CITY OF NEWTON

IN BOARD OF ALDERMEN

ZONING & PLANNING COMMITTEE AGENDA

MONDAY FEBRUARY 27, 2012

7:45pm Room 209

ITEMS SCHEDULED FOR DISCUSSION:

#400-11 ALD. GENTILE, HARNEY, SANGIOLO requesting establishment of a Business 5/Riverside Zone: a mixed-use transit-oriented district at the site of the current Riverside MBTA rail station. The proposed new zone shall allow by special permit a single commercial office building not to exceed 225,000 square feet with a maximum height of 9 stories, two residential buildings not to exceed 290 housing units in total, retail space not to exceed 20,000 square feet, along with a multi-use community center. [11/17/11 @3:36 PM]

#25-12 TERRENCE P. MORRIS, G. MICHAEL PEIRCE, JASON ROSENBERG, JOHN LOJEK proposing a zoning ordinance amendment to amend section 30-15(c)(3)(b) by inserting the word "*subject*" before the word "*lot*", the word "*and"* before the word "*such*" and the word "*adjoining*" after the word "*such*" so that the paragraph reads as follows: *(b) if the subject lot was held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the subject lot and such adjoining lot had on it a single-family or two-family dwelling.* [01/30/2012 @ 3:14PM]

ITEMS NOT YET SCHEDULED FOR DISCUSSION:

Re-Appointment by His Honor the Mayor:

#399-11(2) JAMES H. MITCHELL, 83 Countryside Road, Newton Centre, being re-appointed as an associate member of the Zoning Board of Appeals for a term to expire February 1, 2013 (60 days 03/29/12). [01/30/2012 @ 4:34PM]

#48-12 ALD. ALBRIGHT requesting a discussion with the Executive Office and the Planning Department on the creation of a housing trust. [02/10/2012 @ 9:13AM]

The location of this meeting is handicap accessible and reasonable accommodations will be provided to persons requiring assistance. If you have a special accommodation need, contact the Newton ADA Coordinator Trisha Guditz at 617-796-1156 or tguditz@newtonma.gov or via TDD/TTY at (617) 796-1089 at least two days in advance of the meeting.

Appointment by His Honor the Mayor:

#390-11(2) WILLIAM MCLAUGHLIN, 117 Hammond Street, Newton, being appointed as a full member of the Zoning Board of Appeals for a term of office, filling the full member position vacated by Selma H. Urman, Esq., to expire on September 30, 2012 (60 days 03/06/12). [01/30/2012 @ 4:34PM]

#11-12 ALD. HESS-MAHAN & LINSKY requesting discussion on the implementation and enforcement of the provisions of Section 30-5(c)(1) of the Newton Ordinances which requires that "[w]henever the existing contours of the land are altered, the land shall be left in a usable condition, graded in a manner to prevent the erosion of soil and the alteration of the runoff of surface water to or from abutting properties." [1/11/12 1:01PM]

#162-11 ALD. YATES requesting a report from the Director of Planning and Development on the status of the update of the *Open Space and Recreation Plan*, particularly as it pertains to the Charles River Pathway. [05/12/11 @ 10:16AM]

#60-10 ALD. HESS-MAHAN proposing that sections 30-15(s)(10) and 30-24(b) of the City of Newton Ordinances be amended to substitute a 3-dimensional computer model for the scaled massing model in order to facilitate compliance with recent amendments to the Open Meeting Law and that sections 30-23 and 30-24 be amended to reflect the filing procedures in Article X of the Rules & Orders of the Board of Aldermen. [02/23/10 @ 3:24 PM]

#61-10 ALD. CICCONE, SWISTON, LINSKY, CROSSLEY AND HESS-MAHAN requesting a discussion relative to various solutions for bringing existing accessory and other apartments that may not meet the legal provisions and requirements of Chapter 30 into compliance. [02/23/10 @ 2:48 PM]

#164-09(2) ALD. HESS-MAHAN requesting that the Planning Department study the dimensional requirements for lot and building size for accessory apartments and make recommendations for possible amendments to those dimensional requirements to the board of Aldermen that are consistent with the Newton Comprehensive Plan. [01/07/10 @ 12:00 PM]

#81-11 ALDERMEN JOHNSON, CROSSLEY, HESS-MAHAN, LAPPIN & DANBERG requesting the Director of Planning & Development and the Chair of the Zoning Reform Scoping Group provide updates on the Scoping Group's Progress. These updates will occur at the frequency determined by the Chair of the Scoping Group and the Chair of the Zoning and Planning Committee. [3/14/2011 @ 11:16PM]

#391-09 ALD. DANBERG, MANSFIELD, VANCE AND HESS-MAHAN requesting an amendment to §30-19 to allow payments-in-lieu of providing required off-street parking spaces when parking spaces are waived as part of a special permit application.

#152-10 ALD. BAKER, FULLER, SCHNIPPER, SHAPIRO, FISCHMAN, YATES AND DANBERG recommending discussion of possible amendments to **Section 30-19** of the City of Newton Ordinances to clarify parking requirements applicable to colleges and universities. [06/01/10 @ 4:19 PM]

#207-09(2) ALD. PARKER, DANBERG & MANSFIELD, proposing that chapter 30 be amended to allow additional seating in restaurants. [07/07/09 @ 12:42 PM]

#411-09 ALD. DANBERG, MANSFIELD, PARKER requesting that §30-19(d)(13) be amended by adopting the Board of License Commissioners' current informal policies, which waive parking stall requirements for a set maximum number of seasonal outdoor seats in restaurants and require that indoor seats be temporarily reduced to compensate for any additional outdoor seats while they are in use, by establishing a by-right limit based on a proportion of existing indoor seats that will allow seasonal outdoor seats to be used without need for additional parking.

#49-11 ALD. JOHNSON, Chair of Zoning and Planning Committee, on behalf of the Zoning and Planning Committee requesting that the Director of Planning & Development and Commissioner of Inspectional Services review with the Zoning & Planning Committee the FAR data collected during the eight months prior to the new FAR going into effect and the 12 months after. This committee review should occur no less than bi-monthly but could occur as frequently as monthly, based on the permits coming into the departments. [02-15-2011 @8:44AM]

#153-11 ALD. DANBERG, ALBRIGHT, HESS-MAHAN, JOHNSON requesting that Chapter 30 be amended by adding a new Sec. 30-14 creating certain Retail Overlay Districts around selected village centers in order to encourage vibrant pedestrian-oriented streetscapes which would allow certain uses at street level, including but not limited to financial institutions, professional offices, and salons, by special permit only and require minimum transparency standards for street-level windows for all commercial uses within the proposed overlay districts. [05- 10-11 @3:19 PM]

#153-11(2) ALD. DANBERG, ALBRIGHT, HESS-MAHAN, JOHNSON requesting the map changes necessary to establish certain Retail Overlay Districts around selected village centers. [05-10-11@3:16 PM]

#65-11(3) ZONING AND PLANNING COMMITTEE requesting that the terms "flat roof" and "sloped roof" be defined in the zoning ordinance.

#154-10(2) ZONING AND PLANNING COMMITTEE requesting to amend **Section 30-1 Definitions** by inserting revised definitions for "lot line" and "structure" for clarity. [04-12-11 @11:34AM]

#154-10 ALD. JOHNSON, CROSSLEY and HESS-MAHAN requesting to amend **Section 30-1 Definitions**, by inserting a new definition of "lot area" and revising the "setback line" definition for clarity. [06/01/10 @ 9:25 PM]

#150-09(3) ALD. ALBRIGHT, JOHNSON, LINSKY proposing that a parcel of land located in Newtonville identified as Section 24, Block 9, Lot 15, containing approximately 74,536 square feet of land, known as the Austin Street Municipal Parking Lot, currently zoned Public Use, be rezoned to Business 4. (12/10/10 @9:21AM)

#153-10 ALD. JOHNSON, CROSSLEY AND HESS-MAHAN requesting to amend **Section 30-15 Table 1** of the City of Newton Ordinances to allow a reasonable density for dwellings in Mixed Use 1 and 2 districts. [06/01/10 @ 9:25 PM]

#183-10 ALD. JOHNSON, CROSSLEY AND HESS-MAHAN requesting to amend **Section 30-13(a) Allowed Uses in Mixed Use 1 Districts** by inserting a new subsection (5) as follows: "(5) Dwelling units above the first floor, provided that the first floor is used for an office or research and development use as described above;" and renumbering existing subsection (5) as (6). [06/07/10 @12:00 PM]

Respectfully Submitted,

Marcia Johnson, Chairman

#25-12

BOARD OF ALDERMEN

CITY OF NEWTON

DOCKET REQUEST FORM

DEADLINE NOTICE: Aldermanic Rules require items to be docketed with the Clerk of the Board NO LATER THAN 7:45 P.M. TUESDAY, PRIOR TO THE MONDAY FULL BOARD MEETING in order to be voted to be assigned to Committee(s) that evening.

RECEIVED
Newton City Clerk
2012 JAN 30 PM 3:14
David A. Olson, CMC
Newton, MA 02459

To: Clerk of the Board of Aldermen Date: January 30, 2012

From (Docketer): Terrence P. Morris, Esq.

Address/phone/email: 57 Elm Road Newton, MA ▪ 617 202-9132 ▪ tpmorris.landuse.law@comcast.net

Additional sponsors: G. Michael Peirce, Esq.; Jason Rosenberg, Esq.; John Lojek

1. **Please docket the following item (edit if necessary):** Proposed zoning ordinance amendment to amend section 30-15(c)(3)(b) by inserting the word, "*subject*" before the word, "*lot*", the word, "*and*" before the word, "*such*" and the word, "*adjoining*" after the word, "*such*" so that the paragraph reads as follows:

   "(b) If the subject lot was held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the subject lot and such adjoining lot had on it a single-family or two-family dwelling."

2. **The purpose and intended outcome of this item is:** Zoning Ordinance amendment

3. **I recommend that this item be assigned to the following committees:** Zoning & Planning

4. **This item should be taken up in committee:** As soon as possible, preferably within a month; see explanation in item #8 below re potential emergency.

5. **I estimate that consideration of this item will require approximately:** not more than one hour

6. **The following people should be notified and asked to attend deliberations on this item. (Please check those with whom you have already discussed the issue, especially relevant Department Heads):**

City Personnel	Citizens (include telephone numbers/email please)
Eve Tapper, Chief Planner	Michael Peirce, Esq. mpeirce@gmpeircelaw.com
Seth Zeren, Chief Zoning Code Official	

_____

7. **The following background materials and/or drafts should be obtained or prepared by the Clerk's office prior to scheduling the item for discussion:** copy of the Land Court decision in the Case of *Mauri v. Zoning Board of the City of Newton* et al recently issued (copy attached).

8. **I have provided additional materials and/or undertaken the following research independently prior to scheduling the item for discussion:** Consulted with other land use practitioners that perform much of the work within the City of Newton to ascertain their experience with the long-standing interpretation of existing ordinance and the need for the proposed amendment to correct the negative effect of a wrongful decision of the Land Court recently handed down that overturns the intended effect of the ordinance when previously amended in 2001.

9. **I would like to discuss this item with the Chairman before any decision is made on how and when to proceed.**

10. **I would like the Clerk's office to confirm that this item has been docketed. My daytime phone number is:** 617 202-9132.

11. **I would like the Clerk's office to notify me when the Chairman has scheduled the item for discussion.**

Thank you.

Terrence P. Morris

_____

Terrence P. Morris, Esq.

RECEIVED
Newton City Clerk
2012 JAN 30 PM 3:14
David A. Olson, CMC
Newton, MA 02459

DRAFT
-12

CITY OF NEWTON

IN BOARD OF ALDERMEN

PROPOSED ORDINANCE NO. ____

BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF NEWTON AS FOLLOWS:

That the Revised Ordinances of Newton, Massachusetts, 2007, as amended, be and are hereby further amended with respect to Chapter 30, Zoning, as follows:

amend Section **30-15(c)(3)(b)** by inserting the word "subject" before the word "lot", the word, "and" before the word, "such" and the word, "adjoining" after the word, "such" so that the paragraph reads as follows:

> b) If the subject lot was held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the subject lot and such adjoining lot had on it a single-family or two-family dwelling.

Approved as to legal form and character:

_____
City Solicitor

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss. CASE 10 MISC 419859 (HMG)

MAUREEN MAURI and
RONALD A. MAURI

Plaintiffs

v.

ZONING BOARD OF THE CITY OF
NEWTON, ET AL.

Defendants

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ORDER DENYING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Introduction

This case concerns the construction of a single-family dwelling on a preexisting, nonconforming lot at 31 Bradford Road, Newton, Massachusetts (Locus / Garage Lot).[1] The plaintiffs, Maureen M. Mauri and Ronald A. Mauri (Mauris / plaintiffs) initiated the instant appeal pursuant to G.L. c. 40A § 17 in which they challenge a Decision of the City of Newton Zoning Board of Appeals (Board). That Decision sustained the issuance of a building permit by

[1] *See* Stipulation of Facts ¶ 1 (Plan recorded with the Middlesex County Registry of Deeds in 1890 as 'Lot 39'). Locus has always contained approximately 8,400 square feet of area and 60 feet of frontage. Locus became nonconforming in 1940, when the Newton Ordinance was amended to require a minimum lot size of 10,000 square feet and frontage of no less than 80 feet.

the City of Newton Inspectional Services Department (ISD)[2] to defendants James D. Chansky and Bonnie E. Chansky (Chanskys / defendants). [3]

The plaintiffs have filed a Motion for Summary Judgment claiming, *inter alia*, that the Board's Decision was erroneous in that it stemmed from an incorrect interpretation and application of § 30-15(c)(3)(b) of the Newton Zoning Ordinances (Ordinance).

For their part, the defendants contend that the Board's Decision is consistent with both the plain meaning of § 30-15(c)(3)(b) of the Ordinances, as well as with its historical understanding and application. As such, defendants argue that the Board's Decision should be affirmed. To this end, they have filed a Cross-Motion for Summary Judgment in which they further argue that the plaintiffs lack the standing required to maintain the instant appeal.[4] The Mauris respond that they are "aggrieved" by the Decision of the Board,[5] inasmuch as the Chanskys' proposed construction (dwelling) at Locus will intrude upon their privacy.

In the instant matter, two distinct questions present themselves. The first asks whether the plaintiffs possess the standing necessary to vest this court with subject-matter jurisdiction. [6]

---

[2] The Permit (No. 09080027) was granted on August 3, 2009; *See* Confirmation of lot determination, dated April 29, 2005, issued by Chief Zoning Official, Juris Alksnitis (Plaintiff's Appendix Exhibit 5 and Defendant's Appendix Exhibit H); *See also* Reaffirmation of lot determination, dated March 8, 2007, issued by Commissioner of Inspectional Services, John D. Lojek (Plaintiff's Appendix Exhibit 5 and Defendant's Appendix Exhibit H).

[3] Ernest D. Rogers, also a named defendant, is described as having "submitted the application for the Building Permit in question as agent for property owners, the Chanskys:..." Complaint ¶ 17. Together with the Chanskys, he submitted the opposition to the plaintiffs' Motion for Summary Judgment as well as a Cross-Motion for Summary Judgment.
See Ordinance § 30-27 (b)(2)(c) (The Board's vote to sustain the plaintiffs' appeal was two (2) in favor and three (3) opposed; a four-fifth supermajority vote was required to reverse the ISD's issuance of the Permit).

[4] *See* M.G.L. c. 40A § 17 (only "a 'person aggrieved' by the decision of a board of appeals..." has the requisite standing to bring the present action); *See generally* Defendant's Cross Motion for Summary Judgment.

[5] *See* Plaintiffs' Opposition to the Defendant's Cross-Motion for Summary Judgment, p. 5 (Plaintiffs argue that the proposed construction of a single-family on Locus, approximately twelve (12) feet from Plaintiff's home, will cause a deprivation of their privacy as a result of increased density in an already overly dense lot and neighborhood).

[6] *See Barvenik* at 33 Mass. App. Ct. 129, 131 (1992) ("Aggrieved person status is a jurisdictional prerequisite for § 17 review") [internal quotations omitted]; *See also Sweenie v. A.L Prime Energy Consultants*, 451 Mass. 539, 542 n.9 (2008) ("aggrievement for purposes of pursuing an appeal under . . . § 17 is a jurisdictional requirement" [internal quotations omitted]).

Based upon the Summary Judgment record, the court is satisfied that the Mauris do possess the necessary standing, and are thus "persons aggrieved" within the meaning of G.L. c. 40A § 17.

The second question concerns the decision of the Board sustaining the issuance of the Mauris' Building Permit, and whether that Decision is legally tenable. [7] The court is satisfied that the Board's determination is not legally tenable.

Background

The building permit issued by the ISD would allow the defendants to raze an existing garage and build a single-family dwelling on the Garage Lot at 31 Bradford Road.[8] The Chanskys also own and reside at 25 Bradford Road (House Lot) "immediately adjacent to the northeast" of the Locus.[9] The plaintiffs own the premises and reside at 35 Bradford Road (Mauri Lot), which is "adjacent to the southwest" of the Locus. [10]

The aforementioned lots [11] were created by a plan recorded in 1890. Each lot has an area of 8,400 square feet, while possessing sixty (60) linear feet of frontage. "Since 1916, the House Lot and Garage Lot have been held in common ownership.[12] Since at least 1917, a dwelling has

---

[7] *See* Plaintiffs' Brief in Support of Motion for Summary Judgment (p. 20-21). (A zoning board's interpretation will be set aside where it is "based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary") *quoting Roberts v. Southwestern Bell Mobile Systems, Inc.*, 429 Mass. 478, 485-86, 709 (1999).

[8] *See* Stipulation of Facts ¶ 11; *See* Plaintiff's Appendix Exhibit 2 (Board's Decision cites the language of the ISD Commissioner); *See also* Defendant's Appendix Exhibit H (ISD Determinations).

[9] *See* Stipulation of Facts ¶ 1 (1890 Plan refers to this lot as 'Lot 40').

[10] *See* FN 11, *Supra.* (1890 Plan refers to this lot as 'Lot 38'). In sum, the Mauris reside at 35 Bradford Road, which is adjacent to 31 Bradford (Locus). The Mauris' residence at 35 Bradford Road is separated from 25 Bradford Road, the Chanskys' residence, by Locus.

[11] I.e. 25 Bradford Road , 31 Bradford Road, 35 Bradford Road.

[12] Stipulation of Facts (Stipulation), ¶ 4.

been located upon the House Lot. [13] Since at least 1917, a garage has been located upon the Garage Lot and used by the owners of the House Lot. [14]

The Ordinance was first adopted by the City of Newton in 1922. The House Lot and Garage Lot were then located in the Private Residence Zoning District which imposed no minimum frontage or lot size requirements.[15] In 1940 [16] the Ordinance was amended and imposed its first frontage and lot size requirements of eighty (80) linear feet and 10,000 square feet, respectively in what was renamed the Single Residence B District.[17] As a consequence of this amendment, each of the three lots became, and presently remains, nonconforming as to lot size and frontage. Under the current iteration of the Ordinance, the House Lot and Garage Lot are located in a Single Residence 2 District. For lots created prior to December 7, 1953, the frontage requirement remains at 80 feet, while the lot area requirement remains at 10,000 square feet. [18] The Chanskys acquired both the House Lot and the Garage Lot in by deed dated July 15, 1987. [19]

On August 3, 2009 the ISD issued a building permit to the defendants for the construction of a single family dwelling at 31 Bradford Road, the Garage Lot. The Chanskys' proposal calls for construction to be sited from approximately 7.5 feet to 10 feet from the property line they share in common with the plaintiffs. The plaintiffs' residence, in turn, is located approximately 4.5 feet from that common property line. [20]

---

[13] Id., at ¶ 5.
[14] Id., at ¶ 6.

[15] Id., at ¶ 7.
[16] Presumably on October 11, 1940. See in this connection, Sec. 30-15 (c)(1) of the Ordinance.
[17] Stipulation, at ¶ 8.
[18] Id., ¶ 10.
[19] Id., ¶ 9.
[20] Id., ¶ 14.

Plaintiffs assert that the building permit will allow their neighbors, the Chanskys, to build a far larger structure upon the Garage Lot, than the currently existing garage.[21] Predicated upon exterior elevations, plans, photographs and assessors' records included with the exhibits, this court concludes that the Chanskys' garage consists of a modest, single story, one-car structure closely abutting the common property line between the Chanskys' Garage Lot and their House Lot.[22] By contrast, the proposed dwelling at two and half stories, would be in excess of thirty–two feet in height. It would be set back 7.5 feet to 10 feet from the common property line shared with the Mauris. [23] As the Mauris' dwelling is set back approximately 4.5 feet from that common boundary line, the two structures would be approximately 12 feet apart at their closest point.

Critically, the proposed dwelling will contain thirteen windows, including two windows in a roof dormer, on the side directly facing the Mauris' residence. According to the plaintiffs, the proposed dwelling will extend further east than their own home. The topographical plan [24] provided the court suggests a structure of approximately 55 feet in length, running alongside the plaintiffs' dwelling.

The plaintiffs challenge the propriety of the Board's Decision in sustaining the issuance of the building permit. They argue, *inter alia*, that § 30-15 (c)(3)(b) of the Ordinance was

---

[21] *See* Affidavit of Architect AIA, Dennis C. Rieske as attached to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment, App. 20.
[22] Exhibits C and D.
[23] With a sideyard setback of 7.5 feet, the proposed dwelling would be in compliance with the setback requirements in the Single Residence 2 District.
[24] Topographic Site Plan of the permit plans. See Affidavit of Dennis C. Rieske, AIA, ¶ 5.

erroneously interpreted by the Board. Rather, they contend that the Chanskys' two lots have merged rendering the Locus unbuildable as a matter of law.[25]

Summary Judgment

Summary judgment must be granted when "pleadings, depositions . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ.P. 56(c). The non-moving party "may not rest upon the mere allegations or denials of [their] pleadings, but [their] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial [and] [i]f [they] do[] not so respond, summary judgment, if appropriate, shall be entered against [them]."[26] Having found no genuine issue of material fact, summary judgment is appropriate "where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law."[27] In adjudging whether a factual issue is *genuine*, "the [c]ourt must determine whether the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Steffen v. Viking*, 441 F. Supp.2d 245, 250 (2006), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where resolution of the case depends solely upon judicial determination of a question of law, Mass. R. Civ.P. 56(c) permits the court to grant a summary decision.[28]

---

[25] According to the common law doctrine of merger, "A basic purpose of the zoning laws is 'to foster the creation of conforming lots." *Preston v. Board of Appeals of Hull*, 51 Mass. App. Ct. 236, 238 (2001); In *Seltzer*, that court enunciated the general rule, "[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize the nonconformities with the dimensional requirements of the zoning by-law or ordinance." *See Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 (1987); *See* Plaintiffs' Brief in Support of Motion For Summary Judgment, p. 8-9 ("the two lots merged into a single lot when they became nonconforming upon adoption by the City of Newton in 1940 of a 10,000 square foot area requirements and an 80 foot frontage requirement").

[26] "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *See Kourouvacilis*, 410 Mass. at 713, *citing Celotex Corp.* v. Catrett, 477 U.S. 317, 323-4 (1986).

[27] *See Opara v. Massachusetts Mut. Life Ins. Co.*, 441 Mass. 539, 544 (2004).

[28] *See* Mass. R. Civ. P. 56 (c).

The moving party bears the burden of proving the absence of any genuine issue of material fact, and that he is deserving of judgment as a matter of law. *See Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 232 (1997). The moving party has discharged said burden once "[they] demonstrate [], by reference to material described in Mass. R. Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving a legally cognizable interest" (internal quotations omitted) *Standerwick v. Zoning Board of Appeals of Andover,* 447 Mass. 20, 35 (2006). Said a different way, "the material supporting a motion for summary judgment...must demonstrate that proof of [an essential] element at trial is unlikely to be forthcoming" *Id.*

Although "the party facing summary decision [has the right] to have the facts viewed in a favorable light, . . . [it] does not entitle that party to a favorable decision." *Caitlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992). For example, where the non-moving party merely relies on "bald conclusions" they are not thereby entitled to resist a motion for summary judgment. *Id.*

The present appeal yields no genuine issue of material fact. Rather, the only relevant issues which this court must resolve, are issues of law. Under these circumstances, the present action is ripe for summary judgment.

Discussion and Analysis

Standing Pursuant to G.L. c. 40A, § 17.

Under G.L. c. 40A § 17, this court lacks subject-matter jurisdiction to reach the merits of a case absent a showing of "aggrievement".[29] *See Marotta v. Board of Appeals of Revere*, 336

[29] *See Marashlian v. Zoning Board of Appeals of Newsburyport*, 421 Mass. 719, 721 (1996) (Only those persons aggrieved by a Decision of a Zoning Board of Appeals may seek judicial review of that administrative determination).

Mass. 199, 202-03 (1957). *See* also *Tsagronis v. Board of Appeals of Wareham*, 415 Mass. 329, 334 (1994) (standing as an aggrieved party is jurisdictional and cannot be conferred by stipulation or waiver) (Abrams, J., Dissenting): The Appeals Court has described standing as "a gateway through which one must pass en route to an inquiry on the merits..." *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005).

As owners of property directly abutting the Garage Lot, the Mauris are clearly "parties in interest," pursuant to G.L. c. 40A § 11.[30] Those entitled to notice of the proceedings are presumed to have the requisite interest. *Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 33 (2006). The Mauris therefore enjoy a rebuttable presumption that they are "persons aggrieved" by the Decision of the Board. *See Marotta v. Board of Appeals of Revere*, 336 Mass. 199, 204 (1957). *See also Marashlian*, 421 Mass. 719, 721 (1996).

In *Standerwick*, the Supreme Judicial Court offered the following instructive commentary regarding the presumption of standing and the manner in which it may be rebutted:

> We have explained that to rebut the presumption, the defendant must offer evidence "warranting a finding contrary to the presumed fact...." [T]he presumption recedes when a defendant challenges a plaintiff's status as an aggrieved person *and offers evidence supporting his or her challenge...."* {R]ebuttable presumption "continues only until evidence has been introduced *which would warrant a finding contrary to the presumed fact."*
> A presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by "throwing upon his adversary the burden of going forward with evidence."
> Thus, an abutter is presumed to have standing until the defendant comes forward with evidence to contradict the presumption. Our conclusion that this evidence must "warrant a finding contrary to the presumed fact" does not shift the burden of proof on the issue of standing to the defendant.... [I]f presumed fact is "met and encountered" by defendant's contrary evidence, burden of proof remains with plaintiff and is "not for the defendant to show that [the presumed fact] does not exist"

[30] G.L. c. 40A § 11 defines a "party in interest" as "petitioners, abutters, owners of land directly opposite on any public street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner." In the present appeal, defendants to not dispute plaintiffs' presumed standing and the facts of record indicate that the Mauris are due this statutorily imparted presumption.

> In a summary judgment context, a defendant is not required to present affirmative evidence that refutes plaintiff's basis for standing.... [M]aterial supporting motion for summary judgment "need not negate, that is, disprove, an essential element of the claim" of the party upon whom the burden of proof at trial will rest" but "*must demonstrate that proof of that element at trial is unlikely to be forthcoming.*" It is enough that the moving party "demonstrate..., *unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving" a legally cognizable injury.*
> See *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999) (defendants rebutted plaintiff's presumption of standing where plaintiff's deposition testimony "failed to show that the proposed project will impair any interests of the [plaintiff] that are protected by the zoning law."; *Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 622 (1993) (deponents' inability to "articulate whether or how the plaintiffs would be injured" were not conclusive but caused the presumption of standing "to recede." Through discovery of the plaintiffs , the [defendant] demonstrated that the plaintiffs had no factual basis for their claims....
> But the [defendant] may rebut a presumption of standing by seeking to discover from such plaintiffs the actual basis of their claims of aggrievement. If a person claiming to be aggrieved can point to no such evidence, a party seeking summary judgment is entitled to rely on that fact. Once the developer in this case rebutted the plaintiffs' presumption of standing, the plaintiffs were required to... meet their burden to establish standing. (internal citations omitted) (emphasis added)

To rebut the plaintiffs' presumptive standing, the court may deem sufficient, evidence adduced in the course of discovery, including depositions and answers to interrogatories.

Legal arguments and mere allegations are not sufficient to rebut the plaintiffs' presumed standing. *See Watros*, 421 Mass. at 111 (reversing Appeals Court judge's conclusion that presumption of standing may be rebutted by denials in defendant's Answer); *Marinelli v. Bd. of Appeals of Stoughton*, 440 Mass. 255, 258 (2003) ("speculation [as to whether named grantor possessed proper] authority [to convey a parcel] on behalf of a trust is insufficient to rebut [the] presumption [of standing]"); *Valcourt v. Zoning Bd. of Appeals of Swansea*, 48 Mass. App. Ct. 124, 128 (1999) ([i]t is not enough simply to raise the issue of standing in a proceeding under § 17 [; t]he challenge must be supported with evidence").

That said, evidence adduced through discovery may rebut the plaintiffs' presumed standing, such as depositions, answers to interrogatories, and expert affidavits, if they shed doubt

on plaintiffs' bases for asserting aggrievement. In *Cohen*, the court "treat[ed] [the] submissions [of plaintiffs' depositions] as effectively challenging the plaintiffs' standing."[31] Essentially, plaintiffs' presumptive standing will have receded once the defendants have either proffered affirmative evidence showing that a basis for standing is not well-founded, or alternatively, the defendants can rely on plaintiffs' lack of factual foundation for asserting a claim of "aggrievement". *See Standerwick*, 447 Mass. at 35-36. *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999) ("trustee's deposition testimony failed to show that the proposed project will impair any interests of the trustee that are protected by the zoning laws," rebutting plaintiffs' presumption of standing).

In this way, the defendant may rebut the plaintiffs' presumption of aggrievement either by providing affirmative evidence—that a basis for aggrievement is not well founded—or by showing, in the negative, that the plaintiffs lack any factual foundation for asserting a claim of aggrievement.

Consequently, if this court is to conclude that the Mauris' presumptive standing has been effectively rebutted, it must find that the plaintiffs' claimed basis for aggrievement is "not well founded" or that their claims "lack any factual foundation."

In arguing that they are persons aggrieved, the plaintiffs make the following assertion:

> The Mauris claim...that "they are "aggrieved" by the decision of the Board, insofar as the Chanskys' proposed construction (Dwelling) at Locus *will result in a violation of plaintiffs' privacy.*"[32] (emphasis added)

For their part, the Chanskys readily concede as follows:

> The *only issue* by which the Mauris claim that they would be aggrieved by the construction of a home on the Garage Lot is one of privacy (Mauri Depo at 26, 32, 34-35, 38-39, 66-Exhibit 19). [33] (emphasis added)

---

[31] *See Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 622 (1993).
[32] Plaintiffs' Brief in Support of Motion for summary Judgment (Plaintiffs' Brief), pp. 2-3.
[33] Defendants' Memorandum, p 7.

Given these acknowledgements, this court limits it consideration of the Mauris' standing, to privacy related concerns.

In their Memorandum, [34] the defendants argue as follows:

> The Mauris, as abutters to 31 Bradford, are "parties in interest" who enjoy a rebuttable presumption that they are "persons aggrieved" from a decision of the ZBA. Once there is a challenge to the plaintiffs' standing, however, any presumed status as "person aggrieved" recedes, and "the jurisdictional question is decided on 'all the evidence with no benefit to the plaintiffs from the presumption'... [T]he plaintiff must [then] put forth credible evidence to substantiate his (her) allegations. (internal citations omitted)

The defendants suggest that once a challenge is lodged, the plaintiffs' presumptive standing recedes. Thus, in the case at bar, extracts [35] from a deposition of Maureen M. Mauri have been provided in which the defendants inquired as to her aggrievement. In the course of her deposition Ms. Mauri testified, in relevant part, as follows:

> A. "... the primary issue was the issue of privacy.
> Q. How would the construction of a house on the garage lot, how would that impact your privacy?
> A. Well, the way my house is built, it's 4 ½ feet from our lot line, and the proposed house is then 7 ½ feet from the lot line....
> We have a den that is the room that we pretty much live in that would look out onto this house, that's a room that we don't want to keep the blinds closed at all times. It's a room that we watch TV in, exercise in, fold laundry in, sit in and read.
> Q. So part of the issue with privacy is the fact that the proposed house would be about—
> A. 12 feet....
> Q. Those were... concern about privacy on upper levels of the house?
> A. On all levels of the house, except the basement.
> Q. You previously talked about the den, and that's on the first floor, right?
> A. Yes.
> Q. And you also expressed concerns about privacy issues from a house being built next door with the two upper levels?
> A. I have... two 84 inch windows that go up the staircase, and that looks directly on the sitting area on the landing and right directly into my bedroom that is on a path from a closet to a bathroom. [36]

---

[34] *Id.* p. 18.
[35] A limited number of deposition extracts only, have been provided the court.
[36] Deposition of Maureen M. Mauri (Deposition), pp. 32-34.

Q. Aside from privacy issues, are there any other issues that you discussed with Mr. Rieske ? [37]

A. Yes,... actually this goes again to privacy. We talked about our deck, which goes off our kitchen.... And the new house, the proposed new house, would go beyond our house and past our deck and there would be a room with windows also [in the proposed house]. [38]

Q. And again, the issue with that [deck] you expressed concern about is related to privacy?

A. Yes, because in the summertime we have, on a nice day, we would have breakfast out there, we could have lunch out there; when we're home on weekends, we entertain out there and sit out there. And suddenly, now the [proposed] house extends way back there beyond our house, so that would be a privacy issue.... [39]

Q. ...[S]etting aside privacy issues, are there any other issues that you've identified...associated with the construction of a house on the garage lot?

A. Well there would be things like the noise factor from a house being so close. We're unable to put an air conditioner in on our third floor, so we in the summer would keep those windows open. They are round windows and can't accommodate an air conditioner....so one would assume that there would be noise with a house so close.

Additionally, the defendants have provided an Affidavit of William J. Pastuszek, Jr., an appraiser.

According to Mr. Pastuszek:

> [He has] been engaged by the Defendants James D. Chansky, Bonnie E. Chansky and Ernest D. Rogers to provide [his] expert opinion as to the impact, if any, of the construction of a single family residence at the Chanskys' property at 31 Bradford Street, Newton, Massachusetts on the value of the adjacent single family residence located at 35 Bradford street, Newton. [40]

His Affidavit continues:

> I have...conducted diminution of value studies and have reviewed such studies done by others. These include measuring the effect of existing or proposed potential adverse influences, easements, lot line discrepancies, and title errors. [41]

He concludes as follows:

> It is my opinion that the construction of the residence will not have an adverse impact on the abutters' home at 35 Bradford Road, or on any other properties in the immediate area.

---

[37] See affidavit of Dennis C. Rieske, AIA as presented by the plaintiffs.
[38] Deposition, p. 34.
[39] Id. 37.
[40] Affidavit of William J. Pastuszek, Jr. (Pastuszek Affidavit), ¶ 2.
[41] *Id.*, ¶ 5.

It is noteworthy that Mr. Pastuszek nowhere references the issue of privacy. Rather, as an appraiser, he focuses, not surprisingly, upon a possible diminution in value of the Mauris' property. However, this is a form of aggrievement that Ms. Mauri raises only in passing in her deposition testimony. [42] A possible diminution in value is taken up by neither party in their respective briefs. [43]

This court concludes therefore that in focusing exclusively upon a possible diminution in value, the Pastuszek Affidavit is of no moment in challenging or countering the plaintiffs' standing, presumptive or otherwise.[44] Moreover, in weighing the testimony before it, [45] this court is satisfied that the defendants have failed to rebut the presumption of standing enjoyed by the plaintiffs. The Mauris have provided compelling testimony concerning a likely loss of privacy. They have done so to a degree well beyond that required under *Butler, supra.* That loss of privacy, in turn, is adequately tethered to an interest protected by the Ordinance. The court concludes therefore that the plaintiffs' presumption of standing has not been rebutted.

Were this court to conclude, arguendo, that the Mauris' presumption of standing *had* been effectively rebutted, the burden would rest with the plaintiffs to "demonstrate, not merely speculate, that there has been some infringement of [their] legal rights"[46] and "that [their] injury is special and different from the concerns of the rest of the community."[47] In *Standerwick*, the Court concluded that "a person aggrieved . . . must assert a plausible claim of a definite violation

---

[42] This conclusion is predicated upon the relatively few pages of deposition testimony in the summary judgment record.
[43] See Mauri Deposition p. 39. At 39:19, Ms. Mauri raises the issue of "[d]ensity in the neighbor[hood?]," as well.
[44] Nor does it counter the plaintiffs' Rieske Affidavit which is concerned solely with privacy issues.
[45] This court does not believe that the privacy concerns voiced by Ms. Mauri are "beyond the scope of common knowledge, experience and understanding" and that expert testimony is necessary therefore to establish aggrievement. See *Standerwick* , 447 Mass. at 36.
[46] *See Barvenik v. Alderman of Newton,* 33 Mass. App. Ct. 129, 132 (1992).
[47] *See Denneny v. Zoning Bd. of Appeals of Seekonk,* 59 Mass. App. Ct. 208, 211 (2003) (emphasis added).

of a private right, a private property interest, or a private legal interest."[48] Moreover, if one is to demonstrate standing, one must show that the injury occurred to "an interest the zoning scheme [sought] to protect." *Standerwick*, 447 Mass. at 32.

If the Mauris are to defeat a motion for summary judgment predicated upon a claimed lack of standing, they must proffer "credible evidence to substantiate [their] allegations." *See Marashlian*, 421 Mass. at 721. In *Butler v. City of Waltham*, 63 Mass. App. Ct. 435 (2005), the court discussed the burden of proof needed for a demonstration of standing, as follows:

> Frequently, the question whether a plaintiff has made the requisite showing is a question of fact and, for that reason, a judge's finding that a person is or is not aggrieved will not be set aside unless the finding is clearly erroneous... The "findings of fact" a judge is required to make when standing is at issue, however, differ from the "findings of fact" that [a] judge must make in connection with a trial on the merits. Standing is the gateway through which one must pass en route to an inquiry on the merits. When the factual inquiry focuses on standing, therefore, *a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true.* "Rather the plaintiff must put forth credible evidence to substantiate his allegations. [It is i]n this context [that] standing [is] essentially a question of fact for the trial judge." (emphasis added)
>
> Although decided zoning cases have not discussed the ingredients of "credible evidence," cases discussing the same concept... have observed that "credible evidence" has 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 board's action. Conjecture, personal opinion, and hypothesis are therefore insufficient. *Id* at p.441. (internal citations omitted)

In *Marhefka v. Zoning Board of Appeals of Sutton*, 79 Mass. App. Ct. 515, 521, n.10 (2011), the Court determined that "a protected interest can [. . .] arise implicitly from the intent of the by-law's provisions."[49] Further, where the injury alleged "relate[d] to protected density

---

[48] *See Standerwick v. Zoning Board of Appeals of Andover*, 447 Mass. 20, 33 (2006), *quoting Barvenik*, 33 Mass. App. Ct. at 132 (internal quotations omitted); *See also Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1998).

[49] *Quoting Sheppard v. Zoning Bd. of Appeal of Boston*, 74 Mass. App. Ct. 8, 12 (2009) ("The requirements regarding lot size, lot width, and side yard are intended to further [the general purposes of the by-law]").

and dimensional interests," the *Marhefka* Court held that "[t]he density and dimensional requirements of the by-law confer[red] standing on the plaintiffs [. . .] based on the aggravation of the preexisting nonconformity of adjoining lots." [50] *Id.* at 520.

See in this regard, § 30-2 of the City of Newton Zoning Ordinance, captioned *Purpose of chapter*, which provides inter alia, as follows:

> The provisions of this chapter are ordained by the city for the purposes of promoting the health, safety, convenience and welfare of its inhabitants by:
>
> ...(b) Preventing overcrowding of land and undue concentration of population;
> ...(e) Lessening the congestion of traffic.
> ...(j) Providing for adequate light and air.

In the case of *Dwyer v. Gallo,* 73 Mass. App. Ct. 292, 296 (2008), the plaintiffs raised density concerns regarding proposed construction on two adjacent undersized lots next to their home. The Court in construing provisions of the Walpole Zoning By-Law somewhat analogous to § 30-2 supra, made the following relevant observation:

> [S]ome of the local by-law's purposes are to "prevent overcrowding of land, lessen congestion, [and] avoid undue concentration of population," all of which are furthered to some extent by the area and frontage requirements of the by-law. There can be little doubt, then, that the Dwyers have raised a private property or legal interest protected by the zoning by-law.

After discussing the Dwyers' concerns including those related to increased artificial light and decreased backyard privacy, the Court concluded as follows:

> Especially given the close quarters involved here [construction on two 20,000 square foot lots rather than the required 40,000 square feet], the plaintiffs' concerns cannot reasonably be characterized as ill-founded or speculative. Accordingly, it was error for the judge to conclude that the plaintiffs lacked standing.... *Id.* at pp. 296-297.
>
> [C]rowding of an abutter's residential property in violation of the density provisions of the zoning by-law will generally constitute harm sufficiently

[50] It is this court's view that the density and dimensional requirements of the Ordinance may confer standing based upon compelling privacy concerns.

perceptible and personal to qualify the abutter as aggrieved and thereby confer standing to maintain a zoning appeal. [51]

The case of *Sheppard v. Zoning Board of Appeals of Boston*, 74 mass. App. Ct. 8 (2008), also concerned issues of standing predicated upon, inter alia, privacy and density concerns. In *Sheppard*, the Court observed as follows:

> This injury relates to density interests protected by applicable zoning laws.... [T]he stated purposes of Boston's zoning code include "prevent[ing] overcrowding of land;...lessen[ing] congestion in streets; [avoiding]undue concentration of population; [and providing] adequate light and air." *The requirements regarding lot size, lot width and side yard are intended to further these purposes.* (emphasis added)

Given the foregoing decisional law, this court is satisfied that the Mauris' privacy concerns are sufficiently tethered to density interests of the sort protected by the local Zoning Ordinances. *See* § 30-2 referenced supra.

To lend additional support to their claims of aggrievement, the plaintiffs enlisted the services of Dennis C. Rieske, an AIA [52] Registered Architect (Rieske). By means of an affidavit, Mr. Rieske provided this court with a comprehensive analysis of the impact of the Chanskys' proposed dwelling on the Mauris parcel. In conducting his analysis, Mr. Rieske studied the permit plans for the proposed dwelling, obtained field measurements, made visual observations and provided photographs.

In furtherance of his analysis, Rieske located thirteen windows on the proposed structure and determined how they would orient to the twelve windows located on the northwest face of the Mauris' dwelling.[53] Mr. Rieske also analyzed the lines of sight from the proposed dwelling's

---

[51] The parcels at issue were two pre-existing non-conforming lots, i.e. Lot 1A and 2A. The zoning requirements since "at least 1956....required 20,000 square feet and 125 feet of frontage for buildable lots in the residential B zoning district." However, Lot 1A contained 12,918 square feet and 71.42 feet of frontage. Lot 2A contained 13,418 square feet and 71.94 feet of frontage.

[52] American Institute of Architects

[53] *See* Affidavit Of Dennis C. Rieske, A1A ¶ 6 ("[T]he banks of windows proposed for Lot 31, containing a total of 13 windows, would be (moving from right to left on the elevation drawings) the following approximate distances

anticipated window banks into the Mauris' home.[54] Among Mr. Rieske's conclusions, are the following:

> [T]he windows proposed for the Lot 31 [Garage Lot] dwelling will create direct lines of sight into all the windows on the northwest side of the Mauris' house, on the first, second and third floors. These windows permit views into the front hall, living room and den on the first floor, the staircase and hallway leading to the master bedroom on the second floor, and stairway and hallway leading to office areas on the third floor.... In addition, the windows in the bank on the left (rear) of the southeast wall of the proposed dwelling would look directly onto the middle of the Mauris' rear deck.... I anticipate other effects to include diminished ambient daylight....
>
> Based on the foregoing, it is my professional opinion that construction of the house proposed for Lot 31 will have a substantial and negative impact on the Mauris' privacy and the use and enjoyment of their property.
>
> Construction of the proposed house would also require removal of a large, twelve foot tall dense rhododendron that now provides significant screening for the Mauris' rear deck.
>
> Since my visit on May 2, 2010, the Chanskys erected a six-foot (6.0') high stockade fence along much off the property line separating the Mauris' home and Lot 31. I have inspected the fence, and because it extends at most, only one foot, approximately, above the sill lines of the first floor windows of the Mauris' home, it is my further professional opinion that it will not significantly mitigate the negative impacts described above. [55]

The photographs provided by the Affiant depict a small single story, one car garage at an appreciable distance from the Mauri residence. The Chanskys propose to demolish the garage replacing it with a two and one half story residential dwelling that would be approximately twelve feet from the Mauri residence at the nearest point. The materials provided by Mr. Rieske including elevations and photographs make clear the disparity between the size and location of the proposed dwelling verses that of the existing garage.

---

from the Mauris' house measured on a perpendicular to the closest point: #1 – eighteen feet (18'); #2 – sixteen and one-half feet (16.5'); #3 – twenty-eight feet (28'); and the windows at #4 – twenty-eight feet (28') and looking onto the Mauris' rear deck.").

[54] *See* Affidavit Of Dennis C. Rieske, A1A ¶ 9 ("[T]he windows in the bank of the left (rear) of the southeast wall of the proposed dwelling would look directly onto the middle of the Mauris' rear deck, which is an open structure with baluster railings.")

[55] *See* Affidavit Of Dennis C. Rieske, A1A (Filed on December 1, 2010) (app. 20). Mr. Rieske is a principal at BTA Architects, Inc. and Developmental Resources, Inc. of Cambridge.

The Chanskys do not effectively rebut the privacy concerns raised by the plaintiffs regarding lines of sight into the Mauris' windows and onto their deck. Rather, they rely in large measure upon their argument that compliance with the 7.5 foot setback renders irrelevant any density concern related to frontage and lot area. For their part, the plaintiffs seek to couple their privacy concerns with "deficient lot size and frontage." [56] [57]

The following opinions lend support to the plaintiffs' assertions of standing based upon claims of privacy. The first, *Ulliani v. Board of Appeals of Burlington*, No. 03-P-1562 (2003) is an Unpublished Opinion of the Appeals Court which this court cites for its persuasive value. In *Ulliani,* the Court discussed standing in the context of the plaintiff's privacy concerns, as follows:

> Standing is essentially a question of fact for the trial judge, which we will reverse only if the finding is clearly erroneous. [Here] [t]he judge found that [the plaintiff] had standing because she was an abutter whose privacy would be "greatly diminished by the presence of two homes abutting her backyard," and because the noise level would be increased.
>
> *That [the plaintiff's] concerns were related to the objectives of the town's density regulation required no testimony.* The Zoning Act, permits a municipality to deal with a variety of matters including density of population and intensity of use, adequate provision of light and air, prevention of overcrowding, and promotion of open space.... It is implicit that the town's density regulation was within the scope and concern of the Zoning Act.... Accordingly it was not error for the judge to conclude that [the plaintiff] had standing. (emphasis added) (internal citations omitted)

The case of *Bertrand v. Board of Appeals of Bourne*, 58 Mass. App. Ct. 912 (2003), is also relevant to the case at hand. In *Bertrand,* the trial judge had upheld the grant of a variance on grounds that the plaintiffs lacked standing to challenge it. In reversing that decision, the Appeals Court observed as follows:

---

[56] Plaintiffs' Reply Brief with Respect to Standing, p. 2.

[57] *See* Stipulation of Facts ¶ 14. See also Section 30-15 Table 1- Density and Dimensional Controls. While the Minimum Lot Area in the Single Residence 2 district is normally 15,000. For lots created before 12/7/53 however, as is the case with the three lots at issue, the minimum Lot Area is reduced to 10,000 feet. Likewise, the frontage requirement in the District is typically 100 feet. In those pre-12/7/53 Lots however, the frontage requirement is reduced to 80 feet. So too, the side setback requirement is given as 15 feet, but for those lots created before 12/7/53. As to those, the side setback requirement is given as 7.5 feet.

> Since 1971,...Gibbons has owned two contiguous vacant lots (locus), each consisting of approximately 20,000 square feet. At the time of purchase, both lots were of buildable dimensions. Thereafter, in 1986,Bourne increased the minimum square footage required for constructing as single family house... to 40,000 square feet... [The plaintiffs] articulated concerns about increased noise, increased artificial light and decreased backyard privacy....
> [T]he grounds for the plaintiffs' objections related directly to the objectives of the density regulation at issue. Especially given the close quarters involved here, the plaintiffs' concerns cannot reasonably be characterized as ill-founded or speculative.

Lastly, another Unpublished Opinion of the Appeals Court, *Ruggles v. Board of Appeal of Boston*, No. 03-P-960 (2005), is cited for its persuasive value. Once again, the Appeals Court addressed a challenge to the plaintiff's standing as a "person aggrieved." Concurring with the motion judge that the plaintiff possessed standing, the Court noted that a "[p]erson aggrieved" is a term that should not be construed narrowly.

It continued, as follows:

> The variance [granted to the defendants] allows construction of a house *within fourteen feet of the westerly wall of a house owned by the plaintiff*... There are *ten windows in that wall*, through which, prior to the [defendants'] construction, [the plaintiff] had a westerly view of eighty feet to the nearest building wall. The new [defendants'] house now obscures the view from those windows. There is a reduction of light and air flow from the new construction, and [the plaintiff] experiences a diminution in privacy in the warmer months when the windows are open. (Emphasis added)

The facts in *Ruggles* are not without their parallel to the case at bar.

In view of the foregoing, this court is satisfied that the Mauris have advanced a "plausible claim of a definite violation of a private right, a private property interest, or a private legal interest."[58] Consequently, even if their presumptive standing had been adequately rebutted, this court believes that the plaintiffs have amply demonstrated their aggrievement, and therefore standing under G.L. c. 40A, § 17.

---

[58] *See Harvard Sq. Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989); *See also Barvenik v. Aldermen of Newton*, 33 Mass. App. Ct. 129, 130-132 (1992).

Merger

G.L. c. 40A § 6, fourth par., provides exemptions from the Merger Doctrine 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 the then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet or frontage.

The Garage Lot finds no protection in the Merger Doctrine set out in G.L. c. 40A, § 6 fourth par... In this regard, the defendants, in their Memorandum of Law state as follows:

> The Mauris' reliance upon case law interpreting the fourth paragraph of G.L. c. 40A, § 6 is inapplicable here, because that portion of the statute is inapplicable if "building upon such lot is not prohibited by the zoning ordinance or by-laws in effect in the city or town."

The relevant sentence of paragraph 4, as cited by the defendants, supra, reads in its entirety, as follows:

> The provisions of this paragraph shall not be construed to prohibit a lot being built upon, if at the time of the building, building upon such lot is not prohibited *by the zoning ordinances or by-laws in effect in a city or town.* (emphasis added)

Thus, cities and towns are afforded the opportunity to enact essentially more lenient merger exemptions than those appearing in G.L. c. 40A, § 6, fourth par. The instant appeal turns on the relevant provisions of the Ordinance, and whether they exempt the Chanskys' Garage Lot from the operation of the Merger Doctrine.

In reaching its Decision that the Locus was exempt from the operation of the Merger Doctrine, and therefore, constituted an independent, buildable lot, the Zoning Board was called upon to construe § 30-15(c)(3)(b) of the Ordinance.

Section 30-15 provides in relevant part as follows:

Section 30-15 Density/Dimensional Requirements

> Except as provided in section 30-21 (non-conforming uses), the density and dimensional controls set forth in the Tables below shall apply to all buildings, structures and uses in each of the said districts.

Subsection 30-15(c) Exceptions Applicable in Residential Districts

> Any increase in area, frontage, or setback requirements prescribed in Table 1 of this section shall apply to any lot in a residential zoning district except to the extent that either the provisions of Massachusetts General Laws, Chapter 40A, Section 6, as in effect on January 1, 2001, or the following provisions, provide otherwise.[59]
>
> Any increase in area, frontage, or setback requirements prescribed in Table 1 of this section shall not apply to any lot in a residential district *if all of the following requirements are met*:
>
> (1) At the time of the recording or endorsement, whichever occurred sooner, on October 11, 1940 if the recording or endorsement occurred before October 11, 1940, the lot
>
> a) conformed to the requirements in effect at the time of recording or endorsement, whichever occurred sooner, but did not conform to the increased requirements, and
> b) had at least five thousand (5,000) square feet of area, and
> c) had at least fifty (50) feet of frontage.
>
> (2) The size or shape of the lot has not changed since the lot was created unless such change complied with the provisions of section 30-26.

[59] *See* Newton's Ordinance at § 30-15, Table 1. Locus is located in a "Single Residence 2" district. The minimum required lot size for pre-1953 properties is 10,000 square feet of area, and the minimum frontage requirement is 80 feet.

(3) Either

> a) The lot was not held in common ownership at any time after January 1, 1995 with an adjoining lot or lots that had continuous frontage on the same street with the lot in question, [60]
>
> or
>
> b) If *the lot* was held in common ownership at any time after January 1, 1995 with an *adjoining lot* or lots that had continuous frontage on the same street with the *lot in question*, *such lot* had on it a single-family or two family dwelling. (emphasis added)

It is undisputed that both the Garage Lot and the House Lot, at all times relevant hereto [61] have been held in common ownership, are adjoining lots, and have continuous frontage on the same street, Bradford Road.[62] The point of disagreement concerns the particular lot to which the phrase "such lot" refers.[63] The Mauris argue that "such lot" refers to its immediate antecedent, "the lot in question," i.e. the Garage Lot. Were that to be the case, the Garage Lot would have merged with the House Lot, thereby rendering the Garage Lot unbuildable.

For their part, the Chanskys assert that "such lot" refers to "adjoining lot or lots." In the present context, the "adjoining lot" must be taken as a reference to the Chanskys' House Lot. If the interpretation urged upon this court by the Chanskys were deemed correct, the Garage Lot would not have merged with the House Lot. As a consequence, the Garage Lot would be a

---

[60] Section 30-15 (c)(3)(a) is not applicable inasmuch as the lot at issue, the Garage Lot, was held in common ownership prior to and "after January 1, 1995."

[61] *See* Stipulation of Facts ¶ 9 (Chanskys were deeded 25 and 31 Bradford Road in 1987, and have been owners of those lots from that date until the present).

[62] *See* Stipulation of Facts ¶ 1, 4.

[63] To an overwhelming extent, the merits of this case have been argued and are herein decided, so as to pinpoint the proper interpretation of § 30-15(c)(3)(b)'s language, "such lot".

buildable lot protected from increased frontage and area requirements. In their respective determinations, both the ISD [64] and the Board have espoused the latter view.

The case turns on this narrow point of interpretation.

It is this court's view that the language of Subsection b) is clear insofar as the phrase "such lot" refers, quite naturally, to its immediate antecedent, the "lot in question." *See Cottone v. Cedar Lake, LLC*, 67 Mass. App. Ct. 464, 469, n. 7. ("The 'rule of last antecedent' holds that the 'qualifying phrases are to be applied to the words or phrases immediately preceding and are not to be construed as extending to others more remote.'") The "lot in question," is, in turn, a reference, also clear, to the opening phraseology of Subsection b), i.e "If *the lot* was held in common ownership...." (emphasis added)

This court is satisfied that the Garage Lot, one of two commonly owned adjoining lots, sharing frontage on the same street, will have merged with the House Lot unless it can be shown that the lot in question, the Garage Lot, has been improved by a "single-family or two-family dwelling." However, as the use of term Garage Lot in the present context suggests, Lot 31 has been improved not by a dwelling but by a garage. Inasmuch as the Locus remains unimproved by a dwelling of any sort, the lots will have been merged, thereby rendering the Garage Lot unbuildable.

This view gains support from the case of *Carabetta v. Board of Appeals of Truro,* 73 Mass. App. Ct. 266 (2008) In Carabetta, the Court cited the following principle:

> It is well settled that "[a]djacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities...." This general rule has been applied both prior to and "after enactment of our current zoning enabling act." Id., at 268.

---

[64] *See* Appendix to Plaintiffs' Brief, p.2. The ISD Commissioner, in his Memorandum of October 23, 2009 to the Board, effectively reworded § 30-15 (c)(3) (b) by inserting the word "adjoining" so that the relevant phrase read "such adjoining lot." As so rewritten, the language appeared to support the ISD position.

> The statutory "grandfather" provision contained in G.L. c. 40A, s. 6, incorporates this doctrine by providing protection from increases in lot area and frontage requirements only to nonconforming lots that are not held in common ownership with any adjoining land. While a town may choose to adopt a more liberal grandfather provision it must do so with clear language. (internal citations omitted) Id., at 269.

The Affidavit of George E. Mansfield (Mansfield Affidavit) provides useful insight into [65] the legislative history associated with § 30-15 (c)(3) (b). In the case of *Petrucci v. Board of Appeals of Westwood*, 45 Mass. App. Ct. 818, 823, n. 7, the Court observed that "[a]lthough clear statutory language ordinarily obviates the need to resort to rules of interpretation... legislative history may be referenced by way of supplementary confirmation of the intent reflected in the words used." In the case at bar, the Mansfield Affidavit serves such a confirmatory purpose. [66]

Conclusion

For the foregoing reasons, this court concludes that the issuance of the building permit upon the application of the named defendant Ernest D. Rogers, as agent for Bonne E. Chansky and James D. Chansky was based upon legally untenable grounds. The decision of the Zoning Board of Appeals to uphold the determination of the Commissioner of the Inspectional Services Department likewise, was legally untenable as it was based upon an erroneous interpretation of the Zoning Ordinances of the City of Newton.

In reaching these legal conclusions the court has, under the doctrine enunciated in *Petrucci,* supra, considered the Affidavit George E. Mansfield. The Affidavit of Michael Ullman, a Tufts university English professor stands on a different footing, however. As to the affidavit of

---

[65] Appendix to Plaintiffs' Brief, Exhibit 7.
[66] See also in this regard, Memorandum of the Associate City Solicitor to the Board of Alderman dated July 6, 2001. Appendix to Plaintiffs' Brief, Exhibit 4.

William J. Pastuszek, Jr. the court has considered same, although for the reasons specified supra, has concluded that it is bears little relevance to the standing issue.

Accordingly, it is hereby

ORDERED that the defendants' Motion to Strike the Affidavit of Michael Ullman, PhD. is hereby **ALLOWED.** It is further

ORDERED that the defendants' Motion to Strike the Affidavit of George E. Mansfield, is hereby **DENIED.** It is further

ORDERED that the plaintiffs' Motion to Strike the Affidavit of William J. Pastuszek, Jr. is hereby **DENIED.**

ORDERED that the plaintiffs' Motion for Summary Judgment is hereby **ALLOWED.** It is further

ORDERED that the defendants' Cross-Motion for Summary Judgment is hereby **DENIED.**

Judgment to issue accordingly,

SO ORDERED

By the Court (Grossman, J.)

H Grossman

Attest:

Deborah J. Patterson
Recorder

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

Dated: December 22, 2011.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

MIDDLESEX, ss. CASE 10 MISC 419859 (HMG)

MAUREEN MAURI and
RONALD A. MAURI

Plaintiffs

v.

ZONING BOARD OF THE CITY OF
NEWTON, ET AL.

Defendants

JUDGMENT

This case came to be heard on the Motion of the Plaintiffs and the Cross-Motion of the Defendants for Summary Judgment. An Order allowing the Plaintiffs' motion and Denying the Defendants' Motion has been entered this day.

In accordance therewith, it is hereby

ORDERED and **ADJUDGED** that the Building Permit [1] issued by the City of Newton Inspectional Services Department in conjunction with undersized lot at 31 Bradford Road, Newton, Massachusetts, [2] is hereby **REVOKED.**

It is further

[1] Building Permit No.09080027.
[2] The Chanskys' Garage Lot.

ORDERED and **ADJUDGED** that the decision of the City of Newton Zoning Board of Appeals is hereby **ANNULLED.**

By the court. (Grossman, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: December 22, 2011.

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER