LAND COURT REPORTER

PUBLISHED BY MASSACHUSETTS LANDLAW

VOLUME 32
2024

Land Court Justices

LAND COURT JUSTICE	YEAR APPOINTED
Gordon H. Piper, Chief Justice	2002
Robert B. Foster	2011
Howard P. Speicher	2015
Michael D. Vhay	2017
Diane R. Rubin	2019
Jennifer S. D. Roberts	2019
Kevin T. Smith	2021

COMMENTARY BY:

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CITE BY VOLUME AND PAGE OF THE
LAND COURT REPORTER THUS:
Dugas v. Costas, 32 LCR 25 (2024)

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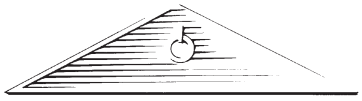

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Municipal discounts avaiilable.

MASSACHUSETTS LAND COURT REPORTER (ISSN-1522-6700)
675 VFW Parkway, #354, Chestnut Hill, MA 02467
(800) 637-6330 www.landlaw.com

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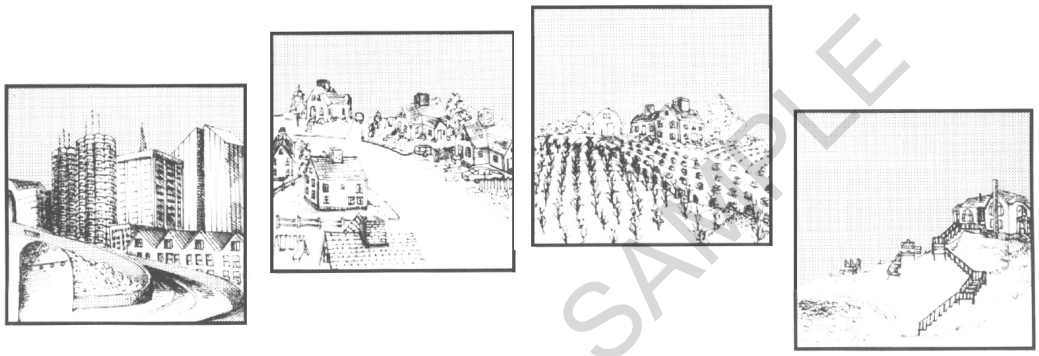

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Accessory Use (See also Use Categorization/Violation)

Garage

Where the Pembroke zoning bylaws proscribed any special permits for accessory garages showing spaces for more than four cars, the municipality was not prevented from denying a special permit for a garage that was twice as large as a typical four-car garage but which the homeowner claimed would be limited to four cars. *McMahon* v. *Cassavant (Decision on Cross-Motions for Summary Judgment), [Rubin]* 32 LCR 102 (2024).

Justice Diane R. Rubin found on summary judgment that the Pembroke Zoning Board of Appeals had not acted unreasonably in affirming the Building Commissioner's denial of a permit for a garage accessory to a single-family residence where the plans showed a structure almost twice as large as is normal for a four car garage. Justice Rubin also dismissed the homeowners' appeal on jurisdictional grounds as they had failed to file a timely appeal from an earlier denial of a very similar project. *McMahon* v. *Cassavant (Decision on Cross-Motions for Summary Judgment), [Rubin]* 32 LCR 102 (2024).

Short Term Rental

In a widely publicized decision, Justice Michael D. Vhay annulled a Nantucket ZBA decision affirming the Building Inspector's finding that short term residential rentals were permitted under the zoning bylaws and therefore not subject to the issuance of an enforcement order. Justice Vhay ruled that the Nantucket zoning bylaw did not allow short term residential rentals as principal uses but remanded the case to the ZBA for a determination as to whether the homeowner's rental program was sufficiently incidental so as to be permitted as an accessory residential use within the residential district in question. *Ward* v. *Town of Nantucket (Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 129 (2024).

Adverse Possession

Permissive Use

Hampered for accuracy in this boundary dispute between Oak Bluff's neighbors because of a small-scale 1871 plan showing hundreds of lots, Justice Michael D. Vhay adopted the boundary line articulated by the Plaintiff's surveyor as the "best fit" based on all the information he reviewed including certain monuments. Justice Vhay dismissed the Plaintiff's "back up" adverse possession claim as the use made of the disputed area had been largely permissive. *Held* v. *Van Allen (Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 89 (2024).

Appeals (See also Building Permit/Appeal)

Notice to Town Clerk

Justice Kevin T. Smith dismissed the *pro se* complaint of a neighbor challenging a special permit issued to demolish a two-unit dwelling and replace it with a four-unit dwelling where he failed to file a notice of the action and a copy of his Land Court complaint with the Melrose City Clerk within 20 days of the decision's filing. The Land Court complaint was also filed with the court two days late. *Griffin* v. *Planning Board of Melrose (Decision on Defendant's Motion to Dismiss), [Smith]* 32 LCR 29 (2024).

Remand

On remand from the Appeals Court, Justice Howard P. Speicher ruled on a case-stated basis that the common grantor of two adjoining Somerville properties intended to reserve an easement for access to the Plaintiffs' property and such an easement was reasonably necessary for use of the property because the alternatives were less than practical. *Lavoie* v. *McRae (Decision), [Speicher]* 32 LCR 138 (2024).

Timeliness

Justice Diane R. Rubin found on summary judgment that the Pembroke Zoning Board of Appeals had not acted unreasonably in affirming the Building Commissioner's denial of a permit for a garage accessory to a single-family residence where the plans showed a structure almost twice as large as is normal for a four-car garage. Justice Rubin also dismissed the homeowners' appeal on jurisdictional grounds as they had failed to file a timely appeal from an earlier denial of a very similar project and argued, without success, that this project was materially different. *McMahon* v. *Cassavant (Decision on Cross-Motions for Summary Judgment), [Rubin]* 32 LCR 102 (2024).

Justice Kevin T. Smith dismissed the *pro se* complaint of a neighbor challenging a special permit issued to demolish a two-unit dwelling and replace it with a four-unit dwelling where he failed to file a notice of the action and a copy of his Land Court complaint with the Melrose City Clerk within 20 days of the decision's filing. The Land Court complaint was also filed with the court two days late. *Griffin* v. *Planning Board of Melrose (Decision on Defendant's Motion to Dismiss), [Smith]* 32 LCR 29 (2024).

Attorney's Fees

Conservation Restriction

Justice Jennifer S. D. Roberts ordered the reimbursement of the attorney's fees incurred by the Sudbury Valley Trustees when enforcing a conservation restriction against the unlawful construction of an outdoor riding ring on land burdened by the restriction. *Sudbury Valley Trustees, Inc.* v. *Iron Horse Equestrian, LLC (Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 111 (2024).

Frivolous Litigation

Having ruled in December of 2023 that this Chatham landowner and attorney should remove various encroachments he had placed on a private way well beyond its centerline and which materially interfered with the very broad easement rights of neighboring landowners to pass over the way, Justice Howard P. Speicher granted the Defendants' motion for attorney's fees. The decision finds that the Plaintiff's easement claims were frivolous and lacking in good faith. Noteworthy in this case also were the Plaintiff's contradictory positions at different points in the litigation with respect to his adverse possession and easement claims and a completely unsupported contention that the Defendants had somehow abandoned their fee claim. *Kuzma* v. *Rollins (Memorandum and Order Allowing Defendant's Motion for Costs and Counsel Fees), [Speicher]* 32 LCR 164 (2024).

An attorney/Plaintiff's adverse possession and easement claims in a Chatham dispute were unsustainable from the start given that he was subject to a preliminary injunction in a Superior Court case during the 20-year possessory period pursuant to which he was enjoined from placing anything on the way in question or obstructing it. *Kuzma* v. *Rollins (Memorandum and Order Allowing Defendant's Motion for Costs and Counsel Fees), [Speicher]* 32 LCR 164 (2024).

Pro Se Litigant

For purposes of ruling on a motion for reimbursement of attorney's fees for frivolous litigation, Justice Howard P. Speicher ruled that the Plaintiff, an attorney representing himself, would be considered as being represented by counsel during most of the proceeding. *Kuzma* v. *Rollins (Memorandum and Order Allowing Defendant's Motion for Costs and Counsel Fees), [Speicher]* 32 LCR 164 (2024).

CUMULATIVE SUBJECT MATTER DIGEST–JANUARY-MARCH 2024

Condominiums

Phasing Rights

A 2017 amendment to the Master Deed of a Worcester Condominium was without effect where the Declarant failed to obtain the required assent of 75% of the unitholders because, contrary to his contention, he could not vote on behalf of the unbuilt and unsold units. Moreover, the amendment was not endorsed by the then serving trustees and was not properly acknowledged by a notary. *Country Club Acres Trust* v. *Worcester County Country Club Acres, LLC (Second Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 31 (2024).

Conservation Restriction (See also Deeds (Restriction), Restrictive Covenants)

Riding Ring

Ruling on cross-motions for summary judgment, Justice Jennifer S. D. Roberts held that an outdoor riding ring, and the activities attendant to its construction, clearly violated a 2007 conservation restriction accorded the Sudbury Valley Trustees for this property in Framingham. The conservation restriction only allowed the construction of certain structures within defined building envelopes. *Sudbury Valley Trustees, Inc.* v. *Iron Horse Equestrian, LLC (Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 111 (2024).

Declaratory Judgment (See also Land Court Jurisdiction)

Zoning Action

Justice Howard P. Speicher dismissed a declaratory judgment claim by the City of Waltham in the context of its attempt to challenge a site plan special permit issued by the Lexington Planning Board authorizing a solar generation facility along the border of the two municipalities, where the City's exclusive remedy was under its G.L. c. 40A, §17 claim and it could not escape its lack of standing by recourse to an advisory opinion. *City of Waltham* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 77 (2024).

Deeds

Boundary Line

Hampered for accuracy in this boundary dispute between Oak Bluff's neighbors because of a small-scale 1871 plan showing hundreds of lots, Justice Michael D. Vhay adopted the boundary line articulated by the Plaintiff's surveyor as the "best fit" based on all the information he reviewed including certain monuments. Justice Vhay dismissed the Plaintiff's "back up" adverse possession claim as the use made of the disputed area had been largely permissive. *Held* v. *Van Allen (Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 89 (2024).

Derelict Fee Statute

Private Way

A Concord Plaintiff was afforded the right under the Derelict Fee Statute and by an easement by estoppel to add a driveway to his private property with access over the way. *Lyczkowski* v. *Keuka Road, LLC (Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 58 (2024).

Developer Exactions (See also Mitigation Fees)

Inclusionary Housing

Justice Diane R. Rubin concluded that provisions of a Stoneham affordable housing bylaw requiring a mandatory set aside of affordable units in eight-lot or greater subdivisions conflicted with the Subdivision Control Law by giving the Planning Board authority to reject compliant plans and also because no just compensation would be provided the landowner as required by § 81Q of the Subdivision Control Law and relevant cases. *Estate of Virginia L. Isola* v. *Town of Stoneham (Decision on Cross Motions for Summary Judgment), [Rubin]* 32 LCR 8 (2024).

Easement by Estoppel

Street or Way

A Concord Plaintiff was afforded the right under the Derelict Fee Statute and by an easement by estoppel to add a driveway to his private property with access over the way. *Lyczkowski* v. *Keuka Road, LLC (Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 58 (2024).

Easement by Grant

Abandonment

Justice Robert B. Foster found that a Nantucket trust had not abandoned its easement rights in a roadway where no inconsistent use of the roadway was shown, the Town of Nantucket did not consider the easement abandoned, and absolutely no intention to abandon was shown on the part of the Defendant. *Three Harbor View Drive, LLC* v. *Reddy (Decision), [Foster]* 32 LCR 155 (2024).

Encroachment

Ruling on a Nantucket easement dispute, Justice Robert B. Foster ordered the Plaintiff to remove encroachments on the roadway that included a granite post, a driveway apron, and a retaining wall, but declined the Defendant's request that brush and trees be removed as these did not interfere with the Defendant's access. *Three Harbor View Drive, LLC* v. *Reddy (Decision), [Foster]* 32 LCR 155 (2024).

Registered Land

Barnstable Plaintiffs did have an express easement to use a bathing beach under a 1946 registration decree but did not have the right to use the access way to the beach because the lots bordering this way had been conveyed before the issuance of the registration decree. Justice Michael D. Vhay also rejected the Defendants' claim that the Plaintiffs' rights to use the beach had expired, pointing out that affirmative easements are not "restrictions" subject to expiration under c. 184,§ 28 after 50 years. *Dugas* v. *Costas (Case Stated Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 25 (2024).

Easement by Implication

Expense

On remand from the Appeals Court, Justice Howard P. Speicher ruled on a case-stated basis that providing a new curb cut for the Plaintiffs' property would have involved eliminating parking spaces and impractical tandem parking that would pose maneuvering problems. Justice Speicher did not find the new curb cut was financially impractical where it involved the relocation of a storm drain at a cost of $75,000-$100,000 since the combined value of the units at the Plaintiffs' property was approximately $1.2 million. *Lavoie* v. *McRae (Decision), [Speicher]* 32 LCR 138 (2024).

Intent of the Parties

On remand from the Appeals Court, Justice Howard P. Speicher ruled on a case-stated basis that the common grantor of two adjoining Somerville properties intended to reserve an easement for access to the Plaintiffs' property and such an easement was reasonably necessary for use of the property because the alternatives were less than practical. *Lavoie* v. *McRae (Decision), [Speicher]* 32 LCR 138 (2024).

Parking

On remand from the Appeals Court, Justice Howard P. Speicher ruled on a case-stated basis that the common grantor of two adjoining Somerville properties intended to reserve an easement for access to the Plaintiffs' property and such an easement was reasonably necessary for use of the property because the alternatives were less than practical. In this case, providing a new curb cut for the Plaintiffs' property would have involved eliminating parking spaces and impractical tandem parking that would pose maneuvering problems. Justice Speicher did not find the new curb cut was financially impractical where it involved the relocation of a storm drain at a cost of $75,000-$100,000, given that the combined value of the units at the Plaintiffs' property was approximately $1.2 million. *Lavoie* v. *McRae (Decision), [Speicher]* 32 LCR 138 (2024).

Estoppel

Equitable

A 2017 amendment to the Master Deed of a Worcester Condominium was without effect where the Declarant failed to obtain the required assent of 75% of the unitholders because, contrary to his contention, he could not vote on behalf of the unbuilt and unsold units. Moreover, the amendment was not endorsed by the then serving trustees and was not properly acknowledged by a notary. The Declarant was also not entitled to equitable remedies of laches or estoppel as it appeared that he orchestrated a fraud by backdating the amendment to make it appear that it was endorsed by the then serving trustees, *Country Club Acres Trust* v. *Worcester County Country Club Acres, LLC (Second Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 31 (2024).

Evidence (See also Hearsay)

Parol Evidence Rule

The parol evidence rule would be applied to bar a claim to the right to access a Concord way that was based on alleged representations made during the settlement of the appeal. *Lyczkowski* v. *Keuka Road, LLC (Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 58 (2024).

Expert Testimony

Quality of Testimony

The effective expert testimony of an architect armed with shadow studies and photographs showing the negligible impact of an addition to a nonconforming Marblehead residence on the Plaintiffs' views, light, and privacy, led Justice Kevin T. Smith to dismiss for lack of standing a challenge to a Planning Board special permit under Section 6. Going on to rule on the merits anyway, Justice Smith found that the Plaintiffs' objections unbacked by expert testimony and based solely on their own personal speculations were no match for the architect's thorough studies showing little or no impacts on the abutters. Justice Smith also rejected the Plaintiffs' claims that a variance was needed for a minor new sideyard setback nonconformity, finding that the Planning Board had applied the proper special permit provisions of the Marblehead bylaw and had the authority to authorize this new setback under Section 6. *Morton* v. *Lipkind (Decision), [Smith]* 32 LCR 51 (2024).

Flood Plain Regulation

Special Permit

Justice Robert B. Foster annulled a decision of the Walpole ZBA denying a flood plain overlay district special permit that would have allowed the construction of a single-family residence because the board erred in applying the standards for a general special permit rather than those for a floodplain special permit. *Walsh Brothers Building Company, Inc.* v. *Lee (Decision), [Foster]* 32 LCR 19 (2024).

Floor Area Ratio

General

Justice Kevin T. Smith affirmed the interpretation by the Natick Planning Board of the term "habitable floor area" that did not identify as controlling the current condition of the existing space before re-use and renovation, finding this interpretation to be too restrictive when considering to what extent it should permit expansion and reconstruction of an historic building. *McConville* v. *Planning Board of Natick (Decision), [Smith]* 32 LCR 116 (2024).

Foreclosure by Entry

General

Justice Kevin T. Smith dismissed various claims in a foreclosed homeowner's poorly drafted *pro se* complaint that attacked on procedural grounds the assignee lender's foreclosure sale, finding that the failure of the lender to include the license number of the auctioneer in the notice did not invalidate the sale. *Ameral* v. *Development Group, LLC (Decision), [Smith]* 32 LCR 1 (2024).

Incidental Uses

General

Justice Diane R. Rubin found on summary judgment that the Pembroke Zoning Board of Appeals had not acted unreasonably in affirming the Building Commissioner's denial of a permit for a garage accessory to a single-family residence where the plans showed a structure almost twice as large as is customary for a four-car garage and difficult to consider as "incidental" to the primary dwelling. *McMahon* v. *Cassavant (Decision on Cross-Motions for Summary Judgment), [Rubin]* 32 LCR 102 (2024).

Laches

General

A 2017 amendment to the Master Deed of a Worcester Condominium was without effect where the Declarant failed to obtain the required assent of 75% of the unitholders because, contrary to his contention, he could not vote on behalf of the unbuilt and unsold units. Moreover, the amendment was not endorsed by the then serving trustees and was not properly acknowledged by a notary. The Declarant was also not entitled to equitable remedies of laches or estoppel as it appeared that he orchestrated a fraud by backdating the amendment to make it appear that it was endorsed by the then serving trustees, *Country Club Acres Trust* v. *Worcester County Country Club Acres, LLC (Second Memorandum of Decision on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 31 (2024).

Land Court Jurisdiction

Declaratory Judgment

A lawsuit by Winthrop property owners against the Town arising from their short term rental of a residence was dismissed by Justice Robert B. Foster for lack of Land Court jurisdiction with the exception of their claim

seeking a declaratory judgment on the applicability of the municipality's Bed and Breakfast Special Permit bylaw. *Lambert* v. *Legee (Memorandum and Order on Motions to Dismiss and to Amend Complaint), [Foster]* 32 LCR 14 (2024).

Exhaustion of Administrative Remedies

A lawsuit by Winthrop property owners against the Town arising from their short term rental of a residence was dismissed by Justice Robert B. Foster for lack of Land Court jurisdiction with regard to their claims over violation notices and tickets where they had failed to follow or exhaust the proper municipal administrative remedies before resorting to the courts. *Lambert* v. *Legee (Memorandum and Order on Motions to Dismiss and to Amend Complaint), [Foster]* 32 LCR 14 (2024).

Lodging House Act

A lawsuit by Winthrop property owners against the Town arising from their short term rental of a residence was dismissed by Justice Robert B. Foster for lack of Land Court jurisdiction under the Lodging House Act where this is not one of the statutes over which the court has jurisdiction. *Lambert* v. *Legee (Memorandum and Order on Motions to Dismiss and to Amend Complaint), [Foster]* 32 LCR 14 (2024).

Tort Action

A lawsuit by Winthrop property owners against the Town arising from their short term rental of a residence was dismissed by Justice Robert B. Foster for lack of Land Court jurisdiction with respect to the Plaintiffs' claims of municipal harassment because these sounded in tort. *Lambert* v. *Legee (Memorandum and Order on Motions to Dismiss and to Amend Complaint), [Foster]* 32 LCR 14 (2024).

Mortgages (See also Foreclosure Sale, Servicemembers Civil Relief Act, Tax Title and Liens)

Discharge

Unopposed by the junior lender, Bank of America won a summary judgment motion for the reinstatement of a 2004 mortgage in first position that it held by assignment and for which it had mistakenly recorded a discharge despite the fact that the underlying debt remained unpaid. *Bank of America, N.A.* v. *Kozak (Decision on Plaintiff's Motion for Summary Judgment), [Speicher]* 32 LCR 87 (2024).

Motion Practice (See also Summary Judgment, Reconsideration)

Failure to State a Claim

Justice Kevin T. Smith dismissed various claims in a foreclosed homeowner's poorly drafted *pro se* complaint for failure to state a justiciable claim. These included an effort to affirm her title under c. 185, §26A, discharge the mortgage under c. 240, §15, and purported procedural flaws in the foreclosure sale. *Ameral* v. *Development Group, LLC (Decision), [Smith]* 32 LCR 1 (2024).

Motion to Amend Pleadings

Justice Diane R. Rubin denied a motion to amend pleadings from a Chelsea property owner contesting a tax title foreclosure where these counterclaims were based on the same facts at issue in previous Superior Court litigation and represented nothing more than an attempt to circumvent the valid statutory framework governing municipal demolition of dangerous buildings and the availability of remedial procedures. *City of Chelsea* v. *Vigorito (Decisions on Cross-Motions to Dismiss and Motion to Amend Counterclaim), [Rubin]* 32 LCR 63 (2024).

Motion to Compel Bond

Ruling in a permit session case, Justice Kevin T. Smith granted a developer's motion to compel the Plaintiff abutters to post a bond where he found their complaints about traffic, environmental impacts, and neighborhood incompatibility with regard to a permitted 124-unit multifamily to be based on speculation unbacked by expert opinion. In contrast, the developer presented expert testimony relative to these matters and Justice Smith found the project's negative impacts alleged by the neighbors to be insufficiently particularized and reflecting generalized neighborhood concerns. He therefore required a bond of $200,000. *Fabiano* v. *Collins (Decision on Motion to Compel Bond), [Smith]* 32 LCR 97 (2024).

In determining the amount of the bond that neighborhood abutters opposing a 124-unit Boston residential project would have to post, Justice Kevin T. Smith found the developer's estimate of $200,000 in legal fees and $450,000 in additional ground lease expenses to be reasonable, but rejected estimates for increased construction costs, loss of net income, and borrowing costs as too speculative to form a basis for setting the bond amount. The bond was finally set for $200,000. *Fabiano* v. *Collins (Decision on Motion to Compel Bond), [Smith]* 32 LCR 97 (2024).

Nonconformity (See also Infectious Invalidity, Vested Rights)

Section 6 Finding

Justice Smith rejected Marblehead Plaintiffs' claims that a variance was needed for a minor new sideyard setback encroachment necessary for an addition to a nonconforming residence, finding that the Planning Board had applied the proper special permit provisions of the Marblehead bylaw and had the authority to authorize this new setback under Section 6. *Morton* v. *Lipkind (Decision), [Smith]* 32 LCR 51 (2024).

Nuisance

General

Private abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington saw their nuisance claims dismissed as they failed to allege any present or actionable nuisance from stormwater runoff or EMF radiation, and therefore these claims were not ripe. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Partition Proceedings (See also Joint Tenancy and Co-Tenancy, Tenancy in Common)

Joint Tenancy

Justice Robert B. Foster declined to order specific performance of any "agreement" between brothers whereby one sibling would buy the interest of the other in an inherited property in Wayland because the parties had yet to establish a meeting of the minds with regard to essential terms such as the identity of parties on the deed. *Boulay* v. *Boulay (Memorandum and Order on Cross-Motions for Summary Judgment), [Foster]* 32 LCR 125 (2024).

Pendency of Prior Action

General

Justice Kevin T. Smith dismissed a foreclosed homeowner's poorly drafted *pro se* complaint challenging her foreclosure where a prior pending action in the Housing Court was ongoing as to whether the current occupant's title to the property was valid and the Housing Court clearly had subject matter jurisdiction over such claims. *Ameral* v. *Development Group, LLC (Decision), [Smith]* 32 LCR 1 (2024).

Regulatory Taking

Development Conditions

The regulatory takings claim of the developer of a 30-acre Lexington solar generation facility, unhappy with setback conditions in the site plan permit that would reduce the number of solar panels by 40%, survived a motion to dismiss where Justice Howard P. Speicher found that the claim was sufficiently ripened and the pleadings were adequate to allege interference with the developer's investment backed expectations and deprivation of all economic use. *Tracer Lane II Realty, LLC* v. *Leon (Memorandum and Order on Defendants' Motion to Dismiss), [Speicher]* 32 LCR 85 (2024).

Remedies (See also Contempt Proceedings, Damages)

Certiorari

Abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington under G.L. c. 40A, §17 could not also append a *certiorari* claim in light of the exclusive remedy under §17 that does not allow an alternative remedy. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Specific Performance

Justice Robert B. Foster declined to order specific performance of any "agreement" between brothers whereby one sibling would buy the interest of the other in an inherited property in Wayland because the parties had yet to establish a meeting of the minds with regard to essential contractual terms. These terms included matters such as the identity of the parties on the deed and the mechanics of the transaction. *Boulay* v. *Boulay (Memorandum and Order on Cross-Motions for Summary Judgment), [Foster]* 32 LCR 125 (2024).

Res Judicata (See also Collateral Estoppel)

Identity of Subject Matter

Justice Diane R. Rubin dismissed the counterclaims of a property owner contesting the City of Chelsea's tax title foreclosure of his right of redemption and the municipality's recoupment of its demolition expenses where the issues had been previously litigated in a Superior Court action that was affirmed by the Appeals Court. *City of Chelsea* v. *Vigorito (Decisions on Cross-Motions to Dismiss and Motion to Amend Counterclaim), [Rubin]* 32 LCR 63 (2024).

Justice Kevin T. Smith dismissed a foreclosed homeowner's poorly drafted *pro se* complaint challenging her home's foreclosure on the grounds of *res judicata* where she had brought three previous actions in various courts since 2015 challenging the assignee lender's right to foreclose. *Ameral* v. *Development Group, LLC (Decision), [Smith]* 32 LCR 1 (2024).

Previous Dismissal

Res judicata was invoked by Justice Diane R. Rubin to dismiss counterclaims of a property owner contesting the City of Chelsea's tax title foreclosure of his right of redemption and the municipality's recoupment of its demolition expenses where the Superior Court had previously dismissed these claims and both claim preclusion and issue preclusion were applicable. *City of Chelsea* v. *Vigorito (Decisions on Cross-Motions to Dismiss and Motion to Amend Counterclaim), [Rubin]* 32 LCR 63 (2024).

Restrictive Covenants (See also Agricultural Preservation Restriction, Conservation Restriction, and Deeds (Restrictions)

Duration

Barnstable Plaintiffs did have an express easement to use a bathing beach under a 1946 registration decree but did not have the right to use the access way to the beach because the lots bordering this way had been conveyed before the issuance of the registration decree. Justice Michael D. Vhay also rejected the Defendants' claim that the Plaintiffs' rights to use the beach had expired, pointing out that affirmative easements are not "restrictions" subject to expiration under c. 184,§ 28 after 50 years. *Dugas* v. *Costas (Case Stated Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 25 (2024).

Special Permit

Grounds for Denial or Approval – Floodplain Regulation

Justice Robert B. Foster annulled a decision of the Walpole ZBA denying a flood plain overlay district special permit that would have allowed the construction of a single-family residence because the board erred in applying the standards for a general special permit rather than those for a floodplain special permit. *Walsh Brothers Building Company, Inc.* v. *Lee (Decision), [Foster]* 32 LCR 19 (2024).

Split Lot

Passive Use

Justice Jennifer S.D. Roberts rejected the interpretation of the Cambridge Building Department that a developer of a split lot project was not entitled to use the gross floor area from a residential district to support nonresidential development in the adjoining district since the express language of the relevant ordinance provisions did not limit transfers to the construction of dwelling units and the City's invocation of the doctrine of *ejusdem generis* was not appropriate. *Bolton Street Partners, LLC* v. *City of Cambridge (Memorandum of Decision and Order on Cross-Motions for Summary Judgment), [Roberts]* 32 LCR 143 (2024).

Standing to Sue

Damage to the Environment

Private abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington had independent standing to do so under G.L. c. 214, §7A, which provides for declaratory relief for destruction to any natural resources of the Commonwealth. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Fire

Waltham abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington lacked standing to do so based on their concerns with a potential electrical fire at the site as they offered no evidence for this hazard and their claims to injury were purely speculative. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Landowner in a Different Municipality

Justice Howard P. Speicher dismissed a motion from the proponent of a solar generation facility issued a site plan permit by the Lexington Planning Board that attempted to challenge the City of Cambridge for lack of standing. Cambridge owned a reservoir abutting the project that would be impacted and was in opposition. Justice Speicher also took note of the fact that the City of Cambridge could not be denied standing merely be-

cause it was not an inhabitant of Lexington. *City of Cambridge* v. *Tracer Lane II Realty, LLC (Memorandum and Order on Motion to Dismiss), [Speicher]* 32 LCR 82 (2024).

Waltham abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington could not be denied standing based on the mere fact that they lived in a different municipality as they were direct abutters and needed merely to show aggrievement. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Light and Shadow

In a widely publicized decision, Justice Michael D. Vhay found that an abutter had standing to challenge the Nantucket Building Inspector's refusal to issue an enforcement order barring her neighbors' short term rentals based on her concerns with noisy renters and outdoor lighting being left on all night. *Ward* v. *Town of Nantucket (Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 129 (2024).

The effective expert testimony of an architect armed with shadow studies and photographs showing the negligible impact of an addition to a nonconforming Marblehead residence on the Plaintiffs' views, light, and privacy, led Justice Kevin T. Smith to dismiss for lack of standing a challenge to a Planning Board special permit under Section 6. *Morton* v. *Lipkind (Decision), [Smith]* 32 LCR 51 (2024).

Municipal Boards/Public Entities

Justice Howard P. Speicher dismissed a motion from the proponent of a solar generation facility issued a site plan permit by the Lexington Planning Board that attempted to challenge the City of Cambridge for lack of standing. Cambridge owned a reservoir abutting the project that would be impacted and was in opposition. Justice Speicher also took note of the fact that the City of Cambridge could not be denied standing merely because it was not an inhabitant of Lexington. *City of Cambridge* v. *Tracer Lane II Realty, LLC (Memorandum and Order on Motion to Dismiss), [Speicher]* 32 LCR 82 (2024).

The City of Waltham's attempt to challenge a site plan special permit issued by the Lexington Planning Board authorizing a solar generation facility along the border of the two municipalities failed as Waltham's claim of aggrievement was based on its status as the owner of a parcel of land abutting the project, but its stated concerns were with regard to the project's general impact on Waltham municipal services and not to any specific injury to its parcel of land. Justice Speicher noted, once again, that Waltham could not be deprived of standing merely because it was not an inhabitant of Lexington, as the Defendant had argued. *City of Waltham* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 77 (2024).

Noise

In a widely publicized decision, Justice Michael D. Vhay found that an abutter had standing to challenge the Nantucket Building Inspector's refusal to issue an enforcement order barring her neighbors' short term rentals based on her concerns with noisy renters and outdoor lighting being left on all night. *Ward* v. *Town of Nantucket (Findings of Fact and Conclusions of Law), [Vhay]* 32 LCR 129 (2024).

Privacy

The effective expert testimony of an architect showing that she had designed an addition with no fenestration on the side facing the Plaintiffs' homes defeated their claims that the project would impact their privacy. *Morton* v. *Lipkind (Decision), [Smith]* 32 LCR 51 (2024).

Radiation

Abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington had standing to do so based on their concerns with unsafe levels of EMF radiation from the project where this was an interest specifically protected under the Lexington bylaws and they alleged exposure to unsafe levels. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Ripeness

Private abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington saw their nuisance claims dismissed as they failed to allege any present or actionable nuisance from stormwater runoff or EMF radiation, and therefore these claims were not ripe. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Speculation, Irrelevance, and Generalization

Justice Kevin T. Smith granted Natick property owners summary judgment dismissing the claims of their neighbors challenging a Planning Board special permit allowing the conversion of the Defendant couple's antique single-family residence and carriage house into five residential units. The neighbors presented nothing but speculation and their own fears to back up their concerns with the project's impacts on stormwater management, lighting, shadows, and noise from HVAC units, in contrast to the expert engineering testimony offered by the project proponents. *McConville* v. *Planning Board of Natick (Decision), [Smith]* 32 LCR 116 (2024).

Waltham abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington lacked standing to do so based on their concerns with a potential electrical fire at the site as they offered no evidence for this hazard and their claims to injury were purely speculative. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Private abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington raised generalized concerns about neighborhood stormwater runoff, excessive tree cutting, and damage to the watershed protecting the Cambridge water supply; however, these were not matters affecting their properties in particular but commonly held civic concerns. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

Views

Where the Planning Board regulations explicitly required solar energy systems to mitigate visual impacts, Waltham abutters seeking to challenge a major site plan approval for a solar energy generation project in Lexington showed standing based on their concerns with the visual impacts of the solar panels, above ground utility connections, and clearing of trees. *Learned* v. *Peters (Memorandum and Order on Defendant's Motion to Dismiss), [Speicher]* 32 LCR 70 (2024).

The effective expert testimony of an architect armed with shadow studies and photographs showing the negligible impact of an addition to a nonconforming Marblehead residence on the Plaintiffs' views, light, and privacy, led Justice Kevin T. Smith to dismiss for lack of standing a challenge to a Planning Board special permit under Section 6. *Morton* v. *Lipkind (Decision), [Smith]* 32 LCR 51 (2024).

Statute of Frauds

Email/Text Communications

Justice Robert B. Foster concluded that the Statute of Frauds barred the enforcement of any purported contract between brothers inheriting a Wayland lakefront property as any "agreement" was based on a series of emails that were merely proof of negotiations and not proof of any binding agreement. *Boulay* v. *Boulay (Memorandum and Order on Cross-Motions for Summary Judgment), [Foster]* 32 LCR 125 (2024).

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CHAD JAY BOULAY and MARK BOULAY

v.

TODD SCOTT BOULAY

and

BAMK OF AMERICA, N.A as Servicer for Guaranty Residential Lending, Inc.,
Party-In-Interest

23 MISC 000028

March 4, 2024
Robert B. Foster, Justice

Partition Proceedings-Enforceable Agreement to Convey Share of Property-Statute of Frauds-Email Exchanges-Specific Performance—Justice Robert B. Foster declined to order specific performance of any "agreement" between brothers whereby one sibling would buy the interest of the other in an inherited property in Wayland because the parties had yet to establish a meeting of the minds with regard to essential terms such as the identity of parties on the deed. Moreover, the Statute of Frauds barred the enforcement of any contract between the brothers as the purported "agreement" was based on a series of emails that were merely proof of negotiations and not of any binding agreement.

MEMORANDUM AND ORDER ALLOWING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

This partition action was brought after the petitioner Chad Jay Boulay (Chad) conveyed the subject property from a family trust to Chad and his brothers Mark Boulay (Mark) and Todd Scott Boulay (Todd).[1] Todd then filed a counterclaim alleging that, before the transfer, he and Chad had reached an enforceable agreement by which Chad would sell his share in the property in the form of his beneficial interest to Todd, and sought both specific performance of the alleged agreement and a judgment for unjust enrichment. While admitting that he and Todd did have discussions to that effect, Chad denied that they had ever reached an enforceable agreement. The brothers have filed cross-motions for summary judgment. After hearing and as set forth below, the court finds that the email exchanges between the parties were imperfect negotiations that did not rise to an intention to be bound and an enforceable contract under the Statute of Frauds. The claim for specific performance will be dismissed. Because the claim of unjust enrichment can be addressed as part of the partition proceedings, that claim will go forward.

PROCEDURAL HISTORY

Petitioners Chad and Mark filed their Petition for Partition against respondent Todd on January 20, 2023. Party-in-Interest Bank of America, N.A. filed its Answer on February 28, 2023. An Interim Order appointing Frances X. Hogan as partition commissioner was entered on May 18, 2023, and the signed order appointing Attorney Hogan as commissioner was entered on May 19, 2023. The First Interim Report of Partition Commissioner was filed on June 8, 2023. Respondent's Response to the Commissioner's First Interim Report was filed on June 20, 2023. The Second Interim Report of Partition Commissioner was filed on July 5, 2023. Respondent Todd Scott Boulay's Complaint against Chad Boulay was filed on August 7, 2023, and is treated as a counterclaim (Counterclaim). The Third Interim Report of Partition Commissioner was filed on August 14, 2023. Petitioners' Motion for Summary Judgment (Motion for Summary Judgment) and Memorandum in Support of the Motion for Summary Judgment were filed on September 15, 2023. Respondent's Opposition to Petitioners' Motion for Summary Judgment and Cross Motion for Summary Judgment (Cross-Motion for Summary Judgment) was filed on October 18, 2023. The Affidavit of Todd Winner was filed on October 23, 2023. Petitioners' Reply Memorandum in Support of the Motion for Summary Judgment was filed on October 27, 2023. A hearing on the Motion for Summary Judgment and Cross-Motion for Summary Judgment was held on November 8, 2023, and were taken under advisement. This Memorandum and Order follows.

SUMMARY JUDGMENT STANDARD

Generally, summary judgment may be entered if the "pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c). In viewing the factual record presented as part of the motion, the "court makes 'all logically permissible inferences' in favor of a nonmoving party." *Carroll* v. *Select Bd. of Norwell*, 493 Mass. 178, 192 (2024), quoting *Willitts* v. *Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991). "Summary judgment is appropriate when, '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 a judgment as a matter of law.'" *Regis College* v. *Town of Weston*, 462 Mass. 280, 284 (2012), quoting *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). Where the non-moving party bears the burden of proof, the "burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 711 (1991), citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); see *Carroll*, 493 Mass. at 187-188; *Regis College*, 462 Mass. at 291-292.

1. Because the Petitioners, one respondent, and several interested parties share the last name Boulay, the court refers to the Boulays by first name to avoid confusion.

"Rule 56 (e) provides that once a motion is made and supported by affidavits and other supplementary material, the opposing party may not simply rest on his pleadings or general denials; he must 'set forth *specific facts*' (emphasis added) showing that there is a genuine, triable issue." *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 554 (1976). "A fact is not disputed merely because it has been denied by a nonmoving party." *Carroll*, 493 Mass. at 191. Thus, "mere assertions of disputed facts" are insufficient to defeat a motion for summary judgment. *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989). A response supported by specific facts is necessary to create a genuine issue of material fact. *Carroll*, 493 Mass. at 191.

FACTS

The following material facts appear undisputed from the record presented by the parties.

1. On December 9, 2011, Margaret Boulay (Margaret) created the Boulay Realty Trust (Trust), naming herself as trustee and Chad as successor trustee. Resp. Opp. Exh. B.; Pet. Rep. Exh. 1.

2. The Schedule of Beneficiaries of the Trust listed Margaret as having a life estate in the property known as 65 Edgewood Road, Wayland, Massachusetts, and Mark, Todd, and Chad as each having a beneficial interest in the entire trust estate as joint tenants with right of survivorship. Resp. Opp. Exh. B.

3. By quitclaim deed dated December 9, 2011, and recorded January 13, 2017, in Book 68760, Page 322 with the Middlesex South Registry of Deeds (registry), Margaret conveyed her interest in the property to herself as trustee of the Boulay Realty Trust. Pet. Rep. Exh. A.

4. In an Assignment of Beneficial Interest, dated June 15, 2022, Mark assigned his one-third interest to Chad and Mark as joint tenants with rights of survivorship. Resp. Opp. Exh. B

5. On June 29, 2022, Chad assigned his one-third beneficial interest to Samantha Burke Boulay and Chad Boulay as tenants by the entirety. Resp. Opp. Exh. B.

6. A Restated Schedule of Beneficial Interest dated June 29, 2022, lists the beneficiaries of the Trust and their percentage beneficial interests: Mark and Chad as joint tenants with rights of survivorship have a one-third beneficial interest as tenants in common; Todd has a one-third interest as a tenant in common; and Samantha and Chad as tenants by the entirety have a one-third interest as tenants in common. Resp. Opp. Exh. B.

7. In March of 2022, Chad and Respondent Todd began discussing via email the terms of an agreement by which Todd would purchase Chad's interest in the property. Countercl. ¶ 3; Pet. Mem. p. 1.

8. On March 8, 2022, Todd offered to purchase Chad's interest for $75,000. Todd asserts that the $75,000 offer was based on the amount he had paid toward the mortgages, taxes, and escrow after their mother's passing; deferred maintenance and repairs to the property; their mother's premortem wishes; a non-compliant septic system; resolving a property line issue; improvements made to the property; and in consideration of a cash payment. Countercl. ¶ 6.

9. On March 9, 2022, Todd stated that before payment could be made, an attorney would need to draft a formal agreement, Chad's name would be removed from the deed, and Todd's name would be added to the deed. Pet. Memo. p. 2.

10. On March 10, 2022, Chad replied to Todd to state that both Todd and Mark would need to be named on the deed, and Mark could be removed once Todd and Mark settled a transaction that they had between them. Pet. Mem. p. 2.

11. On March 11, 2022, Todd refused to add Mark, citing Mark's tax debt and a fear of a lien being placed on the property if he were added to the deed. Pet. Mem. p. 2.

12. On March 15, 2022, Chad emailed Todd to ask "when can I expect your answer? We need to keep moving forward." Pet. Mem. p. 2. Todd replied to the email, stating he was "ok with the terms in general" but would have his lawyer write up the agreement and terms and would send Chad a copy to look over once his attorney had done so. Countercl. Exh. A.

13. On March 21, 2022, Todd told Chad that before he could "sign off" on the agreement, there needed to be a formal agreement with terms to be signed, and Chad needed to remove his name from the deed and replace it with Todd's. Todd stated he was willing to have his name added before or simultaneously with signing but would not sign an agreement until he was named on the deed. Todd proposed terms of $50,000 in cash upon signing with an additional $25,000 due by April 15, 2022, and a recognition in the agreement of Mark's interest in one-third of the net profit or a lesser agreed upon amount to protect his interest. Todd again reiterated that Mark could not be added to the deed. Todd requested information as to whether Chad's lawyer could draft the deed and agreement and stated that he didn't know what would be necessary to dissolve the original trust but acknowledged that it would likely need to happen along with the agreement. Countercl. Exh. A.

14. On March 25, 2022, Chad texted Todd to state that his attorney was working on the agreement and the language to "ensure everyone is protected through the transaction." Countercl. Exh. B.

15. On March 29, 2022. Chad texted Todd to tell him that the agreement would likely be in the form of two instruments and a draft agreement would be shared "in the next day or so." Countercl. Exh. B.

16. On April 6, 2022, Chad stated that he believed he would have a draft agreement available that day. Countercl. Exh. B.

17. On April 21, 2022, Chad stated that the agreement had been drafted and once "errors and updates" were addressed, a copy would be sent to Todd. Countercl. Exh. B.

18. On April 29, 2022, after Todd had made several attempts to receive an update on the agreement, Chad texted him to say, "I'm not sending you any agreement nor am I signing any agreement with you," as he had received an offer from an investor to purchase the property. Countercl. Exh. B.

19. By quitclaim deed dated January 17, 2023, and recorded with the registry on January 18, 2023, in Book 81169, Page 497, Chad, as trustee of the Boulay Realty Trust, conveyed the property to Chad, Todd, and Mark as tenants in common. Pet. p. 2.

DISCUSSION

Where a seller has repudiated a contractual obligation, and "where it is established that the buyer was ready, willing, and able to perform, specific performance is the appropriate remedy." *Coviello* v. *Richardson*, 76 Mass. App. Ct. 603, 612 (2010). But where there exists a dispute as to whether a contract was created, "the burden is on the [party seeking performance]" to establish the existence of an enforceable contract. *Canney* v. *New England Tel. & Tel. Co.*, 353 Mass. 158, 164 (1967). Todd, the respondent, alleges in the Counterclaim that he entered into a contract with the petitioner Chad on March 15, 2022, to buy Chad's interest in the property for $75,000. Todd seeks specific performance of the sale of Chad's interest pursuant to the terms of the alleged agreement and actual damages stemming from the breach. Chad denies that an enforceable contract was reached. Todd therefore bears the burden of proving the existence of a valid, enforceable contract between the parties.

For a contract to be enforceable, the parties must agree on the material terms and must have a present intent to be bound. *McCarthy* v. *Tobin,* 429 Mass. 84, 87 (1999). In determining the intention of the parties, the court looks to "the words used by the parties, the agreement taken as a whole, and surrounding facts and circumstances." *Massachusetts Mun. Wholesale Elec. Co.* v. *Danvers*, 411 Mass. 39, 46 (1991). Where parties fail to reach agreement as to the material terms of the proposed agreement, this failure to agree "may prevent any rights or obligations from arising on either side for lack of a completed contract." *Rosenfield* v. *U.S. Trust Co.*, 290 Mass. 210, 216 (1935). Without a "meeting of the minds" as to material terms, there is no contract. *Situation Mgmt. Sys., Inc.* v. *Malouf Inc.*, 430 Mass. 875, 878 (2000). While every term of the agreement does not need to be specified with precision and undefined or unspecified terms do not always preclude contract formation, parties must have progressed beyond "imperfect negotiation." *Id.*; *Rosenfeld*, 290 Mass. at 217.

Promises for the sale of real property are enforceable only to the extent that the promise comports with the Statute of Frauds. G.L. c. 259, § 1. "Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized," a contract for the sale of land is not enforceable. *Id*. Massachusetts recognizes that email exchanges between parties can form clear, complete, and binding agreements where those emails serve to memorialize and record the terms of an agreement rather than serve as agreement negotiations. See *Fecteau Benefits Group, Inc.* v. *Knox,* 72 Mass. App. Ct. 204, 211 (2008); *Duff* v. *McKay*, 89 Mass. App. Ct. 538, 544 (2016).

Meeting of the Minds

Todd asserts that the parties had reached a meeting of the minds sufficient to create an enforceable contract. He argues that the record shows that Chad and Todd agreed to bifurcate the agreement between Chad and him and the agreement between Mark and him into two separate transactions and that the agreement with Mark could be addressed after finalizing the agreement between Chad and him. Further, Todd asserts that the condition precedent of Mark's name being added to the deed could be settled as a matter of law and was not an essential term of the agreement. Todd argues that the material terms of the contract were agreed to after these conditions were addressed and thus the parties' email negotiations "settling" these issues created a contract.

Todd's initial offer proposed having an attorney draft the terms, removing Chad's name from the deed, and adding Todd's name in his stead. Chad agreed to have an attorney draft a document to "detail the specifics" of their agreement but consistently stated that both Todd and Mark would need to be named on the deed until after the transactions settled. Todd immediately disagreed about adding Mark, and cited Mark's financial instability as a reason that he could not be added. On March 21, Todd later stated that before he could sign off on an agreement, there needed to be a formal agreement proposed by an attorney with terms to sign, and Chad's name needed to be replaced with Todd's.

The brothers clearly did not agree as to how to address the issue of Mark's name on the deed, nor did they agree about the proper way to handle the transition from Chad being named on the deed to replacing his name with Todd's. The identities of the individual or individuals who are taking possession of the property is a material term, and without a meeting of the minds as to which brother or brothers would be named, they could not form an enforceable contract between them.

Todd's statements that he could not sign off on an agreement without seeing the proposed terms by the attorney is further proof that he himself did not consider them to have a binding agreement as of March 21, 2022. Their discussions had not reached a point where the terms were considered concrete enough to agree to, and Todd's unwillingness to fully agree demonstrates that he did not fully know what would be included in the terms offered in the agreement drafted by the attorney. Todd's repeated statements that he would not be bound by the agreement until a formal draft was prepared by an attorney is indicative of a lack of a present intention to be bound.

For the reasons above, the count finds that the parties did not reach a meeting of the minds that was sufficient to create a binding and enforceable contract between them, as there was no unanimous agreement on the material terms of the contract and the parties lacked a present intention to be bound by contract during that stage of their negotiations.

Statute of Frauds

The Statute of Frauds requires that contracts for the sale of property are enforceable only if there is an agreement or a memorandum of the agreement in writing and signed by the party against whom enforcement is sought. G.L. c. 259, § 1. Here, the writings on which Todd relies are the series of emails between Chad and him. While emails can serve to memorialize the proposed terms of the agreement, the emails here do not serve to put into writing any concrete agreement. The emails are proof of negotiations, not proof of a binding agreement. The parties both stated their desire to have a formal contract drafted by an attorney and agreed that their email negotiations were not to be the final form of their contract.

In other words, the emails show that Todd and Chad were in the stage of "imperfect negotiation," and imperfect negotiations are insufficient to form a binding contractual obligation. *Situation Mgmt. Sys., Inc.*, 430 Mass. at 878. The text and email communications demonstrate that no formal agreement was ever exchanged between the parties. With both parties having made it clear that they wanted a signed agreement prepared by an attorney rather than to rely on the emails before being bound, the emails cannot serve to be a memorandum of an agreement sufficient to comport with the Statute of Frauds.

As there was no agreement on material terms between the parties or a present intention to be bound by their email discussions and the alleged agreement is not enforceable under the Statute of Frauds, summary judgment shall enter in favor of Chad and Mark dismissing Count I of the Counterclaim for breach of contract, and the Cross-Motion for Summary Judgment with respect to Count I will be denied.

Unjust Enrichment

In Count II of the Counterclaim, Todd seeks damages for unjust enrichment, alleging that Chad has received the benefit of Todd's maintenance of the property and the increased property value due to the delay of the sale of the property. Chad received an offer of $675,000 for the property and would only receive one-third of the proceeds after they were allocated between the brothers per the terms of the Boulay Realty Trust.

Unjust enrichment requires that a benefit be conferred by the charging party onto the recipient. As of this date, Chad has not received any benefit that he could not retain in equity and good conscience. The property has not yet sold, and any person owning an interest in the property has a right to partition. G.L. c. 241, § 1. That Todd has needed to incur costs of litigation is insufficient to establish unjust enrichment. The commissioner has suggested multiple means by which the issue of Todd's monetary and labor contributions to the property can be addressed and remedied from the proceeds of the partition sale.

The issue and allegations of whether Chad has breached his fiduciary duty in order to unjustly enrich himself and Mark at the cost of Todd's beneficial interest is not one which is appropriately dismissed on summary judgment. Todd has made allegations of Chad and Mark's enrichment and Chad's breach of fiduciary duty, but the undisputed facts offered by the parties are insufficient to make adjudication of Count II of the Counterclaim appropriate for summary judgment. Such allegations, and the extent of costs associated with the delay or sale, are to be adjudicated as part of the petition for partition. Petitioners' Motion for Summary Judgment as to Count II and Respondent's Motion for Summary Judgment as to Count II for unjust enrichment will both be denied.

CONCLUSION

For the reasons stated above, the Motion for Summary Judgment is **ALLOWED IN PART and DENIED IN PART**. Count I of the Counterclaim is **DISMISSED** with prejudice. The Cross-Motion for Summary Judgment is **DENIED**.

SO ORDERED.

By the Court.

Attest: Deborah J. Patterson, Recorder

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Appears for Chad Jay Boulay and Mark Boulay

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Appears for Guaranty Residential Lending, Inc. and Bank of America, N.A.

Frances X. Hogan, Esq.
Lyne, Woodworth, and Evarts LLP
12 Post Off Square
Boston, MA 02109
Partition Commissioner

* * * * * *

CATHERINE S. WARD

v.

THE TOWN OF NANTUCKET; NANTUCKET ZONING BOARD OF APPEALS; SUSAN MCCARTHY, et al., as they are members of the Nantucket Zoning Board of Appeals; PETER A. GRAPE; and LINDA OLIVER GRAPE

and

RALPH KEITH and BONNIE KEITH, as Trustees of the Delaney Keith Trust,
Intervenors/Defendants

22 MISC 000064

March 14, 2024
Michael D. Vhay, Justice

Accessory Use-Principal Use-Short Term Residential Rentals-Standing-Noise and Light-Regulation by General Bylaw— In a widely publicized decision, Justice Michael D. Vhay annulled a Nantucket ZBA decision affirming the Building Inspector's finding that short term residential rentals were permitted under the zoning bylaws and therefore not subject to the issuance of an enforcement order. Justice Vhay ruled that the Nantucket zoning bylaw did not allow short term residential rentals as principal uses but remanded the case to the ZBA for a determination as to whether the homeowner's rental program was sufficiently incidental so as to be permitted as an accessory residential use within the residential district in question.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Rule 52, Mass. R. Civ. P.)

In 1991, Nantucket's town meeting adopted a comprehensive zoning bylaw[1] that replaced the island's prior zoning bylaw. Section 139-6.A of the 1991 Bylaw states: "[N]o building, structure or land . . . shall be used for any purpose or in any manner other than for one or more of the uses hereinafter set forth as permitted in the district in which such building, structure or land is located, or set forth as permissible by special permit in said district and so authorized."

Massachusetts cities and towns are free to adopt zoning bylaws of this type. See *Town of Harvard* v. *Maxant*, 360 Mass. 432, 436 (1971). Sometimes they're called "permissive" zoning bylaws, see *id.*, but that label's misleading. Those who aren't zoning lawyers are likely to think that "permissive" means "allowing," "lenient," or "tolerant." The American Heritage Dictionary of the English Language, 977 (1976). A permissive zoning bylaw isn't necessarily any of those things. Instead, a permissive bylaw typically is one that prohibits every use of a property in a zoning district unless the bylaw specifically authorizes the use. Under such bylaws, when controversies arise about the lawful use of a property, it's not enough for a property's owner to show that the bylaw doesn't *expressly prohibit* the disputed use; instead, the owner must show that the bylaw *expressly permits* it. See *Maxant*, 360 Mass. at 436; *Leominster Materials Corp.* v. *Board of Appeals of Leominster*, 42 Mass. App. Ct. 458, 462 (1997); *Town of Belchertown* v. *Paixao*, 19 LCR 542, 545 (2011) (Piper, J.).

In September 2021, plaintiff Catherine Ward sent Nantucket's building commissioner a letter asking him to order Ward's backyard neighbors, defendants Peter and Linda Grape, to stop renting on a short-term basis the primary dwelling on their property (the "Main House") at 9 West Dover Street (the "Grape Property"). In her letter, Ward called such rentals an illegal "commercial use" of the Grape Property, a property that, like Ward's (the "Ward Property"), lies in the Residential Old Historic ("ROH") district under the Zoning Bylaw.

The commissioner promptly declined Ms. Ward's request. He wrote: "[I]n my opinion, the use of the [Grape Property] for short term rentals does not violate the Town's Zoning Bylaw." Ward appealed the commissioner's action to the defendant Nantucket Zoning Board of Appeals (the "ZBA"). In a November 2021 decision (the "ZBA Decision"), the ZBA sided with the commissioner, saying he'd "appropriately applied the plain language of the Bylaw" in refusing Ward's request.

Ms. Ward timely appealed the ZBA Decision to this Court under G.L. c. 40A, § 17. She asks this Court in Count I of her complaint to annul the ZBA Decision. In Count II of her complaint, Ward seeks under G.L. c. 240, § 14A, a declaration against defendant Town of Nantucket (the "Town") that the Zoning Bylaw prohibits short-term rentals in the ROH district.

In March 2023, Ralph and Bonnie Keith, as trustees of the Delaney Keith Trust (the "Keiths"; together with the Grapes, the ZBA, and the Town, the "Defendants"), moved to intervene in this case. The Keiths own 15 Delaney Road on Nantucket (the "Keith Property"). That property's in another residential district under the Zoning Bylaw, the R-1 district. Like the Grapes, the Keiths rent their property short-term. A neighbor who lives in the same R-1 district, Christopher Quick, has done as Ms. Ward did with the Grapes: he challenged the Keiths' use of their property for short-term rentals. As with Ward, the building commissioner and the ZBA disagreed with Quick; he then filed his own c. 40A, § 17 appeal in this Court against the ZBA and the Keiths. See *Quick* v. *Town of Nantucket Zoning Board of Appeals*, Case No. 23 MISC 000056. As this Court was well on its way to reaching the short-term rental question in this case, the Keiths (with no objections from the parties to this case) opted to intervene in this case and be heard on that issue now.

1. As amended, the "Zoning Bylaw." References to the Bylaw are to the version filed at Tab 17 of the Appendix to Plaintiff's Motion for Summary Judgment ("Ward Appendix").

After the parties completed discovery, Ms. Ward moved for summary judgment on her Count II. The Grapes cross-moved for summary judgment on Ward's Count I, asserting that a recently adopted Nantucket general bylaw regulating short-term rentals ("Article 39") moots Ward's challenge to the ZBA Decision. The Town (supported by the Keiths) cross-moved for summary judgment on Ward's Count II, contending she lacks standing under c. 240, § 14A, to bring that claim. The Town and the Keiths also argued the reverse of Ward's principal contention: they submit that the Zoning Bylaw permits short-term rentals in all of Nantucket's residential districts .

In September 2023, the Court denied the parties' summary-judgment motions, as the facts concerning Ms. Ward's standing to bring both Counts of her complaint were disputed. The Court thus ordered the parties to trial on all standing issues. That trial started December 12, 2023, on Nantucket. The Court viewed the Grape and Ward Properties prior to hearing testimony. Trial continued in Boston on January 3, 2024.

Having taken a view, having heard the parties' witnesses, having reviewed the exhibits admitted into evidence, and having read and heard the arguments of the parties' counsel, the Court HOLDS:

- Ms. Ward has standing to bring Count I of her complaint.
- Since the Town (the central defendant on Count II) concedes that the test for standing on Count I is more rigorous than that for Count II (see the Town and the ZBA's Pre-Trial Memorandum of Law, 12, 14 ("Town's Pre-Trial Memorandum," docketed Nov. 30, 2023)), Ward also has standing to pursue Count II.
- The town's adoption of Article 39 hasn't mooted Ward's claims.
- The Zoning Bylaw doesn't expressly authorize short-term rentals as a principal use of "primary dwellings" in the town's ROH district.
- The Zoning Bylaw may allow, however, rentals of primary dwellings as an "accessory use" of such dwellings.
- Since the ZBA didn't consider in connection with Ward's appeal whether the Grapes lawfully were renting their Main House as an accessory use, the Court will vacate the ZBA Decision and return the case to the ZBA for further proceedings.

Pursuant to Rule 52, Mass. R. Civ. P., and Land Court Rule 4,[2] the Court FINDS the facts set forth above as well as these:

THE GRAPE PROPERTY

1. The Grapes have owned the Grape Property since 2017. Their primary residence is in Wellesley, MA. They own another property in Florida.

2. The Grape Property is a 0.13-acre parcel. There are two structures on it, the Main House and the "Garage House." The Main House is a four-bedroom, two-story home. The Garage House is a detached two-story building, with a garage on the first floor and a single-bedroom apartment (with living room, bathroom, and kitchen) on the second floor.

3. The outdoor hardened surfaces leading to, surrounding, and within the Grape Property are uneven. There's a brick patio between the Main and Garage Houses (the "Patio"), adjacent to the rear of each. The Grapes expanded the Patio shortly after they purchased the Property. The Patio stretches between an entrance to the Garage House and a side entrance to the Main House. The Patio's equipped for outdoor dining, and it's frequently used that way in the warmer months. At the rear of the Patio stands a privet hedge. It runs along the entire rear boundary of the Grape Property and separates that Property from the rear of the Ward Property.

4. Near the side entrance to the Main House described in Finding #3 is an outdoor lamp (the "Globe Lamp"). A part of the Main House shields the Lamp and the Patio from passersby on Dover Street. But on the first floor of that part of the Main House, there are rear-facing windows (the "Patio Windows") that are perpendicular to the wall to which the Globe Lamp's attached. Those Windows reflect the Lamp's light in the direction of the Ward Property. At the time of trial, the Globe Lamp had a 35-watt bulb. It's a switched light; it has no regulating timer, photocell, or motion sensor.

5. At the base of the rear of the part of the Main House that's closest to the Ward Property, there's an exterior stairway that descends to the Main House's basement. One can reach that stairway from the Patio. There's an exterior light (the "Stair Light") that's attached to the rear of the Main House, over the exterior stairway. At the time of trial, there was a bulb in the Stair Light that had an interior reflecting surface; no one described its wattage or lumens. The Light was pointing downwards into the stairwell of the exterior stairway. That Light too is switched (the switch is in the basement of the Main House, just inside a door at the base of the stairwell); the Light lacks a regulating timer, photocell, or motion sensor.

6. At the time the Grapes purchased the Grape Property, its prior owners had several bookings for short-term rentals of the Main House. While the Grapes don't rent their Wellesley or Florida properties, they bought the Grape Property in part because of its rental potential. When they purchased the Property, they'd decided they'd accommodate the already-booked rentals, as well as those they hoped to get, by staying primarily in the Garage House (and not in the Main House) when they visited Nantucket. Since buying the Property, the Grapes have stayed in the Main House only when it's not rented. There was no evidence at trial of the Grapes ever occupying the Main House while renting the Garage House.

7. Since buying the Grape Property, the Grapes have advertised the Main House for rent, on a nightly or weekly basis, using lo-

2. Land Court Rule 4 requires parties who move for summary judgment to file a statement "of the material facts upon which the moving party relies . . . ." Rule 4 requires those opposing a motion for summary judgment to respond to the moving party's factual statement. If an opposing party fails to respond properly to the moving party's statement, "the facts described by the moving party as undisputed shall be deemed to have been admitted." Most of the facts concerning the Grape and Ward Properties, the Grapes' rentals, and the Zoning Bylaw were undisputed at summary judgment.

cal real-estate brokers. The Grapes also rent the Main House to their extended family and friends. For the most part, those who rent through brokers communicate with those brokers and not the Grapes. The brokers e-mail lease agreements to renters, then e-mail the Grapes the signed agreements for the Grapes to execute.

8. The Grapes have rented the Main House more often than they've used it for personal stays. Between 2017 and 2021, they occupied the Main House between 40 and 55 days yearly. They generally reserved such times for themselves and made them unavailable for booking. But during that same 2017-2021 period, the Grapes rented the Main House between 90 and 111 days yearly. The number of renters fluctuated between seven and thirteen yearly. None had relationships with the Grapes prior to renting. Some of the renters were repeat customers; most were not. With one exception, all of the Grapes' renters have been families.

9. The length of the rentals of the Grape Property has ranged between five and fourteen consecutive days. The only stay at the Grape Property by someone other than the Grapes that lasted longer than fourteen days was in 2020, during the coronavirus pandemic, when the Grapes' daughter stayed for approximately six weeks.

10. When not used by the Grapes or rented, the Grape Property is vacant. In 2017-2021, the Property was vacant between 214 and 228 days.

11. Rent for the Grape Property ranges from $2000 per week during the offseason to $8000 per week during the summer months. Since 2017, the Grapes have reported between $51,219 and $68,918 yearly in rental income from the Grape Property.

12. The Grapes use a local caretaker and cleaning company to work with renters and maintain the Grape Property when the Grapes aren't there.

EVIDENCE OF THE EFFECT OF THE GRAPES' SHORT-TERM RENTALS ON MS. WARD

13. Ms. Ward owns and resides year-round at the Ward Property, 4A Silver Street in Nantucket. She bought the property in 1993; the present Main House and Garage House on the Grape Property weren't built at that time.

14. Prior to buying the Ward Property, Ward and her family rented other Nantucket residences on a short-term, seasonal basis. For a decade's worth of summers between 2000 and 2010, she also rented out the Ward Property, two times each summer. Ward hasn't done that since 2010.

15. The entire rear of the Ward Property abuts the rear of the Grape Property. Ward has a four-bedroom home on her property. That home has a deck that extends from the rear of the home's main floor. There are bedrooms at the rear of Ward's residence, facing the Grape Property. Ward's is the closest residence to the rear of the Grapes' Main House, their Patio, the Globe Light, and the Stair Light.

16. Ms. Ward's home is substantially upslope of the Grape Property. Thus, notwithstanding the hedge that separates the properties, from her home and deck Ward has an unobstructed view of the rear of both stories of the Grapes' Main and Garage Houses, the Globe Light, the Stair Light, and parts of the Patio.

17. Ms. Ward claims the Grapes' short-term rentals have increased the noise she hears at her property and have subjected her home to increased nighttime light.

18. Since the Grapes' purchase of the Grape Property, repetitive noises from the Grape Property, audible to Ms. Ward from the interior of her home, have increased during those times when the Grapes rent their property. Many of those noises bother Ward. Those noises primarily are (a) the rolling of suitcases, coolers, and other items on the Property's uneven surfaces as people arrive at, or depart from, the Grape Property; (b) the excited voices of the Property's occupants as they explore the Main House and the Patio; (c) clanging and banging accompanying use of the Patio's grilling equipment (including slamming of a grill's lid); and (d) loud conversations, and sometimes parties, on the Patio. Some of the parties include games (a handful have involved drinking) and recorded music. Ward truthfully identified three instances since 2017 when outdoor "party" noise occurred after 10:00 PM. She doesn't hear as much noise from her other neighbors, few of whom rent their properties.

19. In August 2019, Ms. Ward wrote a letter to the Grapes complaining of noise from their renters. The Grapes responded by letter. That letter said the Grapes "want to be respectful neighbors and will address your concerns," but Ward detected no change in the pattern or the volume of noises from the Grape Property after getting the letter. The Grapes did add a note to a sheet of paper titled, "Welcome to 9 West Dover." The Grapes keep the sheet at the Main House; renters don't receive it in advance of their stay. And the note said only this (capitalization in original):

> PLEASE NOTE THAT NANTUCKET TOWN BYLAWS SPECIFY QUIET HOURS BETWEEN 10:00PM TO 7:30AM. WE ASK YOU TO KEEP OUTDOOR NOISE TO A MINIMUM DURING THESE HOURS FOR THE BENEFIT OF OUR NEIGHBORS. THANK YOU!

20. Several times, Ms. Ward has asked the Grapes' renters to be quiet. Most ignored Ward. She also had to repeat the requests each time renters changed.

21. When they are at the Grape Property, the Grapes themselves, their family, and their non-renting guests make the same noises described in Finding #18 above. Ms. Ward hears the bothersome noises more frequently, however, when the Grapes are renting their Property.

22. As a result of the noises described in Finding #18, Ms. Ward has changed (or skipped altogether) the times she gardens, enjoys her deck, or has the rear windows of her house open. She's also considered moving away.

23. As noted earlier, the Patio Windows reflect light from the Globe Light towards the Ward Property. Thus, owing to the elevation of the rear bedrooms of the Ward residence, when the Globe Light's on, both its direct and reflected light shine into Ward's bedrooms unless she's closed their blinds or curtains.

24. When the Stair Light is on, even in the position it was at trial, Ms. Ward can see its light from multiple places within the rear of her house unless she closes the blinds or curtains.

25. After the Grapes purchased the Grape Property, Ms. Ward noticed an increase in instances when the Globe and/or Stair Lights were left on all night. The increase in light disrupted her sleep. She subsequently installed blinds in her home's rear bedrooms; to close the blinds, however, the windows must be closed too, an inconvenience on summer nights.

26. The form that the Grapes provide to renters lacks instructions regarding the use of the Property's outdoor lights.

27. Ms. Ward's home has an outdoor floodlight, but a motion detector regulates it.

NANTUCKET'S GENERAL BYLAWS[3]

28. Chapter 101 of Nantucket's General Bylaws is titled "Noise." Its § 101-1, "General prohibitions; exemptions; relief," provides in pertinent part:

> A. Prohibited noises. It shall be unlawful for any person or persons to create, assist in creating, cause or suffer or allow any excessive, unnecessary, loud or unusual noise which either annoys, disturbs, injures or endangers the reasonable quiet, comfort, repose or the health or safety of others by taking any of the following actions:
>
> > (1) Making of loud outcries, exclamations, other loud or boisterous noises or loud and boisterous singing by any person or group of persons . . . between the hours of 10:00 p.m. and 7:00 a.m. (7:30 a.m. between June 15 and September 15 in each year) where the noise is plainly audible at a distance of 100 feet from the source of the noise or the property line of the building, structure, . . . or premises in which or from it is produced. The fact that the noise is plainly audible at a distance of 100 feet from its source or the property line . . . shall constitute prima facie evidence of a violation of this section.
> >
> > . . .
> >
> > (3) To load, unload, open, close or otherwise handle boxes, crates, containers, building materials, trash cans, dumpsters or similar objects between the hours of 10:00 p.m. and 6:00 a.m. so as to unreasonably project sound across a real property line . . . .

29. Section 101-3.A of the General Bylaws provides that the "Noise" general bylaw "may be enforced by Board of Health officials, Nantucket Police Department Employees, plus Inspectors, Natural Resources Enforcement Officers, and any other agents appointed by the Select Board."

30. Chapter 102 of the General Bylaws (Trial Exhibit 17) is labelled "Outdoor Lighting." Chapter 102 is "applicable to all lighting and no lighting shall be installed or continued that violates the standards of this chapter." *Id.* at § 102-1.E.

31. Section 102-3 of the General Bylaws, "Regulations; prohibitions," provides:

> A. All residential fixtures with lamps of 600 lumens (about 40 watts incandescent) or less per fixture are exempt from regulation.[4]
>
> B. All residential and commercial exterior lighting (except floodlights) shall be contained in fixtures with an opaque top and translucent sides (partially shielded) such that the bulb is not directly visible from adjacent and neighboring properties or public rights-of-way.[5]
>
> C. To minimize light trespass, in residential areas the light level at the property line shall be no greater than 0.5 of a footcandle, measured at a height of five feet above grade.[6]
>
> D. Commercial property or properties containing mixed uses with a commercial component may not have lighting which exceeds the average minimum levels listed in the IESNA Recommended Publication . . . .[7]

32. Section 102-4.D of the General Bylaws provides in part: "Floodlighting is only permitted when it is down-directed and fully-shielded such that the lamp is not visible from adjacent and/or neighboring properties."

33. Section 102-4.E of the General Bylaws provides in part: "Safety and security lighting shall use motion sensors, photocells, or photocell/timers to control duration of nighttime illumination. In all cases the maximum light intensity on the property measured at a height of three feet above grade shall be limited to no more than five footcandles:"

34. Section 102-8 of the General Bylaws gives oversight of enforcement of Chapter 102 to the Town's "Lighting Enforcement Officer."

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3. The Court includes Findings ##28-34 primarily because the parties requested findings concerning Nantucket's light and noise general bylaws. The Court does not base its conclusions concerning Ms. Ward's standing on any finding or holding that the Grapes have violated Nantucket's general bylaws. That Nantucket has general bylaws concerning light and noise is, however, evidence that its residents' interests in reducing noise and light that affect their homes are legitimate. Defendants didn't claim at trial that the Zoning Bylaw doesn't protect those interests.

4. Section 102-2 of the General Bylaws defines "Fixture" as "[t]he assembly that houses the lamp or lamps . . ." Section 102-2 defines "Lamp" as "[t]he component of a light source that produces the actual light."

5. Section 102-2 of the General Bylaws defines "Flood or Spotlight" as "[a]ny light fixture or lamp that incorporates a reflector or refractor to concentrate the light output into a directed beam in a particular direction."

6. Section 102-2 of the General Bylaws defines "Light Trespass" as "[l]ight falling where it is not wanted or needed, generally caused by a light on a property that shines onto the property of others." Section 102-2 defines "Footcandle" as a "measurable industry standard of illumination equivalent to one lumen per square foot. Measured by a light meter."

7. Section 102-2 of the General Bylaws defines "IESNA" as "Illuminating Engineering Society of North America (IES or IESNA), the professional society of lighting engineers, including those from manufacturing companies, and others professionally involved in lighting."

Selected Complaints Filed with the Land Court *No. 3*

March 2024

***NOTE**: Cases are selected from all filings and generally do not include registration, confirmation, and other routine title matters. They appear in an order that reflects their noteworthiness and interest to our subscribers*

Readers should be aware that the facts set forth in this report are derived from the complaints themselves and news reports. When we review the case files, the answers of the Defendants to these complaints have usually not yet been filed. And so, by its very nature, this Complaints Filed report presents a one-sided version of these lawsuits.

CASE NUMBER ***DATE FILED***

PS 000121 *March 7, 2024*

Plaintiff: Rising Community & Housing, Inc.

Defendant: City of Brockton

Plaintiff's Attorney: John McCluskey

A nonprofit that provides housing and services for disabled and homeless people is seeking a declaration on Dover Amendment grounds that would allow it to submit a new variance application to the ZBA to construct a three-story educational facility on a property in Brockton's C-1 commercial zone, featuring a new residential building with 32 studio units and 20 on-site parking spaces. The project will be operated in conjunction with Father Bill's & Mainspring, a nonprofit that provides shelter, outreach, rehousing, and supportive services. The educational aspect that the Plaintiff contends grants it Dover Amendment protections relates to training the homeless in life and employment skills.

The ZBA rejected the Plaintiff's first variance application in September 2023 in a 3-2 affirmative vote short of a supermajority, determining that the locus lacked unique soil conditions, shape, or topography necessitating a variance, and that the project would "negatively impact the orderly development of the neighborhood." The Plaintiff did not appeal the decision but made modifications to the proposal including reducing the total number of units from 32 to 28 and increasing the number of parking spots from 20 to 28. However, the rules governing Brockton's Planning Board include a provision that effectively grants the Board gatekeeper authority to prevent a previously unsuccessful ZBA applicant from returning to the ZBA to reverse course within two years of the initial unfavorable vote. In February 2024, the Planning Board exercised that authority and voted to withhold permission for the Plaintiff to return to the ZBA with a revised proposal. The Plaintiff argues that the Planning Board does not have the authority to determine whether "specific and material changes in the conditions upon which" the ZBA's previous unfavorable action was based, and that the Planning Board is undermining the authority vested in the ZBA under section 16 of the Zoning Act.

According to the Plaintiff's September 2023 variance application, the locus received two variances in 2019—one to convert the existing building to ten apartments, and the second to 15 apartments with 31 bedrooms—but for a variety of reasons the project never came to fruition. The Plaintiff argues that Brockton has a worsening homelessness crisis and that this proposal replaces a structure that is currently a decaying eyesore.

CASE NUMBER ***DATE FILED***

000120 *March 7, 2024*

Plaintiff: William Fialkowski

Defendant: Donna Baltromitis

Plaintiff's Attorney: Charles Kindregan

An Alabama physician is seeking an order compelling his ex-wife to execute all necessary documents to transfer title to a rowhouse the couple has owned in Boston's Bay Village neighborhood. According to the complaint, way back in 2019 an Alabama Circuit Court judge ordered the sale of the property, currently listed for $2.5 million, in connection with the couple's divorce. Then followed years of what the complaint describes as obstructionist, bad-faith behavior on the part of the Defendant ex-wife, Donna Baltromitis, who continued to live at the property rent free which the Plaintiff husband, William Fialkowski, had purchased for himself prior to his marriage. The ex-husband continued to pay the mortgage.

The ex-wife's efforts, according to the complaint, included circumventing the requirement that she nominate three independent brokers to sell the property by picking three brokers from the same agency, all of whom were willing to say that the property could not be sold until major renovations and improvements were completed. Baltromitis also deliberately interfered with a neighbor's right of way in order to provoke litigation; the neighbor subsequently filed suit in the Land Court prompting a *lis pendens* to be placed on the property—rendering a sale impossible. Baltromitis ignored the Alabama court ruling requiring the sale of the property. She then filed a suit against her ex-husband in Massachusetts Superior Court for "breach of contract" in May 2020 and a second suit in Boston Municipal Court seeking an order of protection against her ex-husband—despite the fact that he resided in Alabama and had never threatened her physically. Neither suit was ultimately successful, but these efforts further postponed the sale of the locus.

When Baltromitis refused to vacate the property following the Alabama judge's June 2020 order, the Alabama judge sentenced her to 365 days in county jail—which she has yet to serve—along with making an award to the husband of attorney's fees and mortgage payments from July 2020 through the date of the closing of the property. The Plaintiff/husband then turned to the Massachusetts Housing Court, where he filed an eviction action against his ex-wife. Despite the Defendant's attempts to have the complaint dismissed on the grounds that the notice of termination was defective and that the Alabama orders entered during the COVID-19 temporary eviction moratorium were void, the

Housing and Appeals Court ultimately sided with the Plaintiff husband and Baltromitis vacated the property having lived there rent-free for some five years.

The Plaintiff is afraid that he will be unable to transfer title to the Boston property even if he finds a willing buyer because his ex-wife—who has not disclosed her whereabouts, most likely due to her outstanding contempt orders from the Alabama court requiring her incarceration—must sign the deed. This complaint seeks an order compelling Baltromitis to cooperate and sign the deed and other necessary documentation in connection with the sale of the property.

CASE NUMBER ***DATE FILED***

000099 *February 21, 2024*

Plaintiff: John Cogliano, Kelly and Charles Gallagher, and others

Defendant: Planning Board of Norton, Nextsun Energy, and others

Plaintiff's Attorney: W Paul Needham

A group of Norton property owners is suing the Planning Board for granting a solar developer site plan approval, subject to four conditions, for a 3.9 MW solar farm with 10,540 panels on approximately 23 acres of upland cranberry bogs owned by co-Defendant Fairland Farm, LLC.

The proposal, which the Land Court remanded to the Planning Board, has been the subject of multiple pieces of litigation, 31 LCR 396 (2023), 31 LCR 394 (2023), 31 LCR 323 (2023), 29 LCR 52 (2021), and includes 75 to 150 tons of lithium-ion batteries.

The Plaintiffs are concerned the project would harm their private water supplies—particularly in the event of a fire at a site containing a large volume of lithium ion batteries, as well as generate noise and other nuisances detrimental to quality of life. The complaint alleges that the project decommissioning fund, at roughly $486,000, is insufficient—less than a quarter of what was required for a similar sized project in Wareham—and lacks language requiring increases in the surety amount as decommissioning costs change in the future. Other grievances regarding the current conditions include a noise limit of 8 db above background levels at any property line—in excess of the 3db the Plaintiffs had proposed—and the scaling back of mandated baseline and annual private well testing to homes within 1,000 feet of the site.

According to a December 1, 2019 article in *The Sun Chronicle,* the project, despite the "dual use" of the locus for both solar and cranberry bogs, has been hugely controversial in the community, and the developer more than cut in half the original plans for 24,000 solar panels in response. The area is sited in a well protection zone over the Canoe River Aquifer, which supplies area residents with well water.

CASE NUMBER ***DATE FILED***

000141 *March 18, 2024*

Plaintiff: Robert Martin II and 100 Route 6, LLC

Defendant: Zoning Board of Appeals of Truro and the Building Commissioner of Truro

Plaintiff's Attorney: William Henchy

The owner of a property in Truro's Seashore District that was the subject of the famous 1940 Edward Hopper painting "Gas," which is in the permanent collection of the Museum of Modern Art in New York, is suing the ZBA for upholding the Building Commissioner's November 2023 Cease and Desist order alleging an unlawful extension of a pre-existing non-conforming commercial use of the locus. The current use, a business locally known as "Jack's Garage," involves the sale of firewood, loam, woodchips, crushed seashells and other landscaping materials to the public and contractors. The Building Department and ZBA also determined that structures, materials, and equipment were delivered to the locus without the required Site Plan Approval from the Planning Board, and that the lawful pre-existing commercial use is a gas station.

According to the complaint, from the 1960s through 1998, the retail establishment and gas station operated with an expanding number of items for sale, up until a gasoline spill was discovered at the locus and the sale of gasoline ceased. The owner received several special permits to add uses, structures, and signs to the property. A fire in 2003 destroyed the structure on the premises, and the ZBA granted zoning relief to rebuild the pre-existing non-conforming structure. The Plaintiffs contend that the sale of firewood and other materials by various tenants has been a continuation of the longstanding commercial use of the property and has served to fund the ongoing expense of the 1998 oil spill cleanup. The complaint further alleges that the Plaintiff received constructive approval of the Building Commissioner's earlier May 2023 Cease and Desist Order in November 2023, due to the ZBA's failure to file its decision with the Town Clerk within 14 days. The Building Commissioner issued another Cease and Desist on November 29, 2023, which the Plaintiffs appealed and the ZBA upheld.

CASE NUMBER ***DATE FILED***

000145 *March 19, 2024*

Plaintiff: Northeastcann, Inc.

Defendant: Selectboard of the Town of Saugus and Sanctuary Medicinals, LLC

Plaintiff's Attorney: Sean Coleman and Nicolas Gomes

The operator of a proposed retail marijuana dispensary on Route 1 in Saugus is suing the Selectboard for voting 2-2 thereby denying the facility a special permit, while granting a special permit to co-Defendant Sanctuary Medicinals, LLC for the same use at a different location also on Route 1. The Selectboard also denied five other applicants a special permit for marijuana dispensaries.

The complaint argues that although state law allows municipalities to restrict marijuana retailers to 20% or more of the total number of liquor licenses issued, Saugus has no such regulation in place. The Plaintiff alleges that the process was marred by ir-

regularities—specifically, the Town requires a pre-application meeting before a Marijuana Establishment Review Committee ("MERC"), which the complaint argues the Town Manager manipulated to narrow the selection of applicants to those he wanted approved, and denigrate those he wished denied authorizations. The Plaintiff argues that a political dispute between members of the Board of Selectmen and the Town Manager further undermined the integrity of the process, and that the Town Manager effectively usurped the role of the Selectmen through the MERC. Although the Town Manager never attended the project's hearings before the Selectboard, the Plaintiff contends that the latter was unduly swayed by the findings of the MERC.

The complaint argues that the proposed project is sited in an appropriate location and would provide adequate security measures, address any traffic and parking issues, minimize adverse impacts to neighbors, and be in compliance with the required conditions for a special permit for the marijuana retailer use.

CASE NUMBER ***DATE FILED***

000164 *March 26, 2024*

Plaintiff: Steven Flagg

Defendant: Zoning Board of Appeals of Douglas

Plaintiff's Attorney: Danielle Kemp and David McCay

The owner of a non-conforming lakefront property in Douglas featuring a modified 900-square-foot mobile home on a 13,270-square-foot lot is suing the ZBA for denying him, via a 3-2 affirmative vote short of a supermajority, a special permit to raze and reconstruct the dwelling into a new, larger two-story single-family residence. According to the complaint, the current structure has existed for more than ten years and was built following a fire that destroyed a previous single-family home on the property. However, over time, the mobile home was modified, with cement footings, gutters, an attic with insulation, deck, and other improvements—to the point where the house no longer meets the bylaw's definition of "mobile home" since all that remains of the original mobile home is the frame under the dwelling's new floor.

During the public hearing, several abutters raised concerns about the size of the new house, surface water runoff, and encroachments onto one or more rights of way to the lakefront. The Plaintiff failed to convince the ZBA that replacing a modified trailer with a substantially larger single-family residence would not significantly exacerbate the nonconformities of the locus. The property is in the Rural Agricultural District with a minimum lot size of 90,000 square feet; in addition to inadequate lot size, other nonconformities include road frontage and front and rear yard setbacks.

CASE NUMBER ***DATE FILED***

000172 *March 28, 2024*

Plaintiff: Chris Dittrich

Defendant: James Sullivan

Plaintiff's Attorney: Kate Carter, Daniel Dain, and others

The buyer of a $2,450,000 riverfront home in South Dennis is suing the seller for specific performance over the latter's failure to include a fully-approved permit to construct a deep-water dock at the locus. According to the complaint, the accepted offer included this provision but counsel for the Defendant attempted to add language to the P&S making it the Plaintiff Buyer's obligation to obtain a Chapter 91 license from MassDEP (and not the Seller's). The Defendant has claimed he did not realize the Plaintiff was looking for the full Chapter 91 license prior to closing and released the buyer's $1,000 deposit from escrow. The Plaintiff contends that the Defendant is in breach of his obligations.

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1. Bankruptcy does not always discharge a mortgage lien, and recording a false mortgage discharge affidavit with the registry of deeds is not recommended

LaBrec Realty Solutions, LLC brought a quiet title action seeking a determination that the second mortgage on a property it had acquired out of a bankruptcy proceeding was unenforceable and should be discharged. It fell to Justice Jennifer S.D. Roberts, in *LaBrec Realty Solutions, LLC* v. *ARCPE 1, LLC*, 31 LCR 619 (2023) to untangle the effects of the bankruptcy court's discharge order and the borrower's associated surrendering of the property at issue, and how to deal with LaBrec's counsel having recorded a false mortgage discharge affidavit.

In 2007, Catherine Mallette signed a promissory note in favor of the Irwin Union Bank & Trust Company of Carson City, NV ("Irwin"), secured by a mortgage of even date that was recorded with the Worcester Registry of Deeds (the "Registry"). The Irwin note had a fifteen-year term and an interest rate of 9.136 per annum. It was junior to a mortgage held by Citicorp Trust Bank.

In 2010, Ms. Mallette filed a petition for Chapter 7 bankruptcy protection. Schedule D to her petition listed Citicorp's first mortgage and the Irwin second mortgage. The Individual Debtor's Statement of Intention stated that she intended to surrender the property. On November 3, 2010, the U.S. Bankruptcy Court issued an order granting Ms. Mallette a discharge. The Discharge Order instructs readers to "see the back of this order for important information." The back of the Order states that while the discharge:

> prohibits any attempt to collect from the debtor a debt that has been discharged, … a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien is not avoided or eliminated in the bankruptcy case.

Asset Recovery Companies, LLC ("ARC") purchased the Irwin mortgage, as part of a bundle of mortgages, on or about December 28, 2018. On or about August 28, 2019, ARC wrote off the Irwin mortgage as an uncollectable bad debt, for accounting and tax purposes, and adjusted to zero the balance due on its records. On January 21, 2021, presumably in response to an inquiry from LaBrec's counsel, ARC's loan servicer wrote that:

> Ms. Malletta's [sic] account was closed at the request of [our] client, ARCPE 1 ("Client")[1] on August 20, 2019. The loan was not paid off while serviced [by us], nor was the servicing of the loan transferred to another lender or servicer. The account was closed in our system at our Client's request and we have no additional information.

On May 13, 2021, LaBrec's counsel recorded a Discharge Affidavit with the Registry. In that affidavit, LaBrec's counsel stated that he had:

> ascertained that the mortgagor has satisfied all of the loan obligations of the indebtedness secured by the Mortgage and that the Mortgagor has never received notification that the payment and satisfaction of all the loan obligations has been rejected or that there is any other objection to the adequacy of the payment or satisfaction of all of the loan obligations and that the transmittal of the same has not been returned as undeliverable or for any other reason, without being retransmitted to and received by the Mortgagee, or note holder to whom payment and satisfaction of all of the loan obligations was made;

The affidavit also stated that:

> more than 45 days have elapsed since such payment and satisfaction of all of the loan obligations was made and received by the Mortgagee, Mortgage servicer or note holder.

ARCPE 1 is the current holder of the Irwin mortgage by virtue of an assignment recorded with the Registry.

Judge Roberts found the SJC's decision in *Christakis* v. *Jeanne D'Arc Credit Union*, 471 Mass. 365 (2015) dispositive of the question of the continued viability of a mortgage after the mortgagor's discharge in bankruptcy. As Chief Justice Gants had framed the issue in *Christakis*, do "judicial liens on real property remain valid after the owner of the property receives a discharge under Chapter 7 of the Bankruptcy Code"? 471 Mass. at 365. The *Christakis* court had observed that:

> Essentially, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem. As a matter of Federal law, an unavoided, otherwise valid lien perfected prior to the bankruptcy filing survives or passes through the bankruptcy. This distinction between in personam and in rem actions comports with the purposes of the bankruptcy process by striking a balance between the need for debtors to obtain a reprieve from their debts, while simultaneously protecting creditors' secured property rights. Thus, the lien may still be enforced, but because of the discharge of personal liability, the enforcement of the lien is an action in rem with no recourse available against the debtor for any deficiency.

Id. at 367-368 (internal quotations and citations omitted).

Ms. Mallette had not obtained an order from the Bankruptcy Court avoiding the Irwin mortgage (or Citicorp's first mortgage). Instead, she had surrendered the property.[2] Judge Roberts found

1. ARCPE 1, LLC appears to have been the entity through which ARC held mortgages, including the Irwin mortgage.

2. The instructions to individuals filing under Chapter 7, provide that, "If you surrender the property to the creditor, your bankruptcy discharge will protect you

that there were no indications in the records of the bankruptcy proceeding that the Irwin mortgage was modified or avoided, nor at the Registry that it was foreclosed upon. The Irwin mortgage remained a valid encumbrance on the property.

LaBrec argued—without citation to any authority—that ARC's having written off the mortgage as an uncollectable bad debt rendered it unenforceable. Judge Roberts declined to consider this unsupported proposition. LaBrec argued that because ARC cannot establish what it paid to acquire it, the Irwin mortgage is invalid. But LaBrec provided no legal authority for the proposition that a mortgage secures only the amount a subsequent holder paid for it. Judge Roberts similarly declined to consider this unsupported argument. LaBrec argued that the Irwin mortgage, unsecured from the underlying note, is of no value. For this, it cited cases holding that where the note has not been discharged the mortgagee holds "bare legal title to the mortgage in trust for the note holder, who has an equitable right of assignment that may be effected by filing a court action to require the mortgagee to assign the mortgage to it." *Culhane* v. *Aurora Loan Servs. of Nebraska*, 826 F. Supp. 2d 352 (D. Mass. 2011). But the cited decisions did not address the circumstances before Judge Roberts, where the underlying debt has been discharged in bankruptcy, but the mortgage has not been avoided. She found that *Christakis* did address such circumstances and was binding.

LaBrec's final argument was that the Irwin mortgage secured a predatory loan in violation of G.L. c. 183C, § 1 and, consequently, was never "perfected". Judge Roberts was not persuaded. First, LaBrec did not appear to have standing to assert that claim, as it was not "a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan". *See* G.L. c. 183C, § 2. Second, LaBrec had not provided evidence that the Irwin mortgage secured a "high cost home mortgage loan", which the statute defines as one having an:

> annual percentage rate at consummation [that] will exceed by more than 8 percentage points for first-lien loans, or by more than 9 percentage points for subordinate-lien loans, the yield on United States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender.

G.L. c. 183C, § 2.5. LaBrec had provided no evidence of when the loan application was received by the lender and no evidence of the relevant yield rates on United States Treasury securities. Judge Roberts took judicial notice that the yield on United States Treasury securities for 10-year Treasury bills on April 13, 2007 was 4.76% and for 20-year Treasury bills on that date was 5.01%. The Irwin note, dated May 7, 2007, was for a fifteen-year term at an interest rate of 9.136 per annum.

Judge Roberts determined that LaBrec had failed to establish that it held title to the property free of the Irwin mortgage. She dismissed LaBrec's quiet title complaint with prejudice.

In light of this conclusion, she also declared invalid the mortgage Discharge Affidavit recorded by LaBrec's counsel. That did not resolve all the issues related to the affidavit. At least two of its sworn statements were demonstrably false. The affidavit stated that all of the loan's obligations had been satisfied, despite counsel having received a letter from the loan servicer stating that the loan had not been paid off and had not been transferred to another lender or servicer. And the affidavit stated that more than 45 days had elapsed since the [nonexistent] payment and satisfaction. And G.L. c. 183, § 55(g)(9)—requiring lenders to timely record mortgage discharges and providing for the recording of an affidavit of discharge if a lender fails to comply— provides that:

> A person who causes an affidavit to be created in accordance with this subsection knowing that the information or statements contained therein, or in any documentary evidence relied upon therefor, or that the copy of any notice or document attached thereto or relied upon therefor is false, shall be punished by a fine of not more than $5,000 in addition to all other remedies at law, both civil and criminal and, in the event of civil liability to anyone damaged thereby, attorneys fees and costs shall be awarded in addition to any award of damages

As the Land Court is a court of limited jurisdiction—*see* G.L. c. 185, § 1—Judge Roberts found herself without authority to enforce that provision. However, she found that LaBrec's counsel also appeared to have violated two of the Massachusetts Rules of Professional Conduct for attorneys:

> Rule 4.1: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact to a third person; …
>
> Rule 8.4: It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; …

And Rule 2.15(B) of the Code Of Judicial Conduct states that, "A judge having knowledge that a lawyer has committed a violation of the Rules Of Professional Conduct that raises a substantial question regarding the lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer in other respects shall inform the Office of Bar Counsel." Accordingly, Judge Roberts found herself bound to report the circumstances of the mortgage discharge affidavit to the Office of Bar Counsel.[3]

Many people assume that the bankruptcy process will relieve the debtor of all obligations to third parties, including all liens on the debtor's property. As this case demonstrates, that assumption is wrong. And any attorney filing an affidavit—or drafting an affidavit for another—should take great pains to ensure that the sworn statements are true.

2. When the language of the statute is clear, that is what it means

Effective January 14, 2021, new language to facilitate the issuance of special permits for projects that include affordable housing was added to the Massachusetts Zoning Act:

from any claim for the difference between what you owe the creditor and what the creditor receives from a sale of the property, unless the court determines that the debt is nondischargeable."

3. The decision lists two attorneys, at separate firms, as counsel for LaBrec but does not indicate which of them recorded the affidavit. For the curious, the decision indicates that the affidavit is recorded with the Registry at Book 65158, Page 4.

> A special permit issued by a special permit granting authority shall require a simple majority vote for any of the following: (a) multifamily housing that is located within 1/2 mile of a commuter rail station, subway station, ferry terminal or bus station; provided, that not less than 10 per cent of the housing shall be affordable to and occupied by households whose annual income is less than 80 per cent of the area wide median income as determined by the United States Department of Housing and Urban Development and affordability is assured for a period of not less than 30 years through the use of an affordable housing restriction as defined in section 31 of chapter 184; …

G.L. c. 40A, § 9, para 13 ("paragraph thirteen").

In *50-56 Market Street, LLC* v. *Ipswich*, 31 LCR 638 (2023), Justice Howard P. Speicher resolved the interplay of this provision with provisions of the Ipswich Zoning Bylaw that allow a developer to buy its way out of providing affordable housing units.

50-56 Market Street, LLC sought a special permit for a ten-unit multifamily project. The project would construct a new, five-unit building behind an existing five-unit building on a site approximately 500 feet from an MBTA commuter rail station. The special permit was required to increase the number of dwelling units above the seven that would be allowed by right based on the lot area. Footnote 11 to the Zoning Bylaw's Table of Dimensional and Density Regulations provides that:

> The Planning Board may increase the number of dwelling units allowed under this requirement by special permit if it determines that a proposed multifamily dwelling or multifamily residential development would provide public benefit to the general public. … Multifamily dwellings or developments that provide at least 20% of the additional dwelling units allowed under this footnote as affordable …, or which pay an affordable housing fee, in accordance with the "Planning Board Regulation: Inclusionary Housing Payment-in-Lieu-of Option", adopted on June 19, 2008, as amended, for each unit allowed under this footnote, will satisfy the public benefit requirement

Rather than include affordable housing units in its project, the developer proposed to pay an affordable housing fee of $36,500 per unit to Ipswich's Affordable Housing Trust Fund. After several nights of public hearing, the Ipswich Planning Board voted 3:2 in favor of the application. Because the vote fell one short of the supermajority required to grant a special permit, the decision was filed with the town clerk as a denial.[4]

Nonetheless, the developer sought a building permit, arguing that the Planning Board's decision should be treated as an approval, based on a majority of members having voted in favor of the project and the project's close proximity to a commuter rail station. The Ipswich Building Commissioner denied the request because, in his view, paragraph thirteen's relaxing of the supermajority voting requirement did not apply to a project using the town's provision allowing payment in lieu of creating affordable housing units.

The developer appealed that decision to the Ipswich Zoning Board of Appeals. At the conclusion of a public hearing process that took ten months, the ZBA voted 5:0 to uphold the Building Commissioner's denial of the developer's application for a building permit. This litigation ensued.

The issue before Judge Speicher was whether paragraph thirteen meant that the project only needed a majority vote to receive a special permit. To resolve this question, he followed the general practice of statutory interpretation of looking first to the language of the statute as "the principal source of insight" into legislative intent. *CommCan, Inc.* v. *Mansfield*, 488 Mass. 291, 294 (2021). Plain and unambiguous statutory language ordinarily "is conclusive as to the legislative intent" unless the consequences adopting a literal construction would be "absurd or unreasonable". *Ciani* v. *MacGrath,* 481 Mass. 174, 178 (2019).

The developer argued that it had satisfied paragraph thirteen's requirement that at least 10% of the units be affordable to those earning less than 80% of the area median income by agreeing to pay the affordable housing fee under the Ipswich zoning bylaw. Judge Speicher found that, while the Ipswich zoning bylaw gives special consideration to multifamily projects in which at least 20% of the additional units are affordable or for which an affordable housing fee will be paid, paragraph thirteen does not offer such flexibility. Compliance with the zoning bylaw's additional density option does not equate to complying with paragraph thirteen's requirement that at least 10% of the housing authorized by a special permit be affordable if a majority vote is to suffice. The developer argued that payment of the affordable housing fee should be treated as equivalent to creating the required affordable housing. But nothing in its complaint alleged that the affordable housing fee would be used to create any particular number of dwelling units, or that those units would be affordable to those earning less than 80% of the area median income. The developer had failed to satisfy the plain language of paragraph thirteen's requirements prerequisite to a majority vote being sufficient to grant the required special permit.

The developer also argued that if Judge Speicher were to consider the legislative intent behind paragraph thirteen and the recent enactments of "similarly-themed statutes" he would find that the goal of the paragraph went "beyond the literal development of affordable housing, and seeks to arm a municipality with multiple means of addressing housing needs." Judge Speicher found that he could not reach such considerations when a statute's language is clear and explicit *E.g., Zoning Bd. of Appeals of Greenfield* v. *Housing Appeals Committee*, 15 Mass. App. Ct. 553, 561-562 (1983).

Finally, the developer argued that requiring a supermajority vote for its project penalized it for opting to pay the affordable housing fee rather than building affordable units. But the developer had chosen to use this option under the local zoning bylaw, preferring to build additional market rate units. And had it chosen to provide the affordable units required to be eligible for a majority vote special permit under paragraph thirteen it could have also

4. Ordinarily, the granting of a special permit requires "a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board." G.L. c. 40A, § 9, ¶ 12.

qualified for the density benefits under the local zoning bylaw. Instead, it chose to go a different route under the local bylaw and in so doing precluded the project from benefiting from paragraph thirteen. Any "injustice or hardship" was of the developer's own making, and the court could not insert words into a clear and unambiguous statute to reach a different conclusion. Judge Speicher upheld the Ipswich Zoning Board of Appeals' decision denying the developer's appeal, as it was based on the only proper reading of the statute.

Home Rule gives Massachusetts municipalities broad authority to restrict or prohibit multifamily (read: affordable) housing absent specific statutes to the contrary, *e.g.*, c. 40B. Episodically, the Legislature enacts statutes to curtail aspects of local resistance to affordable housing. Some, like the MBTA Communities Act[5], will take years to fully implement and require regulatory changes at the state and local levels. Others, like G.L. c. 40A, § 9, ¶ 13 are self-implementing. Anyone planning to use one of these statutes would be well served by carefully parsing its language (and that of any associated regulations) to ensure that their project tracks all of the statutory requirements.

3. Time is not of the essence when the parties continue discussions well past the deadline

When a purchase and sale agreement for land includes a time for performance and language indicating that time is of the essence, courts will strictly construe the parties' self-imposed deadline. If the deadline is not satisfied, then the parties' obligations to each other are extinguished. *Owen* v. *Kessler*, 56 Mass. App. Ct. 466, 467 (2002) *citing McCarthy* v. *Tobin*, 429 Mass. 84 (1999). The parties may waive a "time is of the essence" clause expressly or implicitly by their words and conduct. But such a waiver requires unequivocal action by the waiving party, *e.g.*, conduct that indicates a continued intent to be bound by the agreement.

In *Dossantos* v. *Myers*, 31 LCR 664 (2023), Justice Kevin T. Smith had to decide whether conduct that continued for more than three years after an agreement's time is of the essence deadline sufficed to waive the provision. And if there had been waiver, was the putative purchaser entitled to specific performance? Louis Meyers, the record owner of 67 Ceylon Street in Boston (the "Property"), died intestate on March 14, 1994. Shortly thereafter, his son, Leroy Myers, filed a petition to probate the estate and was appointed as the estate's personal representative. Fast forward to May 2018 and Louis Myers was still the Property's record owner. Leroy Myers, as Trustee of the Estate of Louis Myers, and Joao Dossantos entered a written purchase and sale agreement for the Property. The agreement specified a closing date of July 6, 2018, and contained a "time is of the essence" clause.

When the parties discovered that Leroy Myers did not have authority to sell the Property—he had not yet obtained a license to sell from the Probate and Family Court—the parties agreed to extend the closing to July 30, 2018. Thereafter, they agreed to a further extension to September 3, 2018 so that Myers could reopen his father's estate and obtain a license to sell the Property.

Reopening the old probate action took longer than expected; the parties were unable to close by September 3rd. The parties agreed that Myers would continue to pursue the steps necessary for him to sell the Property to Dosantos. Myers finally reopened the probate action in November 2018.

In March 2019, the parties agreed that Dossantos would move into the Property as a tenant while Myers continued working to obtain a license to sell. Dossantos moved in and began paying monthly rent of $1,200, plus electricity. Dossantos has lived at the Property since then.

On May 10, 2021, Dossantos wrote to Myers seeking a further written extension of the closing date until June 1, 2021. Myers did not sign the extension. E-mail correspondence between the attorneys for Dossantos and Myers, in August and September of 2021, indicated that both parties intended to move forward with the closing as soon as the probate action concluded. On November 1, 2021, Dossantos filed this action. On September 13, 2022, Myers filed a motion in the probate action to allow his final accounting and for an order to complete settlement of the estate. The Probate and Family Court issued that decree and order on May 22, 2023.

Dossantos asked the Land Court to declare that the parties' agreement was still binding on Myers and the Estate of Louis Myers. To prevail, he needed to show that the parties had waived the agreement's "time is of the essence" clause; otherwise, the agreement had long since expired.

Conduct that shows a continued intent to be bound by an agreement may be sufficient to unequivocally imply waiver of a "time is of the essence" clause. The question of waiver is usually for the finder of fact. When, however, no facts are in dispute, waiver is a question of law. *McCarthy* v. *Tobin*, 429 Mass. 84 (1999). Judge Smith found there were no disputes of fact concerning the parties' actions after they failed to close on the date set forth in the agreement, July 6, 2018. The chronology was clear and undisputed.

Myers claimed that the agreement expired when he was unable to obtain a license to sell by September 3, 2018, the last extension to which the parties had agreed in writing. Judge Smith found that, notwithstanding the absence of a further written extension, Myer had finally reopened the probate action and began to take the necessary steps to obtain authorization to sell the property. Myer and Dossantos continued to communicate about the pace of the probate action. Myers entered an oral, month-to-month lease with Dossantos, allowing him and his wife to live at the Property until the probate action concluded. The landlord-tenant relationship proceeded smoothly until late summer or early fall of 2021, when Dossantos's counsel began repeatedly asking about the status of the probate action and for a forecast of a new closing date.

5. Enacted in 2021, the MBTA Communities Act added definitions to G.L. c. 40A, § 1A and created G.L. c. 40A, § 3A (subsequently amended) which requires the approximately 177 communities served by the MBTA (other than Boston) to adopt zoning that allows multi-family housing by right in proximity to transit stations. The Act depends on regulations promulgated by the Executive Office of Housing and Livable Communities, and directs affected communities to revise their zoning accordingly.

Dossantos filed this action only after the probate action appeared stalled.

Judge Smith found "three unequivocal actions" that showed that the parties no longer considered time to be of the essence. First, the parties stayed in communication, directly and through counsel about a closing date after September 3, 2018, with no mention of the deadline for closing under their agreement having passed. Dossantos never asked for the return of his $15,450 deposit, and Myers never indicated a willingness to release the deposit back to Dossantos.

Second, the parties agreed that Dossantos and his wife would move into the Property as tenants at will until Myers could complete the probate action and sell the Property to Dossantos. Dossantos and his wife moved in and began paying rent.

Third, on August 18, 2021, in response to an inquiry from Dossantos's counsel, Myers' counsel stated that the probate action was nearly closed and "Then we can schedule a Closing." This response confirmed the parties' understanding that the agreement had not expired. For these reasons, Judge Smith found that Myers had waived the "time is of the essence" clause in September 2018 and had implicitly agreed to a general extension of the closing until he completed the probate action. Dossantos's actions, particularly his moving into the Property as a tenant at will, showed that he had relied on Myers' promise to sell the Property to him as soon as the probate action concluded. And Myers never took affirmative steps to reestablish a deadline.[6] Judge Smith found that the agreement remained in full force and effect and that Myers, as personal representative of his father's estate, must perform accordingly.

Dossantos also sought an order for specific performance of the agreement. Specific performance is most often appropriate with respect to contracts to convey land because of the unique nature of real property and the inadequacy of money damages to redress a deprivation of an interest in land. *Pierce* v. *Clark*, 66 Mass. App. Ct. 912, 914 (2006) *quoting Raynor* v. *Russell*, 353 Mass. 366, 367 (1967). Judge Smith found specific performance to be an appropriate remedy and ordered Myers to specifically perform and abide by all of the terms of the agreement.[7]

Drafters routinely include "time is of the essence" clauses in purchase and sales agreements, leases, and other contracts concerning interests in land. Sometimes these clauses apply only to specific elements of a contract, such as the time and place of closing or the need to timely pay rent. Sometimes the clauses purport to make time of the essence for each and every contractual provision. If the parties really want time to be of the essence, they need to behave accordingly. If the parties proceed to act as if a deadline did not matter after it is missed, the "essence" can be restored, but only if the party wishing to do so gives clear notice with a reasonable deadline to the other, stating unequivocally that the new deadline will matter.

4. Repeatedly lying to your counterparty is not good faith and fair dealing

Massachusetts common law implies a covenant of good faith and fair dealing in every contract. *UNO Restaurants, Inc.* v. *Boston Kenmore Realty Corp*., 441 Mass. 376, 385 (2004). Where a contract involves the obligation to construct improvements to real property contingent on the issuance of the required approvals, there is an implied obligation for the constructing party to make a good faith effort to obtain the required permits and approvals. *See Sechrest* v. *Safiol*, 383 Mass. 568, 570-571 (1981); *Stabile* v. *McCarthy*, 336 Mass. 399, 402-403 (1957). In *Balasar* v. *76 Litchfield Street Realty Trust*, 31 LCR 672 (2023), Justice Kevin T. Smith had to decide the appropriate remedy where the trustee had lied repeatedly about efforts to obtain required approvals and, in fact, had made no efforts whatsoever.

In 1992, Suniena Balasar purchased 76 Litchfield Street in the Brighton section of Boston. She has lived there ever since. By 2017, she was experiencing financial difficulties and fell into default under a mortgage she had given on the property. The mortgagee began taking steps to foreclose on the property.

In 2018, Kevin J. Mullen, as trustee of 76 Litchfield Street Realty Trust (the "Trust"), made an unsolicited visit to the property. He told Balasar that he was a real estate investor and financial consultant. He proposed a deal that could "save" her house from foreclosure. She would sell the property to the Trust, after which the Trust would lease the property back to her with an option for her to repurchase the property in the future. The option price was based on a formula that assumed that Mullen or the Trust would construct a second-floor addition to the existing house within a reasonably short period after the closing.[8] Under the lease, Balasar would pay $3,800 per month, plus utilities, for a term from April 25, 2019 to October 31, 2020, or 18 months after completion of the work or when an occupancy permit was issued, whichever came later. Two paragraphs of the lease addressed the construction of the second-floor addition:

> 28. OPTION TO PURCHASE: Landlord grants Tenant the option to purchase the property during the term of this lease, for Landlord's original purchase price plus $53,400.00, plus any improvements, costs and expenses related to the improvements to the property, including construction costs, permitting, zoning, building and attorneys fees and costs, at a final purchase price not to exceed Seven Hundred Thousand ($700,000.00) Dollars.
>
> The Tenants Option to purchase shall be deemed waived if the tenant is in default of any provisions of this lease agreement, including its obligation to pay rent. The monthly rent shall increase

6. After parties have waived their "time is of the essence" clause, either may re-establish the clause by giving notice to the other providing a reasonable time for closing, making clear the time and place of closing, and indicating that nonperformance at that time would terminate the agreement. *Blum* v. *Kenyon*, 29 Mass. App. Ct. 417, 422 (1990).

7. Judge Smith ordered that Dossantos would have a period of 60 days from the date of the decision in which to secure financing in accordance with the terms of the agreement. Upon Dossantos's receipt of a commitment letter from a lender, the parties were ordered to schedule a closing on a date and time convenient to the parties and the lender.

8. Balasar intended to rent the addition to her adult son, thereby generating income to help her resolve her financial problems and repurchase the property.

> to $5,000 per month once construction is completed ("completed" is defined as all construction permits signed off and final Certificate of Occupancy issued by the City of Boston). If tenant does not opt to purchase the property, the tenant's lease shall extend to one year from the date construction is completed at $5,000.00 per month. If Tenant is unable to purchase during the Term of this agreement, the option to purchase and lease agreement will expire.
>
> 29. CONSTRUCTION: Landlord agrees during the term of this lease to construct a second floor in size similar to the first floor as a second unit. This provision is contingent upon Landlord obtaining all necessary permits for the City to construct a second unit. If the tenant needs to vacate the property during construction any rent shall be suspended during the tenant's vacancy. Any suspended rents will be collected at the end of the lease or as part of tenant's option to purchase.

Upon execution of the agreement, Balasar conveyed the property to the Trust for $495,850 and continued there, paying rent to the Trust.

Within months, Balasar began to ask Mullen about his efforts to secure approvals from the City of Boston, and when construction of the addition would begin. He had told her that he expected to secure the approvals by July 2019 and that construction would begin in September 2019. Mullen always responded that he was attempting to secure permits, but that the city was rejecting his applications. On January 28, 2020, Mullen told Balasar by email that he had "hit a wall" and that, "The local Zoning lawyers I've spoken with have deferred on handling the appeal."[9] He suggested that he sell the property and share the profits with her. Balasar declined.

In the fall of 2021, Balasar secured pre-approval for a mortgage loan to purchase the property. She told Mullen that, based on the lease's pricing formula, she was prepared to pay the Trust $549,250, representing the price paid by the Trust plus $53,400. The Trust refused to sell the property and made a counteroffer to sell the property to her for $650,000. The Trust's attorney also asserted that Balasar was in default under the lease and, therefore, no longer had a repurchase right. On November 5, 2021, the Trust brought a summary process action seeking possession of the property for Balasar's alleged failure to pay rent. On February 7, 2022, Balasar brought this action. It was around that time that she discovered that neither Mullen nor the Trust had ever attempted to obtain any approvals from the city to construct the second floor addition, *i.e.*, that Mullen apparently had repeatedly lied to her.

Balasar's complaint asserted three claims against the Trust: breach of the lease, for which she sought specific performance of her option to repurchase; an injunction preventing the Trust from selling, encumbering, or collateralizing the property; and money damages for breach of the lease. To prevail on a breach of contract claim, the plaintiff must show that there was an agreement between the parties, that the nonbreaching party was ready to perform, and that the breaching party failed to fulfill its promised obligation. A party that makes these showings is entitled to the benefit of his or her bargain. When the contract involves real property, the court may grant the equitable remedy of specific performance. *Greenfield Country Estates Tenants Ass'n, Inc.* v. *Deep*, 423 Mass. 81, 87-88 (1996). The unique nature of real property and the inadequacy of money damages make specific performance an appropriate remedy for breaches of contracts to convey land. *Pierce* v. *Clark*, 66 Mass. App. Ct. at 914.

The parties' agreement was a unilateral contract giving Balasar the right to buy the property in the future under certain terms and conditions. She has the right, at her election or option, to demand conveyance in the manner specified. Massachusetts common law implies a covenant of good faith and fair dealing in every contract. *UNO Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004). This covenant "provides that neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Anthony's Pier Four, Inc.* v. *HBC Associates*, 411 Mass. 451, 471-472 (1991). Thus, the parties' agreement included the implied obligation that the Trust make a good faith effort to obtain the required approvals for the contemplated second floor addition.

Judge Smith found that the record reflected that the Trust took no steps to obtain a building permit and that Mullen repeatedly lied to Balasar by claiming to have made such attempts. And Mullen then compounded his lies by claiming that none of the lawyers with whom he claimed to have consulted would take the appeal. Judge Smith found that construction of the second floor addition appeared to be permitted as a matter of right under the Boston Zoning Code. The failure to even attempt to obtain a building permit for the promised addition breached the express terms of Paragraph 20 of the parties' agreement and breached the implied covenant of good faith and fair dealing. This destroyed the fundamental premise of the agreement, which was for the Trust to create additional living space and then sell the property back to Balasar.

Judge Smith also found that Balasar was ready, willing, and able to repurchase the property based on the formula set forth in the parties' agreement. The Trusts refusal to sell was unjustified; it had received "a substantial amount of rent" since April 2019, notwithstanding its failure to perform its fundamental obligation. Judge Smith found that money damages for the breach would not adequately compensate Balasar for the harm she had suffered. He ordered the Trust to complete the sale of the property to Balasar in accordance with Paragraph 28 of their agreement. He gave the parties until January 5, 2024 to submit their respective positions on the appropriate purchase price under the agreement if they were unable to agree. As of the date of the writing of this commentary, the docket shows that the parties did not agree, and that Judge Smith had ordered them to attend a REBA mediation screening and then to submit a joint report indicating whether they intend to pursue mediation. One wonders how the legal fees the parties will incur to resolve the final repurchase price compares to the difference in what they believe is the appropriate price.[10] ■

9. In Boston, one seeks zoning relief by applying to the Inspectional Services Department for a building permit and then appealing ISD's refusal letter to the Zoning Board of Appeal.

10. From the docket, the price dispute appears to be over whether Balasar should be required to pay anything more than Trust's original purchase price in light of the Trust having breached the agreement from the start.