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CASE NO. 25-03

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NOTICE OF PUBLIC HEARING BY THE
ZONING BOARD OF APPEALS
ON APPLICATION FOR ADMINISTRATIVE APPEAL

Notice is hereby given that the Belmont Zoning Board of Appeals will hold a public hearing on Monday, February 3, 2025 at 7:00 PM by a hybrid public hearing at the Art Gallery on the third floor of the Homer Building, 19 Moore Street, and by remote access through the Zoom app. to consider an appeal by petitioners, Traci Doherty, Katrin Duevel, Deborah Galli, Daniel W. Halston, Blanca Lain, David Otte, Jane Otte, Sharad Ramanathan, Huang Chi-Ting and Liliane R. Wong to invalidate a building permit issued by-right by the Inspector of Buildings on December 2, 2024, permit number BP-24-964, to construct a second story and a two story addition at 2 Myrtle Street (previously 278 Concord Ave.) located in a single Residence C (SRC) zoning district.

ZONING BOARD OF APPEALS

2024 DEC 11 AM 10:00
TOWN CLERK
BELMONT, MA

Traci Doherty, Katrin Duevel, Deborah Galli, Daniel W. Halston, Blanca Lain, David Otte, Jane Otte, Sharad Ramanathan, Huang Chi-Ting, Liliane R. Wong,
Petitioners,

v.

Ara Yogurtian, as he is Inspector of Buildings of the Town of Belmont, and Alfon Properties,
petitioner for building permit for 278 Concord Avenue,
Respondents.

Notice of Appeal

The Petitioners, direct abutters and neighbors adjacent to the proposed construction at 278 Concord Ave., hereby appeal from the Building Inspector's Dec. 3, 2024 building permit, pursuant to G.L. c. 40A, sections 8, 15. The permit allowed the expansion of a previously approximately 1,500 square foot modest structure to a more than 5,000 square foot structure. The proposed building is on a nonconforming 8,050 square foot lot that is no longer grandfathered as a nonconforming structure, and therefore the developer must seek a variance before it can be extended. Because the Building Inspector failed to consider the abandonment of the nonconforming structure and the need for a variance, the permit should be denied and the developer be required to pursue a variance should it seek to continue with the extension and massive construction of the proposed structure.

Background and Facts

Procedural Background

The developer below initially applied for a building permit to expand an alleged preexisting nonconforming structure at 278 Concord Ave. in a Single Residence C Zoning District. That application was denied because it increased the Gross Floor Area of an alleged nonconforming structure (minimum required lot area of 9,000 square feet ("SF"), whereas the existing and proposed lot area is 8,050SF). The Inspector noted that the proposed addition was more than 30% and did not comply with the rear setback and would therefore require a special permit.

The developer thereafter sought a special permit from the Planning Board and was heard at two Planning Board meetings, on Oct. 15 and 23, 2024. See Exhibit 1. After objections by numerous neighbors and concerns raised by the Planning Board, see Planning Board minutes, dated Nov. 19, 2024 (on file on the Town of Belmont web site), the developer withdrew his application for a special permit and slightly modified his plans. Thereafter, on Dec. 3, 2024, the Building Inspector issued a building permit for the expansion of the structure at 278 Concord Ave. See Exhibit 2.

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The Site of the Proposed Structure

The proposed building is located in what was established as Belmont Park in the early 20th century. The area plan filed in 1894 included houses from Myrtle Street to Oak Street and from Concord Ave. to Orchard Street. The area includes many modest-sized Victorian and Colonial homes in the Single Residence C Zoning District where lot sizes are required to be 9,000SF.

Although of modest size, the homes in Belmont Park have ample space between them.

The previous structure at 278 Concord Ave. was an even more modest home of approximately 1,500SF on a nonconforming lot of approximately 8,050SF (required lot size is 9,000SF). It was a one and one-half story building with ample space between it and the adjacent homes (see exhibit 3, plan filed with the Planning Board on Nov. 5, 2024 locating 278 Concord Ave in the neighborhood and showing the significant change in density resulting from the proposed construction).

Abandonment of the nonconforming structure

The structure at 278 Concord Ave. has not been used as a residential dwelling for more than 18 years. The direct abutters at 10 Myrtle Street and 9 Goden Street can attest that no one lived in the home during that time. The only creatures that have lived in the home were some racoons (see exhibit 4) some many years ago.

Nonuse of the structure as a residence for more than two years has caused it to lose its nonconforming status under both G.L. c. 40A, sec. 6 and Belmont Zoning By Laws, section 1.5.6.

The Proposed Structure

The proposed structure is approximately 5,000SF of living space (see Planning Board minutes, Oct. 15, 2024) when the habitable basement and 3d floor are included, as the Planning Board noted at the initial hearing on the developer's special permit application.

The developer who purchased the home chose not to meet with any of the neighbors, and instead seeks to build a massive structure not in keeping with the homes in Belmont Park. Even when the Planning Board members described the proposed structure as "massive" (see Planning Board minutes, Oct. 15, 2024 (comments of Planning Board member Ms. Guo; agreed to by Planning Board member Ms. Gardener-Todreas)) and not in keeping with the neighborhood, the developer continued to press forward with the structure at a second Planning Board meeting on Oct. 23, 2024. Only on the eve of the third hearing (scheduled for Nov. 6, 2024), and after the abutters filed exhibit 3 with the Planning Board, did the developer withdraw its special permit application and pursue a building permit from the Building Inspector on the (incorrect) basis that it could extend the

structure as a nonconforming structure under Belmont's ByLaws. They did so even though the Petitioners had raised the abandonment of the nonconforming structure status given its nonuse as a residence for more than 18 years before the Planning Board.

Injury Suffered by the Petitioners

The proposed structure will have a significant, detrimental impact on the abutters and the adjacent neighbors: it will lead to an increase in density between the nearby homes, a loss of light, loss of views, increased fire risks, and a massive structure out of harmony with the neighborhood and Belmont Park. It is not in keeping with the general harmony of the neighborhood or the Town of Homes, and its scale and mass will lead more to a feel of brownstones in Brooklyn than homes in Belmont Park.

The Building Permit Was Granted Erroneously Because the Structure at 278 Concord Ave. Is No Longer Entitled to Nonconforming Structure Status

Invalid Building Permit

The Building Inspector issued the permit after the developer withdrew the special permit application and argued that the existing structure could be built as a matter of right as the extension of a nonconforming structure. The Building Inspector, however, nowhere addressed the abandonment of the nonconforming structure and the right to a building permit as a result of the abandoned status of the previous nonconforming structure. The issuance of a building permit was not required, as the Building Inspector suggested at the Planning Board hearing, but is only permissive (see Zoning ByLaw section 1.5.C(1)) when there is a valid nonconforming structure.

Because the lot is no longer entitled to the protection of a nonconforming structure under Zoning ByLaw 1.5.3, the permit impermissibly extends the nonconformity or creates a new nonconformity.

And even if it was not abandoned, the Building Inspector was required, pursuant to G.L. c. 40A, section 6, to make a finding that "such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." No such finding was, or could be, made.

278 Concord Ave. Is No Longer Entitled to Nonconforming Structure Status

Although it had been a grandfathered nonconforming structure, 278 Concord Ave., like all nonconforming structures, is subject to losing that status if it is abandoned, both under G.L. c. 40A, sec. 6 and Belmont's Zoning ByLaws, section 1.5.6 ("A nonconforming use of a structure or land, that has been abandoned or not used for a period of two (2) years, shall not be reestablished and all future use(s) shall conform with this ByLaw"). Unlike other

municipalities, Belmont does not allow continued use of the structure if it is no more detrimental to the community; instead, it simply ceases to be protected as a nonconforming structure.

Even if an owner continues to pay taxes or utilities on a property, the nonuse as a residence extinguishes the owner's (and any successor owner's) right to nonconforming structure status. *Zall v. Zoning Board of Appeals of Salisbury*, 73 Mass. App. Ct. 1103 (2008), *rev. denied*, 452 Mass. 1111 (2008). In part, that is due to the legislature's and Town's expressed policy to discontinue such structures when abandoned.

.Should the owner wish to expand the structure, it no longer qualifies for the protected nonconforming structure status, and instead must proceed by way of a variance. See *Gomes v. Collins*, 21 Land Ct. Rptr 67 (2013) (a residential structure lacking the required frontage and lot area and not used for more than two years "loses the protection enjoyed by it as preexisting and nonconforming"; in order to build on the lot would require the issuance of a variance); *cf.* 974 CMR Sec. 1.15 (abandonment by voluntary discontinuance of a nonconforming structure occurs by virtue of the discontinuance of the occupancy of a nonconforming structure for twelve consecutive months); *Corbett v. Town of Belmont Zoning Board of Appeals*, Misc 14-482257 (Oct. 8, 2015) (remanded for trial on whether property was abandoned or nonused for more than two years leaving owner to lose protections of nonconforming structure).

Requested Relief

The issuance of the permit should be reversed and the permit revoked, and the developer should be required to maintain the existing relationship of building structure to lot size. If the developer seeks to expand on the lot, then it must do so by way of a variance.

2013 WL 485206

Only the Westlaw citation is currently available.
Massachusetts Land Court.
Department of the Trial Court, Plymouth County.

Ronald R. GOMES, Administrator of the Estate
of Manuel L. Gomes, and Gerri Gonsalves,
Administratrix of the Estate of Frank R. Gomes, Plaintiffs
v.
Walter COLLINS, et al., Defendants.

No. 11 MISC 446909(HMG).

I
Feb. 7, 2013.

ORDER

GROSSMAN, J.

Introduction

*1 This action concerns Lots 18 and 33 as depicted on Assessors Map 19 in the town of Carver, Massachusetts. At the time of his passing on November 5, 1962, Manuel L. Gomes was the owner of Lot 33, a landlocked parcel which has never been improved.¹ The plaintiff Ronald R. Gomes currently serves as the Administrator of the Estate of Manuel L. Gomes.²

At the time of his death on October 18, 1988, Frank R. Gomes was the owner of Lot 18.³ The plaintiff Gerri Gonsalves currently serves as the Administratrix of the Estate of Frank R. Gomes.⁴ The plaintiffs initiated this action pursuant to G.L. c. 40A, s. 17 in order to challenge an adverse decision of the Board of Appeals for the Town of Carver (Board). For the reasons that follow, this court will affirm the Board's decision.

Background

On February 17, 2010, the plaintiffs entered into a purchase and sale agreement with Priscilla Burns (Burns) of Carver, Massachusetts, who wished to "raze the single family dwelling presently located on Lot 18 and replace it with a new single-family dwelling to be built on Lot 33."⁵ To this

end, Burns filed an application with the Board "seek[ing] a variance and / or special permit" and citing a "lack of street frontage" in connection with her request.⁶ Lot 18 consists of approximately 27,707 square feet with fifty feet of frontage on Hines Avenue, a private way within the town of Carver.

By deed of June 2, 1930 recorded with the Plymouth County Registry of Deeds at Book 1594, Page 437, Manuel L. Gomes and Elsie M. Gomes, husband and wife as tenants by the entirety, acquired title to a parcel of land within the town of Carver, designated on Carver Assessors' Map 19 as Lot 33 and containing approximately 42,660 square feet.⁷ Thereafter, with the passing of his spouse on December 5, 1940, Manuel L. Gomes (Manuel Gomes) acquired the entire fee in the property.⁸ Following his death on November 5, 1962, plaintiff Ronald R. Gomes was appointed administrator of his estate.⁹

By deed dated May 9, 1927 and recorded with the Registry at Book 1528, Page 536, Manuel L. Gomes and Elsie M. Gomes acquired title to adjoining parcels in the town of Carver depicted as Lots 18 and 34 on Assessors Map 19. These lots are currently shown as Lot 18 on the said Assessors Map.¹⁰ At the time of acquisition, Lot 18 contained a one story, four room cottage, measuring 24 feet by 26 feet that had been constructed in or about 1923.¹¹ The said Lot 18 consists of approximately 27,707 square feet with frontage of fifty feet on Hines Avenue, a private way.¹²

With the passing of his wife, Manuel L. Gomes acquired title to Lot 18 in his sole capacity. On May 5, 1962 he conveyed that lot to Frank R. Gomes by deed recorded with the Registry at Book 2934, Page 249.¹³

"At that time, the dwelling on Lot 18 was occupied by grandchildren of Manuel Gomes and was served by utilities.¹⁴ On July 11, 1963, the town of Carver adopted its zoning bylaws for the first time.¹⁵ As of that date the dwelling on Lot 18 was occupied by the grandchildren of Manuel Gomes."¹⁶ However, "[s]ince November 1963, the structure has been uninhabited."¹⁷

*2 Pursuant to the newly adopted zoning bylaw, buildable lots were required to have a minimum lot size of 22,500 square feet with at least 150 feet of frontage.¹⁸ "The adoption of zoning bylaws in 1963 rendered both Lot 18 and Lot

33 nonconforming lots inasmuch as they lacked sufficient frontage.”¹⁹

A “Lot” is defined in the town Bylaw as a “a single area of land in one ownership defined by metes and bounds or boundary lines in a recorded deed or recorded plan ...” Currently, Lot 18 is located within the Village Zoning District while Lot 33 is in the Residential Agricultural Zoning District (RA District). The Village Zoning District (Village District) requires a minimum lot size of 30,000 square feet and minimum frontage of 100 feet. The RA District requires 60,000 square feet, 150 feet of frontage and a side yard setback of 50 feet.²⁰

Lacking the requisite frontage and lot area, both Lots 18 and 33 are currently nonconforming. Additionally, the structure on Lot 18 is nonconforming as to sideyard setback.²¹ Both parties acknowledge that “[t]he structure is uninhabitable in its present condition.”²² It has likely been so for many years. In this regard, assessors' records dating from 1977 “indicate that at the time the structure had no plumbing, was without windows or doors, and its interior was gutted. They also describe the structure as structurally and economically obsolete.” Since 1991, Lot 18 has been assessed as an unimproved parcel.²³

On October 18, 1988 “Frank R. Gomes died intestate and seized of Lot 18 ...”²⁴ Title to that Lot currently resides in his heirs.²⁵ Plaintiff Gerri Gonsalves serves as administratrix of the estate.²⁶

The plaintiffs, on February 17, 2010, entered into a purchase and sale agreement with Burns to convey their respective lots to her. It is apparently Burns intent that the lots will be together combined in a single owner. It is anticipated that she will “raze the [existing 624 square foot] structure and construct a new 1,740 square foot single family dwelling on Lot 33.”²⁷

The parcels, even if combined, “will remain nonconforming with regard to frontage. However, the proposed 1,740 square foot single family dwelling would conform to all dimensional requirements in the [RA District].”²⁸ Thus, Lot 18 possesses fifty feet of frontage while the RA District in which it resides, has a minimum frontage requirement of 100 feet. For its part, Lot 33 has no frontage at all, while the Village District in

which it is located, has a minimum frontage requirement of 150 feet.

Burns applied to the Board of Appeals seeking a “variance and/or special permit.” She cited a “lack of frontage” as the reason for her request.²⁹ At the request of Burns' attorney, the Board voted to defer any action on the application and to remand the matter to the Building Commissioner (Commissioner). The Commissioner determined that Burns' was not entitled to a Building Permit as of right, but rather would require a special permit.³⁰

*3 On November 21, 2010, Burns filed an application with the Board in which she appealed the Commissioner's refusal to issue a Building Permit as of right. In the alternative however, she sought a special permit for the construction of a single family dwelling.³¹ The application was assigned a new case number 10–938, distinguishing it from the earlier case numbered 10–932.

After publication and notice on case numbered 10–938, the Board, on March 10, 2011, voted to deny Burns' appeal and to deny, as well, the requested special permit.³²

The instant appeal followed on April 1, 2011. The matter has been presented to the court on a case stated basis with an Agreed Statement of Facts, together with Exhibits which were similarly agreed upon by the parties.

Discussion

In their complaint, the plaintiffs request that the decision of the Board be annulled. They argue in this regard that “[t]he decision of the Zoning Board was contrary to law and was therefore arbitrary, capricious, whimsical, and in excess of authority of the Zoning Board.”³³

In their brief, the plaintiffs argue at the outset, that they are entitled to a building permit as of right. In this regard, they cite G.L. c. 40A, s. 6, par. 1 which provides in pertinent part, as follows:

Except as hereinafter provided, a zoning ... by-law shall not apply to structures or uses lawfully in

existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ... bylaw ..., but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of such of said public hearing, to any *reconstruction*, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure* (emphasis supplied)³⁴

Plaintiffs next cite “the applicable bylaw standard in the case at bar,” Section 2254 of the Bylaw which mirrors the foregoing italicized language of G.L. C. 40A, s. 6. The Bylaw provides in relevant part, as follows:

2254. Nonconforming Single and Two-Family Residential Structures.

Nonconforming single and two family residential structures may be *reconstructed*, extended, altered, or structurally changed upon a determination by the Zoning Enforcement Officer that such proposed *reconstruction*, extension, alteration, or change *does not increase the nonconforming nature of said structure* and the issuance of a building permit, where applicable ... (emphasis supplied)³⁵

Plaintiff’s argument is premised largely on the notion that the existing structure has been, and remains, a single family residential structure or dwelling which Ms. Burns wishes to reconstruct on Lot 33, after razing the existing structure on Lot 18.³⁶

*4 In point of fact, the structure lacks those basic elements that would permit one to characterize it as a residential

structure. It is, at best, a modestly sized, deteriorating shell with a tree growing up through the roof and through the lone front dormer. The front portion of that roof and the dormer, which are readily visible in at least two of the photographic exhibits, are in a state of near collapse³⁷ appearing to be held up by the tree, thereby leaving the structure entirely open to the elements. The windows and doors are gone, having been boarded up. The photographic exhibits indicate that the plastered ceilings are largely gone; the wall studs are plainly visible as well.

Moreover, the structure is devoid of those critical elements that one would ordinarily associate with a residence or single family dwelling. In this regard, the photographs disclose the that there are no kitchen or sanitary facilities, no sleeping accommodations, no plumbing or electrical service.

This court is satisfied, therefore, that the “structure” at issue has not at any time relevant hereto, constituted a single family residential structure for purposes G.L. c. 40A, s. 6 or of section 2254 of the Bylaw. By no means is it suitable for occupancy or human habitation.

It is not at all clear, moreover, that the proposal constitutes a “reconstruction” as that term is used in the Bylaw or in section 6 of chapter 40A. In the case of *Glidden v. Zoning Board of Appeals of Nantucket*, 77 Mass.App.Ct. 403, 408 (2010), the Court’s observed that “[t]here is nothing implicit in the meaning of the term [“reconstruction”], or its use in the bylaw, that excludes reconstructing a structure at a different site.” It seems clear, given the facts of the *Glidden* case that when using the term “site”, the *Glidden* Court was speaking not of a different lot, but of a different location or site *on the same lot*. In the case at bar, however, the plaintiffs herein anticipate the creation of a new lot out of two currently nonconforming lots. However, the new lot will remain nonconforming owing to the lack of adequate frontage.³⁸ In no event would the purported reconstruction take place at a different location on the same lot.

Notwithstanding, the plaintiffs’ essential argument is twofold. They assert, in the first instance, that the Burns’ proposal amounts to a *reconstruction* of an existing nonconforming single family residential structure, and secondly, that the proposed reconstruction would not increase the nonconforming nature of the “said structure.” In support of the latter argument, the plaintiffs state that the existing structure on Lot 18 is nonconforming as to side yard setback. They argue, however, that the proposed structure to be built

on Lot 33, as currently existing, will be conforming as to setback requirements. The structure itself, would no longer be located in the Village District, but would be built within the RA District.³⁹ That District has a minimum side yard setback requirement of 30 feet with which the proposed structure would conform.

*5 Further, as to frontage, both Lot 18 and Lot 33 are nonconforming. Lot 18 has 50 feet of frontage while Lot 33 has none. The RA District in which the proposed structure would be built has a 150 feet frontage requirement. In this regard, Ms. Burns has acknowledged that the proposed “new house will be constructed solely on Lot 33.”⁴⁰ Lot 18 has 50 feet of frontage in the Village District which has a frontage requirement of 100 feet. The plaintiffs argue therefore, that the “combined tract will be no more nonconforming with respect to frontage than Lot 18 presently is: “The frontage of the combined tract would remain the same as the frontage of Lot 18:50 feet.”⁴¹

Although the town of Carver concedes that Lot 18 and the structure thereon were lawful and nonconforming when the Bylaw was first adopted in 1963, the town now contends that Lot 18 no longer meets the requirements for the structure to be lawful and nonconforming. A lot is exempted from the zoning restrictions contained in a bylaw if it is not held in common ownership, conformed to the then-existing requirements, and has at least 5,000 square feet of area and 50 feet of frontage. G.L. c. 40, s. 6, para. 4. If so exempt, the structure is lawfully nonconforming, and may be subject to Section 2254 of the Bylaw, quoted supra.⁴²

Chapter 40A, section 6, para. 3 of the General Laws provides that a “by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more.”

In the case of *Town of Orange v. Shay*, 68 Mass.App.Ct. 358 (2007) the Court made the following pertinent observation:

Prior to the enactment of the Zoning Act, G.L. c. 40A in 1975, our case law construed the terms “abandoned” and “discontinued” as being synonymous. Whether a particular zoning ordinance provided for extinguishment of nonconforming uses by use of the terms “abandoned” and “discontinued” was of no moment since the terms were deemed interchangeable.... Since 1975, however, the zoning Act has permitted municipalities to “define and regulate nonconforming uses *and structures abandoned or*

not used for a period of two years or more In so doing, the Legislature provided two separate avenues by which prior nonconforming uses can be extinguished:

(a) abandonment; and (b) a period of nonuse of two or more years. The two concepts were thus no longer interchangeable. *Id.* at 363.

Abandonment requires “the concurrence of two factors, (1) the intent to abandon and (2) voluntary conduct, whether affirmative or negative, which carries the implication of abandonment.” *Id.*

While abandonment can happen “momentarily, without the lapse of any stated period of time,” the phrase “not used” as the legislature employed it, contemplates “a simple cessation of a nonconforming use for a period of at least two years. *Id.*

Where “*the lapse of time following the [cessation of the nonconforming use].. is so significant that abandonment exists as a matter of law ... [.] evidence of things done or not done ... carries the implication of abandonment..[and] [s]upports a finding of intent, whatever the avowed state of mind of the owner Id.* at 364. (emphasis supplied) (internal citations omitted)

*6 The *Orange* Court concluded that cessation of the nonconforming use, “and the passage of over forty years carries a clear implication of abandonment.”

Section 2255 of the Bylaw provides as follows:

A nonconforming use *or structure* which has been abandoned, or not used for a period of two years, shall lose its protected status and be subject to all of the provisions of this zoning by-law .⁴³ (emphasis supplied)

The structure at issue, is plainly nonconforming.⁴⁴ Thus, the town of Carver has elected to regulate nonconforming uses and structures which have been either abandoned or not used for a period of two years or more. In such event, the structure loses the protection enjoyed by it as preexisting and nonconforming. In the case of Carver, the structure in

question becomes subject to all provisions of the Bylaw including the frontage requirements.

A “structure,” is defined under ARTICLE VI. DEFINITIONS of the Bylaw as “anything constructed or erected, the use of which requires fixed location on the ground, including, but not limited to buildings....”⁴⁵

The town argues that Lot 18 is subject to all the provisions of the present Bylaw because the structure is a residential building which was either abandoned, or in the alternative, has not been used for more than two years. *See* Defendants’ Memorandum of Law on the Parties’ Agreed Statement of Facts and Exhibits, at 6. If this court were to find that the structure was either abandoned or not used for a period of two years, then the lots will be subject to the present requirements of the Bylaw, including the frontage requirement. In such event, our inquiry need proceed no further.

A abandonment of a Nonconforming Structure

Although a definition of “abandoned” is provided in neither the Bylaw nor G.L. c. 40A, there is substantial decisional law on point. The case of *Derby Refining. Co. v. Chelsea*, 407 Mass. 703, 708 (1990) is instructive in this regard.

In the *Derby* case, Texaco Oil Refining and Marketing, Inc. (Texaco) discontinued operations at a petroleum storage facility in 1983, due to changing market conditions. In so doing, it proceeded to “mothball” its existing facility. This process entailed pumping out and cleaning petroleum storage tanks, filling them with preservative and sealing them. While Texaco closed its business office it “continued to heat the building, and hired a security firm to check the premises.” Thereafter, it commenced marketing efforts, all the while maintaining its flammable storage licenses, until selling the facility on January 15, 1986 to Derby Refining Company.⁴⁶ The question soon arose whether the use of the petroleum facility had been abandoned by Texaco. In concluding that there had been no such abandonment, the Derby Court observed as follows:

Mere nonuse or sale of property does not, by itself, constitute an abandonment. Additional facts must be present before a finding of abandonment is warranted. The fact that Texaco “mothballed” the facility constitutes evidence of nonuse, but it was not enough

by itself to require a finding of abandonment. We agree with the judge that the reasonable inference to be drawn from the manner in which Texaco shut down the facility is precisely the opposite of abandonment—that *Texaco intended to preserve the facility in good condition for a profitable resale* [See also] Texaco’s voluntary action of diligently renewing its flammable storage licenses in each year preceding the sale to Derby.... *There are also no clear indicia of abandonment. For example, the property was not left unprotected or unsecured ... and no buildings were demolished.* (emphasis supplied) (internal citations omitted)⁴⁷

*7 The Court observed, as well, “that Texaco’s efforts, together with the affirmative steps taken to market the facility as a petroleum storage terminal, “are illustrative of Texaco’s attempt to maintain the integrity of the premises as a marine distributive facility ... In short, even if Texaco had no further use of the locus for its corporate purposes, it did not intend to surrender such use.”⁴⁸

This court is of the view, therefore, that evidence of preservation and maintenance may be seen as inconsistent with an intent to abandon. On the other hand, evidence that a property *has not* been maintained, secured or protected may be viewed as consistent with, if not indicative of, an intent to abandon. In any event, “[a]bandonment is primarily a question of fact.” (quoting *Paul v. Selectman of Scituate*, 301 Mass. 365, 370 (1938)).⁴⁹

A significant factor in determining whether an abandonment has occurred, relates to the period of nonuse or abandonment. “[L]apse of time is not [in and of itself] the controlling factor, although it is evidential, especially in connection with facts showing an intent to discontinue the use.” *Dobbs v. Bd. of Appeals of Northampton*, 339 Mass. 684, 687 (1959).

Courts have even held that a significant lapse of time following a demolition or nonuse may establish the existence of abandonment as a “matter of law.” *Dial Away Co., Inc. v. Zoning Bd. of Appeals of Auburn*, 41 Mass.App.Ct. 165, 172 (1996) (finding that a twenty-three year lapse of time following a demolition of a structure constituted abandonment). While the *Dial Away Co.* court addressed a situation in which demolition had occurred, it cited numerous cases in which there was a time lapse of nonconforming use for its “abandonment as a matter of law” principle. *See, e.g., Mioduszewski v. Saugus*, 337 Mass. 140, 145 (1958) (indicating that failure to exercise a nonconforming use for a period of four years “may well have fatally interrupted” said

use). But while a lapse of time has proved significant in some cases, “an abandonment is something that can [also] happen momentarily, without the lapse of any stated period of time.” *Bartlett v. Bd. of Appeals of Lakeville*, 23 Mass.App.Ct. 664, 669 (1987) (citing *Dawson v. Bd. of Appeals of Bourne*, 18 Mass.App.Ct. 962, 963 (1984)).

The plaintiff bears “the burdens of proof and persuasion on the questions of intent and inability as they relate[] to a possible abandonment.” *Id.* “[A]n owner can by his diligent efforts have some control over a period of vacancy and if he allows an extended time to elapse with only desultory and equivocal action in the meantime, he runs the risk of a sustainable finding of abandonment and discontinuance.” *Dobbs v. Bd. of Appeals of Northampton*, 339 Mass. at 687. For example, a judge’s decision that attached “primary importance to the period of more than ten years during which the disputed units had not been used,” and found that the nonuse of the dwelling units resulted in an abandonment of the nonconforming use, was upheld on appeal. *See Bartlett*, 23 Mass.App.Ct. at 664.

*8 Plaintiffs cite the *Massachusetts Zoning Manual* to support their contention that abandonment is only applicable to nonconforming uses, not nonconforming structures. Plaintiffs’ Brief, at 6. The *Zoning Manual* states that, “The application of the abandonment principle to nonconforming structures is problematic. It is difficult to see how a standing, nonconforming structure, even if vacant, could be abandoned because its mere presence evidences its continued existence.” *Massachusetts Zoning Manual*, s. 6.9.

This argument fails to account for the explicit use of the word “structure” in the provisions of both the G.L. c. 40A and the relevant Bylaw. It fails too, to consider the applicable case law discussed supra holding that nonuse of a *structure* may constitute an abandonment.

Here, the plaintiffs have failed to carry their burden of proof. It is the view of this court the facts as presented are demonstrative of a clear intent to abandon the structure. *See Derby Ref. Co. v. Chelsea*, 407 Mass. at 708. It is undisputed that the structure on Lot 18 was no longer maintained, used, or inhabited following November 1963. *See* Agreed Statement of Facts, at 3. “Assessors’ records from 1977 indicate that at that time the structure had no plumbing, was without windows or doors, and its interior was gutted. They also describe the structure as structurally and economically obsolete.” *Id.* at 4. Lot 18 was no longer assessed as improved from 1991 to the present, and it is undisputed that the “structure is

uninhabitable in its present condition.” *Id.* Thus, contrary to the facts in *Derby Refining*, no effort whatever has been made to preserve the Lot 18 structure for habitation or residential purposes. Indeed, no effort was made to preserve the structure at all. As has been amply documented herein, the property as presently configured is wholly unusable for any purpose, having been rendered unfit for human habitation.

Predicated upon the recitations in the Agreed Statement, as well as the advanced level of deterioration, one may reasonably infer, and I do so infer, that the current situation has existed for an extensive, sustained period of time. This court is satisfied therefore, that the nonconforming structure has, as a matter of law, long since been abandoned and allowed to deteriorate, to the point where components of the structure have literally collapsed. As has been observed, “[a] nonconforming use or structure which has been abandoned, or not used for a period of two years, shall lose its protected status and be subject to all of the provisions of this zoning bylaw.”⁵⁰ (emphasis added) *See also Dial Away Co., Inc.*, 41 Mass.App.Ct. at 172 (finding abandonment as a “matter of law” after a lapse of twenty-three years).

Nonuse of Structure

Even if this court were to resist characterizing the property as “abandoned,” there can be no dispute that no one has utilized the structure for residential, or likely any other purpose,⁵¹ for over forty-six years, i.e. a time period that plainly and substantially exceeds the two year period recited in the Bylaw.

*9 The *Bartlett* case is particularly instructive when construing such a bylaw provision concerning nonuse. *See generally Bartlett*, 23 Mass.App.Ct. at 669–71. In *Bartlett*, the Court indicated that in G.L. c. 40A, s. 6, para. 3, “the Legislature has authorized the use of an *objective standard* which is easily understood by the public and easily administered by building inspectors and boards of appeal.” *Id.* at 669 (emphasis added). The nonuse standard does not involve an inquiry into the intent of the parties—it does not “embrace any concept of specific intent on the part of the person who discontinues [the use of something].” *Id.* at 669 n. 9. The *Bartlett* Court continued “We think the Legislature ... intended to authorize cities and towns to extinguish otherwise protected nonconforming uses if particular premises which are not in fact used for the protected purposes for a minimum of two years.” *Id.* (concluding that the Lakeville board of appeals properly refused a building

permit when two of three dwelling units had not been used for more than two years). Accepting, *arguendo*, the notion that the nonconforming structure still exists,⁵² it is the *use* of the structure that determines whether there has been an abandonment or discontinuance of the structure—not the mere continued existence of the structure. Defendant’s Memorandum of Law on the Parties’ Agreed Statement of Facts and Exhibits, at 7; *Davis v. Zoning Bd. of Chatham*, 52 Mass.App.Ct. 349 (2001).

Here, it is undisputed that the structure has been uninhabited since November 1963 and is in fact uninhabitable. *See* Agreed Statement of Facts, 3–4.

This court is satisfied therefore, that owing to abandonment and non-use, the said structure has long since surrendered its protected status under the Bylaw.

Conclusion

In view of the foregoing, this court concludes as follows: (a) that the structure at issue may not reasonably be characterized as a “single family residential dwelling for purposes of invoking the exceptions set forth in G.L. c. 40A, s. 6, para. 1 or in Section 2254 of the Carver Zoning Bylaw; (b) that however the structure may be characterized, it has long since been abandoned and not used for a period well in excess of two years as set forth in Section 2255 of the Carver Zoning Bylaw;⁵³ (c) that having lost its “protected status ... [it is] subject to all of the provisions of [the] zoning by-law” including those requiring adequate frontage; (d) that for purposes of G.L. c. 40A, s. 6 or Section 2254 of the Carver Zoning Bylaw, a reconstruction may occur at a different site on the same lot or parcel; however, it may not occur upon an

entirely different lot or parcel; and (e) the plaintiffs’ proposal to demolish a nonconforming structure on a nonconforming lot and to erect a new structure on a different or resulting nonconforming lot, would require, under the circumstances pertaining herein, the grant of a variance.

*10 Accordingly, it is hereby

ORDERED the decision of the Board of Appeals of the Town of Carver be, and hereby is, **AFFIRMED**. It is further

ORDERED that the plaintiffs’ complaint be, and hereby is, **DISMISSED**.

Judgment to issue accordingly,

SO ORDERED.

JUDGMENT

This matter came on for consideration upon a case stated basis. An order has entered this day in connection therewith. Accordingly, it is hereby.

ORDERED and **ADJUDGED** that the decision of the Board of Appeals of the Town of Carver is hereby **AFFIRMED**. It is further

ORDERED and **ADJUDGED** that the complaint be **DISMISSED**.

All Citations

Not Reported in N.E.2d, 2013 WL 485206

Footnotes

- 1 Agreed Statement of Facts (Statement), para. 2.
- 2 See Plymouth County Probate Court, Docket No. 04P1450.
- 3 Formerly two adjoining parcels formerly known as Lots 18 and 34 on Assessors’ Map 19. Now known as Lot 18.
- 4 *Id.*, Docket No. 88P1978.

- 5 Complaint, para. 6. Ms. Burns proposes to acquire both parcels, combining them into a single tract. The plaintiffs do not address the manner in which the parcels would be combined.
- 6 *Id.*, para. 7.
- 7 Statement, para. 1.
- 8 *Id.*, para. 3.
- 9 Record title to Lot 33 currently resides in the heirs of Manuel L. Gomes. *Id.*, para. 5.
- 10 Statement, para. 6.
- 11 *Id.*, paragraphs 8 & 9.
- 12 *Id.*, para. 7.
- 13 *Id.*, para. 10.
- 14 *Id.*, para. 11.
- 15 *Id.*, para. 12.
- 16 *Id.*, para. 13.
- 17 *Id.*, para. 23.
- 18 *Id.*, para. 14.
- 19 *Id.*, para. 15.
- 20 *Id.*, paragraphs 16–18.
- 21 *Id.*, paragraphs 20 & 21. Lot 18 resides in the Village District which has a minimum sideyard setback of 25 feet. However, the structure on Lot 18 has an 18 foot sideyard setback.
- 22 *Id.*, para. 26.
- 23 *Id.*, paragraphs 24 & 25.
- 24 *Id.*, para. 27.
- 25 *Id.*, para. 28.
- 26 *Id.*, para. 27.
- 27 *Id.*, para. 29. Emphasis added.
- 28 *Id.*, para. 30.
- 29 *Id.* para. 31.
- 30 *Id.*, paragraphs 34 & 35.
- 31 *Id.*, para. 36.

- 32 *Id.*, para. 38.
- 33 Complaint, p. 3.
- 34 Emphasis supplied as per plaintiffs' brief.
- 35 *Id.*
- 36 Agreed Statement. See for example., para. 21.
- 37 By all appearances, the front portion of the roof and dormer would likely have totally collapsed, but for the presence of the supportive tree.
- 38 It is this court's view that construction on any resulting nonconforming lot would likely require a variance. See *supra*, to the effect that Burns initially applied to the Board seeking a "variance and/or special permit."
- 39 As noted *supra*, Lot 33 is in the RA District.
- 40 See Agreed Exhibit 26, p. 2.
- 41 Plaintiffs' Brief, p. 2., paragraphs d. & e.
- 42 Section 2254 continues: "In the event that the Zoning Enforcement Officer determines that the nonconforming nature of such structure would be increased by the proposed reconstruction, extension, alteration, or change, the Board of Appeals may, by special permit, allow such reconstruction, extension, alteration, or change where it determines that the proposed modification will not be substantially more detrimental than the existing nonconforming structure to the neighborhood."
- See, in this regard, *Schiffenhaus v. Kline*, 79 Mass.App.Ct. 600, 606, n. 8. (2011) agreeing with the trial court that the reconstruction of a nonconforming structure served to increase the existing nonconformity even though that nonconformity derived solely from the lot's inadequate frontage.
- 43 A "nonconforming use or structure" is defined in the Town's Zoning Bylaw to be "any structure or use of land lawfully existing at the effective date of this by-law or subsequent amendment which does not conform to one or more provisions of the by-law."
- 44 See Plaintiffs' Brief, p. 6.
- 45 The term "building" is defined, in turn, as a structure adapted to permanent or continuous occupancy for ... residential ... purposes." It is clear that the structure in question cannot be used for such purposes and fails, therefore, to comport with the definition of "building."
- 46 *Derby Refining Co.* at 705.
- 47 *Id.* at p. 710.
- 48 *Id.*, at p. 711.
- 49 *Id.*
- 50 See Bylaw Section 2255, *supra*.
- 51 There is no indication that the structure was utilized for any purpose during that period. All indications are to the contrary.

52 See discussion *supra* regarding indicia of abandonment and non-use.

53 See also G.L. c. 40A, s. 6., para. 3 cited *supra*.

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