

SUMMATION OF LEGAL POSITION OF THE APPELLANTS
RE: 28 ALEXANDER DRIVE AND 0 DONNIE WAY
(ZBAPP-029141-2024)

Nature of the Appeal. This is an appeal of the decision of the building commissioner pursuant to G.L. Laws Chapter 40A, §§ 7 and 8. The building commissioner has denied appellants' request that he enforce the zoning bylaw and withhold a building permit for the 24-unit affordable housing development proposed by the owners of the above-mentioned properties.

Section 7 provides that the building commissioner is charged with enforcement of the zoning bylaw and shall withhold a permit for the construction of any buildings that would be in violation of the bylaw.

Section 8 provides that any person aggrieved by reason of his inability to obtain enforcement action from the building commissioner may appeal the building commissioner's decision to the zoning board of appeals.

The board of appeals is the final administrative authority to determine whether construction of the proposed buildings would be in violation of the zoning bylaw.

A court lacks jurisdiction to hear an appeal of a building commissioner's decision acting under the local zoning bylaw until the board of appeals first acts. Woburn v. McNutt Bros. Equipment Corp., 16 Mass.App.Ct. 236, 238 (1983) (local administrative remedies must be exhausted before judicial relief may be sought).

Proposed Development and Its Effect on the Appellants. The trustees of Cape Commerce Nominee Trust propose to construct a 24-unit affordable housing development on a 5-acre parcel of land consisting of (i) Lot 8 in a subdivision known as Setucket Heights (street address: 28 Alexander Drive), and (ii) a 4.8-acre parcel situated outside, and to the rear of, the subdivision (street address: 0 Donnie Way). Both properties are situated in a R-40 zoning district.

The Setucket Heights subdivision consists of 29 lots. The subdivision was approved by the Dennis Planning Board in 1968. Single-family residences have been constructed on all lots in

the subdivision. A single-family residence has stood on Lot 8 since 1969.

The developer proposes to demolish the house on Lot 8; eliminate the rear lot line; and combine the former Lot 8 with the 4.8-acre land-locked parcel to form a new 5-acre lot. The width of the new lot will be 75 feet for its first 120 feet of depth. This strip of land will serve as the sole entrance to, and exit from, the proposed development. A site plan of the development accompanies the appellants' original application.

Two of the appellants own and reside at Lots 7 and 9 in the Setucket Heights subdivision. These lots directly abut the entrance to the proposed development. Another appellant owns and resides at Lot 23, which is directly across the street from the entrance to the proposed development.

In a related action tried in the Barnstable Superior Court in August 2024, the uncontroverted evidence was that the proposed housing development will generate 271 vehicle trips on a daily basis throughout the year. All that traffic will enter and exit the proposed development through the 75-foot-wide strip of land which is the former Lot 8.

The appellants have standing as "aggrieved persons" to appeal the building commissioner's decision. Green v. Board of Appeals of Provincetown, 404 Mass. 571, 574 (1989) (a person aggrieved by the decision of the official charged with enforcing the local zoning bylaw has the right to seek administrative relief from the board of appeals, and after exhausting administrative remedies, a right to obtain judicial review).

The Parties Agree that the New 5-Acre Lot is a Panhandle Lot. The minimum width of a lot in an R-40 zoning district is 100 feet. "Lot width" is measured at the "required setback line." The required setback line in an R-40 district is 25 feet. The proposed 5-acre lot does not meet the lot width requirement.

The building commissioner has determined that the new lot is a "panhandle lot," which term is defined in the zoning bylaw as a "lot with the required frontage which has reduced access to the main portion of the lot." The appellants agree with this aspect of the building commissioner's decision.

Legal Issue to be Decided by the Board. The sole issue before the Board is whether the Dennis zoning bylaw permits an affordable housing development consisting of 24 single-family homes to be constructed on a panhandle lot. Resolution of this question requires a close reading of three sections of the bylaw, and application of the rules established by the appellate courts of Massachusetts which govern interpretations of statutes and other legislative enactments.

Governing Sections of the Dennis Zoning Bylaw.

Section 2.3.3.8 (final sentence) states as follows:
"Panhandle lots shall only be allowed for residential uses."

Section 2.2.2 contains a category of uses identified as "Residential Uses." Ten (10) uses appear in this category:

1. a one or two [family] dwelling unit;
2. a multi-family dwelling unit
3. a lodging house
4. a bed & breakfast
5. a hotel
6. a motel/motor court
7. an open space village development
8. a security apartment incidental to a commercial or industrial use
9. a cluster development within the QNCPRPD (see &4.8)
10. a one-family dwelling unit with accessory apartment.

An affordable housing development created pursuant to section 4.9 of the zoning bylaw does not appear in the category of "Residential Uses." Moreover, only the first and tenth uses are permitted as a matter of right in an R-40 zoning district.

Section 2.2.1 (final sentence) states as follows: "Any use not specifically enumerated in a district herein shall be deemed to be prohibited."

Rules of Statutory Interpretation.

Where a legislative body uses the same words in different sections of a statute or zoning bylaw, and those words concern the same subject matter, the words are presumed to have been used with the same meaning throughout the statute or bylaw. This is an elementary rule of statutory interpretation. Commonwealth v. Wynton, 459 Mass. 745, 747 (2011) and cases cited.

When a municipality has defined terms expressly in its zoning bylaw, a court may not enlarge that definition with its own conceptions of expediency. Melrose-Wakefield Hosp. Ass'n v. Board of Appeal of Melrose, 31 Mass.App.Ct. 923, 924 (1991)

A court will not approve an interpretation of a zoning bylaw that renders a significant portion of a zoning bylaw superfluous. Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 352 Mass. 617, 618 (1967); Advanced Dev. Concepts, Inc. v. Blackstone, 33 Mass.App.Ct. 228, 233 (1992).
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A building commissioner's interpretation of a zoning bylaw is not entitled to deference where such interpretation would render other language in the bylaw without meaning or effect. Hebb v. Lamport, 4 Mass.App.Ct. 202, 209 (1976); In the Matter of Yankee Milk, Inc., 372 Mass. 353, 358 (1977).

Conclusion. An affordable housing development (especially one consisting of 24 single family dwellings) is not a use specifically enumerated in the zoning bylaw as a "Residential Use." The building commissioner's decision is in conflict with the zoning bylaw and must be overturned. This board should determine that a housing development consisting of 24 single-family dwellings is not permitted on a panhandle lot.



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