COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT

NANTUCKET, ss. 21 MISC 000205 (MDV)

GUY MADDALONE and
DIANE MADDALONE,

Plaintiffs,

v.

SUSAN McCARTHY, MICHAEL O'MARA, KERIM KOSEATAC, MARK POOR, and JAMES MONDANI, as members of the TOWN OF NANTUCKET ZONING BOARD OF APPEALS, and MICHAEL METZ,

Defendants.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Rule 52, Mass. R. Civ. P.)

These additional findings of fact and conclusions of law augment those in *Maddalone* v. *McCarthy*, 31 LCR 141 (2023) (Vhay, J.) ("*Maddalone I*"). That decision describes the underlying dispute; the capitalized terms in *Maddalone I* have the same meanings as the identical capitalized terms in this decision.

Maddalone I identifies the parties' five issues for trial. After that trial, held in the fall of 2022, the Court concluded with respect to the first trial issue that plaintiffs Guy and Diane Maddalone have standing under G. L. c. 40A, § 17, to challenge defendant Michael Metz's special permit for the Renovations. *Maddalone I*, 31 LCR at 144. That brought the Court to the second issue for trial: whether Metz had lost the right to seek the special permit by not using the Existing Structures (both of which are nonconforming structures under Nantucket's Zoning

Bylaw) for more than three years after November 2, 2016. See Bylaw, § 139-33.C ("Nonconforming uses and structures abandoned or not used for a period of three years shall not be reestablished."). *Maddalone I* held that this issue was a mixed question of law and fact, but one the defendant members of the Town of Nantucket Zoning Board of Appeals (the "Board") hadn't addressed during its proceedings on Metz's permit application. *Maddalone I*, 31 LCR at 144-145. The Court thus vacated the Board's decision granting that permit and remanded the case to the Board to consider the § 139-33.C issue. *Maddalone I*, 31 LCR at 145.

In May 2023, the Board issued a second unanimous decision (the "Remand Decision"). The Board concluded that § 139-33.C didn't disqualify Mr. Metz from getting a special permit for the Renovations. The Board thus affirmed its earlier decision granting the permit. The Maddalones timely sought review of the Remand Decision. In an order dated January 30, 2024 ("*Maddalone II*"), this Court concluded that the Board had misinterpreted the term "dwelling unit" under the Bylaw, a key component of another Bylaw term, "primary dwelling," which is the allowed principal use of the Existing Dwelling. The Court further held that the proper test under § 139-33.C for determining whether Metz was no longer using the Existing Dwelling was whether "there was . . . no effort to market, rent, or occupy the [Dwelling] or to maintain it as a dwelling." *Maddalone II* at 6 (bracketed material added), quoting *Cox* v. *Davis*, 25 LCR 67, 71 (2017) (Long, J.).

The Court allowed the parties to take additional discovery on the "non-use" issue and to supplement the trial record. By order dated June 13, 2024, the Court resolved the second of the five *Maddalone I* trial issues, concluding that between November 2016 and December 2020, the Existing Structures didn't suffer from a lack of use under the standards described in *Maddalone II*.

In this decision, the Court resolves the three remaining *Maddalone I* trial issues. The Court HOLDS that the Board properly construed the exemptions to the Bylaw's term "structure" as not including "window wells," and that a window well included among the Renovations is such an exempt feature. The Court further HOLDS that substantial evidence supports the Board's conclusions that (a) the Renovations would not be substantially more detrimental to the Surfside neighborhood than 16 Western Avenue's pre-existing nonconforming conditions and (b) construction of the Renovations is "in harmony with the general purpose and intent" of the Bylaw. Bylaw at § 139-30(A)(1). The Court will thus AFFIRM the Board's grant of a special permit for the Renovations.

Pursuant to Rule 52, Mass. R. Civ. P., the Court FINDS those facts previously found in *Maddalone I*, 31 LCR at 141-143, as well as the following. The numbers on the findings that follow resume from where they left off in *Maddalone I*:

Window Wells

21. As part of the Renovations, Mr. Metz proposed to enlarge and finish the Existing Dwelling's basement. On the eastern side of the enlarged basement (that is, the side closest to the Maddalone property at 14 Western Avenue), Metz proposed a bedroom that had a window surrounded on the basement's exterior by a window well. The well is virtually identical in size, shape, structure, and elevation above the grade of the Metz property (16 Western Avenue) to a window well built by the Maddalones in 2018, on the side of 14 Western Avenue that's facing 16 Western Avenue, to provide light to the Maddalones' renovated basement. Each party's respective window well extends into side-yard setback areas on each party's property. Each window well is at or below grade on each property.

22. Section 139-2 of the Bylaw defines "structure" as

> [a]nything constructed or erected, the use of which requires a fixed location on the ground. "Structure" shall be construed, where the context allows, as though followed by the words "or part thereof" and shall include, but not be limited to, buildings, retaining walls which support buildings, platforms, antenna towers, steel storage containers, lighthouses, docks, decks, chimneys, tents, and game courts. "Structure" shall not include retaining walls not exceeding four feet in height for landscaping purposes, fences, rubbish bins, underground propane tanks, stairs, access

> ramps, or platforms that provide the minimum Building Code compliant access to a structure and that extend into the required front, side, or rear yard setback less than a depth of three feet, and within a total area less than 20 square feet on a lot containing less than 40,000 square feet . . . .

23. The Court accepts Board chairman Susan McCarthy's testimony that the Board never has considered at- or below-grade window wells to be parts of "structures" under § 139-2 of the Bylaw. That's consistent with how Nantucket's zoning administrator treated the Maddalones' 2018 renovations to 14 Western Avenue: while the Maddalones' window well encroached into their property's side-yard setback, the administrator didn't treat their proposed window wells as creating a dimensional nonconformity, and he didn't require the Maddalones to obtain any zoning relief.

The Renovations

24. Section 139-33.A(1) of the Bylaw provides:

> Preexisting, nonconforming structures . . . may be extended, altered, or changed, provided that:
>
> (a) The special permit granting authority finds that such extension, alteration, or change shall not be substantially more detrimental than the existing nonconforming structure . . . to the neighborhood. Where an existing structure violates a front, rear, or side yard setback distance, the special permit granting authority may issue a special permit to allow an extension, alteration, or change to the structure, provided that the nonconforming setback distance is not made more nonconforming and based upon a finding that the extension will not be substantially more detrimental to the neighborhood than the existing nonconformity . . . .

25. Section 139-30.A(1) of the Bylaw provides: "The special permit granting authority shall issue special permits for structures . . . which are in harmony with the general purpose and intent of this chapter subject to the provisions of such chapter."

26. Finding #4 describes the non-conforming setbacks of the Existing Garage and the Existing Dwelling. Ignoring the new window wells, the Renovations didn't change the Existing Dwelling's non-conforming western side-yard setback distance, 5.6 feet. The Renovations also didn't change the Existing Garage's non-conforming eastern side-yard setback distance (7.8 feet), but they extended into the Garage's non-conforming setback, within the Garage's footprint, a second floor. The Renovations reduced, however, the Existing Garage's front-yard non-conformity (0.2 feet, when 30 feet was required). The renovated structures are set back 10.4 feet from Western Avenue.

27. The changes discussed in Finding #26 had the effect of removing from 16 Western Avenue's front-yard setback at least 160 square feet of the Existing Garage's

ground-level encroachment. But it also intensified the pre-existing eastern side-yard encroachment by adding 44 square feet of second-floor space within the side-yard setback.

28. Over the last 25 years, many Surfside-neighborhood homes (many of which had been beach cottages) have been renovated and expanded. Some of those projects (like the Maddalones') have been done without owners obtaining special permits. Other projects have required special permits or variances. Owing to setback nonconformities, several neighborhood homes are pre-existing, nonconforming structures under the Bylaw. The Maddalone home had a legally pre-existing, nonconforming western side-yard setback at the time they purchased it. That part of their home remains nonconforming.

29. As of the time of trial, of the twelve waterfront homes on Western Avenue, nine (including the Maddalone house) had second floors. Some of the Surfside homes have attached garages that also have second-floor space above the garage. Some have added livable area by renovating their basements and relying on window wells for emergency access.

30. Since the Existing Dwelling was a historic structure, the Renovations were subject to review by the Nantucket Historic District Commission (the "HDC"). In December 2020, Mr. Metz applied to the HDC for a "certificate of appropriateness" for his planned renovations to the Existing Structures. After recommending certain changes to Metz's plans, the HDC issued a certificate of appropriateness in January 2021. The Maddalones didn't appeal the certificate.

31. The as-built Renovations are in accordance with the final HDC-approved plans. The Renovated structures have a similar architectural "feel" to the Existing Dwelling. The bulk of the Renovated structures is at ground level, unlike the taller Maddalone home (which is an "upside-down" house, with its kitchen, substantial decks and living areas on the second floor). The Court viewed Western Avenue's waterfront properties at a distance, on their "beach" side, during the trial. The Renovated structures fit the Surfside neighborhood architecturally and are less massive than many of the nearby homes, including the Maddalones'.

32. Unlike the Existing Structures, the as-built Renovations meet modern building and fire codes.

33. The Board approved the Renovations "subject to the condition that appropriate screening between the garage and the property line be maintained and/or that any disturbed screening be replaced."

* * *

In reviewing a local board's grant of a special permit, the court must

> "make independent findings on the evidence presented to the judge, and . . . determine, based on that evidence, the legal validity of the decision of the permit granting authority." "If the board's decision is supported by the facts found by the judge, 'it may be disturbed only if it is based on a legally untenable ground, or is unreasonable, whimsical,

> capricious or arbitrary.'" [The applicant has] the burden to demonstrate that the prerequisites [for the permit] were met and that zoning relief was justified.

Perry v. *Board of Appeal of Boston*, 100 Mass. App. Ct. 138, 143 (2021) (citations and footnotes omitted), quoting *Barlow* v. *Planning Bd. of Wayland*, 64 Mass. App. Ct. 314, 321 (2005), and *Fish* v. *Accidental Auto Body, Inc.*, 95 Mass. App. Ct. 355, 362 (2019). Of the three remaining trial issues, the first (whether the Board properly interpreted the Bylaw's term "structures" as excluding window wells) is a question of law. It's the court's responsibility to determine "the content and meaning of statutes and by-laws . . . ." *Shirley Wayside Ltd. Partnership* v. *Board of Appeals of Shirley*, 461 Mass. 469, 474-475 (2012), quoting *Britton* v. *Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73-74 (2003). The two other trial issues turn on whether substantial evidence supports the Board's determinations concerning the effects of the Renovations.

Window Wells as "Structures"

> We determine the meaning of a bylaw "by the ordinary principles of statutory construction." We first look to the statutory language as the "principal source of insight into legislative intent." When the meaning of the language is plain and unambiguous, we enforce the statute according to its plain wording "unless a literal construction would yield an absurd or unworkable result." We "endeavor to interpret a statute to give effect 'to all its provisions, so that no part will be inoperative or superfluous.'"

Shirley Wayside, 461 Mass. at 477 (citations omitted), quoting *Framingham Clinic, Inc.* v. *Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981); *Adoption of Daisy*, 460 Mass. 72, 76 (2011); and *Connors* v. *Annino*, 460 Mass. 790, 796 (2011). A court must also "accord deference to a local board's reasonable interpretation of its own zoning bylaw, with the caveat that an 'incorrect interpretation of a statute . . . is not entitled to deference.'" *Shirley Wayside*, 461 Mass. at 475 (citations omitted), quoting *Atlanticare Med. Ctr.* v. *Comm'r of the*

Div. of Med. Assistance, 439 Mass. 1, 6 (2003). See also *Perry* v. *Hull Zoning Bd. of Appeals*, 100 Mass. App. Ct. 19, 23 (2021) (local board's "unreasonable" interpretation of a bylaw does not enjoy deference under *Shirley Wayside*). Deference to a board's interpretation of a bylaw typically is warranted when a bylaw term has multiple reasonable meanings and the board expressly has chosen one of them. See, for example, *Tanner* v. *Boxford Bd. of Appeals*, 61 Mass. App. Ct. 647, 649-652 (2004). Deference also is appropriate where bylaw provisions conflict and the board expressly has reconciled them. See *Perry*, 100 Mass. App. Ct. at 21-23.

This case involves the sort of problem that arose in *Perry*, a conflict among bylaw terms. The first sentence in § 139-2's definition of "structure" is simple: a structure is "[a]nything constructed or erected, the use of which requires a fixed location on the ground." Had the definition stopped there, the Maddalone and Metz window wells would be "structures," as both were "constructed" and require "a fixed location on the ground." But the second and third sentences of § 139-2's definition of the "structure" introduce ambiguities. The second sentence states (emphases added):

> "Structure" shall be construed, where the context allows, *as though followed by the words "or part thereof"* and shall include, but not be limited to, buildings, *retaining walls which support buildings*, platforms, antenna towers, steel storage containers, lighthouses, docks, decks, chimneys, tents, and game courts.

One component of that sentence reinforces the conclusion about window wells that one can draw from the first sentence (the Maddalone and Metz wells are attached to, and hence arguably are "part of," each residence's basement foundation), but another component ("retaining walls which support buildings") is in tension with that conclusion: the parties' window wells don't "support" any buildings. (Then again, the second sentence states that "structures" are "not . . . limited to" what the sentence lists.) The third sentence only adds to the tension (emphasis added):

> "Structure" *shall not include retaining walls not exceeding four feet in height for landscaping purposes*, fences, rubbish bins, underground propane tanks, stairs, access ramps, or platforms that provide the minimum Building Code compliant access to a structure and that extend into the required front, side, or rear yard setback less than a depth of three feet, and within a total area less than 20 square feet on a lot containing less than 40,000 square feet.

The Maddalones view the "structure" definition as putting forth, in its first sentence, an expansive concept of "structure," followed by examples of such "structures" in the second sentence, followed in the third sentence by a list of the sole exemptions from the first and second sentences.[1] But none of the three sentences expressly says that's what the three sentences are doing. Moreover, if that's how the definition of "structure" is supposed to work, it arguably creates conflicts with § 139-2's definition of "yard" (emphases added):

> The area of a lot to be kept free of buildings and other structures (*except* fences, fence gates, *landscape retaining walls,* mail and lamp posts, utility service poles, and pedestals, lot accessways, and docks, bulkheads, groins and other coastal engineering structures). The setback distance from any required front, side, or rear yard shall be measured from the corner board of the structure, if applicable, or the closest point (excluding the eaves and any exterior insulation) between the structure and the lot line.

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[1] They also argue that the Court should ignore the third sentence's mention of retaining walls because the Metz window well is more than four feet in height. That argument overlooks § 139-17.A of the Bylaw. It provides (emphasis added): "Building *and structure* height is measured as the average height . . . from the average mean grade to the highest point of the building and/or structure." Section 139-2 of the Bylaw defines "Mean Grade" as the "median grade line established between existing grade and finish grade measured along a line four feet from the perimeter of the building or structure, extended four feet beyond the building or structure at each end." Section 139-2 defines "Average Mean Grade" Building and Structure Height" thusly:

> (1) Average mean grade shall be the average of the mean grades established along the median grade line. There shall be only one average mean grade for each continuous mean grade line.
>
> (2) Where a side does not have continuous existing and/or finish grade lines, caused by retaining walls or horizontal breaks created by setbacks or protrusions, the average mean grade shall be the average of separately calculated average mean grades for each separate continuous median grade line and shall be proportional to the horizontal length of each continuous median grade line.

It's apparent from these definitions that the Bylaw disregards the "height" of what's underground.

One could avoid the conflict created by the Maddalones' reading of "structure" and the Bylaw's definition of "yard" by treating window wells as "landscape retaining walls" for purposes of the Bylaw: after all, the Maddalone and Metz window wells prevent their side lawns from subsiding into excavated areas surrounding each home's basement windows. Such an interpretation would allow one to ignore window wells when determining front-, side-, or rear-yard setbacks. But well prior to Mr. Metz applying for his special permit, the Board chose not to resolve the conflict that way: instead, it opted not to treat window wells as "structures" in the first place. The Maddalones offer no argument why the Board's choice is unreasonable. Under *Perry*, this Court must respect that choice.[2]

Impact of the Renovations Upon the Surfside Neighborhood

In considering a local board's finding concerning a proposed alteration's "substantial detriment" to the neighborhood,

> judicial review typically requires two principal inquiries, one of which involves an almost purely legal analysis and the other of which involves a highly deferential bow to local control over community planning.
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> As for the first inquiry, an essentially legal analysis is required to decide whether the board's decision was based on "a legally untenable ground," or, stated in a less conclusory form, on a standard, criterion, or consideration not permitted by the applicable statutes or by-laws. Here, the approach is deferential only to the extent that the court gives "some measure of deference" to the local board's interpretation of its own zoning by-law. In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the board has chosen from those sources the proper criteria and standards to use in deciding to grant or to deny the variance or special permit application.

[2] At pages 13-14 of his pretrial brief, Mr. Metz argues that under G. L. c. 40A, § 6, as interpreted in cases such as *Bellata* v. *Brookline Zoning Bd. of Appeals*, 481 Mass. 372 (2019), he didn't need a special permit to build his window well, as it is a minor, small-scale addition to a statutorily protected single-family, nonconforming structure. Because the Court upholds the Board's interpretation of "structure" as not including window wells, the Court will not address this first of two arguments that Metz makes under *Bellata*. (The Court discusses the second *Bellata* argument in footnote 4 below.)

> The second inquiry is different. Assuming that the board has drawn on proper criteria and standards, the court then must determine, on the basis of the facts it has found for itself, whether the board has denied the application by applying those criteria and standards in an "unreasonable, whimsical, capricious or arbitrary" manner. More specifically, when reviewing a denial of an application for a permit governed by G. L. c. 40A, § 6, the question for the court is whether, on the facts the judge has found, any rational board could conclude that the addition or alteration the applicants propose would be substantially more detrimental to the neighborhood than the existing structure.
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> As is evident, this second element of review, unlike the first, is highly deferential, and gives the board discretion to deny a permit application even if the facts found by the court would support its issuance. As a consequence, the board's discretionary power of denial extends up to those rarely encountered points where no rational view of the facts the court has found supports the board's conclusion that the applicant failed to meet one or more of the relevant criteria found in the governing statute or by-law.

Britton v. *Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73-75 (2003) (citations and footnotes omitted), quoting *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970); and *APT Asset Mgmt., Inc*. v. *Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 138 (2000).[3]

The Maddalones raise arguments that require both types of *Britton* inquiries. Their pretrial brief discusses at length how the Board didn't follow c. 40A, § 6, ¶ 1, when it authorized the renovations. The Maddalones are correct that § 6 provides *a* framework for municipal regulation of reconstructions, extensions, alterations, and changes to pre-existing, nonconforming structures. But § 6 isn't the only permissible means of regulating such things. As Judge Speicher discussed in *Wojcik* v. *Lovett*, 24 LCR 343 (2016), municipalities may regulate changes to pre-existing, nonconforming structures *either* through the § 6 process (which

[3] While *Britton* involved a board's finding that an alteration would be substantially more detrimental to the neighborhood, and hence denied an alteration application under c. 40A, § 6, the Appeals Court in *Kelley* v. *Zoning Bd. of Appeals of Somerville*, 95 Mass. App. Ct. 1103 (2019) (Rule 1:28 decision), applied the *Britton* tests to a grant of a special permit under a local bylaw governing alterations of nonconforming structures, where the board found that the proposed alterations would not be detrimental.

often requires a so-called "§ 6 finding") *or* via special permits. See also *Shrewsbury Edgemere Assocs. L.P.* v. *Board of Appeals of Shrewsbury*, 409 Mass. 317, 321-324 (1991) (§ 6 allows municipalities to regulate via special permit certain changes to nonconforming structures).

Judge Speicher held in *Wojcik* that East Brookfield's zoning bylaw regulated changes to nonconforming structures purely under § 6: certain alterations not allowed as of right required only a "finding" by the town's board of appeals (but no special permit) that the change "is not substantially more detrimental than the existing non-conforming" structure. *Id.* at 345-347. Nantucket has chosen the other method described in *Wojcik* (and approved in *Shrewsbury Edgemere*) for regulating alterations of nonconforming residential structures: via special permit.[4] Since the Bylaw uses that method, the Board was obligated to make affirmative findings only "as to the existence of each condition required for the granting of the special permit." *Sheehan* v. *Zoning Bd. of Appeals of Plymouth*, 65 Mass. App. Ct. 52, 55-56 (2005).

The Board's Decision contains both findings that the Bylaw requires. One addresses whether the Renovations would be substantially more detrimental to the Surfside neighborhood relative to the Existing Structures. The Board answered no. The facts as found by this Court support the Board's conclusion. The Renovations removed at least 160 square feet of the Existing Garage's ground-level encroachment into 16 Western Avenue's front-yard setback. In exchange, the renovated dwelling added 44 square feet of encroaching second-floor space on the building's eastern side yard. The Board reasonably could have concluded on those facts alone that the Renovations were less detrimental to the Surfside neighborhood than the Existing

[4] Of course, municipalities can't use a special-permit system to circumvent § 6's limits on municipal powers to regulate changes to single or two-family residential structures. See *Bellata*, 481 Mass. at 376-385 (describing limits and how they apply to local special-permit and variance requirements). Citing *Bellata*, Mr. Metz argues at page 10 of his pretrial brief that he didn't need to get a special permit to undertake the Renovations: he lawfully could have done so just by getting a building permit. Since the Court concludes that the Board validly granted Metz the special permit for which he'd applied, the Court will not decide this second *Bellata* argument.

Structures' nonconformities. Under *Britton*, the facts as found by this Court don't allow it to second-guess the Board's conclusion concerning detriment to the neighborhood.

Harmony with the Bylaw's Purpose and Intent

While *Britton* discussed its two "inquiries" in a case involving judicial review of a local board's analysis under § 6 of the detriments associated with altered nonconforming structures, its comments are equally pertinent to the second finding that the Bylaw required the Board to make in this case if it were to grant Mr. Metz a special permit: that the Renovated structures "are in harmony with the general purpose and intent of [the Bylaw] subject to the provisions of [the Bylaw]." Bylaw at § 139-30.A(1). *Britton* recognizes that if a zoning board has "drawn on proper criteria and standards," whether the board has applied them correctly "involves a highly deferential bow to local control over community planning." *Britton*, 59 Mass. App. Ct. at 73-74. See also *Copley* v. *Board of Appeals of Canton*, 1 Mass. App. Ct. 821, 821 (1973) ("the board's evaluation of the seriousness of the problem, not the judge's, . . . is controlling").

Section 139-1 of the Bylaw states that its purpose is "[t]o promote the health, safety, convenience, morals and general welfare of its inhabitants, to lessen the danger from fire and congestion and to improve the Town . . . ." The Board found that the Renovations were "in conformity with the general purpose and intent" of the Bylaw. Based on the facts the Court has found, this Court can't fault that conclusion. The Renovated structures are safer, and pose less of a fire danger, than the Existing Structures. Thanks to tasteful design and the HDC's review, the Renovated structures improve the Surfside neighborhood's appearance. Mr. Metz obtained additional living space at 16 Western Avenue without creating a building as large or as bulky as others in the neighborhood. The Renovated structures also lessen 16 Western Avenue's zoning nonconformities, and in a thoughtful response to the Maddalones' concern about the

intensification of the setback nonconformity along their property line, the Board ordered appropriate vegetative screening. As the facts support the Board's "Bylaw harmony" finding, this Court won't second-guess that finding either.

Judgment to enter accordingly.

/s/ Michael D. Vhay
Michael D. Vhay, Associate Justice

Dated: November 8, 2024