93 Mass.App.Ct. 48
Appeals Court of Massachusetts,
Suffolk..

William A. BRUNO, trustee, [1] & another [2]
v.
ZONING BOARD OF APPEALS
OF TISBURY & others. [3]

No. 17–P–174
|
Argued November 9, 2017
|
Decided March 19, 2018

Subdivision Control, Approval not required, Zoning requirements. Zoning, Enforcement, Nonconforming use or structure. Practice, Civil, Summary judgment, Zoning appeal, Statute of limitations. Limitations, Statute of.
CIVIL ACTION commenced in the Land Court Department on May 2, 2014.
The case was heard by Gordon H. Piper, J., on motions for summary judgment.

Attorneys and Law Firms

Douglas A. Troyer for the plaintiffs.

Howard M. Miller for Samuel Goethals & another.

Jonathan M. Silverstein for Zoning Board of Appeals of Tisbury.

Present: Meade, Shin, & Ditkoff, JJ.

Opinion

DITKOFF, J.

*1 The plaintiffs, William A. Bruno and Lynne Bruno, as trustees of the W.A.B. Realty Trust and L.B. Realty Trust (Brunos), appeal from a Land Court judgment upholding the denial by the zoning board of appeals of Tisbury (board) of the Brunos' request to enforce the zoning law against the defendants, Samuel Goethals and Mary Goethals, as trustees of the Goethals Family Trust (Goethals). The Goethals subdivided a piece of land on which there was a primary house and a guesthouse, separating the two structures and leaving the guesthouse on an undersized lot. We conclude that the ten-year statute of limitations under G. L. c. 40A, § 7—which governs actions to compel the removal of a structure because of alleged zoning violations—commenced at the time that the lot containing the primary house was conveyed, rather than at the endorsement of the approval not required (ANR) subdivision plan. As the Land Court judge concluded otherwise, we reverse that portion of the judgment and remand for further proceedings, while affirming the judge's denial of the Brunos' request for attorney's fees and costs from the members of the board.

1. Background. The Goethals and Brunos separately own adjoining real property parcels, held in trust, located on Goethals Way in the town of Tisbury. The Goethals' property (Lot 1) and the Brunos' property (Lot 2) formerly comprised a single parcel (original lot), first purchased by the Goethals family in or around the 1930's. The original lot contained a single-family dwelling when the Goethals purchased it, and they added a separate garage sometime prior to 1960.

In 1978, the planning board of Tisbury granted the Goethals a special permit under the town zoning by-law (by-law) to build a detached guesthouse on the original lot. As authorized by the special permit, the Goethals constructed a guesthouse structure of approximately 850 square feet in place of the garage. In or around 1986, the Goethals performed additional work on the guesthouse, including the addition of two bedrooms and increasing the total area to 1,710 square feet. There is no evidence that the 1986 addition was authorized by a building permit.

On December 19, 2001, the planning board endorsed the Goethals' plan to subdivide the original lot into two parcels, Lot 1 and Lot 2, with approval not required (ANR) under G. L. c. 41, § 81L. Under the subdivision plan, Lot 1 measured approximately 12,350 square feet and contained the guesthouse, and Lot 2 measured approximately 32,200 square feet and contained the original single-family dwelling. Both lots are in Tisbury's R–25 zoning district, which requires a minimum lot size of 25,000 square feet for a single-family dwelling, well in excess of the square feet assigned to Lot 1. [4]

*2 Lot 1 and Lot 2 remained in common ownership following the ANR subdivision, until the Goethals conveyed Lot 2 to the Brunos by deed dated August 17, 2005, and recorded two weeks later. Under the terms

of the conveyance, the Goethals reserved easements for their family and guests granting access across a portion of the Brunos' property to use the beach. After the 2005 conveyance, the Goethals maintained ownership of Lot 1.

In 2010, the Goethals converted a television room in the former guesthouse into a bedroom, bringing the number of bedrooms to five. The Goethals did not seek any permits or authorization for this work. The lots are subject to the "Coastal District and Barrier Beach Regulations" (coastal district regulations) incorporated into the by-law, which limit dwellings to three bedrooms and a maximum occupancy of five persons.

Since 2006, the Goethals have rented or attempted to rent their house for up to eight weeks each July and August. They have advertised it sometimes as a three-bedroom vacation home and sometimes as a five-bedroom vacation home sleeping up to ten guests.

Apparently displeased with the guesthouse expansion and rental use, the Brunos complained to the Goethals and town officials concerning the zoning nonconformities and violations. In September, 2013, the Brunos submitted a letter to the town zoning enforcement officer, requesting enforcement of the by-law prohibiting the presence of a single-family house on an undersized lot.[5] On January 8, 2014, the town zoning enforcement officer denied the Brunos' request on the basis that the six-year statute of limitations under G. L. c. 40A, § 7, barred enforcement. The Brunos appealed the decision to the board, which unanimously affirmed on the same statute of limitations grounds, while finding the house in nonconformity with the by-law.

On May 2, 2014, the Brunos filed a complaint and later an amended complaint in the Land Court pursuant to G. L. c. 40A, §§ 7 and 17, to annul the board's determination, compel the removal of the Goethals' house, and award them attorney's fees and costs.[6] On the parties' cross motions for summary judgment, the judge concluded that the ten-year statute of limitations in § 7, rather than the six-year statute of limitations in the same section, applied.[7] The judge then determined that the by-law violations commenced in 2001 with the ANR subdivision endorsement—not the 2005 conveyance and thus that the enforcement action was barred by the statute of limitations. We reverse.

2. Standard of review. We review de novo a Land Court judge's decision granting summary judgment to a zoning board of appeals. Palitz v. Zoning Bd. of Appeals of Tisbury, 470 Mass. 795, 799, 26 N.E.3d 175 (2015). On appeal, the issue "is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Molina v. State Garden, Inc., 88 Mass. App. Ct. 173, 177, 37 N.E.3d 39 (2015), quoting from Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991).

*3 3. Statute of limitations. a. Enforcement actions. General Laws c. 40A, § 7, as appearing in St. 1989, c. 341, § 21,[8] provides a statute of limitations for any enforcement action seeking "to compel the removal, alteration, or relocation of any structure" because of a zoning violation. That is the case here; the Brunos demand nothing less than the removal of the Goethals' house.

The statute requires such enforcement actions be brought and recorded either within six or ten years of "the commencement of the alleged violation," depending on the nature of the violation and the manner in which it arises. Under § 7, the six-year limitation period applies where the "real property has been improved and used in accordance with the terms of the original building permit." G. L. c. 40A, § 7. This provision bars actions against alleged violations to (1) terminate, limit, or modify the use allowed by a building permit; or (2) remove, alter, or relocate a structure authorized by a building permit and being used in accordance with that building permit. See Moreis v. Board of Appeals of Oak Bluffs, 62 Mass. App. Ct. 53, 58–60, 814 N.E.2d 1132 (2004). In contrast, the ten-year statute of limitations does not depend on the issuance of a building permit. See id. at 60, 814 N.E.2d 1132. Rather, it bars actions intended "to compel the removal, alteration, or relocation of any structure" on the basis of a zoning violation after ten years, regardless of how the structure came to be. See Bruno v. Board of Appeals of Wrentham, 62 Mass. App. Ct. 527, 535 n.14, 818 N.E.2d 199 (2004), citing Lord v. Zoning Bd. of Appeals of Somerset, 30 Mass. App. Ct. 226, 227–228, 567 N.E.2d 954 (1991).

The Brunos contend that they are challenging the use of the Goethals' house as a residence instead of as a guesthouse, and thus their action is not subject to

any statute of limitations.[9] As the judge observed, at least since 2005, there "is, and has been, a single-family residence on Lot 1. And a single-family residential use is allowed of right in this zoning district." We agree with the judge that the use of the Goethals' house "constitutes a single family residential use of that lot," and, therefore, "the current use is a lawful one." See Lord, 30 Mass. App. Ct. at 227–228, 567 N.E.2d 954; Moreis, 62 Mass. App. Ct. at 57–59, 814 N.E.2d 1132.

As the judge stated, the Brunos request "nothing less" than the removal of the house, bringing their suit squarely within the purview of the statute of limitations in § 7. To whatever extent the Brunos request in the alternative an injunction against all uses of the house, we see no substantive difference (from the perspective of the statute of limitations) between the removal of a structure and the total preclusion of its use for any purpose. The latter would inevitably require the eventual removal of the structure all the same. Either way, as the judge correctly discerned, the Brunos are challenging "structural violations" subject to the ten-year statute of limitations. Bruno, 62 Mass. App. Ct. at 535 n.14, 818 N.E.2d 199. See Lord, 30 Mass. App. Ct. at 228, 567 N.E.2d 954 (ten-year limitations period protects structural alterations made without building permit).

*4 b. Commencement of violation. "It is well settled that '[u]nder the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes.' " Timperio v. Zoning Bd. of Appeals of Weston, 84 Mass. App. Ct. 151, 155, 993 N.E.2d 1211 (2013), quoting from Hoffman v. Board of Zoning Appeal of Cambridge, 74 Mass. App. Ct. 804, 811, 910 N.E.2d 965 (2009). The merger doctrine applies in such circumstances unless "clear language" in the zoning ordinance states otherwise, Dwyer v. Gallo, 73 Mass. App. Ct. 292, 298, 897 N.E.2d 612 (2008), as "[t]he 'usual construction of the word "lot" in a zoning context ignores the manner in which the components of a total given area have been assembled and concentrates instead on the question of whether the sum of the components meets the requirements of the by-law.' " Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266, 270–271, 897 N.E.2d 607 (2008), quoting from Asack v. Board of Appeals of Westwood, 47 Mass. App. Ct. 733, 736, 716 N.E.2d 135 (1999).

In this case, Lot 1 as proposed in the ANR subdivision in 2001 was in nonconformity with the by-law. Taken together, however, Lots 1 and 2 formed a single conforming lot under the Goethals' common ownership. The by-law does not specify anything to the contrary, and the merger doctrine accordingly applies here; Lot 1 and Lot 2 must therefore be viewed as a single conforming lot until the 2005 conveyance, regardless of the prior ANR subdivision.

Zoning violations created by ANR subdivisions, moreover, do not commence for enforcement purposes until the subsequent conveyance of a lot. "Zoning violations arising from nonconformities may be stayed by the doctrine of merger, 'which treats adjacent lots currently in common ownership as a single lot for zoning purposes so as to minimize nonconformities.' " Palitz, 470 Mass. at 800, 26 N.E.3d 175, quoting from Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 261, 797 N.E.2d 893 (2003). As a result, even though the ANR subdivision created nonconforming lots, the Tisbury zoning enforcement officer could not have pursued an enforcement action against the Goethals until the time of the conveyance. See Palitz, 470 Mass. at 800, 26 N.E.3d 175 ("absent a variance, alienation of one of the nonconforming properties will result in realization of the zoning violations by the new owner" [emphasis supplied]). See also Carabetta, 73 Mass. App. Ct. at 271 n.10, 897 N.E.2d 607 (conveyance severing common ownership "demerged" adjacent lots, and resulted in purchase of nonconforming lot subject to enforcement).

The statute of limitations in § 7 applies as equally to town enforcement actions as it does to private lawsuits. If we construed the statute of limitations as commencing upon the ANR endorsement, any property owner could obtain an ANR endorsement for a subdivision plan and then wait ten years to separate the lots, thus creating nonconforming lots without any opportunity for the town to enforce its zoning by-law. Our construction, by contrast, allows the town ten years after the lots are separated to enforce its zoning by-law, consistent with the Legislature's intent.

The 2001 ANR subdivision did not create an enforceable zoning violation; such a violation was created only when the Goethals conveyed Lot 2 to the Brunos in August, 2005.[10] Under § 7, the Brunos were required to commence and record their action within ten years of that date. The Brunos brought their action on May 2, 2014. If they

effectively recorded their action on April 30, 2015, as they claim, [11] their claims are not barred by § 7. Accordingly, we reverse and remand for further proceedings. [12]

*5 4. Attorney's fees and costs. There is no basis for the assessment of attorney's fees and costs against the board members in this case. General Laws c. 40A, § 17, inserted by St. 1975, c. 808, § 3, provides that "[c]osts shall not be allowed against the board or special permit granting authority unless it shall appear to the court that the board or special permit granting authority in making the decision appealed from acted with gross negligence, in bad faith or with malice." Generally, there can be no finding of bad faith in the absence of evidence of improper motives, harassment, or causing needless delay or unnecessary cost. Sheehan v. Zoning Bd. of Appeals of Plymouth, 65 Mass. App. Ct. 52, 61–62, 836 N.E.2d 1103 (2005).

Here, the record does not show any harassment or delay, nor negligence of any kind on the part of the board. The Brunos' allegations of bad faith and gross negligence are without merit, if not frivolous, and the judge properly denied their request under § 17.

5. Conclusion. The ten-year statute of limitations under G. L. c. 40A, § 7, commenced no earlier than August 17, 2005. So much of the judgment granting the Goethals' motion for summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion. So much of the judgment as denies attorney's fees and costs against the board members under G. L. c. 40A, § 17, is affirmed.

So ordered.

All Citations

--- N.E.3d ----, 93 Mass.App.Ct. 48, 2018 WL 1370635

Footnotes

1 Of the W.A.B. Realty Trust and the L.B. Realty Trust.

2 Lynne Bruno, trustee of the W.A.B. Realty Trust and the L.B. Realty Trust.

3 Jeffrey Kristal, Anthony Holand, Susan Fairbanks, Michael Ciancio, Neal Stiller, Frank Piccione, and John Guadagno, as members of the zoning board of appeals of Tisbury; and Samuel Goethals and Mary Goethals, trustees of the Goethals Family Trust.

4 As the moniker suggests, an ANR endorsement expresses no view of town authorities as to the zoning compliance of any lot proposed by a subdivision plan. Palitz v. Zoning Bd. of Appeals of Tisbury, 470 Mass. 795, 807, 26 N.E.3d 175 (2015), quoting from Cornell v. Board of Appeals of Dracut, 453 Mass. 888, 892, 906 N.E.2d 334 (2009) ("ANR indorsement serves merely to permit the plan to be recorded ... and is not an attestation of compliance with zoning requirements").

5 The Brunos raise no claim that the 1986 addition is actionable at this late date.

6 The Brunos assert that they recorded their action in the registry of deeds on April 30, 2015.

7 The judge also found the Goethals' house in violation of the by-law and the coastal district regulations. The judge correctly noted that the Goethals agreed to perform the necessary work to conform their dwelling to the coastal district regulations once this dispute is resolved. The Goethals reaffirmed this agreement at oral argument before this court. We see no need to address this issue further.

8 Section 7 was amended in 2016. See St. 2016, c. 184, § 1. The amendment took effect after the entry of judgment appealed from here, and did not materially alter the statutory language discussed infra.

9 This would be so because the ten-year limitations period does not apply to actions alleging only use violations and because the six-year limitations period applies only where, unlike here, the action is challenging a use (or structure) authorized by a building permit.

10 Because it is unnecessary for our result, we leave unresolved the issue whether a zoning violation, realized upon conveyance, commences at the date of the deed or at the time of its recording.

11 Whether the commencement of the suit was properly recorded is disputed and must be determined by the Land Court on remand.

12 Of course, even if the recording issue is decided favorably to the Brunos, removal orders "do not necessarily follow every determination of a zoning violation." Sheppard v. Zoning Bd. of Appeal of Boston, 81 Mass. App. Ct. 394, 405, 963 N.E.2d 748 (2012). Rather, a court may consider equitable factors and the potential availability of alternative remedies. See Steamboat Realty, LLC v. Zoning Bd. of Appeal of Boston, 70 Mass. App. Ct. 601, 606, 875 N.E.2d 521 (2007).

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

Adrian BIGAMY and Petra Bignami, Plaintiffs,
v.
Miguel SERRANO, Marisa Serrano, and Jesse Geller, Mark Zuroff, Johanna Schneider, Lark Palermo, Paul Bell and Randolph Meiklejohn, as they are members of the Brookline Zoning Board of Appeal's, Defendants.

MISCELLANEOUS CASE NO. 21 MISC 000429 (HPS)
|
Dated: March 16, 2022

MEMORANDUM AND ORDER ON MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT

By the Court (Speicher, J.)

***1** This is the third case in a series of disputes between the owners of the front and back lots resulting from a long-ago division of a lot on Tappan Street in Brookline. Plaintiffs, the Bignamis, the owners of the front lot of the divided property seek to annul a decision by the Brookline Zoning Board of Appeals (the "Board") authorizing an addition to a single-family home owned by the private defendants, the Serranos, on the rear lot of the divided property.

For the reasons set forth below, the Serranos' motion to dismiss the Bignamis' claim that the Serrano property is an illegal lot not entitled to be treated as lawfully nonconforming, is ALLOWED, and the Bignamis' motion for summary judgment on the same issue is DENIED; the Serranos' motion to dismiss the complaint in other respects and the Bignamis' motion for summary judgment on the merits of the Board's decision and findings made pursuant to G. L. c. 40A, § 6 are DENIED.

FACTS

In considering a motion to dismiss for failure to state a claim, the court accepts as true well-pleaded factual allegations in the complaint and reasonable inferences drawn therefrom. *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004). Generally, if matters outside the pleadings are presented to and not excluded by the court, the motion will be treated as a motion for summary judgment. Mass. R. Civ. P. 12(b), 12(c). Accordingly, the following material facts are found in the record, including exhibits submitted by the parties and publicly available documents, for purposes of Mass. R. Civ. P. 56, and are undisputed for the purposes of the pending motion to dismiss and the cross-motion for summary judgment:

The parties and the properties

1. Plaintiffs Adrian and Petra Bignami (the "Bignamis") own and reside at 146 Tappan Street in Brookline ("Lot A" or the "front lot" or the "Bignami property").[1] The Bignamis have lived at 146 Tappan since August, 2012.[2]

2. Defendants Miguel and Marisa Serrano (the "Serranos") own and reside at 150 Tappan Street in Brookline ("Lot B" or the "rear lot" or the "Serrano property").[3] The Serranos moved into 150 Tappan in March, 2018 after nearly two years of renovations on the residence.[4]

3. The Serrano property is located to the rear of the Bignami property and has no frontage on any street.[5]

4. The Serrano property is accessed by a shared driveway, approximately 9 feet wide, that crosses the Bignami property.[6]

5. The shared driveway begins at Tappan Street, crosses over the westerly side of the Bignami property and continues onto the Serrano property.[7]

History of the properties

6. The Bignami property and the Serrano property were originally a single parcel owned by Edith May. Sometime prior to 1904, the common property was improved with a single-family home on the front of the property, and a horse stable on the rear of the property.[8]

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7. In 1925, the horse stable was converted into a single-family dwelling that is now the Serrano residence.[9]

8. Following Ms. May's death, the executor of her estate divided the common property into two lots by way of an "approval not required" plan pursuant to G. L. c. 41, § 81P ("ANR Plan"), endorsed by the Brookline Planning Board on May 14, 1954 and recorded on June 24, 1954. The ANR Plan depicts the front lot, Lot A, with an existing structure (now the Bignami property and residence) and the rear lot, Lot B, with an existing structure (now the Serrano property and residence). The front lot also retained the previous street address of 146 Tappan Street while the rear lot was numbered 150 Tappan Street.[10]

***2** 9. The ANR Plan showed a 40-foot wide "right of way" over the eastern side of Lot A, which provided access for Lot B to Tappan Street.[11]

10. Both lots depicted in the ANR Plan were conveyed to Benedict Alper and Ethel Alper (the "Alpers") by way of a deed dated June 22, 1954 and recorded on June 24, 1954.[12]

11. The deed to the Alpers referenced the 40-foot right of way depicted in the ANR Plan: "[t]his conveyance is subject to a '40-foot Right of Way' over the Easterly side of said Lot A and extending from Tappan Street to Lot B as shown on said [ANR Plan] [...]"[13]

12. By a deed dated June 23, 1954, a day following the conveyance of both lots to the Alpers, the Alpers conveyed Lot B to George Faxon and Janet Faxon (the "Faxons").[14] The two deeds were recorded simultaneously on consecutive pages at 9:00 A.M. on June 24, 1954. Thus, the two lots created by the approval of the ANR Plan a month earlier came into separate ownership as a matter of record title on June 24, 1954.

13. The deed from the Alpers to the Faxons referenced the 40-foot right of way as follows: "[t]his conveyance is subject to a '40-foot Right of Way' over the Easterly side of said [front lot] as shown on the [ANR Plan], extending from Tappan Street to said Lot B, for the benefit of said Lot B, to be used for pedestrian traffic only. Provided however, and it is specifically covenanted and agreed that said 40-foot Right of Way shall not be used for any purposes [...] so long as the present existing driveway from Tappan Street across the westerly side of Lot A to the building in the rear of said Lot B is available for all purposes for which driveways are commonly used [....]"[15]

14. On March 14, 1963, the Alpers, then-owners of Lot A and predecessors in interest to the Bignamis, entered into an express easement with Harry and Barbara Moses, then-owners of Lot B and predecessors in interest to the Serranos, which granted mutual "right[s] to use the present existing driveway from Tappan Street across the westerly side of Lot A to the garage building in the rear of Lot B, [...] for all purposes for which driveways and footways are commonly used in the Town of Brookline."[16]

15. In July, 1954 the Brookline building commissioner ruled that the division of the property as shown on the ANR Plan violated provisions to the Brookline Zoning Bylaw unrelated to frontage. The Alpers, who were no longer the owners of the rear lot, appealed to the Board. The Board issued a decision dated September 22, 1954 in which it granted a variance from the provision unrelated to frontage, and remarked that, with the right of way shown on the ANR Plan, the rear lot had frontage conforming to the requirements of the Bylaw.[17] There is no suggestion in the record that any enforcement action was ever instituted by any Brookline building official as a result of the failure to construct and use the 40-foot right of way shown on the ANR Plan.

16. Had the 40-foot right of way been constructed on the ground following the approval of the ANR Plan in 1954, and had the owners of the rear lot not been deprived of the right to use the 40-foot right of way by the restriction in their deed, the rear lot, as approved by the endorsement of the ANR Plan, would have been in compliance with the frontage requirements of the Brookline Zoning Bylaw as it existed at the time of the approval of the ANR Plan in May, 1954.[18] With the restriction against use of the 40-foot right of way instituted by the deed from the Alpers to the Faxons, Lot B was in violation of the then-existing frontage requirements of the Brookline Zoning Bylaw as of the conveyance to the Faxons.

***3** *Easement Case decision*

17. In the Decision and Judgment issued in the prior Easement Case between the two parties, Judge Long ruled that the "40-foot right of way easement over the Bignami lot for the benefit of the Serrano lot no longer exists for any purpose."[19]

18. Judge Long further found and ruled that the "40-foot right of way easement ended on May 8, 1963 with the recording of the 1963 Agreement which gave the Serrano lot a permanent affirmative easement over the shared driveway."[20]

DISCUSSION

The Serranos have moved to dismiss the Bignamis' complaint pursuant to Mass. R. Civ. P. 12(b)(6) on the grounds that it is both legally insufficient with respect to the Bignamis' argument that the Serranos needed a variance, and not just a special permit, for a change in a lawfully nonconforming use or structure, and on the separate ground that there are no facts alleged that would support a conclusion that the Board was arbitrary or capricious in approving the Serranos' application for a special permit. The Bignamis have cross-moved for summary judgment, arguing that on the undisputed facts in the record, the Serranos were not entitled to the relief granted by the Board.

In reviewing the sufficiency of a complaint under Rule 12(b)(6), the court takes the allegations of the complaint as true and draws from them all reasonable inferences in the light most favorable to the plaintiff. See *Golchin v. Liberty Mut. Ins. Co.*, 460 Mass. 222, 223 (2011). "In assuming the facts as alleged, however, '[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations.' " *Edwards v. Commonwealth*, 477 Mass. 254, 260 (2017), quoting *Leavitt v. Brockton Hosp.*, Inc., 454 Mass. 37, 39 n.6 (2009). "A complaint only survives a motion to dismiss if it includes enough factual heft 'to raise a right to relief above the speculative level.' " *Revere v. Massachusetts Gaming Comm'n*, 476 Mass. 591, 609 (2017), quoting *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008).

*4 "Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644 (2002). "The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact." *Id.* at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. *See Attorney Gen. v. Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." *Ng Bros. Constr. v. Cranney*, supra, 436 Mass. at 648. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976).

The court's inquiry in reviewing a decision of a board of appeals granting zoning relief is a hybrid requiring the court to find the facts *de novo*, and, based on facts found by the court, and not those found by the board, to affirm the board's decision unless it was "based on a legally untenable ground, or was unreasonable, whimsical, capricious, or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). This is a two-part inquiry requiring the court to first determine whether the board's decision was based on a legally untenable ground. A legally untenable ground is a "standard, criterion, or consideration not permitted by the applicable statutes or by-laws." *Britton v. Zoning Bd of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003).

Only after determining that the decision was not based on a legally untenable ground does the court consider, on a more deferential basis, "whether any 'rational view of the facts the court has found supports the board's conclusion ...' " *Bedell v. Zoning Bd. of Appeals of Carver*, 74 Mass. App. Ct. 450, 453 (2009), quoting *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 75. The court may not overturn the board's decision unless "no rational view of the facts the court has found supports the [zoning board's] conclusion ..." *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass. App. Ct. at 74-75. See also *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, 461 Mass. 469, 485 (2012) (board must apply its own criteria rationally and may not deny special permit for expansion of nonconforming use "in the absence of credible evidence").

I. THE BOARD PROPERLY TREATED THE SERRANO PROPERTY AS LAWFULLY NONCONFORMING.

Both parties have raised an argument concerning whether the Board's decision was legally untenable: the Bignamis allege in their complaint and argue in their motion for summary judgment that the Serrano property is not lawfully nonconforming so as to be properly the subject of the relief sought by and granted to the Serranos. It is instead, the Bignamis argue, an illegal lot because it has no legal frontage, and never did. Their argument, if correct, would require the Serranos to obtain a frontage variance, as well as (or instead of) the special permit for change in a nonconforming structure

that was granted to them by the Board. The Serranos counter and assert that a 2016 amendment to G. L. c. 40A, § 7 cured the illegality of the Serrano property as a matter of law and conferred on it status as lawfully nonconforming with respect to its lack of legal frontage. They move on this basis to dismiss this aspect of the Bignamis' appeal.[21]

***5** The parties agree that at the time the properties were divided by the approval of the ANR Plan in May, 1954 and sale of the rear lot into separate ownership from the front lot in June, 1954, the Brookline Zoning Bylaw required the following for legal frontage:

> Section 11 (e) **Frontage upon Street.** Except in use districts 1 and 2, no building shall be erected upon a lot no abutting for a distance of at least 40 feet upon a public or private way or a way approved by the Planning Board, unless such lot abuts upon, and has appurtenant to it the right to use, a way or place not less than 40 feet wide leading to a public or private way.[22]

The 40-foot right of way shown on and approved as part of the ANR Plan was evidently designed to comply with this requirement of the Bylaw so as to provide the rear lot with legal frontage. The mere approval of an ANR Plan confers no zoning validity on lots that do not otherwise comply with a zoning bylaw. *Palitz v. Zoning Bd. of Appeals of Tisbury*, 470 Mass. 795, 799 (2015) ("An ANR endorsement does not, however, render a lot compliant with zoning laws."); see also, *Gattozzi v. Director of Inspectional Services of Melrose*, 6 Mass. App. Ct. 889 (1976); *Planning Bd. of Nantucket v. Bd. of Appeals of* Nantucket, 15 Mass. App. Ct. 733, 738 (1983). However, had the 40-foot way been constructed and used by the owners of the rear lot, the lot would have had legal frontage in compliance with the Bylaw as it existed at the time. Any subsequent changes to the Bylaw's frontage requirements would have rendered the rear lot to be a lawfully nonconforming lot with respect to frontage, as it would have complied with the Bylaw at the time it was separated in ownership from the front lot.

Instead, immediately upon the conveyance of the rear lot into separate ownership and recording of the deed on June 24, 1954, the lot became an illegal lot with respect to frontage. See *Bruno v. Zoning Bd. of Appeals of Tisbury*, 93 Mass. App. Ct. 48, 53 (2018) ("Zoning violations created by ANR subdivisions, moreover, do not commence for enforcement purposes until the subsequent conveyance of a lot."); accord, *Lussier v. Rhodes*, 17 MISC 000283 (Mass. Land Ct. December 24, 2018) (1972 ANR endorsement created lot that did not conform to frontage and other dimensional zoning requirements; violation commenced no later than 2006 conveyance to defendants, entitling lot to lawful nonconforming status under G. L. c. 40A, § 7, 3rd para, upon expiration of ten years with no enforcement action).

The illegality of the rear lot as of the date of conveyance was irrespective of whether the 40-foot right of way was built on the ground. This is because the deed from the common owners, the Alpers, to the new owners of the rear lot, the Faxons, stipulated that although the deed was "subject to" the 40-foot right of way, which was "for the benefit of [the rear lot]" the deed further provided that "it is specifically covenanted and agreed that said 40-foot Right of Way shall not be used for any purposes [...] so long as the present existing driveway from Tappan Street across the westerly side of Lot A to the building in the rear of said Lot B is available for all purposes for which driveways are commonly used [....]"[23] Thus, as of the conveyance to the Faxons, the rear lot did not have "appurtenant to it the right to use" the 40-foot right-of way, making it noncompliant with the frontage provision of the Bylaw. As of the date of the conveyance of the rear lot, subject to the just-quoted limitation, the rear lot was an illegal lot by reason of its lack of legal frontage. The conveyance in 1963 of a permanent easement over the westerly driveway for the benefit of the rear lot made the inability of the owner of the rear lot to ever use the 40-foot right of way permanent, resulting in its extinguishment, as Judge Long has previously found and ruled in the easement dispute between the parties.

***6** But for the 2016 amendment to G. L. c. 40A, § 7, that would be the end of the inquiry. The passage of ten years from the commencement of the violation on the date of the conveyance subject to the restriction on use of the right of way, did not give the rear lot status as a lawfully nonconforming property. The passage of the statutory limitations period of ten years in June, 1964 simply made the lot an illegal lot that was immune to an enforcement action. "To the extent [a property owner] argues that it was entitled by right to replace a lawful pre-existing nonconforming structure, the limitation period of G. L. c. 40A, § 7, does not render the prior structure lawful, just immune from enforcement action." *Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole*, 61 Mass. App. Ct. 124, 127 n. 9 (2004). See also *Bruno v. Bd. of Appeals of Wrentham*, 62 Mass. App. Ct. 527, 536 (2004) (unlawful uses do not gain lawful prior nonconforming status by passage of statutory enforcement period); *Mendes v. Bd. of Appeals of Barnstable*,

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28 Mass. App. Ct. 527 (1990) (structure constructed with the benefit of variance is not a lawful nonconforming structure and use carried on in the structure is illegal rather than lawfully nonconforming).

That all changed with the enactment of the new third paragraph of G. L. c. 40A, § 7. Section 1 of chapter 184 of the Acts of 2016, entitled, "An Act Relative To Non-Conforming Structures," which became effective November 2, 2016, inserted the following new third paragraph to G. L. c. 40A, § 7:

> If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located ... within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures.[24]

The parties agree that no enforcement action was taken by the responsible Brookline building official with respect to the violation of the frontage requirement within ten years from the separation of the lots in June, 1954, or at any time since then. Rather, the Bignamis argue that the benefits of the amendment to G. L. c. 40A, § 7 do not confer lawful nonconforming status on the Serrano property because the illegality with respect to zoning resulted not from the erection of the building on the rear lot, but from the change in lot lines resulting from the endorsement of the ANR Plan followed by the sale of the rear lot into separate ownership. The Bignamis argue that the new statute confers protection only when there is a failure to bring an enforcement action "within a period of 10 years from the date the structures were erected;" and since the structure on the rear lot was erected well before 1954, the violation did not result from the erection of the building, and accordingly the Serrano property never acquired lawful nonconforming status.

The Bignamis' argument is incorrect because it does not take into account all of the relevant language in the 2016 amendment and because it fails to account for the purpose of the statute, which is to confer lawful nonconforming status with respect to structures that do not conform to local zoning bylaw dimensional requirements, irrespective of how the violation arose, as opposed to uses that do not conform to local zoning requirements.

A starting point in determining whether the Legislature intended to confer lawful nonconforming status in the circumstances of this case is the title of the Act inserting the new third paragraph of G. L. c. 40A, § 7. "The title of an act is part of it and is relevant as a guide to the legislative intent." *Com. v. Savage,* 31 Mass. App. Ct. 714, 716 n.4 (1991). "The courts are free to consult the title of an act as, an aid for the application of its text." *Anheuser-Busch Inc. v. Alcoholic Beverages Control Com'n,* 75 Mass. App. Ct. 203, 208 (2009). Although the title is not conclusive, legislative intent may be apparent from both the title of an act and its text. See *Buccaneer Dev., Inc. v. Zoning Bd. of Appeals of Lenox,* 83 Mass. App. Ct. 40, 43 (2012). Sometimes, as is almost the case here, one need look no further than the title of a statute to determine what the Legislature intended, as where "[t]he title sets forth clearly and plainly the single object and aim of the statute if any were necessary to its construction." *Smith v. Bd. of Appeals of Needham,* 339 Mass. 399, 401 (1959) (construing the effect of the zoning freeze provisions of a predecessor statute to G. L. c. 40A, § 6).

*7 The title of the statute, "An Act Relative To Non-Conforming Structures," makes it apparent that the protections afforded by the new paragraph were intended to benefit nonconforming *structures,* but not nonconforming *uses*, and not nonconforming *lots* upon which no structure has yet been built. The title provides that the statute addresses the status of only one of the three types of situations covered by G. L. c. 40A, § 6 with respect to the status of properties that do not comply with local zoning ordinances or bylaws. Section 6 provides for exemptions to changes in local zoning bylaws for "structures or uses lawfully in existence or begun" at the time of any zoning change, and it provides separately for the exemption from changes in zoning for "lot[s] for single and two-family residential use" which at the time of "recording or endorsement" met certain minimum requirements for frontage and area not present here. Section 6 also separately provides an elaborate system of "zoning freeze" protections designed to protect developers from zoning changes imposed after they have recorded subdivision plans conforming with the zoning at the time of endorsement of their plans, but before they have obtained building permits and started construction. *O'Rourke v. Rothman,* 448 Mass. 190, 197-198 (2007).

The three types of noncompliance of property, structures, uses, and unbuilt-upon lots, are treated differently in different parts of Section 6. As the title of the 2016 amendment makes clear, the expiration of a statute of limitations against enforcement now confers lawful prior nonconforming status on illegal structures, but not with respect to unlawful uses. A use that was commenced unlawfully, as opposed to a structure, never gains status as a lawful prior nonconforming use. See, e.g., *Bruno v. Bd of Appeals of Wrentham*, supra, 62 Mass. App. Ct. at 530-531. An illegal use does not acquire status as a lawful nonconforming use by virtue of the expiration of the six-year statute of limitations prescribed under G.L. c. 40 A, § 7. *Patenaude v. Zoning Bd. of Appeals of Dracut*, 82 Mass. App. Ct. 914, 915 (2012); *Bruno v. Bd. Of Appeals of Wrentham*, supra, 62 Mass. App. Ct. at 536-537. In order to be a lawful nonconforming use, the use must be "not violative of the by-law when it began." *Town of Stow v. Pugsley*, 349 Mass. 329, 334 (1965). The amendment to G. L. c. 40A, § 7 would not change the results of any of these cases if they had arisen after its effective date.

Nor does the 2016 amendment purport to change the status of unbuilt lots as previously treated by Section 6. An unbuilt-upon lot intended for single or two-family use is still protected from increases in dimensional requirements of bylaws or ordinances only if it meets the recording or endorsement and minimum frontage and area requirements of the third paragraph of Section 6. Likewise, plans that are the subject of definitive subdivision approval or ANR endorsement are still subject to the limited protections afforded by the fourth and fifth paragraph "zoning freeze" provisions of Section 6. Unbuilt lots that do not have the benefit of Section 6 exemptions do not gain any additional protection from the 2016 amendment to Section 7.

The noncompliance of the Serrano property is not with respect to status as a noncompliant unbuilt lot, nor is it with respect to any alleged noncompliance with the use requirements of the Brookline Zoning Bylaw, as the structure on the property is proposed to remain as a single-family dwelling.[25] The Bignamis argue that the Serrano property is not entitled to the benefit of the protection offered by the 2016 amendment to Section 7 because its nonconformity is related to its lack of frontage, a circumstance that came into existence after the structure on the property was built. However, this kind of noncompliance is one that exists because of the relationship of the structure to the lot, and as with any other such nonconformity caused by the existence of a structure on a lot, its existence for ten years without the commencement of an enforcement action entitles it to the protections afforded by the 2016 amendment to Section 7.

***8** "[T]he statutory language is the principal source of insight into legislative purpose." *Bronstein v. Prudential Ins.* Co., 390 Mass. 701, 704 (1984). In interpreting a statute, a court must ascertain its meaning "from all the statute's words ..." *Ciani v. MacGrath*, 481 Mass. 174, 178 (2019). In interpreting a statute, the court must "strive to give effect to each word of a statute so that no part will be inoperative or superfluous." *Id.*

The Bignamis' argument ignores these rules of statutory construction by ignoring the word "alterations" in the statute in order to focus only on the language in the last sentence of the third paragraph of Section 7. They point to the language "within a period of 10 years from the date the structures were erected" and contend that the clause "from the date the structures were erected" limits coverage of the statute to situations in which the noncompliance results directly from the construction of a noncompliant building. This argument ignores the language in the first sentence of the paragraph, which confers the benefits of the new statute on real estate that "has been improved by the erection or *alteration* of 1 or more structures and the structures or *alterations* have been in existence for a period of at least 10 years ..." (emphasis added). Thus, it is not only the erection of a structure that can trigger the benefits of the statute, but also the "alteration of 1 or more structures...." If the Legislature intended to give effect only to those situations involving the "erection" of a structure and not its "alteration," it would not have included the word "alterations" in the statute.

Furthermore, the court does not read the word "alteration" so narrowly as to exclude from its coverage alterations not only of the structure itself but alterations of the lot on which it stands that change a structure's relation to its lot lines, its area, or its frontage. There is no practical difference between an alteration to a structure that changes its relation to its lot line, say, by building an addition that moves it closer to its lot line, and an alteration to the lot line itself, that also moves the building closer to its lot line. A construction that narrowly limited interpretation of the word "alterations" so that it only applied to alterations to the structure itself, and not to alterations to the lot that changed the structure's relation to the lot, would ignore the Legislature's use of the word in the statute and would construe the word more narrowly than there is any indication the Legislature intended. This is a literal interpretation of the use of the word "alterations" in the statute

so as to give the word its intended meaning. To the extent this interpretation of the word is less than literal, a court "will not adopt a literal construction of a statute if the consequences of doing so are absurd or unreasonable, such that it could not be what the Legislature intended." *Meyer v. Veolia Energy North America*, 482 Mass. 298, 211-212 (2019), quoting *Ciani v. MacGrath*, supra, 481 Mass. at 178.

In the present case, within the meaning of the third paragraph of G. L. c. 40A, § 7, the rear lot was "improved by the ... alteration of 1 or more structures," that is, the dwelling on the rear lot was altered by the change in lot lines effected by the conveyance of the rear lot into separate ownership following the endorsement of the ANR Plan. This alteration occurred upon the conveyance and recording of the deed from the Alpers to the Faxons on June 24, 1954, and the violation caused by the conveyance continued for more than ten years with no enforcement action having been commenced. Accordingly, on the effective date of the 2016 amendment, November 2, 2016, the Serrano property became deemed to be lawfully nonconforming and could properly be considered by the Board for consideration of a Section 6 finding.

II. THE MOTION TO DISMISS AND THE CROSS-MOTION FOR SUMMARY JUDGMENT ARE DENIED IN ALL OTHER RESPECTS.

***9** Aside from the legal issue presented by the parties and addressed by the court in the previous section the present action presents a question only of whether the Board's decision to grant the Serranos a Section 6 special permit was arbitrary and capricious.

The Bignamis' by their motion for summary judgment, and the Serranos, by their motion to dismiss, each claim that the court can conclude, as a matter of law, based on the undisputed facts in the record, whether "any 'rational view of the facts the court has found supports the board's conclusion ...' " *Sedell v. Zoning Bd. of Appeals of Carver,* 74 Mass. App. Ct. 450, 453 (2009) quoting *Britton v. Zoning Bd. of Appeals of Gloucester,* supra, 59 Mass. App. Ct. at 75. The parties ignore the requirement that the court find the facts *de novo* before making such a determination. Further, the court disagrees with the parties that the court can find for either party on the facts presently before the court, as material facts are certainly disputed, and the court will not make a determination whether the Board exceeded its authority without a trial.

CONCLUSION

For the reasons stated above, treating as a separate count the Bignamis' claim that the Board's decision was legally untenable because the rear lot is an illegal lot not entitled to the benefits of the third paragraph of G. L. c. 40A, § 7, as amended by St. 2016, c. 184, the Serranos' motion to dismiss is ALLOWED and the Bignamis' motion for summary judgment is DENIED and said claim, treated as a separate count, will be dismissed; in all other respects, the Serranos' motion to dismiss and the Bignamis' motion for summary judgment are DENIED. Following the completion of discovery, the parties are to contact the court and request the scheduling of a pretrial conference.

So Ordered.

All Citations

Not Reported in N.E. Rptr., 2022 WL 796201

Footnotes

1 Plaintiffs' Summary Judgment Appendix ("App.") Exhibit ("Exh.") 1, Statement of Agreed Facts from prior zoning lawsuit, *Bignami v. Serrano,* Land Court case no. 19 MSC 000246 (Long, J.) ("Agreed Facts") ¶ 2.

2 Decision issued in prior lawsuit, *Bignami, et al. v. Serrano, et al.* Land Court case no. 18 MISC 000323 (Long, J.) (herein referred to as the "Easement Case" decision), included as an attachment to defendants' motion to dismiss and as exhibit 1 to plaintiffs' summary judgment appendix.

3 App. Exh. 1, Agreed Facts ¶ 1.

4 Easement Case decision, p. 5.

5 App. Exh. 1, Agreed Facts ¶ 6.

6 Easement Case decision, pp. 2, 5.

7 Easement Case decision, p. 2.

8 App. Exh. 1, Agreed Facts ¶¶ 10, 11.

9 App. Exh. 1, Agreed Facts ¶ 11; Easement Case decision, p. 4.

10 App. Exh. 5, ANR Plan dated May 12, 1954 recorded with the Norfolk County Registry of Deeds on June 24, 1954 as Plan No. 859 of 1954.

11 App. Exh. 5.

12 App. Exh. 6, Deed from the May Estate to the Alpers, recorded with the Norfolk County Registry of Deeds on June 24, 1954 in Book 3272, Page 545.

13 App. Exh. 6.

14 App. Exh. 7, Deed from the Alpers conveying Lot B to the Faxons, recorded with the Norfolk County Registry of Deeds on June 24, 1954 in Book 3272, Page 547.

15 App. Exh. 7.

16 App. Exh. 9, 1963 Easement Agreement.

17 Amended Complaint, Exh. N.

18 App. Exhs. 18, 19, Brookline Zoning Bylaw, as published 1949 and 1956, Section 11(e).

19 Easement Case decision and judgment.

20 Easement Case decision, p. 38.

21 The Bignamis' Amended Complaint asserts only one count, an appeal pursuant to G. L. c. 40A, § 17. The parties have treated the claims of the Bignamis and the issues raised by the Serranos in their motion to dismiss as if the complaint were in two counts, one claiming that the Board's decision was legally untenable because the Serranos' lot is illegal, and the other claiming the Board's decision was arbitrary and capricious. The court adopts the parties' structure in addressing the issues raised.

22 App. Exh. 18.

23 App. Exh. 7.

24 St. 2016, c. 184, § 2 provides that the protections of the new third paragraph of G. L. c. 40A, § 7 "shall be applicable regardless of whether the structure was erected prior to or after the effective date of this act."

25 Although this is apparently a disputed fact.

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