81-891-03

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

02-P-921

JARED B. STAMELL

vs.

PLANNING BOARD OF CHILMARK.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from a judgment of the Land Court affirming the defendant planning board's denial of the plaintiff's subdivision plan, the plaintiff contends (i) that section 4.02A of the Chilmark subdivision rules and regulations authorizes the defendant only to condition, and not to deny, approval of the plaintiff's plan based on inadequate access to the proposed subdivision; and (ii) that the Land Court judge erroneously declined to determine that the plaintiff holds the legal right to make improvements to the access roadway sufficient to address the defendant's concern over access. We affirm the judgment of the Land Court.

The plaintiff's first argument is addressed by North Landers Corp. v. Planning Bd. of Falmouth, 382 Mass. 432, 436 (1981), in which the Supreme Judicial Court, faced with a local subdivision regulation substantially identical to that involved in the present case and a developer's contention that the regulation did not "give[] due notification to an owner or subdivider that adequate access must be provided or that it will form a basis for

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the imposition of conditions or disapproval of the submitted plans," concluded that the regulation (construed in conjunction with G. L. c. 41, § 81M) authorized denial of a plan where off-site access ways were inadequate to serve the proposed subdivision.

The plaintiff's second argument fails because the servient tenants are not parties to the present action and, in their absence, no binding declaration may enter regarding the scope of the plaintiff's rights to use, maintain, and improve the claimed access easement.[1]

The judgment of the Land Court, affirming the planning board's decision denying the plaintiff's application for subdivision plan approval, is affirmed.

So ordered.

By the Court (Laurence, Green, & Trainor, JJ.),

Clerk

Entered: November 20, 2003

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[1] As a general matter, we agree with the plaintiff that the planning board is empowered, incident to its consideration of an application for subdivision approval, to consider whether the applicant's ownership and easement rights authorize the applicant to gain access to the proposed subdivision (or to improve such access) in the manner deemed necessary by the planning board to satisfy the requirements of the subdivision control law and the planning board's rules and regulations, and that correctness of the planning board's conclusions on such matters are properly within the scope of judicial review on appeal from the planning board's decision (provided all necessary parties are present).

During oral argument on the motion, this court discussed transferring the instant action to the superior court. The last sentence of G. L. c. 185, § 15 (§ 15), provided that "[t]he land court may, upon application of either party or upon its own motion, transfer to the superior court any action in which *no* right, title or interest to land its involved . . .." (emphasis added). Conversely, the superior court may order the removal of jury-waived civil actions to the land court "where any right, title or interest in land *is* involved . . ." (emphasis added). G. L. c. 212, § 26A.

On prior occasions, courts have found that actions brought under G. L. c. 40A, § 17, in fact, implicate "right, title or interest" in land. *See Schiffone* v. *Zoning Bd. of Appeals of Walpole*, 28 Mass. App. Ct. 981, 982 (1990); *Kimberk* v. *Boston Zoning Comm'n*, 7 LCR 214 (1999).[2] Therefore, this court has no basis under § 15 to transfer the instant action to the superior court.

Based upon the foregoing, the motion is allowed. The amended complaint shall be dismissed.

So ordered.

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* * * * * *

JARED B. STAMELL

v.

ANNABEL DIETZ, SUE DOHERTY, WARREN M. DOTY, MITCHELL POSEN, PHIL SMITH and LESLIE WEISS, as they are Members of the PLANNING BOARD OF THE TOWN OF CHILMARK

Misc. Case Nos. 249130 and 251830

March 5, 2002
Leon J. Lombardi, Justice

Subdivision Review–Failure to File Subdivision Rules with the Registry of Deeds–Effect of Prior Approvals of Lots on Private Way—Where the Chilmark Planning Board determined that a safe and convenient access road did not exist between a proposed subdivision and a roadway, and the plaintiff was unable to demonstrate that he had a right to make the improvements he represented he would undertake in an amended subdivision plan, the Board was not required to approve his amended plan.

DECISION

Pursuant to G. L. c. 41, § 81BB, and c. 185, § 1(k), Jared B. Stamell (Stamell) commenced the cases at bar appealing two decisions of the Chilmark Planning Board (Board). Stamell proposes to subdivide a parcel of land consisting of approximately sixty acres (locus) off Blue Barque Road (Blue Barque) and Quenames Road (Quenames) in Chilmark and to create three buildable lots.

Stamell filed the first complaint against the members of the Board on June 29, 1998 (first action), and filed the second complaint on October 27, 1998 (second action). The Board answered the complaints on July 10, 1998, and December 28, 1998, respectively.[1]

The parties filed on May 12, 2000, Joint Pre-Trial Memorandum. As part of that memorandum, the parties submitted a statement of agreed facts. I have incorporated certain of those agreed facts within my findings of fact.

A trial was held in Edgartown on January 18, 2001. In the presence of counsel, I took a view of the properties at issue on the morning of trial.

The following witnesses testified at trial: Stamell; Alfred Howard, Stamell's traffic engineer and transportation planner (traffic engineer); Michael Moscow, an owner of property abutting Blue Barque; Douglas Hoehn, a registered professional land surveyor called by Stamell (surveyor); Chilmark Police Chief Timothy Rich (police chief); and Chilmark Fire Chief David Norton (fire chief). A stenographer recorded and transcribed the proceedings.

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2. The Appeals Court affirmed *Kimberk* on other grounds in Memorandum and Order Pursuant to Rule 1:28 issued on December 21, 2001.

1. The parties on March 8, 2000, filed in the second action Joint Motion to Consolidate Cases. I allowed the motion on the following day.

The parties marked twenty exhibits for identification, and seventeen of those exhibits were admitted into evidence.[2] By leave of court, the parties submitted on February 12, 2001, exhibits marked twenty-one and twenty-two. These nineteen exhibits are hereby incorporated into this decision for the purpose of any appeal.

I gave the parties the opportunity to submit post-trial memoranda. Stamell and the Board submitted their memoranda on April 26, 2001.[3]

I find the following facts:

I. Parties

1. Stamell is a resident of New York and owns a second residence situated on locus.

2. At the commencement of the cases at bar, Annabel Dietz, Sue Doherty, Warren M. Doty, Mitchell Posen, and Phil Smith were residents of Chilmark and comprised the membership of the Board.

II. Subdivision Rules and Regulations

3. The Board first adopted the Town of Chilmark Rules and Regulations Governing Subdivision of Land (Chilmark rules) on June 19, 1975. In conformity with G. L. c. 41, § 81Q, the planning board on May 27, 1976, filed a set of the Chilmark rules with the recorder of the land court (recorder).[4,5]

4. In January 1982, the Board adopted Section 4.02A of the Chilmark rules (Section 4.02A). The Board in January 1985 adopted revisions to Appendix C of the Chilmark rules (1985 Appendix C). Section 4.02A and the 1985 Appendix C were part of the set of the Chilmark rules dated April 1987 filed with the recorder on February 5, 1988.

5. The Board issued a set of the Chilmark rules containing a revision date of November 15, 1989 (1989 rules) following the adoption of amendments to Appendix C of the same date (1989 Appendix C) (exhibit 6).

6. On January 10, 1991, the Board filed with the recorder a copy of the 1989 Appendix C.

7. The Board did not transmit Section 4.02A or the 1989 Appendix C to the Dukes County Register of Deeds (Dukes register) at any time prior to March 17, 1998.

8. The first sentence of Section 3.03 of the 1989 rules provides: "[a]ll roads and paths in any subdivision shall be designed so that, in the opinion of the Board, they will provide safe pedestrian and vehicular travel.

9. Section 3.06 of the 1989 rules states: "[t]he minimum width of road and path rights-of-way shall be prescribed in Appendix C. Greater widths may be required by the Planning Board when deemed necessary for present and future vehicular travel."

10. In pertinent part, Section 4.02A of the 1989 rules provides:

> "Where, in the opinion of the board, the road system within a proposed subdivision does not connect with or have access to a public way having a width, surface, configuration, contour and other characteristics adequate to provide safe and convenient access to the lots in the subdivision or the private ways connecting the subdivision to a public way do not provide such adequate access, the board may, as a condition of approval of a plan, require that such adequate access be provided by the subdivider, including requiring the subdivider to perform some or all of the following actions:
>
> . . .
>
> 2) in the case of a private way or ways connecting the subdivision to a public way, acquire and dedicate to the owners of such private way or ways a parcel(s) of land abutting such way or ways, or an easement over such land . . . ;
>
> 3) make such physical improvements to and within such . . . connecting private way or ways so that said ways conform, at a minimum, to the standards required for roads within the subdivision; and
>
> 4) such other actions with respect to the . . . connecting private access ways as the board may deem necessary to provide for safe and convenient access to all lots in the subdivision for the amount of traffic expected to be generated by such subdivision in addition to existing traffic on such ways."

11. The 1989 Appendix C to the 1989 rules defines (a) "Traveled Way" as "the finished road surface;" (b) "Roadway" as "the road system including the traveled way and its shoulders;" and (c) "Right of Way" as "legal bounds of the road, which shall be 40 feet from side to side." In pertinent part, the 1989 Appendix C describes "Standard Roadway" as a "single-lane, traveled way with the following dimensions and conditions: A. Fourteen (14) feet Roadway cleared of trees, stumps, rocks and brush to a height of 14 feet. B. Twelve (12) feet Roadway stripped of loam and filled and compacted with 'hardener.' C. Eight (8) feet Traveled Way . . . ."

12. In addition to other requirements, the 1989 Appendix C specifies in section B.4. that turnouts thirty feet long and six feet wide shall be constructed at selected places along a roadway and in section B.12. that brush, scrub, and sapling trees must be removed at inside curves and intersections to allow for safe visibility. In the case of a "few larger trees," section B.12. permits them to remain provided lower branches are removed to allow a fourteen foot vertical clearance.

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2. The exhibits admitted into evidence at trial are numbered one through eleven and fifteen through twenty.

3. By letter received on May 17, 2001, the Board brought to my attention the decision issued by the court (Green, J.) on March 22, 2001, in *Lundquist* v. *Grandstaff*, 9 LCR 149 (2001). Stamell submitted a letter on June 4, 2001, responding to the statements contained in the Board letter. I consider each letter as additional legal argument and part of the respective post-trial memoranda submitted by the parties.

4. This court maintains a record of the filings by each city and town of its subdivision rules and regulations. I have taken judicial notice of such records as they pertain to Chilmark. *See Dwight* v. *Dwight*, 371 Mass. 424, 426 (1976). *See also* P. J. Liacos, Massachusetts Evidence § 2.8.1, at 25 (7th ed. 1999).

5. On July 22, 1976, the Chilmark Town Clerk re-filed this set of the Chilmark rules and included Appendices A through F omitted from the original filing.

III. Title to locus

13. By deed dated November 13, 1981 (1981 deed), Herbert R. Hancock, Jean F. Hancock, and Esther R. Hancock (collectively, Hancock grantors) conveyed locus to Susan B. Frank (Frank), the wife of Stamell (exhibit 7, attachment C). The 1981 deed is recorded with the Dukes County Registry of Deeds in book 388, at page 1.[6] Immediately following the legal description of locus, the 1981 deed contained three paragraphs: (a) a right to hunt reserved for the benefit of Herbert R. Hancock, his family, and guests; (b) a restriction that "no more than five (5) single family homes may be constructed on said premises without the prior written permission of the Grantors herein;" and (c) a reservation of an exclusive right for the Hancock grantors, their families, and guests to use a portion of a certain beach together with a right of way to and from that beach area.

14. Stamell obtained title to locus as evidenced by a deed of Frank dated January 11, 1993, recorded in book 597, page 391 (exhibit 7, attachment B).

IV. Blue Barque and Quenames

15. The closest public way to locus is South Road. Two private ways, Blue Barque and Quenames (collectively, private road), connect locus to South Road. Blue Barque begins at South Road and runs easterly until it intersects with Quenames. From the intersection with Blue Barque, Quenames continues south to locus. The distance from South Road to locus along the private road is approximately seven-tenths of a mile.

16. As shown on a map introduced into evidence by the parties, a forty-foot wide way identified as Hancock Road extends easterly 1,428 feet (exhibit 9). At a point approximately 1,238 feet east of South Road, a thirty foot right of way known as Fenner Way runs in a northerly direction. Although it begins on South Road within the layout of Hancock Road, Blue Barque meanders over lots on the north side of Hancock Road for a distance of almost 800 feet. For approximately 628 feet, Blue Barque is situated within the layout of Hancock Road. Except for the portions used as Blue Barque, Hancock Road is a paper street.

17. The surface of the roadbed or traveled way, which constitutes the private road, consists of dirt and gravel. The width of the private road varies between eight and ten feet in width. In some places, the sides of the private road have been cleared for a total width of fourteen or fifteen feet. In some locations, the land along the sides is above the grade of the private way.

18. Where vehicles are unable to pass one another, drivers use turnouts or driveways along the private road. Occasionally, a vehicle encountering a second vehicle in certain locations along the private road must back up to an area where the vehicle may pull into a turnout or driveway.

19. The private road passes through the property of Deborah Hancock (Ms. Hancock's land) located to the north of locus. The Hancock grantors held title to both locus and Ms. Hancock's land at the time they conveyed locus to Frank. Stamell does not hold any record right or deeded easement to pass over or through Ms. Hancock's land. The rights of Stamell to use the private road are based upon prescription.

20. According to the surveyor, the presence of a significant amount of vegetation at the intersection of South Road and Blue Barque in March or April 1998 created visibility problems for vehicles exiting onto South Road.

21. In April 1998, Ms. Hancock constructed split rail fences on Ms. Hancock's land, approximately 1,100 feet in length along each side of the private road. The distance between the fences ranges from twelve and one-half feet to fourteen feet. For most of the 1,100 foot length bounded by fences, it is impractical for two vehicles to pass one another.[7]

22. As of May 1998, the private road provided access to thirteen homes. Of those homes, nine are located within the first three-tenths of a mile from the intersection of Blue Barque and South Road.

23. Additionally, the fifty-four members of the Hancock Beach Association (association) use the private road as their principal access to a beach located to the west of Stamell's beach. Each member has two keys to a gate and is allowed to bring guests to the association's beach. Members of the association and their guests may use their own vehicles to reach that beach.

V. Plan submissions and related issues

24. On August 18, 1995, Stamell submitted an application for the approval of a preliminary plan (preliminary plan) pertaining to locus (exhibit 1). As part of the submission, Stamell included a document entitled "Key Plan Factors," which contained eleven paragraphs. Paragraph six proposed a "[r]elocated access road with a forty foot wide layout; planned eight foot wide travelled hardener road with two foot shoulders," and paragraph eight contained a "[p]roposal to install five new turnouts along Quenames Road in accordance with standards specified by the . . . Board."

25. The Board issued a certificate approving the preliminary plan on October 23, 1995, with certain recommendations and requests. One request was for Stamell to undertake "improvements to the access road."

26. On March 17, 1998, Stamell filed a definitive subdivision plan dated March 4, 1998 (original plan), proposing to subdivide locus into three lots (Stamell Subdivision) (exhibit 2).[8]

27. The Board on June 1, 1998, voted to disapprove the original plan (exhibit 3). The decision of the Board was recorded with the Chilmark Town Clerk (town clerk) on June 12, 1998 (original

6. All recording references are to this particular Registry of Deeds.

7. From my own observations on the view, I accept the testimony of the surveyor who stated "for the majority of that section, it would be almost impossible to pass two cars abreast."

8. The original plan was revised on April 13, 1998, and May 18, 1998.

plan denial). Among the reasons given for its disapproval, the Board stated

> "[s]afe pedestrian and vehicular travel on the Blue Barque Road would be adversely affected by the Applicant's Plan in direct violation of [the Chilmark rules], June 19, 1975, (Sections 3.03 and 3.06). Specifically, . . . the absence of a 40' right of way, appropriate turnouts, a 14' roadway cleared of trees, stumps, rocks and brush to a height of 14'; and extra clearing of shoulders to provide safe visibility (as defined in Appendix C) as clear evidence of a substandard road. It was noted that the Applicant does not have the ability to upgrade the road outside his own property because he does not own the Blue Barque Road."[9]

28. Stamell timely commenced the first subdivision action.

29. On July 20, 1998, Stamell filed the original plan with revisions as of July 17, 1998 (amended plan) (exhibit 4). Again, the amended plan called for the Stamell subdivision to consist of three buildable lots. Although it did not make any change to the lots shown on the original plan, the amended plan added two notes. The third note (third plan note) read as follows:

> "Blue Barque Road and Quenames Road from South Road to the property shall be upgraded to provide for appropriate turnouts, a fourteen foot roadway cleared of trees, rocks, stumps and brush to a height of fourteen feet and extra clearing of shoulders as necessary to provide safe visibility (as defined in Appendix C of [the Chilmark rules] dated June 19, 1975.) In addition, applicant shall establish by court order or by such other means satisfactory to the Board that the road runs in a forty foot right of way (or such other right of way as may be applicable under [the Chilmark rules]) and that he has the right to upgrade the road to an applicable standard."

30. Subsequently, the Chilmark Board of Health approved the septic systems proposed for the amended plan.

31. On or about August 11, 1998, Stamell sent a letter addressed to the Wakeman Conservation Center (exhibit 15). In pertinent part, Stamell wrote:

> "Unsafe and inadequate conditions on Blue Barque Road were made clear recently at several meetings of the . . . Planning Board. [ ] The road safety problems exist because Blue Barque Road does not meet Chilmark's road rules and regulations. As a result, fire and emergency vehicles are unable to use the road. [ ] There are blind corners, overhanging limbs from trees, and shoulders that are higher than the road. [ ] The unsafe conditions must be remedied."

32. Pursuant to G. L. c. 240, §§ 1 and 6, Stamell commenced an action in this court (Hancock action) by filing a complaint against Deborah Hancock (Ms. Hancock) on September 4, 1998 (exhibit 7).[10] In the Hancock action, Stamell seeks to establish his right to bring the private road into compliance with the Chilmark rules for roads within a subdivision and claims Ms. Hancock has unreasonably interfered with his attempts to do so. Among other allegations, Stamell claims Ms. Hancock's actions has exposed him and his family to the risk that fire and other emergency vehicles will not be sent to locus in case of an emergency.[11] On September 23, 1998, Ms. Hancock submitted Answer and Counterclaim in the Hancock action.[12,13]

33. The Board on September 21, 1998, gave four reasons for its disapproval of the amended plan: (a) "[t]here is no basis to conclude that the Applicant can do anything but travel Blue Barque Road;" (b) "[t]he Applicant has not produced sufficient evidence that he has the right to upgrade the road to satisfy the requirements of [the Chilmark rules];" (c) "other than the Board of Health's issuance of Septic Permits, nothing seems to have changed since the first denial on June 12, 1998;" and (d) "for all of the reasons stated previously in our first denial" (amended plan denial) (exhibit 5). The town clerk received the amended plan denial on October 8, 1998.

34. Stamell timely brought the second subdivision action.

35. The traffic engineer testified that, during peak travel periods, automobiles of association members often travel together to and from the beach in convoys or caravans of two to six vehicles. A study performed by the traffic engineer indicated that on August 22, 1998, between 11:00 a.m. and Noon, eight vehicles entered the fenced area of the private road and eleven vehicles exited the area.

36. In a report to Stamell dated August 2, 1998, the surveyor recommended certain improvements to the private way, including the removal of seventeen trees and seven turnouts to be improved in the section leading to Ms. Hancock's land. Further, the surveyor suggested the construction of additional turnouts on Ms. Hancock's land on each side of the private road between stations 27+00 and 30+00 (exhibit 18).[14]

37. The Chilmark Police Department owns three police cruisers and two ambulances. The ambulances are approximately eight feet wide.

38. The police chief testified that, in his opinion, the private road is not adequate for emergency access. In particular, the police chief described the fenced section of the private road as a chute and is inadequate due to the lack of safe turnouts. The police department uses the private road for access to homes and beaches.

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9. At the commencement of trial, the parties stipulated that the sole issue in controversy is the adequacy of the private road and that all other issues have been resolved.

10. *Stamell* v. *Hancock*, Miscellaneous Case No. 250619

11. By agreement of Stamell and Ms. Hancock, the court (Kilborn, C. J.) issued an order on September 18, 1998, requiring Ms. Hancock to remove certain portions of the spilt rail fence and enjoining Ms. Hancock from "interfer[ing] with repairs undertaken by plaintiff Stamell necessary to the maintenance of Blue Barque Road as a rural country road for access" to locus.

12. The court (Kilborn, C. J.) on January 12, 2000, allowed a motion to intervene brought by other landowners along the private road. On February 9, 2000, Michael B. Moskow, Donna B. Moskow, Ursula Goodenough, and John Heuser (intervenors) filed an amended complaint. Stamell answered the amended complaint on March 6, 2000, and asserted various counterclaims. In their respective pleadings, Ms. Hancock and the intervenors claim that the easement held by Stamell is limited to ten feet in width.

13. As of this date, the competing claims of the parties in the Hancock action as to their rights in the private road have not been adjudicated.

14. The stations are shown on exhibit 9 beginning at 0+00 at the intersection of South Road with the private road and ending with 36+00 at locus.

39. The Chilmark Fire Department owns four pieces of fire fighting apparatus. The fire trucks are approximately nine feet tall, eight feet wide, and thirty feet long. Since the fire department consists of volunteers, most emergency personnel arrive at a scene in their private vehicles.

40. The fire chief testified that, in his opinion, the private road is not adequate for fire fighting purposes. According to the fire chief, the number of vehicles responding to an emergency would create congestion, traffic backups, and delays in responding to the scene.

VI. Road issues and Board action on other applications

41. In 1982, the Board approved a subdivision application of Larry Franciose for two lots located on Fenner Way (Franciose lots). Blue Barque is used for access to the Franciose lots.

42. As of March 17, 1998, Tea Lane and Meetinghouse Road were unpaved public ways in Chilmark. Tea Lane at that time had a posted speed limit of fifteen miles per hour. Signage on Tea Lane stated the road had only a single lane for vehicles and directed motorists to use vehicle turnouts.

43. Quansoo Road (Quansoo), an unpaved private way, runs between Quenames and a number of other private ways in Chilmark.

44. On five occasions since 1982, the Board has approved subdivisions that use Quansoo, then Quenames, to reach South Road. In each of those instances, the Board did not require the applicants to demonstrate that they had (a) rights in a forty-foot right of way for roads outside of the proposed subdivisions or (b) the right to upgrade roads outside of the proposed subdivisions (exhibit 21).

45. In the case of thirteen other subdivisions since 1982, the Board approved subdivision plans without requiring the applicants to show they had a forty-foot right of way from the proposed subdivision to the nearest public way. The Board did not require eleven of those thirteen applicants to demonstrate they had a right to upgrade any of the ways outside of the subdivision (exhibit 21).

* * *

Under G. L. c. 41, § 81BB, an aggrieved person may appeal a decision of a planning board concerning a definitive subdivision plan.[15] The planning board decision is reviewed de novo in the trial court. *See Rettig* v. *Planning Bd. of Rowley*, 332 Mass. 476, 479 (1955). *See also Fairbairn* v. *Planning Bd. of Barnstable*, 5 Mass. App. Ct. 171, 173 (1977). "Judicial review of planning board decisions is limited upon a de novo consideration to a determination whether the board's decision exceeded its authority." *Strand* v. *Planning Bd. of Sudbury*, 7 Mass. App. Ct. 935, 936 (1979).

A planning board may deny a definitive subdivision plan either because the Board of Health recommends denial or because the plan fails to meet the specific, applicable rules and regulations of the planning board. *See Pieper* v. *Planning Bd. of Southborough*, 340 Mass. 157, 162-163 (1959). *See also Daley Constr. Co. Inc.* v. *Planning Bd. of Randolph*, 340 Mass. 149, 152-155 (1959). Such regulations must be "comprehensive, reasonably definite, and carefully drafted, so that owners may know in advance what is or may be required of them and what standards and procedures will be applied to them." *Castle Estates, Inc.* v. *Park & Planning Bd. of Medfield*, 344 Mass. 329, 334 (1962). "[T]he developer has the burden of proving that the planning board has exceeded its authority in disapproving the plan." *Fairbairn*, 5 Mass. App. Ct. at 173. A court will affirm the action of a planning board "[i]f the record discloses that any substantial reason given by the board for disapproval of the plan was proper . . . ." *Mac-Rich Realty Constr. Inc.* v. *Planning Bd. of Southborough*, 4 Mass. App. Ct. 79, 80-81 (1976).

In the cases at bar, Stamell asserts three principal arguments challenging the actions of the Board. Those arguments are as follows: (1) the Chilmark rules do not permit the Board to deny a subdivision application for reasons relating solely to the condition of roads outside of the subdivision; (2) Stamell has the right to improve the private road; and (3) based upon three specific grounds, the Board lacked the power to impose Section 4.02A and Appendix C upon Stamell.[16]

I will begin my discussion my addressing each of the grounds raised in Stamell's third argument. Stamell claims that Section 4.02A and Appendix C are ineffective because the Board failed to transmit those provisions to the Dukes register and the recorder as required by statute. The record of this court reveals, and I so find, that the Board did file copies of the Chilmark rules and amendments to those rules with the recorder.

Prior to July 1, 1992, the fourteenth sentence of G. L. c. 41, § 81Q, read as follows:

> "A copy certified by such [town] clerk of any such rules and regulations, or any amendment thereof, adopted after [January 1, 1954,] shall be transmitted forthwith by such planning board to the register of deeds and recorder of the land court, and no rule or regulation, or amendment thereof, shall be effective until certified copies thereof have been so transmitted."

With the enactment of St. 1992, c. 133, § 372, all words following "recorder of the land court" in the fourteenth sentence were deleted as of July 1, 1992. Consequently, any bar against a rule or an amendment being effective until transmitted to the register of deeds and recorder was eliminated by the 1992 enactment prior to Stamell's submission of the original plan or even the preliminary plan.

It is apparent that the filing requirement of G. L. c. 41, § 81Q, is designed to afford interested persons notice of subdivision rules

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15. As the unsuccessful applicant of the original plan and the amended plan, it is undisputed that Stamell has standing as a "person aggrieved" to bring the cases at bar.

16. Although Stamell refers generally to Appendix C, I consider his objections to be directed at the 1989 Appendix C.

and regulations as well as any amendments thereto. Stamell, however, has never claimed he was unaware of Section 4.02A or the 1989 Appendix C. The record clearly supports the conclusion that Stamell knew of these provisions of the Chilmark rules and attempted to address them by adding the third note to the amended plan.

Citing G. L. c. 41, § 81Q, Stamell next argues the Board cannot apply rules and regulations to him that are more onerous that those followed by Chilmark. In pertinent part, the fourth sentence of G. L. c. 41, § 81Q, provides

> "that in no case shall a . . . town establish rules or regulations regarding the laying out, construction, alteration, or maintenance of ways within a particular subdivision which exceed the standards and criteria commonly applied by that . . . town to the laying out, construction, alteration, or maintenance of its publically financed ways located in similarly zoned districts within such . . . town."

The plain language of the statute does not apply to the issues here. The Board has not raised any issue concerning the ways within Stamell Subdivision. The concern of the Board centers on safety issues along the private road between the Stamell Subdivision and South Road.

Further, Stamell maintains that prior approvals of subdivisions utilizing the private road, as well as other substandard private and public ways, require the Board to approve the amended plan. I disagree that such prior approvals lead to the result suggested by Stamell.

It is well settled that a planning board may not disapprove a plan not shown to violate the applicable rules and regulations or the requirements of the board of health. *See Canter* v. *Planning Bd. of Westborough*, 4 Mass. App. Ct. 306, 308 (1976). A planning board may exercise discretion in certain limited instances, such as whether to grant waivers under G. L. c. 41, § 81R.

Here, Section 4.02A gives the Board discretion to determine whether the private ways connecting the Stamell Subdivision to a public way provide safe and convenient access. Although the Board admits it has approved other subdivisions utilizing the private road, there has been at least one significant change in circumstances since those prior approvals. The erection of fences on each side of the private road crossing Ms. Hancock's land has affected the passage of vehicles for approximately 1,100 feet. While drivers may have previously been able to pull off the edge of the roadbed to allow other vehicles to pass, the presence of the fences impedes such movements now.

The Board has determined that the conditions along the private road are unsafe and inadequate. A reviewing court is not to substitute its judgment for that of the planning board provided the board did not exceed its authority. *Arrigo* v. *Planning Bd. of Franklin*, 12 Mass. App. Ct. 802, 809 (1981).

On behalf of Stamell, the traffic engineer testified that the width of the traveled portion of the private road is "about ten feet. But with fourteen feet, you can squeak by two passenger vehicles if, in deed, there isn't a gutter or something to fall in." As found above, the distance between the fences ranges from twelve and one-half feet to fourteen feet impeded.

The burden is on Stamell to prove the Board exceeded its authority in disapproving the Stamell Subdivision. Stamell has failed to demonstrate that the Board acted improperly in applying Section 4.02A to the then-existing conditions on the private road.

Stamell also insists that the Chilmark rules do not permit the Board to deny a definitive plan based upon the condition of roads outside a proposed subdivision. The text of Section 4.02A, according to Stamell, limits the Board to placing conditions on its approval and does not empower the Board to deny an application. Stamell maintains the Board's past practices demonstrate that Section 4.02A permits such conditional approvals.

The Board "may consider factors outside a subdivision, including those pertaining to safety, accessibility and traffic, where such factors are relevant to the requirements of the Subdivision Control Law or local regulation." *Rattner* v. *Planning Bd. of W. Tisbury*, 45 Mass. App. Ct. 8, 10 (1998). The Board thus contends that Section 4.02A permitted the Board to deny the original plan and the amended plan. In the opinion of the Board, the Stamell Subdivision did not connect with a safe and convenient access road and none of the possible remedial actions identified in Section 4.02A applied to either the original plan or the amended plan.

I agree with the Board's interpretation of Section 4.02A. In a number of instances, Stamell himself acknowledged the unsafe and inadequate conditions on the private road. The third plan note made a number of representations to the Board as to how Stamell intended to improve the condition of the private road consistent with the 1989 Appendix C. Stamell further promised the Board that he would "establish by court order or by such other means satisfactory to the Board that the road runs in a forty foot right of way . . . and that he has the right to upgrade the road to an applicable standard."

The situation faced by Stamell before the Board was that it sought to hold Stamell to the representations and promises made part of the amended plan. As noted previously, the issues in the Hancock action have yet to be adjudicated. It would be futile for the Board to impose conditions on its approval of the amended plan where Stamell could not produce what he offered in the third plan note. Just as a planning board is entitled to require an applicant to demonstrate ownership of the subdivided land, "[o]wnership of access rights on which the proposed subdivision depends is no less consequential." *Lundquist* v. *Grandstaff*, 9 LCR 149, 151 (2001).

> "A planning board need not become embroiled in private property disputes in order to consider whether an applicant for subdivision approval has established the access rights upon which the proposed subdivision relies. It is up to the applicant to demonstrate such rights to the satisfaction of the board, and up to a reviewing court (in the event of an appeal) to evaluate whether the board's decision rests on a correct or incorrect factual premise."

Id. at 151 n.16.

Now with neighbors objecting to his proposed improvements, Stamell wishes to ignore the deficiencies in the private road and argues on appeal that the Board has no right to ask him to deliver what he promised to the Board. Such an argument fails. Where the Board determined that a safe and convenient access road did not exist between the Stamell Subdivision and a public way and Stamell was unable to demonstrate he had the right to make the improvements he represented he would undertake in the amended plan, the Board was not required to approve the amended plan.

Finally, Stamell argues he has the right to improve the private road. The record is devoid of any evidence as to the layout of the private road being greater than ten feet wide. While Stamell may have the right to make certain improvements in the private road, it has not been proven that he is entitled to expand the width of the private road beyond its historic uses. The Board argues that it is not required to speculate what a court might do in adjudicating the extent of an applicant's prescriptive rights. *Cf. Miller* v. *Bishop*, 6 LCR 348, 351 (1998), *aff'd*, 49 Mass. App. Ct. 1110 (2000) (invalidating a special permit requiring improvements in a private way beyond the limits of a party's prescriptive rights). The extent of the parties' rights in the Hancock action have not yet been determined, and I am without authority to decide such issues in the cases at bar.

Stamell has failed to sustain his burden of demonstrating that the Board acted arbitrarily or capriciously in issuing either the original plan denial or the amended plan denial. Based upon its determination that the private road does not provide safe and convenient access between the Stamell Subdivision and South Road, the Board acted within its authority in issuing the original plan denial and the amended plan denial.

Judgment to enter accordingly.

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* * * * * *

WALKER REALTY, LLC

v.

PLANNING BOARD OF HOPKINTON, MASSACHUSETTS, by and through its Members, RONALD M. CLARK, JOHN H. COOLIDGE, ROBERT HARTMAN, PETER LAGOY, JOHN LUCAS, PAUL NELSON and TINA ROSE

Misc. Case No. 264161

March 8, 2002
Karyn F. Scheier, Justice

Childcare Facility–Dover Amendment–Site Plan and Special Permit Approval—A site-plan/special-permit denial of a proposed childcare facility in Hopkinton was annulled by Justice Karyn F. Scheier, who determined that the ZBA's efforts to scale back the size of the project, nothwithstanding its conformity with the dimensional demands of its zoning district, represented an unlawful incursion against the protections afforded this use by Section 3 of the Zoning Act.

ORDER OF REMAND

This case was argued March 7, 2002, on cross motions for summary judgment brought by Walker Realty LLC (Plaintiff), and Defendant Town of Hopkinton Planning Board (Board). The underlying case is an appeal pursuant to G. L. c. 40A, § 17, from a decision of the Board denying Plaintiff's application for site plan approval/special permit for a proposed child care center named "Next Generation Children's Center", to be built at 2 Wood Street, Hopkinton (Locus).[1]

Prior to the hearing, both sides submitted memoranda and numerous documents in support of their respective motions, including letters, copies of e-mail messages, and all of the submissions made by Plaintiff to the Board in connection with its application. The summary judgment record also includes the Zoning By-laws of the Town of Hopkington (By-laws), and minutes from the public hearing leading up to the Board's Decision (Decision).

Following lengthy oral argument and discussion with counsel for both sides, this court finds that a remand to the Board, with some instruction, is appropriate. The remand will afford the parties an opportunity to see if an agreement with respect to some of the outstanding issues can be reached, and will narrow the issues for disposition by the court, if an appeal remains necessary.

Accordingly, this Court finds the following based on representations of counsel and the summary judgment record:

1. Plaintiff owns Locus, which is comprised of 1.78 acres and is located in a Business B zoning district under the By-laws (Business District).

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1. [See next page.]