LINDA E. GERACI vs. CITY OF WALTHAM, PATRICK POWELL, in his capacity as the City's ACTING BUILDING COMMISSIONER, and KEVIN MCMANUS.

MISC 11-456490

November 6, 2013

Sands, J.

DECISION

With:

- **MISC 13-480423** : LINDA E. GERACI vs. ZONING BOARD OF APPEALS OF WALTHAM and Barbara Rando, Glenda Gelineau, Gordon LaSane, Mark Hickernell and John Sergi, as they are members of the WALTHAM ZONING BOARD OF APPEALS and the City of Waltham.

Plaintiff filed her unverified Complaint with the Middlesex Superior Court (No. 11-2723) (the Superior Court Action) on August 2, 2011, a) appealing, pursuant to G. L. c. 40A, § 17, a decision of Defendant Waltham Zoning Board of Appeals (the ZBA) which upheld the issuance of a building permit to Kevin McManus (McManus) for property owned by McManus and located at 44 Murray Street in Waltham, MA (Locus), and b) seeking a declaratory judgment pursuant to G. L. c. 231A, relative to the validity of

Section 3.711 of the Waltham Zoning Ordinance (the Ordinance) of Defendant City of Waltham (the City). The City and the ZBA filed their Answer on August 18, 2011.

Plaintiff filed her unverified Complaint with the Land Court (11 MISC 456490) on December 2, 2011, pursuant to G. L. c. 240, § 14A, challenging the validity of Sections 3.711 and 4.218 of the Ordinance facially and as they apply to Locus. Defendants City, Patrick Powell (Powell), and McManus filed their Answer on January 12, 2012. Powell is the Citys zoning enforcement officer, although the Complaint in this action names him as the Acting Building Commissioner. A case management conference was held on January 27, 2012, and the Superior Court Action was consolidated with this case, pending a transfer of the Superior Court Action to this court. This court requested such a transfer, and by Order of Transfer dated February 6, 2012, the Superior Court Action was transferred to this court (13 MISC 480423).

The City, the ZBA, Powell, and McManus (together, Defendants) filed their Motion for Summary Judgment on January 15, 2013, together with supporting brief, Statement of Material Facts, and Appendix including Affidavits of Michael Garvin (the Citys Traffic Engineer), Kevin McManus, Patrick Powell and Linda Geraci. [Note 1] Plaintiff did not file any Opposition. A hearing was held on Defendants Motion on May 1, 2013, at which time the matter was taken under advisement. [Note 2]

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. See Cassesso v. Commr of Corr., 390 Mass. 419 , 422 (1983); Cmty. Nat=l Bank v. Dawes, 369 Mass. 550 , 553 (1976); Mass. R. Civ. P. 56(c).

I find that the following material facts are not in dispute:

1. Plaintiff owns and resides at 36 Caughey Street, Waltham, MA (Plaintiff Property). The respective rear yards of Plaintiff Property and Locus abut. Locus and Plaintiff Property are within the Residence A-4 zoning district (RA-4).

2. Locus is approximately 9,005 square feet in area, with 91.86 feet of frontage on Murray Street. Locus is shown as Lot 26 (Lot 26) and Lot 27 (Lot 27) on plan titled Plan of Building Lots in Waltham, Massachusetts prepared by Hartley L. White, Civil Engineer, dated November 1909 (the 1909 Plan), and recorded with the Middlesex South District Registry of Deeds (the Registry) on December 6, 1909, in Plan Book 182, Plan 34.

3. Lot 26 was conveyed to Maria DeMarco by deed dated June 3, 1912, and recorded with the Registry at Book 3701, Page 204. Lot 27 was conveyed to Maria DeMarco by deed dated August 18, 1916, and recorded with the Registry at Book 4076, Page 333. Subsequent to the 1916 conveyance, Lot 26 and Lot 27 have been held in common ownership and have been conveyed together in one deed.

4. A single family home is located on Locus, constructed pursuant to a building permit issued on July 28, 1952 (the House). The House straddles Lot 26 and Lot 27. The front, side, and rear-yard setbacks of the House on Locus are 30.50 feet, 21.84 feet, and 39.95 feet, respectively.

5. In a RA-4, the minimum lot area is 7,000 square feet, minimum lot frontage is 60 feet, and minimum front, side and rear yard setbacks are 25 feet, 15 feet, and 30 feet, respectively. The House is a conforming structure on Locus, which is a conforming lot. [Note 3]

6. McManus proposes to raze the House and construct a single family home on Lot 26 and another single family home on Lot 27 (the Project). [Note 4] Lot 26 is comprised of 4,275 square feet, with approximately 46.63 feet of frontage, and side-yard setbacks of 7.30 and 10.30 feet, for a combined side-yard setback of 17.60 feet. Lot 27 is comprised of 4,730 square feet,

with approximately 45.23 feet of frontage, and side-yard setbacks of 7.50 and 10.81 feet, for a combined side-yard setback of 18.31 feet. There is no evidence in the Summary Judgment record providing the rear yard setback for either Lot 26 or Lot 27.

7. By letter dated August 31, 2010, Powell approved Locus for Old Lot status pursuant to Section 3.711 and Section 4.218 of the Ordinance (together, the Old Lot Exception).

8. Section 3.711 of the Ordinance, the most recent version of which was adopted on November 25, 1996, states in relevant part:

The minimum frontage requirements of Article IV shall not apply to any lot for single and twofamily residential use in Residence A and Residence B Zones that is shown on a deed, on an approved subdivisions plan or on a plan bearing the endorsement approval not required under the Subdivision Control Law, said deed or plan being duly signed and recorded prior to December 27, 1988, at the Middlesex South Registry of Deeds, that conformed to the existing zoning requirements at the time of recording and has less than the requirements of Article IV but at least...40 feet of frontage in the...RA4....District...and at least 40 feet of frontage in the RA3 District, except if, as of December 27, 1988, more than three adjoining lots were held in common ownership in the RA3 District, then at least 45 feet of frontage shall be required.

9. Section 4.218 of the Ordinance, the most recent version of which was adopted on May 16, 1953, states in relevant part:

4.2181. Yard requirements for lots recorded prior to October 13, 1942. Lots for single and twofamily residential uses lawfully laid out and recorded by plan or deed prior to October 13, 1942, shall comply with the following requirements:

(a) Side yards. There shall be a side yard along each side lot line. The sum of the widths of the two side yards shall be not less than 10 feet for

buildings or projections one story high and not less than 16 feet for higher buildings; provided, however, that for each foot that such a lot is less than 50 feet wide, three inches shall be deducted from the required sum of the widths of the two side yards. No side yard shall be less than five feet.

(b) Rear yards. There shall be a rear yard on every lot, and it shall be at least 30 feet deep behind a building in Residence A or Residence B Districts and at least 20 feet deep behind a building in Residence C Districts; provided, however, that if a lot is less than 100 feet deep, six inches shall be deducted from the required depth of the rear yard for each foot of such lesser depth of lot. In no case shall the clearance be less than 10 feet...

4.2183. The provisions of Sections 4.2181 and 4.2182 shall apply, notwithstanding any merger of lots by deed.

10. On or about December 10, 2010, Powell issued two building permits (the Building Permits) to McManus for construction of two single family homes, one on Lot 26 and the other on Lot 27.

11. On December 30, 2010, Plaintiff filed a Zoning Board of Appeals Application/Petition Form with the ZBA, appealing the issuance of the Building Permits (the ZBA Petition). The ZBA Petition stated, [t]he old lot exception is not applicable to [Locus]. The two parcels merged over 50 years ago when the current home was built straddling both lots.

12. The ZBA held hearings relative to the ZBA Petition on March 1, 2011; April 5, 2011; May 17, 2011; June 14, 2011; and July 12, 2011. At the July 12, 2011, hearing, the ZBA voted 3-2 to deny the ZBA Petition and to uphold the issuance of the Building Permits (the ZBA Decision). A Notice of the ZBA Decision was filed with the City Clerk on July 13, 2011. The ZBA Decision stated that:

1. Petitioner lacks standing to challenge the validity of the small lot provisions in the [Ordinance] (essentially, petition challenges citys power to legislate more generous grandfathering provisions, this she cannot do).

Petitioner also does not qualify as a person aggrieved under G.L. c. 40A given she has presented no plausible claim of a definite violation of a private right, a private property interest, or a private legal interest...

2. [Lot 26 and Lot 27] qualify for the small lot exception of § 4.2181 and § 3.711 of the [Ordinance] so the Building Inspector properly issued the requested permits....

e. The proposed new structures submitted in connection with the landowners application for building permits conform to current small lot zoning provisions (§ 4.218 and § 3.711) and, consequently, eliminates the need to rely upon § 3.7225 or G.L. c. 40A, § 6.

f. In accordance with the aforementioned small lot and reduced setback provisions, the subject lots are not subject to lot area requirements and because the lots were recorded prior to 1942 they are eligible for reduced side and rear yard requirements.

13. Plaintiff filed a Complaint in the Superior Court Action on August 2, 2013, within the twenty day period to appeal the ZBA Decision as set forth in G.L. c. 40A, § 17.

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Plaintiff has filed two Complaints in this matter, but she has done little else to further her cause. Defendants first raise several procedural issues regarding Plaintiffs Complaints and they challenge Plaintiff s standing to appeal the ZBA Decision. Next, Plaintiff contends that the ZBA Decision must be annulled because Section 3.711 and Section 4.218 of the Ordinance (i.e. the Old Lot Exception), upon which the ZBA Decision is premised, are unlawful facially and as applied because these sections violate the uniformity provision of G.L. c. 40A, § 4. Plaintiff also contends that Powell and the ZBA erroneously interpreted and applied G.L. c. 40A, § 6 and the Old Lot Exception. [Note 5] Defendants claim that the ZBA

Decision should not be annulled because the Old Exception was properly interpreted and applied to Locus. I shall examine each issue in turn.

I. Procedural Issues:

In her five count Complaint filed with the Land Court, Plaintiff brought suit pursuant to G.L. c. 240, § 14A and G.L. c. 185, § 1(j½). Count I alleged that Section 4.218 of the Ordinance violates the uniformity clause of G.L. c. 40A, § 4. Count II alleged that Section 3.711 of the Ordinance violates uniformity clause of G.L. c. 40A, § 4. Count III alleged that the Old Lot Exception only applies to vacant land. Count IV alleged that Lot 26 and Lot 27 lost their individual lot identity because the House straddles the two lots. Count V alleged that because Locus must be considered only one lot (rather than Lot 26 and Lot 26, separately), McManus must file a subdivision plan pursuant to G.L. c. 41, § 81P, to divide Locus into two lots in order to construct a house on each lot. In her Complaint filed with the Superior Court, Plaintiff brought suit pursuant to G.L. c. 40A, § 17, appealing the ZBA Decision. Count I alleged that Lot 26 and Lot 27 lost their individual identity because of merger; that Section 3.711 only applies to vacant land; and that Section 4.2181 is not applicable to Locus. Count II of the Superior Court Complaint, pursuant to G.L. c. 231A, alleged that Section 3.711 of the Ordinance is an unconstitutional violation of the uniformity clause of G.L. c. 40A, § 4. As noted, supra, these cases have been consolidated and this court shall address all issues raised in each Complaint. In their brief, Defendants spent a great deal of time and effort alleging that Plaintiff cannot bring suit pursuant to G.L. c. 240, § 14A, to challenge the validity of the Old Lot Exception on the foregoing grounds.

The primary purpose of proceedings under § 14A is to determine how and with what rights and limitations the land of the person seeking an adjudication may be used under the provisions of a zoning enactment... Harrison v. Braintree, 355 Mass. 651 , 654 (1969). The classic case involves a landowner seeking a determination regarding his own land.

Hansen & Donahue Inc. v. Town of Norwood, 61 Mass. App. Ct. 292 , 295 (2004). G.L. c. 240, 14A also authorizes a petition by a landowner on whose land there is a *direct effect* of the zoning enactment through the permitted use of other land. Harrison, supra, at 655 (emphasis added). Defendants contend that Plaintiff cannot avail herself of G.L. c 240, § 14A because her exclusive remedy is an appeal of the Building Permits to the ZBA pursuant to G.L. c. 40A § 8, and then an appeal of the ZBA Decision pursuant to G.L. c. 40A, §, 17. There is no question that with respect to the appeal of the Building Permits, Plaintiffs exclusive remedy was to first exhaust her administrative remedies by appealing the Building Permits to the ZBA, and then appeal the ZBA Decision pursuant to G.L. c. 40A, § 17. See Connors v. Annino, 460 Mass. 790 , 797 (2009). This she has done.

The issue, however, is that Plaintiff is not only challenging the ZBAs application of the Old Lot Exception to the Project, Plaintiff is also challenging the validity of the Old Lot Exception as unconstitutional irregardless of the Project. Moreover, this is not a case where Plaintiff attempts to side-step an administrative appeal. See Whitinsville Retirment Soc., Inc. v. Town of Northbridge, 394 Mass. 757 , 763 (1985). Plaintiff properly appealed the issuance of the Building Permits to the ZBA and she properly appealed the ZBA Decision to this court. Although Plaintiff certainly seeks revocation of the Building Permits, she is also challenging the Old Lot Exception as violating G.L. c. 40A, § 4. At least one proper route of doing so may be through an appeal to this court pursuant to G.L. c. 240, § 14A. Finally, as discussed, infra, Plaintiff has standing to challenge the ZBA Decision. Therefore, I find that this court has jurisdiction to hear all issues in this case, whether they were raised pursuant to G.L. c. 40A, § 17 or G.L. c. 240, §14A. [Note 6]

II. Standing to Challenge the ZBA Decision:

Under G. L. c. 40A, § 17, only a person aggrieved has standing to challenge a decision of a zoning board of appeals. Marashlian v. Zoning Bd.

of Appeals of Newburyport, 421 Mass. 719 , 721 (1996). [I]ndividual . . . property owners acquire standing by asserting a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest. Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass. App. Ct. 491 , 492-93 (1989). In addition, the right or interest asserted by a plaintiff claiming aggrievement must be one that the Zoning Act is intended to protect, either explicitly or implicitly. 81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692 , 700 (2012). To assert a plausible claim, a plaintiff must put forth credible evidence to substantiate his allegations. Marashlian, 421 Mass. at 721. Credible evidence consists of

both a quantitative and a qualitative component . . . Quantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the boards action. Conjecture, personal opinion, and hypothesis are therefore insufficient. Butler v. City of Waltham, 63 Mass. App. Ct. 435 , 441 (2005).

A plaintiff is presumed to be a person aggrieved if it is a party in interest pursuant to G. L. c. 40A, § 11. [Note 7] Marotta v. Bd. of Appeals of Revere, 336 Mass. 199 , 204 (1957); Murray v. Bd. of Appeals of Barnstable, 22 Mass. App. Ct. 473 , 476 (1986). An abutter is entitled to a rebuttable presumption of being a person aggrieved under G. L. c. 40A and therefore has standing to challenge a decision of a zoning board of appeals. 81 Spooner Road, LLC, supra, at 700. In a summary judgment context, a defendant can rebut the presumption of standing in two different ways. First, a defendant can rebut the presumption by showing that the claims of aggrievement raised by plaintiff are not interests protected by G. L. c. 40A or the Ordinance, because [a]n abutter can have no reasonable expectation of proving a legally cognizable injury where the Zoning Act and related zoning ordinances or bylaws do not offer protection from the

alleged harm in the first instance. Id. At 702; Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20 , 35 (2006). Second, where a plaintiff has alleged harm to an interest protected by G. L. c. 40A, defendant can rebut the presumption by producing credible evidence to refute the presumed fact of aggrievement. [Note 8] 81 Spooner Road, LLC, supra, at 702. If the presumption of standing is properly rebutted by defendant, plaintiff must then prove standing, 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, 447 Mass. At 33 (citing Barvenik v. Bd. of Aldermen of Newton, 33 Mass. App. Ct. 129 , 132 (1992); See also Butler, supra, at 440 (noting plaintiffs injury must be special and different from the injury the action will cause to the community at large).

Plaintiff enjoys a rebuttable presumption of standing as defined by G.L. c. 40A, § 11, because Plaintiff Property directly abuts Locus. Defendants challenge Plaintiffs presumption of standing by offering evidence in the form of affidavits from the City Traffic Engineer, Powell, and McManus. Because the issue of standing is contested here, and additional evidence has been offered by Defendants on the issue of standing, the presumption is rebutted and this court will determine standing on all the evidence with no benefit to Plaintiff. See Marotta, supra, at 204; see also Standerwick, supra, at 33-34.

In her Affidavit (the Geraci Affidavit), Plaintiff asserts several alleged harms, including 1) traffic, 2) noise and light pollution, 3) drainage, 4) diminution in property values, and 5) loss of privacy. These harms all relate to increased density because the Project will include two single-family houses on Locus rather than the one single family house which exists now (and has existed since the early 1950s). As a result of the increased density, Plaintiff argues, there will be more traffic, more light and noise, loss of privacy, increased water runoff, diminution in property value, and increased density. I will discuss each of these arguments in turn.

a. Traffic

The Geraci Affidavit alleges that Plaintiff will be harmed by increased traffic in her neighborhood caused by the Project resulting in increased density not permitted under the Ordinance. Plaintiff alleges that it is probable that twice as many vehicles will travel to and from Locus once developed, and such increase will make travel difficult on roads where two-way travel is already difficult. Plaintiff offers no further evidence in support of this alleged harm. Based on the affidavit (the Garvin Affidavit) of the City Traffic Engineer, J. Michael Garvin (Garvin), Defendants challenge Plaintiffs alleged harm of an increase in traffic and argue that the allegation is unfounded. Garvin attested that it is his professional opinion that the addition of one single-family house will not cause any difficulty with parking or traffic on Murray Street or Caughey Street. Furthermore, Garvins Affidavit states that the proposed building project will have an imperceptible impact on traffic on the surrounding roadways. Defendants have shown, based on the Garvin Affidavit, that Plaintiffs claims of traffic problems are unfounded. It should also be pointed out that Locus and Plaintiff Property are located on different streets, so parking and traffic should not be significantly impacted at Plaintiff Property by the Project. Because Plaintiff has not introduced any evidence to support her claim of an increase in traffic as a result of the Project, I find the claim to be mere speculation. Plaintiff has thus failed to put forth credible evidence to substantiate her allegation of standing based on increase in traffic and accordingly does not have standing on this basis. [Note 9] See Marashlian, 421 Mass. at 721.

Based on the foregoing, I find that Plaintiff has not established standing based on traffic concerns to challenge the ZBA Decision.

b. Noise and Light

Plaintiff alleges to have standing based on harms of noise and light pollution resulting from the proximity of Plaintiff Property to the proposed

single-family homes resulting from the Project. Specifically, Plaintiff argues that more noise will emanate from Locus as a result of the existence of two houses where one currently sits from things such as garage door openers and snow removal and that her access to light while in the backyard of Plaintiff Property will be harmed by the Project. Noise and light are recognized harms and may confer standing upon a plaintiff to challenge a decision of the zoning board of appeals. See Bertrand v. Zoning Bd. Of Appeals, 58 Mass. App. Ct. 912 , 912 (2003).

Defendants challenge Plaintiffs alleged harm of light and noise pollution. Defendants argue that the types of noise pollution cited by Plaintiff are not the type of harms that the Zoning Act was intended to protect against. Certainly the Zoning Act and the Ordinance protect against noise and light pollution. See Bertrand, supra, at 912. Furthermore, McManus submitted an affidavit (the McManus Affidavit) in which he describes the way Plaintiff Property is situated on the east side of Prospect Hill to show that the Project will not cause a decrease in exposure to natural light of Plaintiff Property. Although he is clearly not an expert, McManus stated that Plaintiff Property is situated on the east side of Prospect Hill, and states that the proposed two single-family homes will not alter the sunlight exposure that Plaintiff Property receives as a result of its location in relation to Prospect Hill.

Notwithstanding any potential issues involving the affect of the Project on Plaintiff Propertys exposure to natural sunlight, the Geraci Affidavit points out potential harms related to light and noise emanating from Locus that appear to go beyond speculation. The evidence shows that the distance from Plaintiff Property and the House is currently 35.21 feet. This distance will be decreased significantly, to 7.3 feet, as a result of the Project. Furthermore, the Project will result in two single-family homes on Locus where only one currently sits. The fact that the closest structure on Locus will be approximately twenty-eight feet closer to Plaintiff Property increases the likelihood that Plaintiff will be harmed in the future by noise emanating

from the closest building and corresponding use. Furthermore, the fact that there will be two single-family homes where currently one sits makes it likely that more people will be living on Locus and as a result there is an increased likelihood that Plaintiff will be harmed by increased noise emanating from Locus.

Stemming from the same issues surrounding noise pollution discussed above, Plaintiff will also likely be harmed from ambient light pollution emanating from Locus. The fact that the closest structure on Locus will be only 7.3 feet from Plaintiff Property and that there will be twice as many homes on Locus makes it likely that more ambient light will emanate from the additional home and corresponding use. Based on the foregoing, I find that Plaintiff has put forth credible evidence to substantiate her allegations of standing based on noise and ambient light pollution and accordingly has standing on these grounds. [Note 10]

c. Drainage/Runoff

Plaintiff alleges standing based on aggrievement from increased storm water runoff from Locus as a result of the Project. Plaintiff argues that run-off is an issue in the neighborhood and the building of two single-family homes where one currently sits will only exacerbate the problem. Drainage is a recognized harm which may confer standing upon a plaintiff to challenge a decision of the zoning board of appeals. See Paulding v. Bruins, 18 Mass. App. Ct. 707 , 709 (1984). As pointed out in the McManus Affidavit, Plaintiff Property is downhill from Locus, so drainage may be impacted. Defendants challenge Plaintiffs allegation of harm based on drainage, supplying the the Powell Affidavit in support. The Powell Affidavit attests to Powells opinion that the proposed two single-family homes will not adversely affect drainage on Plaintiff Property. In Powells opinion, any harm will also be insignificant because a building permit cannot be issued until City officials sign off that the Project complies with the Massachusetts Residential Code, which has various drainage requirements. [Note 11] The

McManus Affidavit points out that Plaintiff Property is downhill from Locus, which means drainage may be impacted irrespective of the fact that McManus must obtain various permits in order to build.

It is possible that because the Project will increase the lot coverage on Locus and result in less pervious surface area to absorb storm water, there will be increased likelihood that storm water will runoff from Locus and will flow downhill towards Plaintiff Property. Without any expert evidence to the contrary, however, this court cannot conclusively rule that there will be increased runoff from Locus onto Plaintiff Property. It would set up a troubling precedent if this court were to rule that any owner of abutting property downhill from a proposed development, which development would cause an increase in lot coverage or impervious surfaces, will automatically have standing to challenge the development based on increased runoff onto the abutting property without credible testimony regarding contours and drainage flows. Simply put, Geracis alleged harm relating to drainage as set forth in the Geraci Affidavit is nothing more than unfounded speculation.

Based on the foregoing, I find that Plaintiff does not have standing to challenge the ZBA Decision based on increased runoff onto Plaintiff Property as a result of the Project.

d. Diminution of Property Value

Plaintiff alleges standing based on the alleged diminution of the value of Plaintiff Property that will result from the Project. Diminution in property value cannot stand alone and must be tied to a recognized harm. See Standerwick, supra at 30-31. Plaintiff ties her allegation of diminution of property value as a basis for standing to the other alleged aggrievements, including traffic, noise, light, drainage and density. However, Plaintiff has failed to provide credible evidence to substantiate her claim of diminution of property value. As Defendants point out, Plaintiff offered no evidence to substantiate her claim that the Project will result in diminution of the value

to Plaintiff Property. Plaintiffs argument that the value of Plaintiff Property will be diminished is based on her personal opinion and this court views her argument as conjecture and insufficient. Without the support of any additional evidence, I find that Plaintiff has failed to put forth credible evidence to substantiate her allegation of standing based on diminution of property value and accordingly does not have standing on this basis.

e. Density/Loss of Privacy

Plaintiff alleges standing based on the loss of backyard privacy. Specifically, Plaintiff argues that privacy will be severely diminished because the current distance between the boundary of Plaintiff Property and Locus (the Shared Boundary) to the House of 35.21 feet will be reduced as a result of the Project to 7.3 feet between the Shared Boundary and the proposed home on Lot 26. Furthermore, the Geraci Affidavit cites the potential of the Project to require radical trimming of the trees along the shared boundary as another reason her privacy may be harmed. Diminished privacy has been recognized as a cognizable basis for standing. See; Dwyer v. Gallo, 73 Mass. App. Ct. 292 , 297; Bertrand, supra, at 912; Ulliani v. Board of Appeals of Burlington, 62 Mass. App. Ct. 1119 (2005). Plaintiffs alleged harm of decreased privacy is simply a guise for alleging harm relating to increased density in the neighborhood surrounding Plaintiff Property.

It is widely recognized that an abutter has a legal interest in preventing further construction in a district in which the existing development is already more dense than the applicable zoning regulations allow. Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. at 31, 849 N.E.2d 197, quoting from Tsagronis v. Board of Appeals of Wareham, 33 Mass. App. Ct. 55 , 5859, 596 N.E.2d 369 (1992). Furthermore, it is clear that density is an issue which the Ordinance was designed to address and protect against. [Note 12] Provisions in the Ordinance relating to lot coverage and frontage are intended to protect against construction that is

more dense than regulations permit. Sheppard v. Zoning Bd. of Boston, 74 Mass. App. Ct. 8 , 11-12 (2009) ([a]n abutter has a well-recognized legal interest in preventing further construction in a district in which the existing development is already more dense than the applicable zoning regulations allow) (internal citations omitted); McGrath v. Chatham Zoning Bd. Of Appeals, 17 LCR 101 , 103 (2009) ([t]he neighborhood in question is undoubtedly more dense than the bylaw allows). However, an underlying requirement for standing based on increased density is that the neighborhood surrounding the subject properties is already densely built. See Tsagronis, supra; Dwyer, supra at 295296 (2008) ([t]he agreed facts reveal that the Dwyers property and Gallos property are located in a neighborhood where construction is already more dense than allowed by the current zoning); Sheppard, supra, at 11-12 (2009) ([a]n abutter has a wellrecognized legal interest in preventing further construction in a district in which the existing development is already more dense than the applicable zoning regulations allow... As the trial judge observed, Sheppards neighborhood was already dense and overcrowded) (internal citations omitted); McGrath v. Chatham Zoning Bd. of Appeals, 17 LCR 101 , 103 (2009) ([t]he neighborhood in question is undoubtedly more dense than the bylaw allows).

Plaintiff offered no evidence whatsoever to show the neighborhood surrounding Locus and Plaintiff Property is more dense than applicable zoning regulations allow. Plaintiff did not oppose Defendants motion for summary judgment and did not make an oral argument at the hearing on May 1, 2013, when given an opportunity. Outside of the Geraci Affidavit, where she makes general allegations based on her own opinion, there is no evidence to support Plaintiffs claims related to increased density. Indeed, there is no evidence to indicate that density is a problem in Plaintiffs neighborhood. Accordingly, I find that Plaintiff has failed to put forth credible evidence to substantiate her allegation of standing based on loss

of privacy resulting from increased density, therefore Plaintiff does not have standing to challenge the ZBA Decision on these grounds.

Based on all of the foregoing, I find that Plaintiff has standing to challenge the ZBA Decision.

II. Challenges to the Old Lot Exception Pursuant to G.L. c. 240, §14A:

Defendants first assert that Plaintiff is time barred from challenging the validity of the Old Lot Exception on procedural grounds. Plaintiff claims that Sections 3.711 and 4.218 of the Ordinance (the Old Lot Exception), the sections upon which the ZBA Decision is premised, violate the uniformity provision of G.L. c. 40A, § 4, both facially and as applied.

A. Time Bar to Challenging the Old Lot Exception:

Defendants contend that Plaintiff is barred from challenging the Ordinance by the statute of limitations set forth in G.L. c. 40 § 32, which requires that any appeal of a zoning ordinance alleging procedural deficiencies must be taken within ninety (90) days from its publication. [Note 13] See G.L. c. 40, § 32; Bruni v. Planning Bd. of Ipswich, 73 Mass. App. Ct. 663 , 670 (2009). Although Plaintiff has raised the issue of procedural defects, the thrust of the Complaint challenges the substance of Sections 3.711 and 4.218. Plaintiff claims that such sections violate the uniformity provision of G.L. c. 40A, § 4. There does not appear to be any statute of limitations governing this type of challenge. See SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101 (1984) (invalidating provision of by-law as violating G.L. c. 40A, §4 that had been passed two years prior to filing complaint); Emond v. Bd. of Appeals of Uxbridge, 27 Mass. App. Ct. 630 (1989), (entertaining challenge to by-law as violating G.L. c. 40A§ 4 fourteen years after provision in question had been passed). Based on the foregoing, I find that Plaintiff is time barred from challenging any procedural deficiencies relative to the adoption of Sections 3.711 and 4.218 of the Ordinance; however, Plaintiff is not time barred from challenging the

substance of Sections 3.711 and 4.218 of the Ordinance on the grounds that such sections violate the uniformity requirement set forth in G.L. c. 40A, § 4.

B. Facial Violaton of G.L. c. 40A, § 4:

The next issue is whether Sections 3.711 and 4.218 of the Ordinance violate the uniformity provision of G.L. c. 40A, § 4. G.L. c. 40A, § 4, states in relevant part: Any zoning ordinance or bylaw which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted. The basic assumption underlying the division of a municipality into zoning district is that, in general, each land use will have a predictable character and that the uses of land can be sorted out into compatible groupings. SCIT, supra, at 109. A zoning ordinance is intended to apply uniformly to all property located in a particular district...and the properties of all the owners in that district [must be] subjected to the same restrictions for the common benefit of all. Everpure Ice Mfg. Co. v. Bd. of Appeals of Lawrence, 324 Mass. 433 , 439 (1949). Some exceptions to uniformity are sanctioned by [G.L. c. 40A] and involve generally a limited tolerance for nonconforming uses (Section 6 of c. 40A)... SCIT, supra, at 108. It is not unreasonable for a zoning by-law to adjust the impact of broadly drawn standards...where their enforcement would exceed what is necessary to preserve the character of, and property values in, the neighborhood. Emond, supra, at 632. Adjustments to conform zoning standards to the circumstances of particular fact situations need not, we think, be made exclusively by establishing zoning districts on a neighborhood by neighborhood basis. Authorizing adjustments...subject to clear and uniform standards, does not violate the uniformity requirement of G. L. c. 40A, Section 4. Id.

In Emond, the Appeals Court held that a provision of the Uxbridge by-law, which provided that a lot with inadequate frontage may be buildable with a special permit, did not violate the uniformity requirement of G.L. c. 40A,

§4. The by-law in Uxbridge set forth a discrete standard and provided very narrow discretion for the issuance of such special permit. See id. In Noto, supra, a landowner asserted a dimensional restriction violated G.L. c. 40A, § 4 because it only applied to lots in existence after 1998. The Appeals Court summarily dismissed such challenge stating that the town of Weston simply created two classes of lots, those in existence prior to and after 1998. See id. The Appeals Court held, [b]y contrast, the quadrangle requirement is a mathematical formula applied mechanistically across the district to all lots created after its enactment. Such a provision does not offend the uniformity requirement of § 4. Id.

In the case at bar, Sections 3.711 and 4.218 of the Ordinance, i.e the Old Lot Exception, provide an avenue of relief for an owner of an old, undersized lot. Section 3.711 essentially creates two classes of Lots with respect to frontage, (1) those that were shown on a deed, on an approved subdivision plan, or on an [ANR Plan] recorded prior to December 27, 1988 , and (2) those lots that were not shown on a deed or plan prior to December 27, 1988. If a lot was shown on a recorded deed or plan prior to 1988, then those lots are exempt from current frontage requirements. Those lots, however, are still subject to the frontage requirements (forty feet within RA-4) set forth in Section 3.711. Similarly, Section 4.218 creates classes of lots that are subject to different setback requirements depending on when the lots were created. This court can conclusively state that Sections 3.711 and 4.218 do not violate the uniformity requirements set forth in G.L. c. 40A, § 4.

As stated in SCIT, supra, one purpose of the uniformity provision is to require that all similarly situated lots are treated in a similar manner. The provisions in the Ordinance at question do just that. The Ordinance simply creates classes of lots based on when the lots were first created and shown on recorded documents. All lots that fall within each class for frontage and setbacks are treated the same. For instance, all lots within RA-4 laid out prior to 1988 are subject to the forty foot frontage requirement as opposed

to the one hundred foot frontage requirement that applies to all lots within RA-4 created after 1988. All lots within each class are treated similarly, and the owners of such lots are charged with knowledge of which dimensional requirements apply. See Noto, supra. The terms of the Ordinance are clear and Powell and/or the ZBA have no discretion to determine the characterization of the lots. In determining whether to issue a building permit, Powell needed to determine (1) when the lot first came into existence pursuant to a recorded instrument, and (2) based on that finding, determine the applicable frontage and setback requirements set forth in the Bylaw, and (3) determine whether the building plans conform to such requirements. No discretion is afforded and the dimensional requirements in the Ordinance are applied mechanistically. See Noto, supra.

Based on the foregoing, I find that Sections 3.711 and 4.218 of the Ordinance are not facially invalid.

C. Violation of G.L. c. 40A, § 4 As Applied to Locus:

In order to succeed on the claim that the Ordinance violated the uniformity provision of G.L. c. 40A, § 4 as applied, Plaintiff must show that the terms of the Ordinance are arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. MacNeil v. Avon, 386 Mass. 339 , 340(1982), quoting Turnpike Realty Co. v. Dedham, 362 Mass. 221 , 238 (1972). Every presumption is to be afforded in favor of the validity of . . . [a bylaw] and if its reasonableness is fairly debatable, the judgment of the local authorities who gave it its being will prevail. Id. at 341.

Plaintiff submitted no brief on this issue and the Complaint is also devoid of any indication that Sections 3.711 and 4.218 bear no rational relationship to the zoning of Locus. Defendants cite an abundance of case law holding that a municipality may adopt more generous grandfather protections than those afforded under G.L. c. 40A, § 6. See e.g., Marinelli v. Bd. of Appeals

of Stoughton, 65 Mass. App. Ct. 902 ; Lee v. Bd. of Appeals of Harwich, 11 Mass. App. Ct. 148 , (1984). In Shea v. Zoning Bd. of Appeals of Douglas, 72 Mass. App. Ct. 1114 (2008), the Appeals Court affirmed the Land Court in holding that a bylaw may eliminate the merger by deed doctrine set forth in G.L. c. 40A, § 6, and allow two lots that had merged to nonetheless maintain their grandfathered status. See id. With no argument by Plaintiff that Sections 3.711 and 4.218 of the Ordinance are invalid as applied, this court is bound by and agrees with the holdings of the Appeals Court that local ordinance and by-laws may provide for more liberal grandfather protections than G.L. c. 40A, § 6. Sections 3.711 and 4.218 have a rational relationship to zoning objectives, in that they advance the statutory policy behind [G.L. c. 40A, § 6] of keeping once buildable lots buildable. Rouke v. Rothman, 448 Mass. 190 , 197 (2007).

Based on the foregoing, I find that Sections 3.711 and 4.218 of the Ordinance are not invalid as applied to Locus.

III. Validity of the ZBA Decision - Interpretation of the Old Lot Exception:

A. Standard of Review:

Pursuant to G.L. c. 40A, § 17, the ZBA Decision cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary. Robert v. Southwestern Bell Mobile Sys., 429 Mass. 478 , 486 (1999). However, a judge who decides the case on motions for summary judgment engages in no fact finding at all. Instead, the judge looks at the record to determine whether there is any genuine issue of material fact and, if not, whether the evidence, viewed in the light most favorable to the nonmoving party, shows that the moving party is entitled to judgment as a matter of law. Albahari v. Zoning Bd. of Appeals, 76 Mass. App. Ct. 245 , 248249 (2010), citing Mass.R.Civ.P. 56(c). Consideration of the moving party's entitlement to judgment as a matter of law, of course, implicates the substantive law. Id. In the case at bar, the

primary source of substantive law is G.L. c. 40A, § 6, and the relevant sections of the Ordinance.

B. Merger by Common Ownership and Dimensional Requirements:

Plaintiff contends that the ZBA Decision must be annulled because Lot 26 and Lot 27 are not protected as grandfathered lots under G.L. c. 40A, § 6, because they have merged by common ownership. G.L. c. 40A, § 6, para. 4, states in relevant part as follows: Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirements but at least five thousand square feet of area and fifty feet of frontage.

Pursuant to G. L. c. 40A, § 6, para. 4, an exemption from a change in dimensional zoning requirements applies only if the lot at issue was not held in common ownership with adjoining land. Defendants have submitted deeds demonstrating that Lot 26 and Lot 27 have been held in common ownership since 1916. Accordingly, Lot 26 and Lot 27 are not grandfathered as nonconforming pre-existing lots under G.L. c. 40A, § 6, because they were and continue to be held in common ownership. As discussed, supra, however, lots under common ownership may qualify for exemption from zoning ordinances or bylaws that increase area, frontage, width, yard, or depth requirements pursuant to a local ordinance or by-law. See Seltzer v. Bd. of Appeals of Orleans, 24 Mass. App. Ct. 521 , 521522 (1987); McKenna v. Swartz, 21 Mass. L. Rep. 730 (2006). Accordingly, this court must next look to the above cited provisions of the Ordinance for guidance.

Section 3.711 and Section 4.2181 [Note 14], are quoted in relevant part, supra. In summary, Section 3.711 provides that any lot within RA-4 shown on a plan recorded with the Registry prior to 1988 need only have forty

(40) feet of frontage. [Note 15] Section 4.2181 provides that any lot within RA-4 shown on a plan recorded with the Registry prior to 1942 must have a combined side yard setback of ten feet (for one-story buildings) or 16 feet (for two-story buildings) and that there shall be a thirty foot rear-yard setback for lots within R-A. Lastly, and most importantly, Section 4.2183 of the Ordinance states: The provisions of Sections 4.2181...shall apply, notwithstanding any merger of lots by deed.

Turning first to the frontage requirement, G.L. c. 40A, § 6, protects any lot that was not held in common ownership. Section 3.711 certainly provides more lenient frontage requirements for any lot shown on a plan recorded before 1988. Both Lot 26 and Lot 27 were shown on the 1909 Plan, recorded well before 1988. Both Lot 27 and Lot 28, located in RA-4, have more than the required forty feet of frontage. The issue, however, is that Section 3.711 does not have a modifying section stating that its provisions apply regardless of any common ownership. Cf. Section 4.2183. Plaintiff contends that certain language within Section 3.711 imply that said section applies regardless of any merger by deed or common ownership.

Section 3.711 states the frontage requirements shall not apply, but any lot must have at least 40 feet of frontage in the RA-3 District, except if, as of December 27, 1988, more than three adjoining lots were held in common ownership...then at least 45 feet of frontage shall be required. In this regard, Plaintiff states Section 3.711 disavows the common ownership exception within G.L. c. 40A, § 6. Indeed, it seems that in Waltham, the issue of common ownership with respect to frontage requirements is only relevant within RA-3, and only if three or more adjoining lots were held in common ownership. Moreover, even if three lots in RA-3 were held in common ownership, each can still be conforming with respect to frontage if they have at least forty-five (rather than forty) feet of frontage. Based on this reading, any lot held in common ownership with an adjoining lot within RA-4, such as Lot 26 and Lot 27, conform to frontage requirements if they have at least forty feet of frontage. It is clear that the ZBA read Section

3.711 similarly. See Purity-Supreme, Inc. v. Attorney Gen., 380 Mass. 762 , 782 (1980) (In the absence of clear error, the interpretation an administrative body gives to its own rule is entitled to deference.)

Based on the foregoing, I find that Lot 26 and Lot 27 fall within the Old Lot Exception of Section 3.711 of the Ordinance, i.e. common ownership or merger by deed is not relevant, and Lot 26 and Lot 27 each comply with the forty foot frontage requirement of said section.

Turning next to the setback requirements, this court has already mentioned that Section 4.2183 explicitly states that Section 4.2181 (regarding rear and side yard setbacks) apply notwithstanding the merger by deed doctrine. As such, I find that reduced setback requirements set forth in Section 4.2181 apply to Lot 26 and Lot 27. Moreover, Lot 26 (combined side-yard setback of 17.6 feet) and Lot 27 (combined side-yard setback of 18.3 feet) each comply with the ten foot minimum combined side-yard setback requirement stated in Section 4.2181 of the Ordinance. [Note 16]/ [Note 17]

C. Locus Qualifies as a Lot:

Plaintiff also mounts challenges that seemingly relate to how the Ordinance defines the term Lot. These challenges first contend that G.L. c. 40A, § 6 only protects vacant lots, and second, that Locus should be considered as only one lot because the House straddles Lot 26 and Lot 27 . In the Complaint, Plaintiff alleges that G.L. c. 40A, § 6 and Sections 3.711 and 4.812 apply only to vacant land. Plaintiff cites Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 , 18 (1987), which states, [t]here is nothing on the face of the fourth paragraph [of G.L. c. 40A, § 6] to suggest that it was intended to apply to anything but vacant land. This court has plainly stated that the Old Lot Exception can provide more generous grandfather protections than G.L. c. 40A, § 6. Neither Section 3.711 nor 4.218 contain any language limiting their application to vacant land only. Both sections simply refer to Lots, which is defined in the Ordinance as: [a]

parcel of real estate as described in a deed or shown on a plan separate from any other parcel, such deed or plan being recorded in the Registry of Deeds or approved by the Board of Survey and Planning and on file with the City Engineer.

There is certainly nothing in the definition of lot that requires the parcel of real estate to be vacant land. Moreover, a review of the evidence submitted indicates that Lot 26 and Lot 27 are both lots as defined in the Ordinance. First, Powell and the ZBA treated Lot 26 and Lot 27 as lots, and this court shall not overturn the ZBA Decision unless it is based on legally untenable grounds, indeed a high standard. Second, in accord with the definition of Lot, Lot 26 and Lot 27 are shown as separate parcels on the 1909 Plan recorded with the Registry. Third, although Lot 26 and Lot 27 have been in common ownership, in each deed conveying Locus, the description states being Lot 26 and Lot 27 as shown on the 1909 Plan. This evidences an intent that Lot 26 and Lot 27 still maintain some independent status. [Note 18] The fact that the House straddles both lot lines is certainly not fatal to Lot 26 and Lot 27 maintaining status as two separate lots. See Seltzer, supra, at 523 ([w]hile the location of the house was certainly evidence...of an intent to treat the lots as one, we do not think...that it had that effect as matter of law).

Based on the foregoing, I find that Lot 26 and Lot 27 shall be considered two separate lots. Therefore, any contention that Locus must be subdivided into two separate lots, i.e. Lots 26 and 27, pursuant to the procedures set forth in G.L. c. 41, is irrelevant because Locus shall be considered two lots. Finally, Plaintiffs contention that the Old Lot Exception only applies to vacant land is without merit. [Note 19]

Based on the foregoing, Defendants Motion for Summary Judgment is ALLOWED.

Judgment to enter accordingly.

FOOTNOTES

[Note 1] Defendants brief is titled Brief in Support of Motion to Dismiss and for Summary Judgment. Defendants do not argue a motion to dismiss and attach Affidavits to their brief. As a result, this court shall treat the motion as one for summary judgment.

[Note 2] Plaintiff appeared at the hearing but did not make any oral argument.

[Note 3] There is no evidence as to whether the House is one story or two stories.

[Note 4] There is no evidence as to whether each new home will be one story or two stories.

[Note 5] Plaintiff contends that the Old Lot Exception is inapplicable based on the theories of merger by deed and the theory that Locus should be considered one Lot rather than two because the House straddles Lot 26 and Lot 27. The Old Lot Exception requires minimum frontage of forty five feet, minimum combined side-yard setbacks of ten feet, and minimum rear yard setback of thirty feet. There is no allegation in either Complaint that Lot 26 and Lot 27 violate the dimensional requirements of the Old Lot Exception if the Old Lot Exception does in fact apply to Lot 26 and Lot 27.

[Note 6] The ZBA interpreted the Old Lot Exception and determined that Lot 26 and Lot 27 are both buildable lots. Defendants vehemently argued that Plaintiff had no standing to challenge the ZBA Decision and therefore Plaintiff cannot side step the standing requirements of G.L. c. 40A, § 17, to challenge the validity of the Old Lot Exception under G.L. c. 240, § 14A. As discussed, infra, Plaintiff does have standing to challenge the ZBA Decision. Therefore, Defendants contention that G.L. c. 40A, § 17, is Plaintiffs sole remedy to challenge both the ZBA Decision and the validity of the Old Lot Exception is essentially irrelevant. This court passes no judgment on whether a plaintiff can challenge the validity of a local ordinance or by-law as applied by a permit granting authority if such plaintiff has no standing to challenge the permit itself.

[Note 7] The term parties in interest is defined in G. L. c. 40A, § 11, as: the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list . . . . An assessors certification is conclusive for establishing proof of a party in interest. Id.

[Note 8] A defendant can rebut a presumed fact of aggrievement by presenting evidence such as affidavits of experts establishing the allegations of aggrievement as unfounded or de minimus. See e.g. Standerwick, supra, at 35-36.

[Note 9] It should be noted that Plaintiff failed to file an opposition to Defendants Motion for Summary Judgment and further chose not to make an oral argument at the hearing for such motion on May 1, 2013.

[Note 10] The Affidavit of Powell (the Powell Affidavit) does not give any technical basis for finding otherwise.

[Note 11] These requirements include, inter alia, that: [s]urface drainage shall be diverted to a storm sewer conveyance of other approved point of collection that does not create a hazard. Lots shall be graded to drain suface water away from foundation walls. ...Temporary and finished grading shall not direct nor create floording or damage to adjacent property during or after construction. 780 CMR 51.00, R401.3.

[Note 12] Section 1.3 of the ordinance states in part, amongst other things, that the objectives of the Ordinance are to prevent overcrowding of land and to avoid undue concentration of population, each of which are furthered, in part, by the area and frontage requirements of the Ordinance.

[Note 13] Such publication includes posting the amendment in certain public places within the municipality and by publication in a newspaper of general circulation within the municipality.

[Note 14] Section 4.218 states in relevant part: lot area as required by Sections 4.211 through 4.214 shall not apply to lots for single and twofamily residential use which, prior to the adoption of this chapter, were shown as separate parcels on subdivision plans approved by the Board of Survey and Planning or were assessed as separate parcels or were shown on plans or deeds duly recorded with the County Registry of Deeds. With respect to such lots in residential areas, the following provisions shall apply: The next section of the Ordinance is Section 4.2181, a sub-section of 4.218, which contains the side and rear yard setback requirements for lots in existence prior to 1942.

[Note 15] There is no dispute that Lot 26 and Lot 27 were laid out on a recorded plan in 1909.

[Note 16] Even if the two new homes on Lot 26 and Lot 27 are two stories, the combined side-yard setbacks for both lots exceed the minimum sixteen feet required for a two story home in accordance with Section 4.2181 of the Ordinance.

[Note 17] Lot 26 and Lot 27 comply with both the frontage and side-yard set back requirements of the Old Lot Exception. As noted, supra, Plaintiff does not contend that Lot 26 and Lot 27 do not comply with the dimensional requirements of the Old Lot Exception. This court treats Plaintiff as having waived this argument. Therefore,

although there is no evidence in this regard, the ZBA Decision will not be overturned on grounds that Lot 26 and Lot 27 do not comply with the rear-yard setback requirement of the Old Lot Exception. Notwithstanding th

[Note 18] This court notes that the metes and bounds description in several deeds conveying Lot 26 and Lot 27 provide only one description for the two lots; however, as stated, supra, the same several deeds mention that such instrument is a conveyance of Lot 26 and Lot 27 on the [1909 Plan].

[Note 19] This finding also renders meritless Plaintiffs contention in the Complaint that the ZBA Decision violates Section 4.214 of the Bylaw, which states: Except as provided in this section, no lot on which a building is located in any district shall be reduced or changed in area, shape or frontage so that the building or lot fails to comply with the provisions of this chapter. No lot on which a building is situated shall be reduced in area or frontage if such lot is smaller than is herein prescribed. This provision, however, shall not apply when a portion of a lot is taken or conveyed for a public purpose...Neither Lot 26 nor Lot 27 are being reduces or changed in area, shape or frontage. As such, Section 4.214 is not relevant.