



RECENT DEVELOPMENTS IN MASSACHUSETTS ZONING LAW

**A Summary of 2013 Appellate Cases
For MCLE Zoning Practice
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Appeals Court Decisions Under Rule 1:28

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ZONING BD. OF APPEALS OF LUNENBURG V. HOUS. APPEALS COMM.

464 Mass. 38

January 8, 2013

- The Supreme Judicial Court affirmed the Superior Court finding that pursuant to G.L. c. 40B, § 20, the Housing Appeals Committee (HAC) did not err in its decision to issue a comprehensive permit to build affordable condominium units. There was substantial evidence in the record to support the need for affordable housing in the region and the proposed project was not inconsistent with the town's master planning, nor would it undermine it.
- Developer filed for a comprehensive permit to build affordable condominium units in attached townhouses. The town zoning board denied the application, and developer appealed to the HAC. The HAC set aside the denial and ordered the board to issue the permit; the board petitioned for judicial review. The Superior Court affirmed the HAC's decision, and the board appealed.
- The Supreme Judicial Court ruled that in weighing the regional need for affordable housing on an application for comprehensive permit, low-cost market-rate housing that was not subsidized by federal or state government does not need to be considered under G.L. c. 40B, § 20.
- The Supreme Judicial Court further held that the regional need for affordable housing outweighed town's concern in zoning nonconformity.

ZONING BD. OF APPEALS OF SUNDERLAND V. SUGARBUSH MEADOW, LLC

464 Mass. 166

January 14, 2013

- The Supreme Judicial Court upheld the Superior Court's holding that there was regional need for affordable housing under G.L. c. 40B, § 20, where housing authorities in the six-town region had 434 residents waiting for public housing, with a wait of between two and five years for family units and, where the board could not meet its burden of establishing that the conditional permit should not have been granted.
- Defendant land owner applied to the zoning board for the issuance of a comprehensive permit authorizing developer to construct low and moderate income housing. The board denied the application, and defendant appealed to the HAC. The HAC vacated the board's decision and directed the board to issue a comprehensive permit; the board appealed to the Superior Court.
- The Supreme Judicial Court held, pursuant to G.L. c. 40B, § 20, where none of the conclusive presumptions in favor of a board's denial of a comprehensive permit application apply, only housing that is actually subsidized by the federal or state government under a qualifying program may be considered when evaluating whether the regional need for low or moderate income housing is outweighed by local concerns.
- The Supreme Judicial Court also ruled that where the adverse fiscal impact the town would allegedly suffer was based on the inadequacy of existing municipal services or infrastructure and did not derive from the unusual circumstances of the project, the impact was properly omitted from consideration.

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- The Supreme Judicial Court further found that the board failed to meet its burden of establishing that a fire safety concern outweighed the regional need for low and moderate income housing, where an expert stated that other alternative safety measures would accommodate the safety needs of the residents.
- Additionally, the Court found that the HAC's jurisdiction includes the authority to ensure that developers seeking approval under the act to build low and moderate income housing are not assessed fees that are prohibited by its regulations; pursuant to 760 CMR § 56.05(5), the board may not burden an applicant with legal fees arising from the board's general representation by characterizing the legal fee as a filing fee.

MAURI V. ZONING BD. OF APPEALS OF NEWTON

83 Mass. App. Ct. 336

February 22, 2013

FAR DENIED (465 Mass. 1104, May 6, 2013)

- The Appeals Court affirmed the Land Court judgment granting plaintiff neighbors summary judgment and revoking a building permit for construction of a residence on a lot containing a garage, issued by the city inspectional services department for a residential lot owned by the defendant. The Court found that the two adjoining undersized lots held in common ownership, one containing a dwelling and the other containing a garage, merged for purposes of zoning.
- Abutting plaintiffs appealed the decision of the city board of zoning appeals, which granted a building permit to defendant property owners, who had common ownership of two adjoining undersized lots. The Land Court entered summary judgment in favor of plaintiffs, and ordered revocation of the building permit; defendants appealed.
- The Appeals Court found plaintiff abutters, who raised unrefuted issues related to overcrowding, had sufficient standing to challenge further construction in an already overly dense zoning district, pursuant to the density provisions of the zoning ordinance, where proposed dwelling would have been constructed within 12 feet of plaintiffs' home.
- The Appeals Court agreed with the Land Court's finding that the city's zoning ordinance did not provide protection to the garage lot because, based on the language of the ordinance and the rule of the last antecedent, "when two adjacent undersized lots are held in common ownership, [only] the lot improved with a dwelling is protected from increases in the area, frontage, or setback requirements;" in order to qualify for exception, the ordinance required that lot contain a dwelling, not simply adjoin to a lot containing a dwelling.
- Moreover, the Appeals Court examined the legislative history of G.L. c. 40A, § 6, and explained that the Land Court was correct in applying the rule of the last antecedent to interpret the city ordinance.
- The Appeals Court noted that if it was the city's intention to afford lots broader grandfather protection, it should have enacted language to clearly establish such intent.

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MAHAJAN V. DEP'T OF ENVTL. PROT.

464 Mass. 604

March 15, 2013

- The Supreme Judicial Court, remanding the judgment of the Superior Court, found that a project site, which defendant took by eminent domain for urban renewal purposes was not subject to Article 97 of the Amendments to the Massachusetts Constitution (Article 97), G.L.A. Const. Amend. Art. 97, and, therefore, a two-thirds vote of the Legislature was not required to approve the planned redevelopment.
- The Department of Environmental Protection (DEP) issued a waterways license to defendant to redevelop wharf pavilion, located on filled tidelands, that defendant had obtained by eminent domain. City residents then appealed the DEP's decision. The Superior Court ordered declaratory relief and issued a writ of mandamus requiring the DEP to obtain two-thirds vote of Legislature, as required by Article 97.
- The Supreme Judicial Court held that the use of Article 97 land, which incidentally served purposes consistent with Article 97, and displayed similar attributes to Article 97, did not render it subject to Article 97. To qualify under Article 97, lands and easements must have *originally* been taken or acquired for the *primary purposes listed in the statute itself*, which are “the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources, ... *or subsequent to the taking [were] designated for [such] purposes.*”
- Citing G.L. c. 121B, § 45, the Supreme Judicial Court explained that land taken primarily for urban renewal purposes “is generally understood to be taken for the purpose of eliminating decadent, substandard or blighted open conditions,” not for the purposes of Article 97.
- While entitled to judicial consideration, the Supreme Judicial Court disagreed with the 1972 Opinion of the Attorney General's broad interpretation of Article 97, explaining that such opinions are not binding in their particulars.
- Furthermore, the Supreme Judicial Court held, a “chapter 91 license merely certifies that the planned use, including the lease, complies with G.L. c. 91 and accompanying department regulations ... [i]t does not ... transfer from the department to the BRA an extent of legal control over the land at issue.” As such, any disposition triggering the Article 97 voting requirement would need to be granted by the BRA, and not to the BRA; Article 97 “requires a two-thirds vote of the Legislature prior to an actual change in use, not mere preparations for that change.”
- The Court remanded the case for consideration of the license issuance under G.L. c. 30A, § 14 because that issue was not ruled upon by the trial court.

E & J PROPERTIES, LLC V. MEDAS

464 Mass. 1018

March 19, 2013

- The Supreme Judicial Court upheld the Land Court judgment affirming the Fall River zoning board's decision to reverse the building inspector's order, which had required a trust to demolish existing structures on the basis of a condition in a previously-granted

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variance. The variance had permitted the demolition of the structures and the subdivision of the property into multiple single-family lots. Where the variance had not expressly required demolition within a particular time period, the zoning board's decision to reverse the building inspector's order was legally tenable and reasonable.

- The zoning board issued a variance to the trust in 2005, permitting the building demolition and subdivision of the property into twenty buildable lots for single-family residences. Within a year, the planning board endorsed an approval-not-required (ANR) plan for 20 lots, and 16 lots were sold to the plaintiff, who began construction of houses. However, the trust demolished only a portion of the buildings (located on the remaining four lots). In 2009, the building inspector ordered the demolition of the remaining structures. The trust appealed to the zoning board, which reversed the order. The Land Court found that the variance neither required demolition nor imposed a time deadline for demolition to occur.
- The Supreme Judicial Court found that although G.L. c. 40A, § 10, permits a zoning board to impose conditions on its grant of a variance, the "terms of a variance must appear on its face," and the board in this case did not expressly impose a time condition on the demolition.
- The Supreme Judicial Court further held that the variance, which "require[d] that rights ... be exercised within one year," did not require demolition within that period, as demolition was not a "right" authorized by the variance.

PLAINVILLE ASPHALT CORP. V. TOWN OF PLAINVILLE

83 Mass. App. Ct. 710

June 6, 2013

- The Appeals Court affirmed the Land Court entry of summary judgment for the Town and held that pursuant to G.L. c. 40A, § 6, landowner's property lost its "grandfather" protection through nonuse, and the asphalt operation was not entitled to review under the "abandonment" standard repealed by the town over twenty years before the use was discontinued.
- The Appeals Court explained that protection of nonconforming uses in the commercial context is governed by the first and third paragraph of G.L. c. 40A, § 6 which allows towns to regulate nonconforming uses and structures, including changing the standard to end nonconforming use from "abandonment" to a "discontinuance" standard.
- The Appeals Court also found the Land Court was correct in applying the rule of last antecedent to interpret the zoning bylaw to find that all bituminous product manufacturing operations were prohibited under the bylaw, stating that "cement, concrete and bituminous product manufacture and similar operations causing dust, noise and odor" were prohibited uses in all districts, rather than only bituminous product manufacturing operations that caused dust, noise and odor.

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GRADY V. ZONING BD. OF APPEALS OF PEABODY

465 Mass. 725

July 10, 2013

- The Supreme Judicial Court affirmed the Land Court judgment, holding that a zoning variance had “taken effect,” pursuant to G.L. c. 40A, § 11, and did not lapse, where it was not recorded with the registry of deeds within the one-year lapse period set forth in G.L. c. 40A, § 10, but was recorded eleven days thereafter, and where the holders had substantially relied upon it.
- Defendant landowners owned a lot of land, which they subdivided into two lots, one with an existing structure and one vacant. The defendants converted the structure to a condominium and deeded the developed lot to the condominium trust, retaining an access easement to the undeveloped lot. The defendants then received a variance to build a two-family house on the remaining lot; the variance was not appealed. Within one year, the defendants obtained a building permit, hired a contractor, obtained a construction loan, and began to clear the site, but failed to record the variance. One week after the end of the one-year period, the plaintiff, a condominium trustee, made a written request to the building commissioner that he revoke the building permit on the ground that the landowners had failed to record the variance within one year, pursuant to G.L. c. 40A, §§ 10, 11, and therefore, it had not become effective. Upon being notified of the request, the defendants recorded the variance. The building commissioner denied plaintiff’s request on the grounds that the “rights authorized by the variance have been exercised within one year” because work had commenced pursuant to a building permit and the landowners had complied with the conditions specified in the variance. The zoning board upheld the building commissioner’s denial of the request to revoke the building permit; plaintiff appealed. The Land Court determined that the variance had not lapsed, because the defendants had taken substantial steps in reliance on it, and had recorded it within a short period of time after the end of the lapse period.
- Discussing the legislative history of the recording requirement in G.L. c. 40A, § 11, the Supreme Judicial Court explained that the purpose of requiring recording to prevent lapse was to put others who have an interest in the status of the land (such as purchasers of abutting property) on notice of the grant permitting a deviance from the zoning code.
- The case required the Court to address a question left unanswered in Cornell v. Board of Appeals of Dracut, 453 Mass. 888 (2009), in which the Court had held that a variance holder was required both to exercise its rights and record the variance to prevent the lapse of the variance; in that case, the holder had done neither within two years of the issuance. In this case, the Court concluded that, “in the unusual circumstances” of this case, the variance had become effective, notwithstanding the lack of recording within one year, where the variance holders were issued a building permit and took substantial steps in reliance on the variance within one year, including obtaining a construction loan and beginning construction operations, and where there was no apparent harm to any interested parties, other than any harm resulting from the original, uncontested grant of the variance, and the variance was recorded less than two weeks after the expiration of the one-year period.
- The Supreme Judicial Court held that the failure to record the variance did not void the variance, where the variance holder substantially relied on it and acted in good faith.

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TIMPERIO V. ZONING BD. OF APPEALS OF WESTON

84 Mass. App. Ct. 151

August 16, 2013

- The Appeals Court affirmed the Land Court entry of summary judgment, dismissing plaintiff's appeal and finding that plaintiff's lots were not precluded from merging for zoning purposes, where the by-law was subsequently amended when lots were held in common ownership and where land did not meet the conditions of statutory exemption from the common law merger doctrine.
- Plaintiff landowner took title to three lots (7, 8, and 9), nonconforming as to frontage and area.. Plaintiff sought a variance and special permit to develop a separate dwelling unit on Lots 8 and 9, claiming that Lots 8 and 9 remained separate from Lot 7, which was the site of an existing single-family dwelling. The board denied plaintiff's application, explaining that the three lots had merged for zoning purposes by virtue of a subsequent amendment to the previously existing bylaw. In appealing the board's determination, plaintiff argued that an earlier variance decision, which found that pursuant to G.L. c. 40A, § 6, Lot 7 "retained its separate status" from Lots 8 and 9, precluded the board from later finding that the three lots had merged for zoning purposes.
- The Appeals Court agreed with the Land Court's finding that the board's earlier decision did not equate to a finding that Lot 7 was separately owned from Lots 8 and 9, nor was not entitled to res judicata as it was limited in its scope and therefore, did not preclude the board from finding that Lots 8 and 9 were not a separate buildable lot. The Land Court stated that the issue before the board was whether Lot 7 qualified for a variance, not whether the Lots 8 and 9 were separately buildable.
- The Appeals Court held that the board properly found that the lots merged as a result of a subsequent bylaw amendment, which increased the frontage requirements in the zoning district and where neither Lot 7 standing alone, nor Lots 8 and 9 combined met the new foot frontage requirement. The Appeals Court found that the board's earlier decision pertaining to Lot 7 did not "perpetually exempt lot 7 from the merger doctrine in the face of subsequent by-law amendments."
- The Appeals Court explained the statutory protection from merger, pursuant to G.L. c. 40A, § 6, which "grants a perpetual exemption from increased local zoning requirements to certain lots that were once buildable under local bylaws," applies "only if there is compliance with statutory conditions." Thus, the Appeals Court concluded that plaintiff could not claim the "perpetual" protections afforded nonconforming lots under G.L. c. 40A, §6, fourth par., because the land did not meet the conditions of statutory exemption from the common law merger doctrine. Since all three lots were in common ownership at the time the bylaw was amended, the statutory protection did not prevent the three lots from merging for zoning purposes.

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ALFORD V. BOSTON ZONING COMM'N

84 Mass. App. Ct. 359

October 9, 2013

- The Appeals Court affirmed the Superior Court entry of summary judgment for the defendants and held that where an institutional master plan (IMP) approval process was a legislative act and not an adjudicatory proceeding, Article 29 of the Massachusetts Declaration of Rights, which governs the right to be tried by free, impartial and independent judges, did not apply to the proceedings, and that, further, the approval of the IMP was neither arbitrary nor capricious.
- Plaintiffs, abutting neighbors of Boston College, appealed the decision of the Boston zoning commission and the Boston Redevelopment Authority (BRA) approving the implementation of the IMP for expansion of college facilities, sought injunctive relief, and alleged a violation under Article 29 of the Massachusetts Declaration of Rights. The Superior Court entered summary judgment in favor of the zoning commission, BRA, and college; plaintiffs appealed.
- The plaintiffs argued that the IMP approval process was akin to that for special permits and variances, which have been held to be quasi-judicial, adjudicatory proceedings. The Appeals Court noted that the IMP approval process was “created specifically to address the shortcomings that the special permit process posed to health care and educational institutions,” and was more akin to the approval of a zoning amendment, which is a legislative act that implicates long-term governmental policy questions. As such, the IMP approval process was not subject to the procedural protections afforded to adjudicatory proceedings under G.L. c. 30A, § 1. Further, the “substantial overlap of responsibilities between the zoning commission and the BRA renders an adjudicatory format impracticable.”
- The Appeals Court explained that to determine whether a governmental body acts quasi-judicially, courts consider “the nature of the governing standard, and whether the proceeding ‘consist[s] primarily of unsworn statements by interested persons advocating or disapproving the proposed new policy, as contrasted with sworn testimony by witnesses subject to cross-examination in a hearing preceded by specific charges and followed by the adoption of formal findings of fact.’”
- The Appeals Court found that there was no requirement that the public hearings, during the IMP approval process, be conducted on the record as adversarial proceedings.
- The Appeals Court held that pursuant to Article 29, the approval process was not biased where a zoning commission member, who was also a paid lobbyist working on property issues, master planning, and campus master plan, resigned from the commission before it received the IMP and did not participate in any proceedings, hearings, or discussions with any zoning commission members regarding the IMP.
- The Appeals Court also held that the approval of the IMP was not arbitrary or capricious where the decision was made through a process that required “communication and input from multiple sectors of state and local government and private parties in an effort to ensure that the amendment comports to the standards of [the Boston zoning code],” and that the approval of IMP by BRA did not bind zoning commission, which had authority to adopt, reject, or adopt in substantial accord the BRA recommendation.

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BEVERLY PORT MARINA, INC. V. COMM'R OF DEP'T OF ENVTL. PROT.

84 Mass. App. Ct. 612

December 11, 2013

- The Appeals Court vacated and remanded the final decision of Department of Environmental Protection (DEP), in which DEP had granted the city's application for Chapter 91 licenses to construct and develop a restaurant in a designated port area and rejected the plaintiff's competing proposal to build and operate a boatyard on the site.
- The Appeals Court held that the DEP was required to deny the city's license application because, pursuant to G.L. c. 91, a license may not be issued for a project proposed in a "designated port area" (DPA) if a proposal for a "competing project" submitted during the public comment period on the license application would promote water-dependent industrial uses of the project site to a greater extent than the project proposed in the license application.
- The Appeals Court found that "[i]n reviewing license applications for nonwater-dependent uses in DPAs, the DEP first determines whether there is a bona fide industrial use that has expressed an interest in using the site. If there is, the DEP will yield to that marine industrial use, but if there is not a competing interest, it then can consider other nonmarine industrial uses for ... that property."
- Additionally, there was no evidence to support the DEP's conclusion that the competing project was not feasible, and moreover, the Court found that the competing proposal did not have to establish conclusively that it would receive all the required permits and third-party approvals. The Appeals Court explained that 310 CMR § 9.36(5)(a) "does not, by its express terms, require that the proponent of a competing proposal demonstrate that the proposal is feasible; the lone reference to feasibility appears in subsection 2, which requires a clear showing that the competing party has prepared detailed development plans for the competing project, including appropriate feasibility studies." The purpose of the regulation was not to ensure that the competing proposal goes forward, but to ensure a project that does not serve the regulatory purpose (of fostering water-dependent industrial uses) does not preempt availability of the site for the favored uses.
- Lastly, the Appeals Court noted that the DEP's review of a license application under G.L. c. 91 for projects on filled tidelands "typically ought not inquire into the applicant's acquisition of other permits necessary for the project."
- The Appeals Court, accordingly, found that the DEP's conclusion that the competing proposal did not meet the regulations' criteria was legally erroneous and not supported by substantial evidence. The Court vacated the DEP's decision and remanded the case to the DEP for issuance of a decision denying the city's license applications.

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UNPUBLISHED APPEALS COURT RULE 1.28 DECISIONS

Note: Decisions issued by the Appeals Court pursuant to Mass. R. App. 1.28 after February 25, 2008, may be cited for their persuasive value, but not as binding precedent.

- Bardsley v. Conservation Comm'n of Harwich, 84 Mass. App. Ct. 1120 (2013) (affirming the Superior Court holding that the denial of a variance and restriction of the use of a locus does not constitute an unconstitutional taking).
- Cobbett v. Zoning Bd. of Appeals of Marshfield, 83 Mass. App. Ct. 1114 (2013) (FAR denied, 465 Mass. 1104) (direct abutter's concern about density was sufficient to confer standing; ZBA's issuance of special permit was not unreasonable, arbitrary or capricious).
- Chiuchiollo v. Hopedale Zoning Bd. of Appeals, 84 Mass. App. Ct. 1111 (2013) (plaintiff's appeal to the Superior Court was time barred, pursuant to G.L. c. 40A, § 17).
- Danny Bell's LLC v. Zoning Bd. of Appeals of Great Barrington, 83 Mass. App. Ct. 1117 (2013) (FAR denied, 465 Mass. 1104) (affirming the Superior Court holding that the statute of repose in G.L. c. 40A, § 7 did not bar the enforcement of a cease and desist order for activities not in conformity with the building permit; the failure of local officers to enforce the statute and the bylaw did not constitute a forfeiture of governmental zoning power).
- Eburn v. Zoning Bd. of Appeals of Dennis, 83 Mass. App. Ct. 1116 (2013) (ZBA retained discretionary authority to deny special permit where proposed alteration was substantially more detrimental than the existing nonconforming structure to the neighborhood).
- Farrington v. Planning Bd. of Cambridge, 83 Mass. App. Ct. 1110 (2013) (planning board's decision to grant special permits was well within its authority under the zoning ordinance and was not arbitrary, capricious, an abuse of discretion or in excess of its authority).
- Ferris v. Monterey Zoning Bd. of Appeals, 83 Mass. App. Ct. 1112 (2013) (confusion among municipal officials did not rise to a level of controversy pursuant to G.L. c. 231A; no legally cognizable controversy existed where town withdrew its application for a special permit; lack of standing).
- Guaranteed Builders, Inc. v. Bylinski, 84 Mass. App. Ct. 1125 (2013) (plaintiff's complaint, regarding a challenge to dwelling that was built in accordance with a building permit, was time-barred by the six-year statute of limitations set forth in G.L. c. 40A, § 7; the ten-year statute of limitations did not govern, as it "applies to challenges made to structures not built pursuant to or in reliance on a building permit").
- Harrison v. St. Pierre, 84 Mass. App. Ct. 1128 (2014) (affirming the Land Court holding that pursuant to G.L. c. 40A, § 6, a special permit was invalid because the proposed new structure was not compliant with the local zoning by-laws; "absent a variance, a preexisting nonconforming commercial structure may not be reconstructed, extended, or changed unless

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the new structure first is found to be in compliance with a zoning by-law's setback and other dimensional requirements”).

- Jenkins v. Zoning Bd. of Appeals of Falmouth, 83 Mass. App. Ct. 1124 (2013) (FAR denied, 465 Mass. 1107) (special permit granted to grandfathered lot, where lot was rezoned to a residential use, was not held in common ownership, and met the frontage requirement; pursuant to town’s zoning bylaw, ZBA had discretion and did not exceed its authority in reducing the setback requirement; plaintiff’s claim that the Superior Court trial judge erred in upholding the issuance of a special permit was without merit).
- Lawlor v. Zoning Bd. of Appeals of Taunton, 83 Mass. App. Ct. 1129 (2013) (FAR denied, 465 Mass. 1109) (plaintiff’s concern about increased traffic was sufficient to confer standing to challenge the issuance of a variance; substantial hardship warranting a variance was not found where variance was sought for financial gain).
- Lemansky v. Zoning Bd. of Appeals of Charlton, 83 Mass. App. Ct. 1133 (2013) (FAR denied, 466 Mass. 1102) (appeal was time barred where notice of the building permit’s issuance constituted notice under G.L. c. 40A, § 7; presumption of standing based on concern over increased density was successfully rebutted).
- Lortie v. Zoning Bd. of Appeals of Westport, 84 Mass. App. Ct. 1105 (2013) (concern about density and trespass sufficient to establish standing; plaintiffs were not precluded from seeking judicial review of the amended variance where plaintiffs did not appeal original variance due to their reliance on defendant’s compliance with conditions imposed by the original variance).
- M.R. Pollock & Sons, Inc. v. Zoning Bd. of Appeals of Middleton, 84 Mass. App. Ct. 1107 (2013) (plaintiff failed to meet his burden of proving preexisting nonconforming use).
- McKenney v. Zoning Bd. of Appeals of Westminster, 84 Mass. App. Ct. 1105 (2013) (standing found based on plaintiff’s concern about increased traffic; conflict of interest violation, pursuant to G.L. c. 268A, § 23(b), did not constitute a basis to rescind or vacate the board’s decision under G.L. c. 268A, § 21(a); conducting a hearing on election day was a procedural defect and was subject to the general rule that a party must show that she is prejudiced by the procedural defect).
- Palermo v. Zoning Bd. of Appeals of Manchester-by-the-Sea, 84 Mass. App. Ct. 1112 (2013) (affirming the Superior Court holding that pursuant to G.L. c. 40A, § 6, the ZBA did not exceed its authority in issuing a special permit to demolish and reconstruct a single family house, where the proposed changes were not “substantially more detrimental or injurious to the neighborhood than the existing nonconforming structure”).
- Rice v. Powers, 84 Mass. App. Ct. 1126 (2013) (affirming the Land Court ruling that pursuant to G.L. c. 40A, § 6, the doctrine of merger applied to landowner’s lots and therefore, one lot lost its status as a preexisting nonconforming lot under applicable zoning laws; “ownership of the two adjacent nonconforming lots in different ownership capacities

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(as tenants by the entirety and as trustees) constituted sufficient ‘control’ for purposes of zoning merger”).

- TH Claims, LLC v. Town of Hingham, 84 Mass. App. Ct. 1124 (2013) (plaintiff’s challenge to the building department’s refusal to issue a certificate of occupancy was barred by plaintiff’s failure to bring a timely appeal under the Zoning Act, G.L. c. 40A; the town’s decision to take discretionary action to enforce zoning bylaws, wetlands protection laws, or licensing standards, was not a proprietary action, but rather a regulatory action, and “estoppel does not operate against a governmental unit or officials performing police power duties”).