

To: Paul Fowler, Building Commissioner; Paul Foley, Town Planner
From: Christopher G. Senie, Esq., Victoria Dalmas, Esq., Jack Herndon, Esq.
Re: 36 Depot Street, Dennis Port (“Subject Property”)
Date: May 14, 2025

Issue Presented

This memo focuses on whether or not the floor area ratio (“FAR”) limitation set out in the Dennis Zoning Bylaw §2.4.1.2.D.3., which the Zoning Bylaw states is relevant to an intensification of a lawful preexisting nonconforming structure, also applies to a developed residential property made lawful in all its nonconformities solely by variance relief under Zoning Bylaw §1.4.2.2 and M.G.L. c. 40A, §10.

Summary Answer

The FAR requirement does not apply.

Key Background Facts

The Subject Property, containing two small residences, was originally part of a cottage colony which came to be divided under Subdivision Control Law M.G.L. c. 81L. Such division does not make the lots or structures thereon lawful, so the then property owners secured a variance (“2022 Variance”) from the Zoning Board of Appeals (“ZBA”) to make lawful all such nonconformities.

The variance allowed for future expansion of the two structures within a specific building envelope shown on a plan attached to and referenced in the variance.

Here are the 2022 Variance conditions:

1. “The lot is granted variance from minimum lot size requirements and is allowed to remain in its current size.
2. The property may continue to be used for residential purposes without the need for further Variance relief.
3. The property may have the residences altered or replaced with a new structure(s) as long as the structure(s) are located within the building envelope on the plan accompanying this decision.
4. New structure(s) on the property may either be two single family dwellings or one two-family dwelling.
5. Future changes on the site shall be subject to normal Dennis Site Plan or Special Permit review processes as appropriate as long as condition 3 and 4 are complied with.”

Zoning Bylaw §1.4.2.1 sets out the ZBA’s special permitting powers as follows:

“1.4.2.1 To hear and decide applications for special permits upon which the Board is empowered to act under this By-Law pursuant to M.G.L. ch. 40A. Special permits may be granted only upon a finding by the Board that the proposed use will not create nuisance, hazard or congestion, or other significant harm to the neighborhood, nor cause derogation from the general purpose and intent of the By-Law, the stated district intent or applicable use criteria. It shall be the responsibility of the applicant for any special permit to show, to the satisfaction of the Special Permit granting authority, that the following criteria area met:

- a. The use is allowed by special permit in the district in which proposed, pursuant to §2.2.2 – Use Regulations Schedule;
- b. Suitability of the site for the proposed use in light of the applicable district intent, as provided in §2.1.5;
- c. Adequacy of management of traffic flow within the site as well as in relation to adjoining streets and properties, so as to minimize unsafe or harmful impacts of the use;
- d. Compatibility of the proposed use with surrounding land uses, so as to minimize harmful impact or conflict with existing desirable neighborhood character, including views, vistas and other aesthetic values;
- e. Adequacy of provision of utilities and other necessary or desirable public services;
- f. Adequacy of control of artificial light, noise, litter, odor or other sources of nuisance or inconvenience to adjoining properties, public ways and neighborhoods; and
- g. Adequacy of protection from degradation and alteration of the natural environment, including but not limited to slopes and other topographical features, vegetation, wetlands, groundwater and water bodies and wildlife habitat.”

So, in order to expand the two structures within the building envelope set out in the 2022 Variance, the applicant must apply for a special permit and address: site suitability; traffic; compatibility with surrounding uses; adequacy of utilities, environmental protection and potential adverse impacts such as light, noise, litter, and odor.

Because this is not a Non-Conforming Condition the entirety of Section 2.4 does not apply. That section is intended to be used where a property has no variance and is lawfully non-conforming. The subject property has the 2022 Variance which addresses future expansion.

This being the case, the FAR provision mentioned above does not apply. FAR is not a general dimensional constraint in the Zoning By-laws. It is not mentioned in the dimensional table (like

height limits, setback distances, minimum area, road frontage and coverage). It is brought into the Zoning By-laws only as the ZBA considers the degree to which a Non-Conforming Condition can be expanded.

The Palitz Case

The case of Palitz v. Zoning Board of Appeals of Tisbury, 470 Mass. 795 (2015) involved nearly identical facts. A property that historically had numerous structures was divided under the same section of the subdivision control law (M.G.L. c. 41, §81L). This provision allows a property owner to create lots specific to existing structures, but such a division does not render the lots lawful from a zoning point of view. So as here, the property owner in *Palitz* then got a variance from the ZBA to make the lots and structures lawful.

Under *Palitz*, zoning relief for nonconformities made lawful by variance is limited to: (1) the relief set out in the variance instrument itself, if any; (2) a modification of the variance; or (3) new variance relief.

The *Palitz* Court held that the *subsequent* (approximately 10 years later) proposed raze and reconstruction would require yet another variance given its ineligibility for structural change as a lawful preexisting nonconforming structure (underlining provided). In other words, M.G.L. c. 40A, § 6 and the local zoning bylaw analogue to that provision governing lawful preexisting nonconforming structures were unavailable as a basis for structural change.

Palitz in substance reflects a distinction in zoning law between that which was dimensionally (including structurally) lawful when created but later rendered unlawful due to a change in the zoning law (*i.e.*, often referred to as grandfathered or as lawful preexisting nonconforming) **AND** that which in its creation event (*i.e.*, the land division in *Palitz*) is made lawful only by action of the zoning board in granting extraordinary variance relief. *See Palitz* at 798-99.¹

Based on the foregoing, the FAR limitation set out in above cited Zoning Bylaw §2.4.1.2.D.3., which governs lawful preexisting nonconforming structural intensifications, is inapplicable to the proposed raze and reconstruction at the Subject Property. Of sole application given the 2022 Variance and the proposed redevelopment should be the conditions set out in that variance,

¹ *See also Mendes v. Board of Appeals*, 28 Mass. App. Ct. 527, 530-31 (1990), noting, in the context of uses, that:

The owners' use of the premises has never been permitted by the town's zoning regulations and has never been **nonconforming** in the special sense that it existed 'at the time the [use restricting] zoning by-law was originally adopted [or amended].' § G. A. of the town by-law. *See also* G.L. c. 40A, §6, 1st par. Use of the site for the construction business began only after the locus was already zoned for residence use. It came about, not through **preexisting right**, deprivation of which might raise constitutional questions, but through the after-the-fact dispensation of a **variance**. For purposes of deciding whether a use is nonconforming within the meaning of G. L. c. 40A, § 6, the question is not merely whether the use is lawful but how and when it became lawful.

[Internal citations omitted and emphasis added].

inclusive of the Zoning Bylaw special permitting criteria set out in above cited Zoning Bylaw §§1.4.2.1.