin and Ms. Coombs opposed.

The Neighbors then filed an appeal with the BOS, which voted on June 10, 2015, to set aside HDC II pending resolution of the action then pending in the Superior Court ("BOS II). (*Id.*). Thereafter, the Neighbors appealed a portion of the BOS II decision to this Court (1575CV00018). The Kaschuluk parties also appealed a portion of the BOS II decision to this Court (1575CV00019). Plaintiffs appealed this decision to the BOS which considered it on May 20, 2015. Ms. Williams attended that BOS meeting. (Ex. 34) BOS issued its decision on June 10, 2015 (Ex. 45). The Board appropriately was concerned about its initial remand (BOS I) back to the HDC; the Board understood that BOS I was then on appeal to Nantucket Superior Court. The Board voted 2-1 to "set aside (HDC's) issuance of the certificate of appropriateness approving removal . . . pending resolution of the appeal in Superior Court and that after receiving a decision of the Superior Court that the HDC follow the court's ruling." This BOS decision was also appealed.

RULINGS OF LAW

The Court addresses the issue of the Plaintiffs', the Montgomery's, Berman's and Hoyt's, standing as a threshold matter before turning to the substantive merits of the Plaintiffs' claims. The Plaintiffs contend that they are "persons aggrieved," and therefore, they have standing to challenge the HDC decision based on their alleged loss of view.

"Generally, concerns about the visual impact of a structure do not suffice to confer standing. . . ." *Martin* v. *The Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 146 (2001). See also *Sheehan* v. *Zoning Bd. of Appeals of Plymouth*, 65 Mass. App. Ct. 52, 55 (2005) (stating plaintiffs concern about visual impact of

condominium development not sufficient to confer standing). "However, where a [] bylaw specifically provides that the [] board should take into consideration the visual impact of a proposed structure, this 'defined protected interest may impart standing to a person whose impaired interest falls within that definition.'" *Kenner* v. *Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011), quoting *Martin*, 434 Mass. at 146-147. Moreover, a by-law or ordinance may "create and define a protected interest" when specific provisions denote factors that must be taken into account by a board making permit decisions. *Monks* v. *Zoning Bd. of Appeals of Plymouth*, 37 Mass. App. Ct. 685, 688 (1994) (by-law provision conditioning grant of permit on maintaining visual character of neighborhood created protected interest in plaintiff); *Martin*, 434 Mass at 146-147 (by-law requiring board to consider visual factor creates protected interest).

In the HDC Rules and Regulations, Section Two of that Act states:

> The purpose of this Act is to promote the general welfare of the inhabitants of the Town of Nantucket through the preservation and protection of historic buildings, places and districts of historic interest through the development of an appropriate setting for these buildings, places and districts and through the benefits resulting to the economy of Nantucket in developing and maintaining its vacation-travel industry through the promotion of these historic associations.

Section 9(a) states: "It shall be the function and the duty of the Historic District Commission to pass upon the appropriateness of exterior architectural features of buildings and structures hereafter to be erected, reconstructed, altered or restored within the Historic Nantucket District wherever such exterior features are subject to view from a . . . public way, . . . traveled way, a street or way shown on a land court plan, or shown on a plan recorded in the Registry of Deeds. . . ." Section 12 of the same Act states "Any person or the Historic District Commission, aggrieved by a decision of the Board of Selectmen, may appeal to the Superior Court. . . ." There is no dispute that the Barn can be viewed from North Liberty Street, which is a public way, traveled by both vehicles and pedestrians.

This Court is satisfied that the Plaintiffs have standing to bring this action because they are all abutters (adjacent or directly opposite the subject property) pursuant to the HDC's Abutter Notification Policy (Ex. 3), whose view would be impaired by the Barn's removal.[11] Each Plaintiff owns a home where they either reside or which they regularly visit every season on North Liberty Street in Nantucket. Their homes are all within the Town of Nantucket Historic District, within the Core of the Town of Nantucket. As residents and/or abutting property owners, each Plaintiff is entitled to the benefits and protections conferred by Sections 2, 9(a), and 12, and therefore, each qualifies as a "person aggrieved" because the barn's removal would significantly impact the visual character and quality of their view. The Bermans and the Hoyts have a direct view of the Barn from their properties across the street. Thus, the view of the Hoyts and the Bermans would be vacant if the barn is removed.[12] The Montgomerys do not have a view of the Barn from their home; the Barn is set back from the street, on the opposite side of the Seth

[11] This Court's determination that at least one Plaintiff has standing is sufficient to confer standing upon all of the Plaintiffs. In multiple-party litigation, it will suffice to establish standing if "any one plaintiff is aggrieved." Cohen v. Zoning Bd. of Appeals of Plymouth, 35 Mass. App. Ct. 619, 620 (1993); see Save the Bay, Inc. v. Department of Pub. Util., 366 Mass. 667, 674-675 (1975); Murray v. Board of Appeals of Barnstable, 22 Mass. App. Ct. 473, 476 n.7 (1986).

[12] The Defendants' counsel argued that, if the barn is removed, the plaintiffs may have a view restored of the Lily Pond. This court declines to accept what is likely to be only a temporary view. Having a developer present his development goal in a piecemeal fashion is not a feasible or appropriate way for a city or town to thoughtfully address development considerations and their impact on the public's interest. It was a great concern to the initial HDC that it had not seen the defendants' full plan for the property." See HDC I, Ex. 19 paragraph seven. There was testimony by a plaintiff that the defendants had submitted four separate proposals for this property. Mr. Kaschuluk testified he has a plan, but did not know exactly what it was, or at least declined to specify. His initial plan had been to raze the antique shop, move the Seth Ray Home a short distance, remove the barn, and do something with the cooper shop so that they can put in at least one other residential building, if not more. In fairness, when I asked if that means you know you are going to develop the properties, but you do not know exactly what, he agreed. The HDC and BOS should be allowed to consider his plan as a whole as well as the public's interest, instead of the defendants' piecemeal approach. It is correct for an HDC, or a town or city planning unit or that kind of agency which has to consider the public's interest, to do so, which interest the agency cannot really consider if it is required to consider piecemeal development proposals. HDC's workload, as a busy agency staffed by elected officials, would likely benefit if developers were required to submit their entire proposal. In fact, during the trial I learned another case 15-039 was filed on December 31, 2015, appealing the BOS decision allowing the owner to move the Seth Ray Cooper Shop. In their filings in that case, neither side informed the court that this new filing "relates" to these three pending cases, which information should have been provided. This lack of candor with the court is especially problematic as that case could well been tried with these three cases.

Ray House. However, the Mongomerys walk, run or drive by the Barn, which the Defendants seek to remove from that location. The Barn is clearly a very distinct presence in that neighborhood, because it so clearly was built to, and does, complement the Seth Ray House.

Having considered and decided the threshold issue of standing, this Court will analyze the substantive merits of the matter.

The HDC has long exercised broad discretionary power with respect to its decision to grant or deny an application for reasons that fall within the scope of concerns enumerated by the Act. *Gumley* v. *Board of Selectmen of Nantucket*, 371 Mass. 718, 712 (1977) (acknowledging that HDC's "substantial measure of discretionary power with respect to the appropriateness of exterior architectural features," is tempered only by the requirement to adhere to the purposes of its enabling statute). To that end, an appeal of the HDC's decision to the Board pursuant to § 11 of the Act is "not to be taken as transferring that discretionary power to the Board" but instead as a means of confining the HDC's power "within authorized limits or to prevent its abuse. . . ." *Id.* at 723.

Judicial review of an HDC decision is similarly circumscribed; it is "analogous to that governing the exercise of the power to grant ordinary special permits," and therefore, the Court may not disturb the decision "'unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" *Gumley*, 371 Mass. at 723, quoting *MacGibbon* v. *Board of Appeal of Duxbury*, 369 Mass. 512, 515-516 (1962). The Court's inquiry is two-fold: (1) whether the decision, on its face, is "insufficient in law[,]" and if sufficient, (2) whether the decision was "warranted by the evidence." *Warner* v. *Lexington Historic Commn.*, 64 Mass. App. Ct. 78, 81 (2005). See *Marr* v. *Back Bay Architectural Commn.*, 23 Mass. App. Ct. 679, 683 (1987).

This Court finds that HDC I is both sufficient in law on its face and supported by substantial evidence. HDC I made ten separate findings of fact, highlighting the Barn's architectural significance in terms of style and historical context. (*Id.* at ¶¶ 3-4). In particular, HDC I placed significant emphasis on the fact that North Liberty Street has particular historical importance and that the Barn has "become an important part of the historical context and streetscape area." (*Id.* at ¶ 3). Although not expressly identified, the HDC acted pursuant to by-law sections 2 and 9(a) in considering the effect that the Barn's removal would have on the Core's historical character.

The HDC's expressed concern as to the anticipated development and placement of future structures in light of the buffer zone also aligned to its mandated purpose to preserve Nantucket's historic character. Indeed, "Building with Nantucket in Mind" provides ample support for this conclusion: "Any new construction should follow a pattern of site utilization similar to that already established adjacent to it. In particular, consideration should be given to the setback of the buildings from the street, the width of their facades and the spaces between them, especially because these factors contribute to the rhythm and continuity of the buildings as seen together. Where buildings are predominantly aligned along the street creating a unified edge or wall along the street space, the front of a new building should be aligned within the general facade line of its neighbors." (Ex. 7, at p. 61).

Accordingly, this Court cannot say HDC I was arbitrary or capricious or that HDC I was without a substantial basis in evidence in concluding that removal of the Barn would permanently and detrimentally alter an important streetscape, as well as the overall historic character of the Nantucket Historic District. It follows then that the BOS I remand order was

improper and must be vacated. As a consequence thereof, neither HDC II or BOS II can stand and must also be vacated.[13]

ORDER OF JUDGMENT

Based upon the foregoing findings and rulings, it is hereby **ORDERED** that judgment enter in favor of the Plaintiffs, the Montgomery's, Berman's, and Hoyt's to the extent that BOS I and BOS II, as well as HDC II are **VACATED**. HDC I remains in full force and effect.

Elizabeth M. Fahey
Justice of the Superior Court

Dated: March 2, 2017

[13] There are two additional issues that warrant discussion. First, is Ms. Williams. Where, as here, the HDC is acting as a quasi-judicial authority, it seems clear to this Court that Ms. Williams' ex parte discussion with Mr. Kaschuluk on the morning of the HDC I hearing was entirely improper. Nothing in the record indicated that at the beginning of the HDC hearing she disclosed her conversation with real applicant. This may well be an example of a situation in which the appearance of familiarity and/or relationship, undue influence or other ethical/conflict concerns would require at least full disclosure if not recusal. Second, is Mr. Pohl's participation in this trial not as an HDC member, but as the Kaschuluk parties' expert witness. He is certainly well qualified and able to be so involved. However, the same concern of possible impropriety relating to Ms. Williams' conduct may also apply to Mr. Pohl's future participation in HDC matters involving the Kaschuluk defendants generally. This court has concerns as to whether the only adequate remedial step to avoid future conflict issues would be for Mr. Pohl to consider at least full disclosure if not recusal in any HDC matter involving either any application filed by, or on behalf, of any of the Kaschuluk defendants.. See generally City of Boston v. Massachusetts Gaming Commission, et al., 2015 Mass. Super. LEXIS 140; 33 Mass. L. Rptr. 247 (2015).

#50

Commonwealth of Massachusetts
County of Nantucket
The Superior Court

NANTUCKET, ss **CIVIL ACTION (CONSOLIDATED)**

Thomas M. Montgomery et al **NO. 1575CV00003**
Plaintiffs
v
Board of Selectmen of Nantucket et al
Defendants

Thomas M. Montgomery et al **NO. 1575CV00018**
Plaintiffs
v
The Board of Selectmen of Nantucket et al
Defendants

Jeffrey Kaschuluk, Individually and as Trustee of The Nanticut Realty Trust et al **NO. 1575CV00019**
Plaintiffs
v
Board of Selectmen of Nantucket et al
Defendants

JUDGMENT

This action came on for jury waived trial before the Court, Hon. Elizabeth M. Fahey presiding, and the parties having been heard, and the Court having rendered its Findings of Facts, Rulings of Law and Order of Judgment,

It is **ORDERED and ADJUDGED:**

That judgment is entered in favor of the Plaintiffs, the Montgomery's, Berman's, and Hoyt's to the extent that BOS I and BOS II, as well as HDC II are **VACATED**. HDC I remains in full force and effect.

Dated at Nantucket, Massachusetts this 20th day of March, 2017.

Mary Elizabeth Adams,
Clerk of the Courts

A TRUE COPY, ATTEST:
Mary Elizabeth Adams
Nantucket Superior Court

Addendum D

17-P-1432 Appeals Court

THOMAS M. MONTGOMERY & others[1] vs. BOARD OF SELECTMEN OF NANTUCKET & others.[2]

No. 17-P-1432.

Nantucket. October 2, 2018. - March 14, 2019.

Present: Massing, Neyman, & Ditkoff, JJ.

Historic District Commission, Decision, Appeal. Practice, Civil, Historic district appeal, Standing. Zoning, Person aggrieved. Words, "Person aggrieved."

Civil actions commenced in the Superior Court Department on February 5 and June 24, 2015.

After consolidation, the case was heard by Elizabeth M. Fahey, J.

Jonathan W. Fitch (Andrea Peraner-Sweet also present) for Jeffery Kaschuluk & others.

Kenneth R. Berman (Sarah F. Alger also present) for the plaintiffs.

[1] Barry H. Berman, Peggy McCarthy Berman, Joan M. Hoyt, Philip Hoyt, and Margot S. Montgomery.

[2] Jeffery Kaschuluk, Michael J. Maitino, the Nantucket historic district commission, and Westbay Development, Inc.

MASSING, J. This appeal arises out of a dispute between the owner of a historic property in Nantucket and his neighbors over whether the owner may remove an ancillary structure, a barn, from the premises. Over the course of the administrative proceedings and ensuing litigation, relevant officials in Nantucket have taken inconsistent positions concerning the historical significance of the barn. Ultimately, a Superior Court judge held a bench trial on three consolidated complaints for judicial review. The judge found, first, that the neighbors had standing to oppose removal of the barn and, second, that the first decision of the Nantucket historic district commission (commission), denying the owner's application to remove the barn, must stand. On the owner's appeal, we determine that the judge did not err in finding that the neighbors have standing; however, we vacate the judgment and remand with respect to the commission's first decision.

Background. 1. The property. The Seth Ray house on North Liberty Street, built in the mid-1700s, is one of the most historic structures in one of the most historic districts of old Nantucket. Seth Ray's cooper shop, where barrels were made to supply Nantucket's whale oil trade, stands on the adjacent parcel. Two structures of lesser pedigree share the same parcel with the Seth Ray house: the barn, completed in or around 1972, stands between the house and the cooper shop, and an antique

shop built in the 1930s is located on the other side of the house. The barn and the antique shop were built to match their surroundings in style and materials. Tour guides walking visitors down North Liberty Street point to the Seth Ray house, the cooper shop, and the barn (despite its relatively recent construction) as representative of life in Nantucket at the turn of the Nineteenth Century.

A barn not being a necessity of life in the Twenty-first Century, even in old Nantucket, the owner[3] of the Seth Ray structures sought to remove the barn from its present location and relocate it to elsewhere on the island. As the first step toward realizing this goal, the owner applied to the commission for permission.

2. The act. In 1970, the Legislature created the Nantucket historic district (St. 1970, c. 395 [the act]), including "the land and waters comprising the town of Nantucket," id. at § 4, and the commission, id. at § 3.[4] The act was adopted "to promote the general welfare of the inhabitants

[3] The application was filed by then-owner defendant Michael J. Maitino, working together with real estate developer defendant Jeffery Kaschuluk and defendant Westbay Development, Inc., a corporation owned and controlled by Kaschuluk. Kaschuluk purchased the property from Maitino at some point during the course of the litigation.

[4] The act repealed and replaced St. 1955, c. 601, which had divided Nantucket into two historic districts.

of the town of Nantucket through the preservation and protection of historic buildings, places and districts of historic interest." Id. at § 2. To erect or alter any building or structure in Nantucket, an owner must first obtain a permit from the commission, in the form of a certificate of appropriateness (certificate). Id. at § 5. In deciding whether to grant a certificate, the commission must consider the effect a proposed alteration would have on the "exterior architectural features which are subject to public view from a public street, way or place." Id. A permit is also required to raze or to remove any building or structure; the act empowers the commission "to refuse such a permit for any building or structure of such architectural or historic interest, the removal of which in the opinion of said commission would be detrimental to the public interest of the town of Nantucket or the village of Siasconset." Id. at § 6. "[A]ny person aggrieved" by a decision of the commission may appeal to the board of selectmen (board), id. at § 11, and "[a]ny person or the [commission], aggrieved" by a decision of the board may appeal to the Superior Court, id. at § 12.

3. The proceedings. The commission voted three to two[5] to deny the owner's request to remove the barn. In its first

[5] The majority consisted of commissioner John McLaughlin and associate commissioners Jascin Leonardo-Finger and Abigail Camp.

decision, the commission noted that "[t]he streetscape of this area of North Liberty Street has particular historical importance and has been described as iconic," and that although the barn was built between 1972 and 1975, it "has become an important part of the historical context and streetscape of the area." Also, expressing "great concern" and uncertainty about the "potential of a new structure being placed in that space" -- the application did not disclose the owner's plans for the property after removing the barn -- the commission concluded that removal of the barn "would negatively impact the historic character of the neighborhood, the historic value of the existing remaining structure and the streetscape."

The owner appealed the commission's first decision to the board. The board noted that its review was limited, and that it "must be careful not to substitute its judgment for that of the [commission]." Nonetheless, two members of the board questioned the validity of the commission's determination that removal of the barn would be "detrimental to the public interest," given that it was a relatively recent addition to the property. One board member "questioned the rationale for the decision in light of [the owner's] evidence of numerous other permitted removals

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The chair of the commission, Linda F. Williams, and commissioner Ray Pohl made up the minority. The trial judge found that Williams had engaged in "entirely improper" ex parte communications with the owner prior to the hearing.

of structures which were of allegedly much greater historic significance" than the barn. Town counsel suggested that a closer comparison of the other permitted removals would be necessary to determine whether the denial was arbitrary and capricious. By a vote of four to one, the board issued its first decision, remanding the matter to the commission for a further hearing to consider the "foregoing issues, questions, and comments."

Opposing the remand order, a group of neighbors, including the owners of the parcels abutting and directly across the street from the owner's property, filed a complaint in the Superior Court seeking judicial review of the board's first decision, followed shortly thereafter by an emergency motion to stay proceedings before the commission. A Superior Court judge denied the motion for a stay.

On remand from the board, the commission, with different participating membership, took an entirely different view of the barn and its relationship to its surroundings. In its second decision, the commission emphasized that the space occupied by the barn had lain vacant for forty to seventy years before the barn was built, providing the neighbors with an unobstructed view of Lily Pond, and that "[a]nother historic structure" had been moved down the street to "open up Lily Pond vistas as an example of historical context for views of Lily Pond in this

immediate area." The commission further noted that the two-story barn was not built "in the same style as the original ancillary one-story structure it replaced," but instead was designed in the gambrel style of the adjacent Seth Ray house. The commission also found that the streetscape had been altered many times over the past century, that the barn "has no historically significant architectural value," and that its removal "would not negatively impact the historic character of the neighborhood, the historic value of the significant remaining structure or streetscape." Further noting that any speculation regarding the owner's future plans for the property would be improper,[6] the commission voted three to two[7] to grant a certificate permitting removal and relocation.

[6] Under the act, the owner would need to apply to the commission for another certificate to erect any replacement building. St. 1970, c. 395, § 5.

[7] Commissioner Linda F. Williams and commissioner Ray Pohl, who had voted in the first commission decision to approve removal, were joined by associate commissioner Abigail Camp, who had voted against removal in the first decision, to form the new majority approving removal in the second commission decision. See note 5, supra. The minority in the second commission decision was made up of commissioner John McLaughlin, who had voted against removal in the first decision, and commissioner Diane Coombs, who had not participated in the first decision. The trial judge found it "more than troubling" that the chair, Williams, had assigned Camp to be the fifth commissioner to hear the case on remand instead of associate commissioner Jascin Leonardo-Finger, who had seniority and would have been chosen in the ordinary course.

Now the neighbors appealed to the board. In its second decision, the board expressed concern that its prior remand decision "may have involved the [b]oard's substitution of its judgment for the judgment of the [commission] members rather than a decision whether the [commission] decision was arbitrary and capricious." Noting that the Superior Court appeal of the board's first decision had not yet been adjudicated, the board voted to set aside the certificate issued in the second commission decision and instructed the commission "to revisit the application following resolution of the related appeal in Nantucket Superior Court." Both the owner and the neighbors filed new complaints in the Superior Court seeking judicial review of second board decision.

The three complaints for judicial review were consolidated for trial in the Superior Court. In her thorough written findings, rulings, and order for judgment issued after a five-day bench trial, the judge found as a threshold matter that the neighbors had standing to challenge the commission's issuance of the certificate. On the merits, the judge determined that the commission's denial of the certificate in its first decision was not arbitrary and capricious and was based on substantial evidence, and that the board's ruling in its first decision to vacate the first commission decision was improper. Consequently, she concluded that "neither [the second commission

decision nor the second board decision] can stand" and annulled those decisions. The net result was that the first commission decision, which denied the owner permission to remove the barn, "remain[ed] in full force and effect." The owner appeals.

Discussion. 1. Standing of the neighbors. a. Legal landscape. The act permits "any person aggrieved" by a ruling of the commission to appeal to the board, and "[a]ny person" or the commission "aggrieved" by a decision of the board to seek judicial review in the Superior Court. St. 1970, c. 395, §§ 11-12. Status as a "person aggrieved" is a prerequisite for standing to maintain an appeal under the act. Cf. 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 700 (2012); Barvenik v. Aldermen of Newton, 33 Mass. App. Ct. 129, 131 (1992). The act, however, does not define "person aggrieved."

"A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977). See generally Ginther v. Commissioner of Ins., 427 Mass. 319, 322-323 (1998). Because "[w]e read the [act] in the light of the more general statutes providing for zoning, G. L. c. 40A, and for historic districts, G. L. c. 40C," Gumley v. Selectmen of Nantucket, 371 Mass. 718,

719 (1977), we examine how the term has been construed in those related contexts.

The analysis of standing under the Historic Districts Act[8] is straightforward, as G. L. c. 40C, § 5, supplies a specific definition of the term "person aggrieved": "the applicant, an owner of adjoining property, an owner of property within the same historic district as property within one hundred feet of said property lines and any charitable corporation in which one of its purposes is the preservation of historic structures or districts." This definition was the result of an amendment to c. 40C, which previously limited the right to obtain administrative and judicial review of a decision of a historic district commission to the "applicant." Springfield Preservation Trust, Inc. v. Springfield Historical Comm'n, 380 Mass. 159, 160-161 (1980). See St. 1983, c. 429, § 1.

The c. 40C definition of "person aggrieved" thus provides standing to owners of nearby property in the same historic district as the structure under consideration, as well as to organizations dedicated to historic preservation. The

[8] The Historic Districts Act enables cities and towns to establish their own historic districts, with discretion to determine the scope of the district and the precise interests to protect. See G. L. c. 40C, § 3. As the Legislature created and has amended the Nantucket historic district through special acts over the years, Nantucket has never needed to resort to using c. 40C.

Legislature recognized that these persons and entities have a legitimate interest and a right to be heard to protect the historic integrity of their neighborhoods. Under c. 40C, all of the neighbors here, who live within the same historic district as the property and are either abutters or reside across the street, would have standing.

Determining who is a "person aggrieved" under G. L. c. 40A is far more complex. The Zoning Act allows a "person aggrieved" by a zoning decision to seek administrative and judicial review, see G. L. c. 40A, §§ 13 & 17, but it does not define the term. By judicial construction, "[a] 'person aggrieved' is one who 'suffers some infringement of his legal rights.'" 81 Spooner Rd., LLC, 461 Mass. at 700, quoting Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719, 721 (1996). The term is "not to be narrowly construed," Marotta v. Board of Appeals of Revere, 336 Mass. 199, 204 (1957), but it "requires a showing of more than minimal or slightly appreciable harm," Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115, 121 (2011).

The "right or interest" asserted by the person claiming to be aggrieved must be one that the governing zoning scheme is intended to protect. 81 Spooner Rd., LLC, 461 Mass. at 700. Kenner, 459 Mass. at 120. In the context of the Zoning Act, "[d]emonstrating aggrievement requires a plaintiff to show she has suffered a specialized, cognizable injury 'not merely

reflective of the concerns of the community.'" Murrow v. Esh Circus Arts, LLC, 93 Mass. App. Ct. 233, 235 (2018), quoting Denneny v. Zoning Bd. of Appeals of Seekonk, 59 Mass. App. Ct. 208, 211-212 (2003). "The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy." Kenner, supra at 122.

Concerns about the visual impact of a proposed structure on abutting property generally are insufficient to confer standing under the Zoning Act; however, these concerns may warrant standing where the local zoning bylaw specifically provides that visual consequences should be taken into account. Thus, where the local zoning bylaw required the permit-granting authority to consider "[v]isual [c]onsequences" on public ways and properties in the vicinity, an abutter had standing as a person aggrieved to challenge a proposed "towering steeple" atop a temple that would be visible from most of her property, day and night. Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141, 146-147 (2001). See Monks v. Zoning Bd. of Appeals of Plymouth, 37 Mass. App. Ct. 685, 688 (1994) (where zoning bylaw protected visual character of adjacent buildings and neighborhoods, summary judgment erroneously ordered against plaintiffs who established that cellular telephone tower would have visual

impact on both their home and neighborhood). By contrast, an abutter lacked standing to challenge a special permit to construct a communications tower where the local zoning bylaw did not address visual consequences. See Denneny, 59 Mass. App. Ct. at 213-215. See also Kenner, 459 Mass. at 123 (plaintiffs not aggrieved by proposed erection of new house across the street in same footprint as existing house, but seven feet taller; although bylaw protected visual interests, judge found that increased height "would have a de minimis impact on the [plaintiffs'] view of the ocean").

In summary, although the act, the Zoning Act, and the Historic Districts Act all use the term "person aggrieved," the legally cognizable injuries under each are not identical. See Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28 (2006) (while Zoning Act and comprehensive permit statute, G. L. c. 40B, both refer to person aggrieved, the interests they protect differ). If anything, the interests protected by the act here are more closely aligned with those protected by the Historic Districts Act. We turn next to the act itself and the judge's findings thereunder.

b. Standing under the act. Standing was a contested issue at trial. The judge took a view and heard substantial testimony regarding the North Liberty Street neighborhood, the property, the barn, and the injuries that the neighbors alleged would

attend its removal. All of the neighbors testified about the high value they placed on the historic character of their neighborhood when seen from their homes and from the street when they drive, bicycle, walk, or run by their homes -- and their concern that removal of the barn would damage the neighborhood's historic integrity. The judge concluded that the act required consideration of the visual impact of proposed removal, and that, as abutters, each of the neighbors "qualifie[d] as a 'person aggrieved' because the barn's removal would significantly impact the visual character and quality of their view." The issue of aggrievement is a question of fact for the judge, and the judge's ultimate findings on the issue will not be disturbed unless clearly erroneous. See Kenner, 459 Mass. at 119; Marashlian, 421 Mass. at 722; Talmo v. Zoning Bd. of Appeals of Framingham, 93 Mass. App. Ct. 626, 630 (2018).

The act is intended to protect the visual consequences of an alteration to the "exterior architectural features" of an existing building or structure -- to the extent that those features are "subject to public view from a public street, way or place." St. 1970, c. 395, § 5. It also protects buildings or structures "of such architectural or historic interest" that, in the commission's opinion, their removal "would be detrimental to the public interest of the town of Nantucket or the village of Siasconset." St. 1970, c. 395, § 6. That is, the act

protects visual interests that are connected with preserving the historic integrity of Nantucket and its neighborhoods.

Focusing on the act's stated interest in protecting and preserving historical buildings and exteriors only to the extent that they are visible from public ways, the owner contends that the neighbors' interest in their private views are not protected, or, alternatively, that any diminution of the neighbors' views does not affect them any differently than it affects the general public. In Higgins v. Department of Envtl. Protection, 64 Mass. App. Ct. 754, 754-755, 757 (2005), the plaintiff owners of office property abutting a proposed waterfront hotel in Newburyport sought an adjudicatory hearing to challenge a waterways license approved by the Department of Environmental Protection. The administrative law judge dismissed the challenge on the ground that the plaintiffs lacked standing, a determination that we affirmed on certiorari review. Id. at 755, 757. Although the plaintiffs were able to demonstrate that "the impact on their views from their private offices differ[ed] in kind or magnitude from that of the general public," id. at 757,[9] the waterways statute specified that it was

[9] The relevant regulations defined "aggrieved person" as someone who "may suffer an injury in fact, which is different either in kind or magnitude, from that suffered by the general public" and within the scope of interests protected by the waterways statute. Higgins, 64 Mass. App. Ct. at 756, quoting 310 Code Mass. Regs. § 9.02 (2000).

concerned only with waterfront views from public places, such as parks and esplanades. Id. In addition, the administrative law judge rejected the plaintiffs' claim that they used the public areas more frequently than the general public because of the proximity of their workplace, and we upheld this interpretation of the regulation as not being patently wrong, unreasonable, arbitrary, or capricious. Id. at 758.

Unlike the views from the offices in Higgins, the views that the neighbors enjoy coincide with the public views that the act is intended to protect. Moreover, the neighbors' regular use and enjoyment of the public ways on which their homes are situated is patently more intensive than the office workers' incidental use of the nearby public waterfront areas in Newburyport. The neighbors' claimed injuries are "personal to [them], not merely reflective of the concerns of the community." Denneny, 59 Mass. App. Ct. at 211.

In addition to their visual interests, as owners of property located in the Nantucket historic district, the neighbors have "a legitimate interest in preserving the integrity of the district" in which both their properties and the barn are located. Murray v. Board of Appeals of Barnstable, 22 Mass. App. Ct. 473, 476 (1986). See Harvard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491, 495 (1989) (denying standing to parties who did not own or

occupy property in same zoning district as proposed buildings). This interest is particularly relevant in the context of the Historic Districts Act. See G. L. c. 40C, § 5; Kelley v. Cambridge Historical Comm'n, 84 Mass. App. Ct. 166, 180 n.25 (2013) (plaintiffs unable to rely on c. 40C "for standing as owners of property within the same historic district, because . . . no historic district has ever been established in the area," and they did not otherwise qualify as aggrieved persons under G. L. c. 40C, § 5). While this interest may carry less weight under the Zoning Act, see Denneny, 59 Mass. App. Ct. at 215-216, it supports the neighbors' standing under the act at issue here.

The act protects the historic integrity of the public views of all of Nantucket, including where the neighbors reside. They sufficiently demonstrated that the removal of the barn would have a substantial effect on the historical character of their neighborhood's "streetscape" (in the commission's parlance) and their own enjoyment of it. That is, they alleged "a particularized harm to [their] own property and a detrimental impact on the neighborhood's visual character." Kenner, 459 Mass. at 121. Moreover, the neighbors' claim of aggrievement is substantial enough to confer on them a right to heard. Under the owner's reading of the act, no property owner in Nantucket other than the applicant would ever have standing to challenge a

decision of the commission. The act's use of the term "person aggrieved" rather than "applicant" indicates that standing is not so limited. See Springfield Preservation Trust, Inc., 380 Mass. at 160-161.[10]

The owner also refers us to a handful of decisions of the Land Court and the Appellate Division of the District Court Department in which residents of neighborhoods were denied standing to challenge a decision of a historic district commission. All of those cases concerned parties that were at some remove from the challenged development; none of those cases involved an abutter. See Kelley, 84 Mass. App. Ct. at 180 (plaintiffs, who were not abutters but lived "in close proximity" to church with municipal landmark status, lacked

[10] At the other extreme, the neighbors cite cases from other jurisdictions that permit a broad range of persons with interests in the integrity of protected districts to challenge development that might adversely affect those places. See, e.g., Sierra Club v. Jewell, 764 F.3d 1, 5 (D.C. Cir. 2014) (conferring standing on persons "who view and enjoy the [Blair Mountain, West Virginia,] Battlefield's aesthetic features, or who observe it for purposes of studying and appreciating its history" to litigate its listing in National Register of Historic Places to prevent surface coal mining); Dover Historical Soc'y v. Dover Planning Comm'n, 838 A.2d 1103, 1114 (Del. 2003) (standing conferred on landowner residents of Historic District of Dover based on their "enforceable right in the 'aesthetic benefit' derived from the Historic District as a whole"). We need not adopt the neighbors' very broad concept of standing to uphold the judge's finding that they have asserted a cognizable interest in the fate of the barn.

standing to challenge alteration to church under landmark regulations).

In Kenner, where the neighbor across the street was denied aggrieved person status under the Zoning Act because the judge found that an addition that would raise the challenged property's roof line by seven feet was de minimis, the appellate court could not say that the trial judge's decision was clearly erroneous. 459 Mass. at 123. Here, the owner proposes to remove an entire building, which is more than de minimis. See Butts v. Zoning Bd. of Appeals of Falmouth, 18 Mass. App. Ct. 249, 253 (1984) (abutter who established that his ocean view would be "completely blocked" by proposed remodeling of neighbor's home had standing as person aggrieved). The owner here has not shown that the trial judge's decision was clearly erroneous. Thus, we agree with the judge's determination that the neighbors are persons aggrieved under the act.

2. Decisions of the commission and the board. Before we review the judge's determination that the remand order in the first board decision was improper, and that the first commission decision, denying the owner permission to remove the barn, must therefore stand, we address a significant threshold issue. An administrative remand order is generally viewed as interlocutory and not appealable. See Wrentham v. West Wrentham Village, LLC, 451 Mass. 511, 514-515 (2008); East Longmeadow v. State Advisory

Comm'n, 17 Mass. App. Ct. 939, 940 (1983). The owner contends that the judge should not have considered the propriety of the first board decision, as it was not a final order. Indeed, the same logic might apply to the second board decision, which also remanded the application to the commission for further consideration, albeit with the further instruction that the commission await the resolution of the Superior Court litigation. Given the unusual circumstances of this case, where the unorthodox remand order in the second board decision was followed by the adjudication of three consolidated Superior Court complaints, culminating in a judicial remand order requiring the commission to deny the certificate, reaching the merits is the prudent course of action. Cf. Federman v. Board of Appeals of Marblehead, 35 Mass. App. Ct. 727, 730 (1994) ("If an order of remand allows the administrative tribunal no leeway, the order takes on the character of finality, and an appeal is in order").

In reviewing the decisions of the commission and the board, we apply a standard "analogous to that governing exercise of the power to grant or deny special permits." Gumley, 371 Mass. at 719. "The decision of the commission cannot be disturbed either by the board or by the court 'unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or

arbitrary.'" Id. at 724, quoting MacGibbon v. Board of Appeals of Duxbury, 369 Mass. 512, 515-516 (1976).

The trial judge concluded that the first commission decision was sufficient on its face, supported by substantial evidence, and not arbitrary or capricious. See Warner v. Lexington Historic Dists. Comm'n, 64 Mass. App. Ct. 78, 82-83 (2005). Because, in her view, the first commission decision was valid, the judge concluded that the board's remand order in its first decision was not. It is true that the act "confers on the commission a substantial measure of discretionary power with respect to 'the appropriateness of exterior architectural features' and congruity to historic aspects of the surroundings and the district." Gumley, 371 Mass. at 723. On review, the board does not have the same discretionary power as the commission; the purpose of the board's review is "either to confine the power of the commission within authorized limits, or to prevent its abuse, for example, by decisions based on peculiar individual tastes." Id.

That said, it was within the board's discretion to remand the application to the commission to consider additional facts to inform its deliberations, to provide additional explanation, and thus to ensure a decision that is not arbitrary or

capricious.[11] The possibility that the commission may have taken inconsistent positions on similar proposals, without exploring or explaining the inconsistency, is a particularly relevant concern. See Steamboat Realty, LLC v. Zoning Bd. of Appeal of Boston, 70 Mass. App. Ct. 601, 606 (2007) (affirming order denying request for height variance where board had "well-established interest in preserving the architectural integrity of a historic neighborhood" and "a record of furthering such an interest by consistently denying all requests for a height variance"); Fafard v. Conservation Comm'n of Reading, 41 Mass. App. Ct. 565, 568 (1996) (agency acts arbitrarily when "the basis for action is not uniform, and, it follows, is not predictable"). We discern no error of law or abuse of discretion in the first board decision, which remanded the matter for further consideration.

The second commission decision, finding the barn not to be architecturally or historically significant "upon further consideration of the prior record and consideration of the new materials," like the first commission decision, appears facially valid. But the irregularities in the proceedings noted by the trial judge -- the chair's ex parte communications, her choice

[11] Neither Gumley nor § 11 of the act supports the neighbors' bald assertion that the board "had only two choices: either affirm [the first commission decision] or annul it. Nothing else."

of one associate commissioner over another to participate in the decision, and the chosen associate commissioner's switch in vote, see notes 5 and 7, supra -- raises the specter that the commission may have considered improper factors or acted for reasons outside of its mandate. See Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury, 94 Mass. App. Ct. 594, 599-600 (2018); Fafard, 41 Mass. App. Ct. at 568. In these circumstances, so much of the second board decision that set aside the second commission decision for still further consideration appears to us to be a lawful exercise of the board's authority.[12] As a result, the commission was to have one more "opportunity to exercise its discretionary power, applying the statutory criteria." Gumley, 371 Mass. at 725.

Accordingly, the judgment is vacated. A new judgment shall enter affirming the second board decision to the extent that it set aside the certificate and remanded the owner's application to the commission. The commission shall consider any

[12] We are not persuaded by the owner's argument that the second board decision is invalid because it was decided by a two-to-one vote with only three of the five board members participating. The act requires the board's decisions to be "determined by a majority vote of the members of the board," St. 1970, c. 395, § 11, but it contains no requirement that all members of the board participate in the board's decisions. "In the absence of statutory restriction the general rule is that a majority of a council or board is a quorum and a majority of the quorum can act." Clark v. City Council of Waltham, 328 Mass. 40, 41 (1951), quoting Merrill v. Lowell, 236 Mass. 463, 467 (1920).

application in accordance with the act and consistent with this opinion.

So ordered.