MEMORANDUM

TO: Members of the Large House Review Study Committee
FROM: Jeanne S. McKnight
DATE: February 8, 2016
RE: Reconstruction of Non-Conforming Single-Family Houses in Needham

At our January 7, 2016 meeting, I said I would forward recent Massachusetts appellate court cases on the issue of reconstruction of prior nonconforming residential structures. Two cases are attached: Gale v. Zoning Board of Appeals of Gloucester, 80 Mass. App. Ct. 331 (2011) and Deadrick v. Zoning Board of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014).

In Gale the Court determined that reconstruction of a pre-existing nonconforming single-family residence by Foote (the private co-defendant with the Gloucester ZBA) required only that the ZBA issue a special permit, finding that the new residence was not more detrimental to the neighborhood than the existing residence, even though the new residence would increase or intensify a pre-existing nonconformity; a variance was not required. Foote's proposed new structure had a larger footprint than the previous structure, going from a 1,000 sq. ft. cottage to a 2,700 square foot 2-bedroom house that would exceed the bounds of the existing footprint, and would increase the pre-existing setback nonconformities. Gale, the abutting property owner, argued that a variance was required to increase the existing setback nonconformities and that Foote did not meet the standards required for the issuance of a variance. The Appeals Court upheld the entry of summary judgment by a Land Court judge in favor of Foote and the ZBA, concluding that the ZBA's grant of a special permit, based on its finding of no substantial detriment to the neighborhood, was all that was required.

When the Gale decision was issued in 2011, it created a concern as to whether this case meant that *new* non-conformities could be permitted by means of a mere finding, without a variance. The Appeals Court in Deadrick in 2014 clarified that Gale applied only to intensification of an existing non-conformity, not to the creation of a new non-conformity, which would still require a variance. The Chandlers (co-defendants with the ZBA) proposed to replace a 2,161 square foot house built in 1929 with a new house having an additional 529 square feet of living space, on substantially the same footprint as the prior house. The replacement house, however, would have exceeded the Zoning Bylaw's 20-foot height limit in Chatham's coastal conservancy district (thus creating a new non-conformity as to height). The Court remanded the matter to the Chatham ZBA to determine whether the proposed new structure was eligible for a certain height exemption under the Zoning Bylaw for houses built prior to January 16, 1992 and required to be elevated in accordance with FEMA regulations "provided there is no expansion." The remand was so that the ZBA could expressly determine whether this reconstruction constituted an "expansion" or not under the Zoning Bylaw so as to trigger or not trigger the height limit exception.

It is the clarifying language in Deadrick that is important on the issue of whether the addition of new nonconformities to a pre-existing nonconforming residential structure requires a variance (see p. 5 of Deadrick). The Court noted that the new structure would keep many of the preexisting nonconformities of the old structure (lot size, building coverage, frontage, front and side yard setbacks) but (if not exempt as explained above) would create an *additional* nonconformity with respect to height, noting that the Land Court judge below had determined that the addition of a new nonconformity required a variance rather than a special permit/finding. The Chandlers challenged this interpretation, arguing that both new and existing nonconformities could be permitted by special permit/finding. The Land Court judge had noted that it appeared the statement in Gale that *a permit granting authority, after identifying the particular respect(s) in which the existing structure does not conform to the present bylaw, must then determine whether the proposed reconstruction would intensify the existing nonconformities or result in additional ones and, if yes, a finding of no substantial detriment is required,* does not distinguish between reconstruction that results in increased existing nonconformities, versus creating new, additional nonconformities. The Land Court judge concluded that while intensifying existing nonconformities could be done with only a special permit/finding, the creation of new nonconformities requires a variance. The Appeals Court in Deadrick agreed with this interpretation, citing and distinguishing Rockwood c. Snow Inn Corp., 409 Mass. 364 (1991), which pertained to reconstruction or expansion of a non-residential nonconforming structure (see p. 7 of Deadrick). The Court said, applied strictly to residential structures, the holding in Rockwood would require a variance even for extensions of existing nonconformities; however, a long line of cases have held that an alteration which intensifies an existing nonconformity in a residential structure may be authorized upon a finding of no standing detriment, citing Gale. Thus, the Appeals Court in Deadrick concluded by saying that it construed the provisions of the first and second sentences of §6 (fully cited below) together to allow extension of existing nonconformities, but to require a variance for the creation of any new nonconformity.

In applying these two cases to Needham's Zoning Bylaw, I shall confine my comments to reconstruction of single-family residences in Needham zoning districts where single-family residences are allowed by right, since two-family houses in Needham present both use and structural non-conformities.

Gale and Deadrick explain Mass law, G.L. c.40A (the Zoning Act) §6, ¶1, which provides in relevant part: "Except as hereinafter provided, a zoning … bylaw shall not apply to structures or uses lawfully in existence or lawfully begun…, but shall apply to any change or substantial extension of such use …, [and] to any reconstruction, extension or structural change of such structure … except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by … by-law that such change, extension or alteration shall not be substantially more detrimental than the existing

nonconforming [structure or] use to the neighborhood."

Needham's Zoning Bylaw provides for reconstruction [defined in Section 1.4.7.1 as the voluntary razing and rebuilding of a building] of single-family dwellings in Section 1.4.7.3 as follows: "A lawful pre-existing non-conforming single-family ... dwelling which is non-conforming because of front, side and rear setback, build factor, area and/or frontage requirements of this By-Law may be reconstructed as a matter of right and without a special permit or finding by the Board as required in the preceding section [1.4.6] provided that the new building is built in compliance with all front, side and rear setback, lot coverage, building height and building story requirements of the current By-Law including but not limited to the provisions of Section 4.2.1 (g) [side and rear setback for new construction on lots created before 1/9/1986 in Single Residence A, Single Residence B and General Residence District], (i) [side setback for new construction on lots created after 1/9/1986 in Single Residence B or General Residence District], (j) [rear setback for new construction on any lot in Single Residence B and General Residence Districts], and (k) [lot coverage for new construction in the Single Residence B District and General Residence District] and provided that the building as reconstructed has a footprint no greater in area than that of the original non-conforming building." If the proposed reconstruction does not meet these standards, then it would require a special permit under Section 1.4.6.

Section1.4.6 provides in relevant part as follows: "... a lawful pre-existing ... non-conforming building may be structurally altered, enlarged or reconstructed only pursuant to a special permit issued by the Board of Appeals pursuant to Section 7.5.2. No such permit shall be issued except in accordance with the requirements of Section 7.5.2 nor unless the Board shall determine that such change, extension, alteration, enlargement or reconstruction would not be substantially more detrimental to the neighborhood than using the existing non-conforming use of structure. The issuance of a special permit hereunder shall not authorize the violation of any dimensional, parking or intensity regulation with which the structure or use was theretofore in conformity."

I mentioned these cases at our meeting of January 7th in the context of discussion of suggested increases in front and side setback requirements for residential construction. Objections were raised to the suggested increases. I commented that those objecting are ignoring that an existing house on some of the lots that were under discussion [undersized lots or corner lots] may already be closer than the existing lot line setback requirement. I noted that in such a case, there could be a finding made by the Zoning Board of Appeals that a new house at that setback would not be more detrimental to the neighborhood than the existing non-conforming house. Ms. Newman said, however, that if the house is merely altered, such a finding could be made, but if the house is demolished, the new house would need to comply in every respect with the current zoning requirements. I responded that recent case law says otherwise [that a non-conforming house may be reconstructed with such a finding even if the non-conformity is intensified]; however creating a new non-conformity is a different story [creating a new non-conformity can only be done with a variance – and a variance may be issued only if certain strict standards are met, which is rarely the case]. I believe the Gale and Deadrick cases stand

for these principles. I recommend that Town Counsel be consulted for an opinion if the applicability of this case law to the provisions of the Needham Zoning Bylaw is not clear.

# JUSTIN E. GALE & others [Note 1] vs. ZONING BOARD OF APPEALS OF GLOUCESTER & another. [Note 2]

80 Mass. App. Ct. 331

May 10, 2011 - September 2, 2011

Court Below: Land Court Department, Suffolk

Present: KANTROWITZ, SMITH, & WOLOHOJIAN, JJ.

Related Cases:

- 18 LCR 330

Zoning, Person aggrieved, Special permit, Variance, Nonconforming use or structure.

In a civil action brought in the Land Court by plaintiff landowners appealing from a decision of the zoning board of appeals of Gloucester (board), which granted a special permit and a variance pursuant to G. L. c.40A, § 6, to the defendant trustee, the owner of neighboring property, allowing the reconstruction of a pre-existing nonconforming structure on the defendant's property, the judge correctly determined that the plaintiffs had standing to appeal, where, due to a right of way over the plaintiffs' property, the defendant's plan to construct a year-round residence on neighboring property would have a particularized impact on the use of that right of way in the future, especially during the construction phase of the new residence [334-335]; further, the judge correctly concluded that the board's finding under G. L. c.40A, § 6, was sufficient to allow reconstruction, and that, as a matter of law, a variance was not required [335-338].

CIVIL ACTION commenced in the Land Court Department on December 30, 2008.

The case was heard by Charles W. Trombly, Jr., J., on a motion for summary judgment.

Michael K. Terry for the plaintiffs.

Kevin M. Dalton for George B. Foote, Jr.

Suzanne P. Egan for zoning board of appeals of Gloucester.

**SMITH, J.** The plaintiffs, Justin E. Gale, Henry Ware Gale, Peter Peabody Gale, Benjamin Winsor Gale, and Emily Anne



Gale (the Gales), appeal from the entry of summary judgment dismissing their appeal from a decision of the zoning board of appeals of Gloucester (board). That decision granted a special permit and a variance to the defendant trustee, George B. Foote, Jr., allowing the reconstruction of a pre-existing nonconforming structure on the land he held in trust.

1. Background. The following undisputed facts are taken from the summary judgment record. The Gales are owners of property located at 17 Squam Rock Road in Gloucester. Foote, as trustee, is the owner of the neighboring property, 19 Squam Rock Road, which is held in trust for the members of the Foote family (the Footes). At one time, the two properties comprised a single lot owned by Lyman Gale, an ancestor of both the Footes and the Gales. When Lyman Gale died in 1961, the property was divided into two lots. One lot was conveyed to Lyman Gale's son Winsor Gale, and the other was conveyed to Lyman Gale's daughter Priscilla Smith. Winsor Gale's lot is now owned by the Gales (Gale property), and Smith's lot is held in trust for the benefit of the Footes (Foote property). At the time the original lot was divided, a right of way was created over the Gale property onto the Foote property.

The properties are located in an R-2 residential zoning district, and are situated on the coastal peninsula of Annisquam, on Cape Ann, with ocean views of Ipswich Bay. The Gale property is L-shaped, essentially surrounding the Foote property on two sides, and contains a 3,000 square foot, two-story residential structure and a smaller accessory structure. The Foote property contains a 1,000 square foot seasonal cottage, with access from Squam Rock Road via the right of way over the Gale property. The Foote property does not conform to the requirements of the Gloucester zoning ordinance (ordinance) regarding lot area, side yard setback, front yard setback, and rear yard setback. It is undisputed that these nonconformities predate the enactment of the ordinance, rendering the Foote cottage a pre-existing nonconforming structure.

In 2008, the Footes sought to replace the cottage with a larger year-round residence. The plan for the new residence called for a 2,700 square foot, two-bedroom structure that would exceed the bounds of the existing footprint. The new residence was



designed and situated on the lot to facilitate the access and residence of Anna Foote, the eighty-seven year old matriarch of the Foote family.

To reconstruct the residential structure, George Foote petitioned the board for a special permit pursuant to G. L. c. 40A, § 6, and a variance pursuant to § 2.4.5(d) of the ordinance. Under the relevant portion of G. L. c. 40A, § 6, first par., inserted by St. 1975, c. 808, § 3, a pre-existing nonconforming structure or use may be changed, extended, or altered if it is not "substantially more detrimental" to the character of the neighborhood than the original structure or use, as determined by the local permit granting authority. Section 2.4.5(d) of the ordinance provides that "unless authorized by a variance from the Board of Appeals . . . , those portions of the replacement structure that constitute an increase in the footprint of the original structure [must] comply with all provisions of this ordinance, and in particular the dimensional requirements of Section 3.2."

Following review of the proposed plan, the board granted the Footes a special permit, finding that "even if there is an intensification of any nonconformities, the house as reconstructed . . . will not be substantially more detrimental to the neighborhood than the existing nonconforming structure . . . ." As to the requested variance, the board noted that "literal enforcement of the zoning

ordinance would result in personal and financial hardship for the Petitioner" due to the lot's narrowness, steep grade, and scattered ledge outcroppings. It also noted that these hardships do not generally affect other properties in the neighborhood and that the proposed structure would be appropriate in its setting. The board accordingly granted the requested variance from the requirements of the ordinance.

Following the board's decision, the Gales appealed to Land Court, pursuant to G. L. c. 40A, § 17, alleging that the variance was granted in error, as the soil conditions, topography, and shape of the lot were not extraordinary, and because lot shape is not a proper legal consideration in determining whether a variance should be granted. The Gales also claimed that the decision was based on incorrect frontage figures and misleading plans. The Footes responded, in part, by challenging the Gales' standing to appeal the board's decision.

Page 334

On the Gales' motion for summary judgment, a judge of the Land Court affirmed the board's decision. As to standing, the judge observed that the Gales, as immediate abutters, enjoy a presumption of being persons aggrieved. He then concluded that the Gales have a legal interest in the proceedings due to the right of way over their property, which may "increase in year-round use, as well as construction of the proposed structure, which may affect [the Gales'] enjoyment of their land." The judge also noted the close proximity of the two residences, listing as particular concerns the Gales' property value, the privacy and enjoyment of their property, and their enjoyment of light and air, specifically their ocean views. Having found standing on the part of the Gales, the judge held that a finding under G. L. c. 40A, § 6, would have been sufficient to allow reconstruction of the structure, and that "as a matter of law, a variance was not required." In the alternative, the judge determined that the variance was validly granted.

The Gales now appeal to this court, arguing that the judge erroneously concluded both that a variance was not required, and that, if it were required, the variance was properly granted. On appeal, the Footes again challenge the Gales' standing to appeal. The board also filed a brief, maintaining that § 2.4.5(d) of the ordinance was properly enacted, and that the city of Gloucester has the authority to require certain variances under that section of the ordinance. The board also argues that the variance was properly granted in this case. [Note 3]

2. Discussion. We review a grant of summary judgment de novo, to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561 , 566 (2009), quoting from Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117 , 120 (1991). In doing so, we "may consider any ground supporting the judgment." Ibid., quoting from Augat, Inc. v. Liberty Mut. Ins. Co., supra.

Page 335

a. Standing. We begin our analysis by briefly addressing the issue of standing. General Laws c. 40A, § 17, as amended through St. 2002, c. 393, § 2, provides that "[a]ny person aggrieved by a

decision of the [zoning] board of appeals . . . may appeal to the land court department . . . by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk." An abutter to property on which another is allegedly acting in violation of a local by-law or ordinance is presumed to be an "aggrieved" person with standing to contest a claimed violation. G. L. c. 40A, § 11. See 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 78 Mass. App. Ct. 233 , 241 (2010). The Gales fall into this category; their presumptive standing must be effectively rebutted by evidence offered by the Footes. See Marashlian v. Zoning Bd. of Appeals of Newburyport, 421 Mass. 719 , 721 (1996). "Once the presumption is rebutted, the burden rests with the plaintiff to prove standing [i.e., aggrievement], which requires that the plaintiff 'establish -- by direct facts and not by speculative personal opinion -- that his injury is special and different from the concerns of the rest of the community.' " Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20 , 33 (2006), quoting from Barvenik v. Aldermen of Newton, 33 Mass. App. Ct. 129 , 132 (1992).

We agree with the judge's determination that the Gales have standing to appeal under G. L. c. 40A, § 17. As the judge noted, due to the right of way over the Gale property, the Footes' plan to construct a year-round residence would have a particularized impact on the use of that right of way in the future, especially during the construction phase of the new residence. See Marashlian v. Zoning Bd. of Appeals of Newburyport, supra at 722 (abutter's concern of increased traffic and reduced parking conferred standing); Bedford v. Trustees of Boston Univ., 25 Mass. App. Ct. 372 , 376-377 (1988) (same). [Note 4]

b. Special permit. As noted, the board granted the Footes a



special permit to reconstruct the residence on their property pursuant to G. L. c. 40A, § 6, first par., which provides in relevant part:

"Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun . . . , but shall apply to any change or substantial extension of such use, . . . , to any reconstruction, extension or structural change of such structure . . . except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or][ [Note 5]] use to the neighborhood."

The permit in this case was granted following a determination by the board, pursuant to the second sentence of the statute, that the new residence would not be substantially more detrimental than the existing nonconforming structure to the neighborhood. [Note 6] See Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 , 56 (1985). The Gales do not challenge that finding, but instead argue that the local requirement of seeking a variance pursuant

to § 2.4.5(d) of the ordinance, in addition to the G. L. c. 40A, § 6, finding, is not precluded by the language of the statute. We disagree. In resolving this dispute, we are again called on to interpret the "difficult and infelicitous" language of the first two sentences of G. L. c. 40A, § 6, as they pertain to single or two-family residential structures. Fitzsimonds v. Board of Appeals of

Page 337

Chatham, supra at 55. The Supreme Judicial Court, in the concurring opinion in Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852 , 857-859 (2005) (Greaney, J., concurring) (hereinafter Bransford), discussed the interpretive framework set out by this court in Fitzsimonds, supra, and Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 , 21 (1987), and later applied in Goldhirsh v. McNear, 32 Mass. App. Ct. 455 , 460 (1992), and Dial Away Co. v. Zoning Bd. of Appeals of Auburn, 41 Mass. App. Ct. 165 , 170-171 (1996). That framework provides that under the second "except" clause of the first paragraph of the statute, as concerns single or two-family residential structures, the permit granting authority must first "identify the particular respect or respects in which the existing structure does not conform to the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones. If the answer to that question is in the negative, the applicant will be entitled to the issuance of a special permit." Bransford, supra at 858, quoting from Willard v. Board of Appeals of Orleans, supra at 21- 22. If the answer is in the affirmative, a finding of no substantial detriment under the second sentence is required. Ibid., quoting from Willard v. Board of Appeals of Orleans, supra. [Note 7]

This two-part framework does not include application of a local by-law or ordinance as an additional step when proceeding to the no substantial detriment finding under the second sentence. That finding stands alone as sufficient to proceed with the proposed project, if the permit granting authority deems that no substantial detriment will result from the extension or alteration. This conclusion is in keeping with special treatment explicitly afforded to single or two-family residential structures under the statute. Thus, we hold that the board's finding in this case was all

Page 338

that was required; no variance under the ordinance was needed to proceed with the proposed reconstruction. [Note 8]

The Gales' citation to Rockwood v. Snow Inn Corp., 409 Mass. 361 (1991), does not change the result. The court in Rockwood noted: "Indeed, even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that 'would intensify the existing nonconformities or result in additional ones.' " Id. at 364, quoting from Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. at 22. [Note 9] Although the cited language would superficially seem to require adherence to the ordinance in this case, Rockwood involved the granting of a special permit under § 6 to a commercial structure. Therefore, the second except clause of the statute was not relevant

to the result reached, and the quoted language is dicta outside the context of commercial cases. [Note 10] Further, the concurring opinion in Bransford neither cited Rockwood for this proposition nor included such a requirement in the framework it discussed. Bransford, supra at 858-859. Rather, as we have observed, Bransford holds that exterior alterations or reconstructions of single or two-family residential structures that increase or intensify any pre-existing nonconformities may be authorized by means of a finding of no substantial detriment under the second sentence of the first paragraph of § 6. Ibid.

Judgment affirmed.

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FOOTNOTES

[Note 1] Henry Ware Gale, Peter Peabody Gale, Benjamin Winsor Gale, and Emily Anne Gale.

[Note 2] George B. Foote, Jr., trustee of the 1988 revocable trust indenture of Anna Putnam Foote.

[Note 3] The board did not file an appeal in this case, but nevertheless filed a brief. At oral argument, the panel allowed the board to present its arguments on appeal despite this procedural deficiency.

[Note 4] In reaching our conclusion, we note that the Supreme Judicial Court's recent decision in Kenner v. Zoning Bd. of Appeals of Chatham, 459 Mass. 115 (2011), is not to the contrary. In that case, the court held that the plaintiffs did not have standing because they had failed to show that the increased height of a proposed new neighboring house would have more than "a de minimis impact on the [plaintiffs'] view of the ocean." Id. at 123. Here, although the judge did rely, in part, on the Gales' claim of a loss of air and light, our decision is based on other factors, and we need not address the issue of lost ocean views.

[Note 5] See Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 , 21 (1987) (supplying necessary words to language of statute).

[Note 6] It is undisputed that the proposed reconstruction would either increase the existing nonconformities or cause new nonconformities.

[Note 7] The concurrence in Bransford discussed this framework in the context of a case involving a proposed reconstruction of a nonconforming single-family residence that conformed to all the dimensional requirements of the local by-law except lot size. The primary issue raised was whether the proposed reconstruction could increase the nonconforming nature of the structure due to its location on an undersized lot. Bransford, supra at 859. The question was answered by the concurrence in the affirmative. Ibid. Thereafter, a majority of the court in Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357 , 358 (2008), adopted the reasoning and result reached by the concurrence in Bransford.

[Note 8] Because the judge correctly concluded that the variance was unnecessary, so much of the board's decision as purported to grant it was a nullity. We accordingly express no view on the

judge's comment regarding the grounds justifying the variance itself.

[Note 9] Although the court cited Willard, that case did not hold that a local ordinance or by-law applies to a reconstruction, extension, or change to a single or two-family residential structure subject to a no substantial detriment finding. Rather, the quoted language is taken from text establishing the interpretive framework later adopted in Bransford, supra at 858-859.

[Note 10] Likewise, those cases "indicat[ing] that nonconforming uses may be changed or substantially extended only where the local ordinance or by-law specifically authorizes those practices" are inapposite. Titcomb v. Board of Appeals of Sandwich, 64 Mass. App. Ct. 725 , 729 (2005), quoting from Bobrowski, Handbook of Massachusetts Planning Law § 6.04[A] (2d ed. 2002). Although § 6 concerns both structures and uses, the analyses involving the two are necessarily separate and distinct. See Willard v. Board of Appeals of Orleans, supra at 21 n.9.

SARA DEADRICK[1], & others[2] *vs.* ZONING BOARD OF APPEALS OF CHATHAM, & others[3]

1 Individually and in her capacity as executor of the Estate of Mary Ann Hall Deadrick.
2 Stuart Hall Deadrick, Spencer Hall Deadrick.
3 Robert Jeffrey Chandler and Jayne Kerry Chandler.

**No. 13-P-1264.**

**APPEALS COURT OF MASSACHUSETTS**

***85 Mass. App. Ct. 539*; *11 N.E.3d 647*; *2014 Mass. App. LEXIS 75***

**April 2, 2014, Argued**
**June 25, 2014, Decided**

**SUBSEQUENT HISTORY:** Appeal denied by *Deadrick v. Zoning Board of Appeals of Chatham, 469 Mass. 1108, 2014 Mass. LEXIS 738, 20 N.E.3d 610 (Mass., Sept. 5, 2014)*

**PRIOR-HISTORY:**

Suffolk. CIVIL ACTION commenced in the Land Court Department on December 31, 2007.

Following review by this court, *80 Mass. App. Ct. 1104 (2011)*, the case was heard by *Alexander H. Sands, III*, J., on motions for summary judgment and a motion for reconsideration was heard by him.
*Hallock v. Chatham Zoning Bd. of Appeals, 2013 Mass. LCR LEXIS 30 (2013)*

**HEADNOTES-1** *Zoning*, Nonconforming use or structure, Special permit, Variance, By-law, Appeal, Board of appeals: decision, *Practice, Civil*, Variance, Zoning appeal, *Statute*, Construction.

**COUNSEL:** *Daniel P. Dain* for the Robert Jeffrey Chandler & another.

*Peter S. Farber* for the plaintiffs.

**JUDGES:** Present: Grasso, Green, & Fecteau, JJ.

**OPINION BY:** FECTEAU

**OPINION**

FECTEAU, J. The defendants, Robert Jeffrey Chandler and Jayne Kerry Chandler (collectively the Chandlers), appeal from the entry of summary judgment by a judge of the Land Court that reversed a decision of the Chatham zoning board of appeals (board). The board had granted the Chandlers a special permit allowing them to reconstruct a pre-existing nonconforming structure on their nonconforming lot. In reversing the board's decision, the judge determined that because the proposed new structure's increased height created a new, additional nonconformity, distinct from the pre-existing dimensional and coverage nonconformities, a variance was required. We agree with the judge's decision that a variance would be required if the proposed increase in height constitutes an additional nonconformity not otherwise exempted by the town by-law. However, we also conclude that the judge erroneously concluded that the board had determined that the Chandlers' project is ineligible for the exemption from certain height limits created by § IV.A.3 of the Chatham bylaw.[4] Consequently, we vacate the entry of summary judgment and remand the matter for further proceedings before the board.

4 As we discuss below, if the project is eligible for the exemption created by § IV.A.3 of the by-law, it would not create a new nonconformity and, hence, would not require a variance.

1. *Facts.* The following undisputed facts are taken from the summary judgment record. On July 1, 2005, the Chandlers purchased property located at 24 Windmill

Lane in Chatham, Massachusetts containing a single-family home (old structure). The old structure was built in approximately 1929 and is located within a residential R-40 district and in a coastal conservancy district.[5] The old structure is 19.2 feet high above grade, and contains 2,161 square feet of living space. The Chandlers' property is nonconforming as to lot size and building coverage, and contains additional dimensional nonconformities with respect to its frontage, front yard setback, and side yard setback.

> 5 Section IV.A.3 of the bylaw defines the coastal conservancy district as all land delineated in a 100-year flood plain, in which the Chandler property is located. Pertinent to the present case, the section also provides:
>
> "Structures shall not exceed twenty feet (20 feet) in height. Provided there is no expansion, those dwellings which existed prior to January 16, 1992 and are required by the Building Inspector to be elevated in accordance with FEMA regulations, shall not be required to conform to the twenty (20 foot) height restriction."

In November, 2007, the Chandlers filed an application for a special permit seeking to raze the old structure and replace it with a new structure. The new structure, as proposed, will contain an additional 529 square feet of living space on substantially the same footprint as the old structure.[6] The new structure maintains the same nonconformities as the old structure with respect to frontage, setbacks, lot size, and building coverage. However, the height of the new structure is 27.2 feet above grade and, therefore, exceeds the maximum allowable height of twenty feet in the coastal conservancy district.

> 6 The footprint of the new structure pushes outward from that of the old structure to a total of twenty-eight feet and would include a squaring off of a twenty-eight square foot notch between the old structure and attached garage, two small entrance porches in the front yard, and two small proposed patios in the rear.

Part of this height increase is due to the property's location in a "velocity zone" as designated by the Federal Emergency Management Agency (FEMA), which mandates pilings instead of a foundation. Pursuant to FEMA regulations, any "substantial improvement" to a structure located within a velocity zone must be built on pilings with an elevation above the 100-year flood elevation.[7] The proposed height of the new structure, not including the FEMA foundation, is 23.5 feet above flood elevation.[8]

> 7 The 100-year flood elevation, as it applies to the locus, is approximately twelve feet.
>
> 8 The Chandlers argue that FEMA regulations, as incorporated into the State building code, required them to raise the new structure's heating, air conditioning and hot water systems, and electrical and plumbing fixtures and equipment above the 100-year flood evaluation. The Chandlers claim that these mechanicals, located in the basement of the old structure, would have to be placed in the attic of the new structure thereby contributing to the new structure's increased height.

2. *Procedural history.* On December 31, 2007, John V. C. Saylor, Georgia A. Saylor, Peter Hallock, Edwin J. Deadrick, and Mary Anne Hall Deadrick filed their complaint appealing from the board's decision to grant a special permit to the Chandlers, pursuant to *G. L. c. 40A, § 17*.[9] The plaintiffs filed a second amended complaint[10] on March 5, 2008, which added a count under *G. L. c. 240, § 14A*, seeking an interpretation of § V.B and § IV.A.3 of the Chatham zoning bylaws.

> 9 After the death of John Saylor, the Land Court judge allowed the plaintiffs' assented to motion to remove John V.C. Saylor and Georgia A. Saylor as parties.
>
> 10 The plaintiffs' first amended complaint, filed on January 3, 2008, corrected a minor factual issue.

Thereafter, both parties filed cross motions for summary judgment. A judge of the Land Court allowed the Chandlers' motion, concluding that the plaintiffs lacked standing to challenge the special permit. However, in *Hallock v. Zoning Bd. of Appeals of Chatham, 80 Mass. App. Ct. 1104, 951 N.E.2d 1013 (2011)*, an unpublished decision pursuant to *rule 1:28* (2011 decision), a panel of this court determined that the Deadricks had standing, and remanded the case to the Land Court.[11]

> 11 In the 2011 decision, this court determined that Hallock had no standing. The 2011 decision also dismissed a second count of the plaintiffs' complaint, which sought a declaration under *G. L. c. 240, § 14A*, on procedural grounds. Accordingly, the only remaining issue before the judge on remand was the plaintiffs' appeal of the special permit pursuant to *G. L. c. 40A, § 17*.

On remand, both parties renewed their cross motions for summary judgment. In a decision dated February 21, 2013, the Land Court judge allowed the plaintiffs' motion for summary judgment and reversed the board's decision granting the special permit. The judge reasoned that, since the new structure created an additional non-

conformity as to its height, the project required a variance rather than a special permit.

On March 6, 2013, the Chandlers filed a motion for reconsideration, or in the alternative, for a ruling on their pending motion for entry of final judgment, arguing that the 2011 decision of this court had determined the merits of the case favorably to them. On April 9, 2013, the Chandlers also filed a motion under *Mass.R.Civ.P. 60(b)*, 365 Mass. 828 (1974), seeking relief from the judgment on the basis that the last surviving original plaintiff, Mary Anne Deadrick, had died in July, 2012, resulting in a "gap in the title." Thus, the Chandlers claimed that the judgment should be vacated and the complaint dismissed for lack of an aggrieved party at the time the judgment entered. In response, Mary Anne Hall Deadrick's daughter, Sara Deadrick Frye (Frye), acting in her capacity as executor of her mother's estate, filed a motion under *Mass.R.Civ.P. 17(a)*, as amended, 454 Mass. 1401 (1982), to be substituted as plaintiff for her deceased mother. On the same day, Sara Deadrick Frye and Mary Anne Hall Deadrick's other children, Stuart Hall Deadrick and Spencer Hall Deadrick (collectively the Deadrick children), appearing in their individual capacities, filed a motion under *Mass.R.Civ.P. 20(a)*, 365 Mass. 766 (1974), seeking to be joined as plaintiffs in this action.[12] The motions for substitution and joinder were allowed on April 30, 2013, but the Land Court judge took under advisement the Chandlers' *rule 60(b)* motion on the issue of the Deadrick children's standing.

12 Accompanying the motions was the affidavit of Sara Deadrick Frye, in which she disclosed to the court that she and her siblings each held some ownership interest in the Deadrick property throughout the litigation, which they obtained from their parents in four separate conveyances between 1991 and 1995. Frye also indicated that, upon their mother's death, she and her siblings succeeded to the remaining interest in the property held by their mother at the time of her death. Lastly, Frye explained that she and her siblings were well aware of the litigation and shared the same concerns that their parents had regarding the much larger house proposed on the Chandler lot and the effect the proposed house would have on their ocean views.

In an order dated June 4, 2013, the judge determined that, because the Deadrick children had some ownership interest in the property from the outset of the dispute, they shared the same harm as their parents. Therefore, the judge concluded the Deadrick children had standing because this court previously had determined that their parents' harm was a basis for standing. In the same order, the judge denied the Chandlers' motion for reconsideration, noting that the 2011 decision was limited to the issue of standing. The judge also rejected the Chandlers' additional argument that § IV.A.3, of the Chatham bylaw, discussed *infra*, permitted the Chandlers to exceed the applicable maximum height restriction. The judge concluded that the board had determined that the new structure constituted an "expansion" under § IV.A.3 of the bylaw, and therefore was ineligible for its exemption from applicable height restrictions; he also expressed his view that if the board had determined that it was not an expansion, such a decision would be arbitrary and capricious. In any event, the judge ruled that the height exemption provided by § IV.A.3 was inapplicable, so that the new structure's increased height created a new nonconformity requiring a variance.

3. *Discussion.* "We review the Land Court judge's summary judgment decision de novo. Because the judge does not engage in fact finding in ruling on cross motions for summary judgment, we owe no deference to his assessment of the record." *Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 517, 947 N.E.2d 1090 (2011)* (footnote and citations omitted). Turning to the merits of the Chandlers' appeal,[13] we first consider whether the judge correctly decided two issues: (1) whether the board considered the applicability of § IV.A.3 of the bylaw to the new structure, while weighing the Chandler's application for a special permit, and (2) whether the addition of new nonconformities to a pre-existing nonconforming residential structure require a variance or special permit.

13 On appeal, the Chandlers ask us to reconsider our previous 2011 decision, *Hallock v. Zoning Bd. of Appeals of Chatham, 80 Mass. App. Ct. 1104, 951 N.E.2d 1013 (2011)*, where a panel of this court determined that the Deadricks had standing. We decline to revisit the issue. The Chandlers also challenge standing on the grounds that the original Deadrick plaintiffs are now deceased and the substituted plaintiffs, the Deadrick children, do not have standing because they do not live on the locus. Like the Land Court judge, we reject this argument. From the onset of this case the Deadrick children have had some ownership interest in house. As such, the Deadrick children have the same harm as their parents, which we already determined was an adequate basis for standing.

On remand after the 2011 decision, the judge properly recognized that the decision was limited to the issue of standing. Specifically, the judge correctly understood that he needed to determine if the board had ruled on the applicability of § IV.A.3 of Chatham's zoning bylaw to the new structure; as he stated: "The first issue

is whether the ZBA made a finding as to whether or not the New structure was an expansion of the Old structure."

Section IV.A.3 of the bylaw exempts certain structures from otherwise applicable height restrictions if FEMA regulations require the additional height. See note 5, *supra*. Accordingly, if the new structure is not an "expansion" within the meaning of § IV.A.3, then it qualifies for the exemption created by that section from the otherwise applicable twenty foot height restriction. The increased height would not be a new nonconformity, and the Chandlers may proceed under their special permit. However, in denying the Chandlers' motion for reconsideration, the judge concluded that the zoning board had already found the new structure to be an "expansion," within the meaning of § IV.A.3 and, therefore, confirmed his conclusion that the Chandlers' project required a variance rather than a special permit.

The question of the applicability of § IV.A.3 to the new structure is significant. As discussed below, we conclude that the Land Court judge correctly ruled that the creation of a new nonconformity in a preexisting nonconforming structure requires a variance, and not just a special permit based on substantial detriment pursuant to the second sentence of *G. L. c. 40A, § 6*. Accordingly, if the new structure is ineligible for the exemption created by § IV.A.3, it requires a variance and the board's decision granting a special permit for the project would be invalid. Conversely, if the new structure is eligible for the exemption created by § IV.A.3, it does not require a variance and the project may proceed by special permit.

a. *Applicability of § IV.A.3 to the new structure*. As we have observed, the Land Court judge correctly recognized that his first task following the remand ordered by the 2011 decision was to determine whether the board considered and determined the applicability of § IV.A.3 to the new structure in its special permit decision. "[A]lthough interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning by-law." *Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669, 715 N.E.2d 470 (1999)*. "Reviewing courts will interpret zoning by-laws 'in accordance with ordinary principles of statutory construction, with some measure of deference given to the board's interpretation.'" *Eastern Point, LLC v. Zoning Bd. of Appeals of Gloucester, 74 Mass. App. Ct. 481, 486, 907 N.E.2d 1151 (2009)* quoting from *APT Asset Mgmt., Inc. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138, 735 N.E.2d 872 (2000)*. Accordingly, the interpretation of the application of a provision of a local zoning by-law to a request for a special permit ordinarily should be undertaken in the first instance by the local board acting as the special permit granting authority, and only thereafter subject to judicial review within the context of an appeal pursuant to *G. L. c. 40A, § 17*.

We disagree, however, with the Land Court judge's conclusion that the board considered and determined the applicability of § IV.A.3 to the new structure in its special permit decision. The board's decision does not expressly refer to § IV.A.3. Nor does it appear that the board's use of the term "expand" within its decision was intended to express a conclusion that the new structure constitutes an "expansion" within the meaning of § IV.A.3, making the new structure ineligible for the height exemption it provides.[14] Instead, when the board's decision is considered as a whole, we conclude that its use of the word "expand," in two places, was merely descriptive, in a general sense, of the new structure proposed by the Chandlers' application for a special permit. The board's only mention of height was in the board's finding that the height was "not out of scale for the neighborhood." Significantly, even this single finding was within the board's analysis of whether the new structure was substantially more detrimental to the neighborhood. In fact, the board's decision appears to focus principally, if not exclusively, on whether the new structure would be "substantially more detrimental to the neighborhood," under the rubric of *G. L. c. 40A, § 6*. We conclude that the board did not consider or determine the applicability of § IV.A.3 to the new structure in its special permit decision.

> 14 Indeed, the plaintiffs do not contend otherwise. In their brief here, they stated: "The board considered the application solely under Section V.B. and did not address either Section IV.A.3.a or Section IV.A.6.d.l. The board did not address the height issue at all."

As we have observed, zoning is a local matter, and questions of interpretation of the local zoning bylaw ordinarily are matters for the local board charged with administration of the bylaw, with some deference thereafter due to the board's resulting interpretation. Here, however, there was no initial determination by the board as to the applicability of § IV.A.3 to the Chandlers' new structure.

Moreover, whether the new structure is an expansion under § IV.A.3 is at least a mixed question of law and fact. As such, the proper application of § IV.A.3 to the particularities of the new structure depends to a great extent on what the municipality intended to achieve by enactment of that section. Since "[t]he object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as

a whole, such interpretation is to be adopted rather than one which will defeat that purpose." *Dennis Hous. Corp., v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 83, 785 N.E.2d 682 (2003)*, quoting from *Champigny v. Commonwealth, 422 Mass. 249, 251, 661 N.E.2d 931 (1996)*. Given the board's local, particularized "home grown" knowledge, we conclude that the board is entitled here to interpret its own bylaw in the first instance.[15] See *Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. at 669*.

15 Our opinion is not intended to be read as an expression of any conclusion regarding the question whether the new structure is eligible for the exemption provided by § IV.A.3 of the bylaw. We disagree, however, with the conclusion by the Land Court judge that an interpretation by the board that the new structure qualifies for the exemption furnished by § IV.A.3 would be unreasonable.

*b. The addition of new nonconformities to a pre-existing nonconforming residential structure requires a variance.* Although we conclude that the matter should be remanded to the board, we nonetheless consider whether the Land Court judge correctly concluded that introduction of a new nonconformity to a pre-existing nonconforming residential structure requires a variance, because the question has been fully briefed and argued and because, as noted above, if the Land Court judge was incorrect in his conclusion there would be no need for a remand; the board's special permit decision alone would be sufficient to allow the Chandler's project to proceed, without regard to the applicability of § IV.A.3.

As stated above, the new structure will keep many of the preexisting nonconformities of the old structure but, if not exempt under § IV.A.3 of the by-law, it will create an *additional* nonconformity with respect to height. Consequently, the judge determined that the addition of a new nonconformity required a variance rather than a special permit. The Chandlers challenge this interpretation, arguing that both new and existing nonconformities fall under the purview of a special permit.

"In resolving this dispute, we are again called on to interpret the 'difficult and infelicitous' language of the first two sentences of *G. L. c. 40A, § 6*, as they pertain to single or two-family residential structures." *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 336-337, 952 N.E.2d 977 (2011)* (*Gale*) quoting from *Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55, 484 N.E.2d 113 (1985). G. L. c. 40A, § 6* reads as follows:

"Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.* Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." (Emphasis added).

The highlighted portion above is often referred to as the second 'except' clause. *Fitzsimonds v. Board of Appeals of Chatham, supra at 56*. To our knowledge, the issue whether existing nonconformities and the creation of new nonconformities should be treated differently under the second except clause of *c. 40A, § 6*, has not been directly addressed by any appellate court. However, in *Gale, supra at 337*, this court summarized the general standard for cases concerning the second except clause:

"[U]nder the second 'except' clause of ... the statute, as concerns single or two-family residential structures, the permit granting authority must identify the particular respect or respects in which the existing structure does not conform to the present bylaw and then determine whether the proposed alteration or addition would *intensify the existing nonconformities or result in additional ones*. ... If

> the answer to that question is in the affirmative, a finding of no substantial detriment under the second sentence is required." (quotations and citations omitted).

Citing the above language, the Land Court judge noted that "[a]t first blush, it appears this statement in *Gale* does not distinguish between reconstruction that results in increased existing nonconformities, versus creating new, additional nonconformities." However, after careful review of the relevant case law, the judge concluded that while intensifying existing nonconformities requires a special permit, the creation of new nonconformities requires a variance. A similar review of relevant cases also is helpful here.

In *Gale, supra*, we determined that the reconstruction of a pre-existing nonconforming residential structure required a special permit to increase or intensify a pre-existing nonconformity. There, the plaintiffs appealed from the entry of summary judgment dismissing their challenge to the board's grant of a special permit to the defendant, their neighbor. *Id. at 332*. The defendant's proposed new structure had a larger footprint than the previous structure and increased the setback nonconformities. *Ibid.* This court upheld the entry of summary judgment, concluding that the board's grant of a special permit, based upon its finding of no substantial detriment to the neighborhood, was all that was required. *Id. at 337*.

Prior to *Gale*, in *Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 853, 832 N.E.2d 639 (2005)*, Justice Greaney, in a concurring opinion of an equally divided Supreme Judicial Court, determined that only a special permit, with the requisite finding that the proposed structure was not substantially more detrimental to the neighborhood, was required to increase or exacerbate an existing nonconformity.[16] There, the plaintiff wanted to build a new house which conformed to the zoning by-law's structural requirements, but nonetheless doubled the size of the old structure on a undersized nonconforming lot. *Id. at 853-854*. Because the expansion of the structure's footprint on an undersized lot exacerbated the nonconformity, the court found that a finding of no substantial detriment was required under the second sentence of *§ 6*. *Id. at 861-862*. The court then upheld the board's denial of a special permit as it was within the board's discretion to find that the new structure was substantially more detrimental to the neighborhood. *Id. at 862*.

> 16 In *Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 357-358, 878 N.E.2d 915 (2008)*, the court adopted the reasoning of the concurring opinion in *Bransford*.

Therefore, as the Land Court judge noted, "in *Gale* and *Bransford*, the Appeals Court and the Supreme Judicial Court, respectively, were faced with the issue of an extension to a pre-existing nonconformity and those courts properly limited their final holdings to such circumstances." See *Gale, supra at 338* ("*Bransford* holds that exterior alterations or reconstructions of single or two-family residential structure that increase or intensify any pre-existing nonconformities may be authorized by means of a finding of no substantial detriment under the second sentence of the first paragraph of *§ 6*"). Nonetheless, some confusion arises from the seminal formulation of the operation of the second except clause articulated in *Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21-22, 514 N.E.2d 369 (1987)*: "[T]he [second 'except' clause] should be read as requiring a board of appeals[17] to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or *result in additional ones*."

> 17 Justice Greaney's concurrence in *Bransford* (which as we have observed was subsequently adopted by a majority of the court in *Bjorklund* v. *Zoning Bd. of Appeals of Norwell*, see note 16, *supra*) expressed the view that the initial determination should be made by the building inspector rather than the board of appeals. See *Bransford, supra at 858, n.8, 9*.

It is important to observe at this juncture that the second "except" clause is directed to differentiating between those changes to nonconforming residential structures that may be made as of right, and those that require a finding of no substantial detriment under the second sentence of *§ 6*. *Bransford*, for example, was concerned principally with determining whether a particular change "increased the nonconforming nature" of the residential structure at issue. *444 Mass. at 857*. In the present case, it is undisputed that the new structure will increase the nonconforming nature of the old structure. The question, then, is not whether the second "except" clause authorizes the Chandlers' project as a matter of right, without a finding of no substantial detriment, but whether a finding of no substantial detriment under the second sentence of *§ 6* may authorize the creation of new nonconformities in a pre-existing nonconforming structure. Although we are aware of no appellate case resolving that question in the context of a residential structure, the Supreme Judicial Court has twice concluded that the creation of a new

nonconformity in a pre-existing commercial structure requires a variance.

In *Rockwood v. Snow Inn Corp., 409 Mass. 361, 362, 370, 566 N.E.2d 608 (1991)*, the board of appeals granted the defendant a special permit to extend two prior nonconforming structures, which were nonconforming as to setback. *Id. at 362*. However, in addition to the setback violation, the proposed new structures also violated the by-law's lot coverage requirement. *Ibid.* Because the violation of the lot coverage requirement created a new, additional nonconformity, the court reversed the grant of the special permit. *Id. at 370*. In reaching its conclusion, the court observed that the first sentence of *§ 6* provides that the existing by-law "shall apply" to any extension, reconstruction, or alteration of a pre-existing nonconforming structure. Accordingly, the court concluded, the authority to alter an existing nonconforming structure upon a finding of no substantial detriment under the second sentence of *§ 6* can apply only to changes which themselves conform to the existing by-law, and then only then if they are not substantially more detrimental to the neighborhood. In reaching its conclusion, the court observed that "even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that 'would intensify the existing nonconformities or result in additional ones.'" *Id. at 364*, quoting from *Willard* v. , *25 Mass. App. Ct. at 22*.

To similar effect is *Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87, 89-90, 153 N.E.2d 631 (1958)*, a case decided under the prior version of *c. 40A*.[18] In that case, the Supreme Judicial Court determined that a planned extension to a motor freight terminal that was both a pre-existing nonconforming use and structure required a variance. There, the defendant received a special permit to build an extension to his motor freight terminal located in a single residence district. *Id. at 87-90*. The Supreme Judicial Court, however, reversed because the defendant's proposed extension also violated the by-law's setback requirements. *Id. at 89*. Thus, the court concluded that "[t]he board could properly have allowed an extension of the nonconforming use up to the setback lines ... [h]owever when it permitted the extension beyond the very precise setback requirements contained the ordinance it exceeded its authority." *Ibid.*

> 18 We note that the second "except" clause appearing in the first sentence of the present *c. 40A, § 6*, "had 'no identifiable ancestor in *G. L. c. 40A*, as in effect prior to St. 1975, c. 808, § 3,' and 'made its first appearance, without accompanying explanation ... in 1974 House Doc. No. 5864." *Bransford, 444 Mass. at 858*, quoting from *Willard, 25 Mass. App. Ct. at 18*.

Applied strictly to residential structures, the holding in *Rockwood* would require a variance even for extensions of existing nonconformities; its holding is that "[i]f the first and second sentences [of *c. 40A, § 6*] are read together, the statute permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or bylaw, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures." *Rockwood v. Snow Inn Corp., 409 Mass. at 364*. However, a long line of cases, notably including *Bransford* and *Bjorklund*, have held that an alteration which intensifies an existing nonconformity in a *residential* structure may be authorized under the second sentence of *§ 6* upon a finding of no substantial detriment. See *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. at 338*, distinguishing *Rockwood* v. *Snow Inn Corp.*, on the ground that it dealt with a commercial structure rather than a residential one.

As the Supreme Judicial Court made clear in *Bransford, 444 Mass. at 859*, "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases." (Citation omitted.) See *Strazzulla v. Building Inspector of Wellesley, 357 Mass. 694, 697, 260 N.E.2d 163 (1970)*, cert. denied, *400 U.S. 1004 (1971)* (considering eventual elimination of nonconforming uses as an objective underlying zoning regulations). As the plaintiffs observe, the fallacy of the Chandlers' contention that an alteration creating a new nonconformity may be authorized upon a finding of no substantial detriment is illustrated by contrasting a landowner with a *conforming* structure who wishes to construct an addition that violates the applicable setback requirements (which would require a variance) with a neighboring landowner with a *nonconforming* structure as to height who also wishes to construct an identical addition, also encroaching to the same extent into the required setback (which, according to the Chandlers, would require only a finding of no substantial detriment). Such a result is illogical, given the significantly more stringent burden for a variance, which is granted "only in rare instances and under exceptional circumstances," *Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 450, 136 N.E.2d 198 (1956)*, quoting from *Hammond v. Board of Appeal, 257 Mass. 446, 448, 154 N.E. 82 (1926)*, compared to the lesser burden for a special permit. See *Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 153-154, 355 N.E.2d 461 (1976)*, and cases cited therein. "If a sensible construction is available, [a court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results."

*Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376, 727 N.E.2d 1147 (2000).* Like the Land Court judge, we construe the provisions of the first and second sentences of *§ 6* together to allow extension of existing nonconformities upon a showing of no substantial detriment, but to require a variance for the creation of any new nonconformity.[19]

19 We likewise reject the Chandlers' suggestion that § V.B. of the Chatham by-law can be read to confer blanket authority on the board to authorize, by special permit, any and all alterations, extensions or other changes to a preexisting, nonconforming structure, only upon finding that such changes will not be substantially more detrimental to the neighborhood. Section V.B. does not have such a broad scope. Instead, it merely indicates that a vertical addition that is confined to the structure's existing footprint may still call for a special permit. See, e.g., *Goldhirsh v. McNear, 32 Mass. App. Ct. 455, 461, 590 N.E.2d 709 (1992)* (rejecting the notion that "there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint").

*Conclusion.* For the reasons expressed above, the judgment granting the plaintiffs' cross-motion for summary judgment and the order denying the Chandlers' motion for reconsideration are vacated. The matter is remanded to the Chatham zoning board of appeals to determine whether the Chandlers' proposed new structure is eligible for the exemption provided under § IV.A.3 of the Chatham by-law from otherwise applicable height limitations.

*So ordered.*

SARA DEADRICK[1], & others[2] *vs.* ZONING BOARD OF APPEALS OF CHATHAM, & others[3]

1 Individually and in her capacity as executor of the Estate of Mary Ann Hall Deadrick.
2 Stuart Hall Deadrick, Spencer Hall Deadrick.
3 Robert Jeffrey Chandler and Jayne Kerry Chandler.

**No. 13-P-1264.**

**APPEALS COURT OF MASSACHUSETTS**

***85 Mass. App. Ct. 539*; *11 N.E.3d 647*; *2014 Mass. App. LEXIS 75***

**April 2, 2014, Argued**
**June 25, 2014, Decided**

**SUBSEQUENT HISTORY:** Appeal denied by *Deadrick v. Zoning Board of Appeals of Chatham, 469 Mass. 1108, 2014 Mass. LEXIS 738, 20 N.E.3d 610 (Mass., Sept. 5, 2014)*

**PRIOR-HISTORY:**

Suffolk. CIVIL ACTION commenced in the Land Court Department on December 31, 2007.

Following review by this court, *80 Mass. App. Ct. 1104 (2011)*, the case was heard by *Alexander H. Sands, III*, J., on motions for summary judgment and a motion for reconsideration was heard by him.
*Hallock v. Chatham Zoning Bd. of Appeals, 2013 Mass. LCR LEXIS 30 (2013)*

**HEADNOTES-1** *Zoning*, Nonconforming use or structure, Special permit, Variance, By-law, Appeal, Board of appeals: decision, *Practice, Civil*, Variance, Zoning appeal, *Statute*, Construction.

**COUNSEL:** *Daniel P. Dain* for the Robert Jeffrey Chandler & another.

*Peter S. Farber* for the plaintiffs.

**JUDGES:** Present: Grasso, Green, & Fecteau, JJ.

**OPINION BY:** FECTEAU

**OPINION**

FECTEAU, J. The defendants, Robert Jeffrey Chandler and Jayne Kerry Chandler (collectively the Chandlers), appeal from the entry of summary judgment by a judge of the Land Court that reversed a decision of the Chatham zoning board of appeals (board). The board had granted the Chandlers a special permit allowing them to reconstruct a pre-existing nonconforming structure on their nonconforming lot. In reversing the board's decision, the judge determined that because the proposed new structure's increased height created a new, additional nonconformity, distinct from the pre-existing dimensional and coverage nonconformities, a variance was required. We agree with the judge's decision that a variance would be required if the proposed increase in height constitutes an additional nonconformity not otherwise exempted by the town by-law. However, we also conclude that the judge erroneously concluded that the board had determined that the Chandlers' project is ineligible for the exemption from certain height limits created by § IV.A.3 of the Chatham bylaw.[4] Consequently, we vacate the entry of summary judgment and remand the matter for further proceedings before the board.

4 As we discuss below, if the project is eligible for the exemption created by § IV.A.3 of the by-law, it would not create a new nonconformity and, hence, would not require a variance.

1. *Facts*. The following undisputed facts are taken from the summary judgment record. On July 1, 2005, the Chandlers purchased property located at 24 Windmill

Lane in Chatham, Massachusetts containing a single-family home (old structure). The old structure was built in approximately 1929 and is located within a residential R-40 district and in a coastal conservancy district.[5] The old structure is 19.2 feet high above grade, and contains 2,161 square feet of living space. The Chandlers' property is nonconforming as to lot size and building coverage, and contains additional dimensional nonconformities with respect to its frontage, front yard setback, and side yard setback.

> 5 Section IV.A.3 of the bylaw defines the coastal conservancy district as all land delineated in a 100-year flood plain, in which the Chandler property is located. Pertinent to the present case, the section also provides:
>
> "Structures shall not exceed twenty feet (20 feet) in height. Provided there is no expansion, those dwellings which existed prior to January 16, 1992 and are required by the Building Inspector to be elevated in accordance with FEMA regulations, shall not be required to conform to the twenty (20 foot) height restriction."

In November, 2007, the Chandlers filed an application for a special permit seeking to raze the old structure and replace it with a new structure. The new structure, as proposed, will contain an additional 529 square feet of living space on substantially the same footprint as the old structure.[6] The new structure maintains the same nonconformities as the old structure with respect to frontage, setbacks, lot size, and building coverage. However, the height of the new structure is 27.2 feet above grade and, therefore, exceeds the maximum allowable height of twenty feet in the coastal conservancy district.

> 6 The footprint of the new structure pushes outward from that of the old structure to a total of twenty-eight feet and would include a squaring off of a twenty-eight square foot notch between the old structure and attached garage, two small entrance porches in the front yard, and two small proposed patios in the rear.

Part of this height increase is due to the property's location in a "velocity zone" as designated by the Federal Emergency Management Agency (FEMA), which mandates pilings instead of a foundation. Pursuant to FEMA regulations, any "substantial improvement" to a structure located within a velocity zone must be built on pilings with an elevation above the 100-year flood elevation.[7] The proposed height of the new structure, not including the FEMA foundation, is 23.5 feet above flood elevation.[8]

> 7 The 100-year flood elevation, as it applies to the locus, is approximately twelve feet.
>
> 8 The Chandlers argue that FEMA regulations, as incorporated into the State building code, required them to raise the new structure's heating, air conditioning and hot water systems, and electrical and plumbing fixtures and equipment above the 100-year flood evaluation. The Chandlers claim that these mechanicals, located in the basement of the old structure, would have to be placed in the attic of the new structure thereby contributing to the new structure's increased height.

2. *Procedural history.* On December 31, 2007, John V. C. Saylor, Georgia A. Saylor, Peter Hallock, Edwin J. Deadrick, and Mary Anne Hall Deadrick filed their complaint appealing from the board's decision to grant a special permit to the Chandlers, pursuant to *G. L. c. 40A, § 17*.[9] The plaintiffs filed a second amended complaint[10] on March 5, 2008, which added a count under *G. L. c. 240, § 14A*, seeking an interpretation of § V.B and § IV.A.3 of the Chatham zoning bylaws.

> 9 After the death of John Saylor, the Land Court judge allowed the plaintiffs' assented to motion to remove John V.C. Saylor and Georgia A. Saylor as parties.
>
> 10 The plaintiffs' first amended complaint, filed on January 3, 2008, corrected a minor factual issue.

Thereafter, both parties filed cross motions for summary judgment. A judge of the Land Court allowed the Chandlers' motion, concluding that the plaintiffs lacked standing to challenge the special permit. However, in *Hallock v. Zoning Bd. of Appeals of Chatham, 80 Mass. App. Ct. 1104, 951 N.E.2d 1013 (2011)*, an unpublished decision pursuant to *rule 1:28* (2011 decision), a panel of this court determined that the Deadricks had standing, and remanded the case to the Land Court.[11]

> 11 In the 2011 decision, this court determined that Hallock had no standing. The 2011 decision also dismissed a second count of the plaintiffs' complaint, which sought a declaration under *G. L. c. 240, § 14A*, on procedural grounds. Accordingly, the only remaining issue before the judge on remand was the plaintiffs' appeal of the special permit pursuant to *G. L. c. 40A, § 17*.

On remand, both parties renewed their cross motions for summary judgment. In a decision dated February 21, 2013, the Land Court judge allowed the plaintiffs' motion for summary judgment and reversed the board's decision granting the special permit. The judge reasoned that, since the new structure created an additional non-

conformity as to its height, the project required a variance rather than a special permit.

On March 6, 2013, the Chandlers filed a motion for reconsideration, or in the alternative, for a ruling on their pending motion for entry of final judgment, arguing that the 2011 decision of this court had determined the merits of the case favorably to them. On April 9, 2013, the Chandlers also filed a motion under *Mass.R.Civ.P. 60(b)*, 365 Mass. 828 (1974), seeking relief from the judgment on the basis that the last surviving original plaintiff, Mary Anne Deadrick, had died in July, 2012, resulting in a "gap in the title." Thus, the Chandlers claimed that the judgment should be vacated and the complaint dismissed for lack of an aggrieved party at the time the judgment entered. In response, Mary Anne Hall Deadrick's daughter, Sara Deadrick Frye (Frye), acting in her capacity as executor of her mother's estate, filed a motion under *Mass.R.Civ.P. 17(a)*, as amended, 454 Mass. 1401 (1982), to be substituted as plaintiff for her deceased mother. On the same day, Sara Deadrick Frye and Mary Anne Hall Deadrick's other children, Stuart Hall Deadrick and Spencer Hall Deadrick (collectively the Deadrick children), appearing in their individual capacities, filed a motion under *Mass.R.Civ.P. 20(a)*, 365 Mass. 766 (1974), seeking to be joined as plaintiffs in this action.[12] The motions for substitution and joinder were allowed on April 30, 2013, but the Land Court judge took under advisement the Chandlers' *rule 60(b)* motion on the issue of the Deadrick children's standing.

12 Accompanying the motions was the affidavit of Sara Deadrick Frye, in which she disclosed to the court that she and her siblings each held some ownership interest in the Deadrick property throughout the litigation, which they obtained from their parents in four separate conveyances between 1991 and 1995. Frye also indicated that, upon their mother's death, she and her siblings succeeded to the remaining interest in the property held by their mother at the time of her death. Lastly, Frye explained that she and her siblings were well aware of the litigation and shared the same concerns that their parents had regarding the much larger house proposed on the Chandler lot and the effect the proposed house would have on their ocean views.

In an order dated June 4, 2013, the judge determined that, because the Deadrick children had some ownership interest in the property from the outset of the dispute, they shared the same harm as their parents. Therefore, the judge concluded the Deadrick children had standing because this court previously had determined that their parents' harm was a basis for standing. In the same order, the judge denied the Chandlers' motion for reconsideration, noting that the 2011 decision was limited to the issue of standing. The judge also rejected the Chandlers' additional argument that § IV.A.3, of the Chatham bylaw, discussed *infra*, permitted the Chandlers to exceed the applicable maximum height restriction. The judge concluded that the board had determined that the new structure constituted an "expansion" under § IV.A.3 of the bylaw, and therefore was ineligible for its exemption from applicable height restrictions; he also expressed his view that if the board had determined that it was not an expansion, such a decision would be arbitrary and capricious. In any event, the judge ruled that the height exemption provided by § IV.A.3 was inapplicable, so that the new structure's increased height created a new nonconformity requiring a variance.

3. *Discussion.* "We review the Land Court judge's summary judgment decision de novo. Because the judge does not engage in fact finding in ruling on cross motions for summary judgment, we owe no deference to his assessment of the record." *Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 517, 947 N.E.2d 1090 (2011)* (footnote and citations omitted). Turning to the merits of the Chandlers' appeal,[13] we first consider whether the judge correctly decided two issues: (1) whether the board considered the applicability of § IV.A.3 of the bylaw to the new structure, while weighing the Chandler's application for a special permit, and (2) whether the addition of new nonconformities to a pre-existing nonconforming residential structure require a variance or special permit.

13 On appeal, the Chandlers ask us to reconsider our previous 2011 decision, *Hallock v. Zoning Bd. of Appeals of Chatham, 80 Mass. App. Ct. 1104, 951 N.E.2d 1013 (2011)*, where a panel of this court determined that the Deadricks had standing. We decline to revisit the issue. The Chandlers also challenge standing on the grounds that the original Deadrick plaintiffs are now deceased and the substituted plaintiffs, the Deadrick children, do not have standing because they do not live on the locus. Like the Land Court judge, we reject this argument. From the onset of this case the Deadrick children have had some ownership interest in house. As such, the Deadrick children have the same harm as their parents, which we already determined was an adequate basis for standing.

On remand after the 2011 decision, the judge properly recognized that the decision was limited to the issue of standing. Specifically, the judge correctly understood that he needed to determine if the board had ruled on the applicability of § IV.A.3 of Chatham's zoning bylaw to the new structure; as he stated: "The first issue

is whether the ZBA made a finding as to whether or not the New structure was an expansion of the Old structure."

Section IV.A.3 of the bylaw exempts certain structures from otherwise applicable height restrictions if FEMA regulations require the additional height. See note 5, *supra*. Accordingly, if the new structure is not an "expansion" within the meaning of § IV.A.3, then it qualifies for the exemption created by that section from the otherwise applicable twenty foot height restriction. The increased height would not be a new nonconformity, and the Chandlers may proceed under their special permit. However, in denying the Chandlers' motion for reconsideration, the judge concluded that the zoning board had already found the new structure to be an "expansion," within the meaning of § IV.A.3 and, therefore, confirmed his conclusion that the Chandlers' project required a variance rather than a special permit.

The question of the applicability of § IV.A.3 to the new structure is significant. As discussed below, we conclude that the Land Court judge correctly ruled that the creation of a new nonconformity in a preexisting nonconforming structure requires a variance, and not just a special permit based on substantial detriment pursuant to the second sentence of *G. L. c. 40A, § 6*. Accordingly, if the new structure is ineligible for the exemption created by § IV.A.3, it requires a variance and the board's decision granting a special permit for the project would be invalid. Conversely, if the new structure is eligible for the exemption created by § IV.A.3, it does not require a variance and the project may proceed by special permit.

a. *Applicability of § IV.A.3 to the new structure.* As we have observed, the Land Court judge correctly recognized that his first task following the remand ordered by the 2011 decision was to determine whether the board considered and determined the applicability of § IV.A.3 to the new structure in its special permit decision. "[A]lthough interpretation of the by-law is in the last analysis a judicial function, deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning by-law." *Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 669, 715 N.E.2d 470 (1999)*. "Reviewing courts will interpret zoning by-laws 'in accordance with ordinary principles of statutory construction, with some measure of deference given to the board's interpretation.'" *Eastern Point, LLC v. Zoning Bd. of Appeals of Gloucester, 74 Mass. App. Ct. 481, 486, 907 N.E.2d 1151 (2009)* quoting from *APT Asset Mgmt., Inc. v. Board of Appeals of Melrose, 50 Mass. App. Ct. 133, 138, 735 N.E.2d 872 (2000)*. Accordingly, the interpretation of the application of a provision of a local zoning by-law to a request for a special permit ordinarily should be undertaken in the first instance by the local board acting as the special permit granting authority, and only thereafter subject to judicial review within the context of an appeal pursuant to *G. L. c. 40A, § 17*.

We disagree, however, with the Land Court judge's conclusion that the board considered and determined the applicability of § IV.A.3 to the new structure in its special permit decision. The board's decision does not expressly refer to § IV.A.3. Nor does it appear that the board's use of the term "expand" within its decision was intended to express a conclusion that the new structure constitutes an "expansion" within the meaning of § IV.A.3, making the new structure ineligible for the height exemption it provides.[14] Instead, when the board's decision is considered as a whole, we conclude that its use of the word "expand," in two places, was merely descriptive, in a general sense, of the new structure proposed by the Chandlers' application for a special permit. The board's only mention of height was in the board's finding that the height was "not out of scale for the neighborhood." Significantly, even this single finding was within the board's analysis of whether the new structure was substantially more detrimental to the neighborhood. In fact, the board's decision appears to focus principally, if not exclusively, on whether the new structure would be "substantially more detrimental to the neighborhood," under the rubric of *G. L. c. 40A, § 6*. We conclude that the board did not consider or determine the applicability of § IV.A.3 to the new structure in its special permit decision.

> 14 Indeed, the plaintiffs do not contend otherwise. In their brief here, they stated: "The board considered the application solely under Section V.B. and did not address either Section IV.A.3.a or Section IV.A.6.d.l. The board did not address the height issue at all."

As we have observed, zoning is a local matter, and questions of interpretation of the local zoning bylaw ordinarily are matters for the local board charged with administration of the bylaw, with some deference thereafter due to the board's resulting interpretation. Here, however, there was no initial determination by the board as to the applicability of § IV.A.3 to the Chandlers' new structure.

Moreover, whether the new structure is an expansion under § IV.A.3 is at least a mixed question of law and fact. As such, the proper application of § IV.A.3 to the particularities of the new structure depends to a great extent on what the municipality intended to achieve by enactment of that section. Since "[t]he object of all statutory construction is to ascertain the true intent of the Legislature from the words used. If a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as

a whole, such interpretation is to be adopted rather than one which will defeat that purpose." *Dennis Hous. Corp., v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 83, 785 N.E.2d 682 (2003)*, quoting from *Champigny v. Commonwealth, 422 Mass. 249, 251, 661 N.E.2d 931 (1996)*. Given the board's local, particularized "home grown" knowledge, we conclude that the board is entitled here to interpret its own bylaw in the first instance.[15] See *Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. at 669*.

15 Our opinion is not intended to be read as an expression of any conclusion regarding the question whether the new structure is eligible for the exemption provided by § IV.A.3 of the bylaw. We disagree, however, with the conclusion by the Land Court judge that an interpretation by the board that the new structure qualifies for the exemption furnished by § IV.A.3 would be unreasonable.

*b. The addition of new nonconformities to a pre-existing nonconforming residential structure requires a variance.* Although we conclude that the matter should be remanded to the board, we nonetheless consider whether the Land Court judge correctly concluded that introduction of a new nonconformity to a pre-existing nonconforming residential structure requires a variance, because the question has been fully briefed and argued and because, as noted above, if the Land Court judge was incorrect in his conclusion there would be no need for a remand; the board's special permit decision alone would be sufficient to allow the Chandler's project to proceed, without regard to the applicability of § IV.A.3.

As stated above, the new structure will keep many of the preexisting nonconformities of the old structure but, if not exempt under § IV.A.3 of the by-law, it will create an *additional* nonconformity with respect to height. Consequently, the judge determined that the addition of a new nonconformity required a variance rather than a special permit. The Chandlers challenge this interpretation, arguing that both new and existing nonconformities fall under the purview of a special permit.

"In resolving this dispute, we are again called on to interpret the 'difficult and infelicitous' language of the first two sentences of *G. L. c. 40A, § 6*, as they pertain to single or two-family residential structures." *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 336-337, 952 N.E.2d 977 (2011)* (*Gale*) quoting from *Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55, 484 N.E.2d 113 (1985)*. *G. L. c. 40A, § 6* reads as follows:

"Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure*. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." (Emphasis added).

The highlighted portion above is often referred to as the second 'except' clause. *Fitzsimonds v. Board of Appeals of Chatham, supra at 56*. To our knowledge, the issue whether existing nonconformities and the creation of new nonconformities should be treated differently under the second except clause of *c. 40A, § 6*, has not been directly addressed by any appellate court. However, in *Gale, supra at 337*, this court summarized the general standard for cases concerning the second except clause:

"[U]nder the second 'except' clause of ... the statute, as concerns single or two-family residential structures, the permit granting authority must identify the particular respect or respects in which the existing structure does not conform to the present bylaw and then determine whether the proposed alteration or addition would *intensify the existing nonconformities or result in additional ones*. ... If

> the answer to that question is in the affirmative, a finding of no substantial detriment under the second sentence is required." (quotations and citations omitted).

Citing the above language, the Land Court judge noted that "[a]t first blush, it appears this statement in *Gale* does not distinguish between reconstruction that results in increased existing nonconformities, versus creating new, additional nonconformities." However, after careful review of the relevant case law, the judge concluded that while intensifying existing nonconformities requires a special permit, the creation of new nonconformities requires a variance. A similar review of relevant cases also is helpful here.

In *Gale, supra*, we determined that the reconstruction of a pre-existing nonconforming residential structure required a special permit to increase or intensify a pre-existing nonconformity. There, the plaintiffs appealed from the entry of summary judgment dismissing their challenge to the board's grant of a special permit to the defendant, their neighbor. *Id. at 332*. The defendant's proposed new structure had a larger footprint than the previous structure and increased the setback nonconformities. *Ibid.* This court upheld the entry of summary judgment, concluding that the board's grant of a special permit, based upon its finding of no substantial detriment to the neighborhood, was all that was required. *Id. at 337*.

Prior to *Gale*, in *Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 853, 832 N.E.2d 639 (2005)*, Justice Greaney, in a concurring opinion of an equally divided Supreme Judicial Court, determined that only a special permit, with the requisite finding that the proposed structure was not substantially more detrimental to the neighborhood, was required to increase or exacerbate an existing nonconformity.[16] There, the plaintiff wanted to build a new house which conformed to the zoning by-law's structural requirements, but nonetheless doubled the size of the old structure on a undersized nonconforming lot. *Id. at 853-854*. Because the expansion of the structure's footprint on an undersized lot exacerbated the nonconformity, the court found that a finding of no substantial detriment was required under the second sentence of *§ 6*. *Id. at 861-862*. The court then upheld the board's denial of a special permit as it was within the board's discretion to find that the new structure was substantially more detrimental to the neighborhood. *Id. at 862*.

> 16 In *Bjorklund v. Zoning Bd. of Appeals of Norwell, 450 Mass. 357, 357-358, 878 N.E.2d 915 (2008)*, the court adopted the reasoning of the concurring opinion in *Bransford*.

Therefore, as the Land Court judge noted, "in *Gale* and *Bransford*, the Appeals Court and the Supreme Judicial Court, respectively, were faced with the issue of an extension to a pre-existing nonconformity and those courts properly limited their final holdings to such circumstances." See *Gale, supra at 338* ("*Bransford* holds that exterior alterations or reconstructions of single or two-family residential structure that increase or intensify any pre-existing nonconformities may be authorized by means of a finding of no substantial detriment under the second sentence of the first paragraph of *§ 6*"). Nonetheless, some confusion arises from the seminal formulation of the operation of the second except clause articulated in *Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21-22, 514 N.E.2d 369 (1987)*: "[T]he [second 'except' clause] should be read as requiring a board of appeals[17] to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or *result in additional ones*."

> 17 Justice Greaney's concurrence in *Bransford* (which as we have observed was subsequently adopted by a majority of the court in *Bjorklund* v. *Zoning Bd. of Appeals of Norwell*, see note 16, *supra*) expressed the view that the initial determination should be made by the building inspector rather than the board of appeals. See *Bransford, supra at 858, n.8, 9*.

It is important to observe at this juncture that the second "except" clause is directed to differentiating between those changes to nonconforming residential structures that may be made as of right, and those that require a finding of no substantial detriment under the second sentence of *§ 6*. *Bransford*, for example, was concerned principally with determining whether a particular change "increased the nonconforming nature" of the residential structure at issue. *444 Mass. at 857*. In the present case, it is undisputed that the new structure will increase the nonconforming nature of the old structure. The question, then, is not whether the second "except" clause authorizes the Chandlers' project as a matter of right, without a finding of no substantial detriment, but whether a finding of no substantial detriment under the second sentence of *§ 6* may authorize the creation of new nonconformities in a pre-existing nonconforming structure. Although we are aware of no appellate case resolving that question in the context of a residential structure, the Supreme Judicial Court has twice concluded that the creation of a new

nonconformity in a pre-existing commercial structure requires a variance.

In *Rockwood v. Snow Inn Corp., 409 Mass. 361, 362, 370, 566 N.E.2d 608 (1991)*, the board of appeals granted the defendant a special permit to extend two prior nonconforming structures, which were nonconforming as to setback. *Id. at 362*. However, in addition to the setback violation, the proposed new structures also violated the by-law's lot coverage requirement. *Ibid.* Because the violation of the lot coverage requirement created a new, additional nonconformity, the court reversed the grant of the special permit. *Id. at 370*. In reaching its conclusion, the court observed that the first sentence of *§ 6* provides that the existing by-law "shall apply" to any extension, reconstruction, or alteration of a pre-existing nonconforming structure. Accordingly, the court concluded, the authority to alter an existing nonconforming structure upon a finding of no substantial detriment under the second sentence of *§ 6* can apply only to changes which themselves conform to the existing by-law, and then only then if they are not substantially more detrimental to the neighborhood. In reaching its conclusion, the court observed that "even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that 'would intensify the existing nonconformities or result in additional ones.'" *Id. at 364*, quoting from *Willard* v. , *25 Mass. App. Ct. at 22*.

To similar effect is *Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87, 89-90, 153 N.E.2d 631 (1958)*, a case decided under the prior version of *c. 40A*.[18] In that case, the Supreme Judicial Court determined that a planned extension to a motor freight terminal that was both a pre-existing nonconforming use and structure required a variance. There, the defendant received a special permit to build an extension to his motor freight terminal located in a single residence district. *Id. at 87-90*. The Supreme Judicial Court, however, reversed because the defendant's proposed extension also violated the by-law's setback requirements. *Id. at 89*. Thus, the court concluded that "[t]he board could properly have allowed an extension of the nonconforming use up to the setback lines ... [h]owever when it permitted the extension beyond the very precise setback requirements contained the ordinance it exceeded its authority." *Ibid.*

> 18 We note that the second "except" clause appearing in the first sentence of the present *c. 40A, § 6*, "had 'no identifiable ancestor in *G. L. c. 40A*, as in effect prior to St. 1975, c. 808, § 3,' and 'made its first appearance, without accompanying explanation ... in 1974 House Doc. No. 5864." *Bransford, 444 Mass. at 858*, quoting from *Willard, 25 Mass. App. Ct. at 18*.

Applied strictly to residential structures, the holding in *Rockwood* would require a variance even for extensions of existing nonconformities; its holding is that "[i]f the first and second sentences [of *c. 40A, § 6*] are read together, the statute permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or bylaw, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures." *Rockwood v. Snow Inn Corp., 409 Mass. at 364*. However, a long line of cases, notably including *Bransford* and *Bjorklund*, have held that an alteration which intensifies an existing nonconformity in a *residential* structure may be authorized under the second sentence of *§ 6* upon a finding of no substantial detriment. See *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. at 338*, distinguishing *Rockwood* v. *Snow Inn Corp.*, on the ground that it dealt with a commercial structure rather than a residential one.

As the Supreme Judicial Court made clear in *Bransford, 444 Mass. at 859*, "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases." (Citation omitted.) See *Strazzulla v. Building Inspector of Wellesley, 357 Mass. 694, 697, 260 N.E.2d 163 (1970)*, cert. denied, *400 U.S. 1004 (1971)* (considering eventual elimination of nonconforming uses as an objective underlying zoning regulations). As the plaintiffs observe, the fallacy of the Chandlers' contention that an alteration creating a new nonconformity may be authorized upon a finding of no substantial detriment is illustrated by contrasting a landowner with a *conforming* structure who wishes to construct an addition that violates the applicable setback requirements (which would require a variance) with a neighboring landowner with a *nonconforming* structure as to height who also wishes to construct an identical addition, also encroaching to the same extent into the required setback (which, according to the Chandlers, would require only a finding of no substantial detriment). Such a result is illogical, given the significantly more stringent burden for a variance, which is granted "only in rare instances and under exceptional circumstances," *Blackman v. Board of Appeals of Barnstable, 334 Mass. 446, 450, 136 N.E.2d 198 (1956)*, quoting from *Hammond v. Board of Appeal, 257 Mass. 446, 448, 154 N.E. 82 (1926)*, compared to the lesser burden for a special permit. See *Kiss v. Board of Appeals of Longmeadow, 371 Mass. 147, 153-154, 355 N.E.2d 461 (1976)*, and cases cited therein. "If a sensible construction is available, [a court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results."

*Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376, 727 N.E.2d 1147 (2000).* Like the Land Court judge, we construe the provisions of the first and second sentences of *§ 6* together to allow extension of existing nonconformities upon a showing of no substantial detriment, but to require a variance for the creation of any new nonconformity.[19]

19 We likewise reject the Chandlers' suggestion that § V.B. of the Chatham by-law can be read to confer blanket authority on the board to authorize, by special permit, any and all alterations, extensions or other changes to a preexisting, nonconforming structure, only upon finding that such changes will not be substantially more detrimental to the neighborhood. Section V.B. does not have such a broad scope. Instead, it merely indicates that a vertical addition that is confined to the structure's existing footprint may still call for a special permit. See, e.g., *Goldhirsh v. McNear, 32 Mass. App. Ct. 455, 461, 590 N.E.2d 709 (1992)* (rejecting the notion that "there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint").

*Conclusion.* For the reasons expressed above, the judgment granting the plaintiffs' cross-motion for summary judgment and the order denying the Chandlers' motion for reconsideration are vacated. The matter is remanded to the Chatham zoning board of appeals to determine whether the Chandlers' proposed new structure is eligible for the exemption provided under § IV.A.3 of the Chatham by-law from otherwise applicable height limitations.

*So ordered.*