

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

APR 23 2012

MIDDLESEX, ss.

10 MISC 440141 (KFS)
11 MISC 446982 (KFS)

MLM REALTY TRUST,
Plaintiff

v.

ELIZABETH MORONEY, MICHAEL A.
CAPUANO, JOSEPH FAVALORO,
JAMES KIRYLO, and DANA LeWINTER,
INDIVIDUALLY and as MEMBERS OF
THE CITY OF SOMERVILLE
PLANNING BOARD, CITY OF
SOMERVILLE, and HERBERT F.
FOSTER, JR., ORSOLA SUSAN
FONTANO, JR., RICHARD ROSSETTI,
JR., SCOTT T. F. DARLING, III, ESQ.,
and JOSH SAFDIE, INDIVIDUALLY and
as MEMBERS OF THE SOMERVILLE
ZONING BOARD OF APPEALS,
Defendants

DECISION ON MOTION FOR
SUMMARY JUDGMENT

In these actions, Plaintiff challenges decisions by the Planning and Zoning Boards of the City of Somerville (Somerville or City), which both denied Plaintiff's plans to divide property owned by it into two lots. In addition, in a count against the City itself, Plaintiff seeks to invalidate certain provisions of the Somerville Zoning Ordinance (SZO) under G. L. c. 240, § 14A. This Motion for Summary Judgment encompasses Counts I through IV of the complaint filed in 10 MISC 440141 (First Case) and Counts I through VI set forth of the complaint filed in 11 MISC 446982 (Second Case). As these cases raise identical issues and have been argued together, this summary judgment decision pertains to both cases.

Plaintiffs initiated the First Case on September 27, 2010, by filing a complaint, pursuant to G. L. c. 40A, § 17, appealing the Somerville Planning Board's (PB) denial of Plaintiff's request for a subdivision of property known as 1 Benton Road, Somerville (Locus). In seeking

to have the court annul the PB's decision, Plaintiff alleges that: (1) the PB exceeded the scope of its authority and the decision should be annulled; (2) the decision of the PB is arbitrary and capricious; (3) Plaintiff's site plan meets the criteria set forth in § 5.4.6 of the SZO or can do so with reasonable conditions imposed by the PB; and (4) Defendants, individually and as members of the PB, overstepped their authority granted to them by the SZO.¹ Plaintiff is also seeking declaratory judgment under G. L. c. 240, §14A, that §§ 8.8 and 5.4 of the SZO are invalid per se or unreasonable as applied to Locus.

In addition to appealing the PB's decision in the First Case, Plaintiff appealed the PB's decision to the Somerville Zoning Board of Appeals (ZBA). As a result of the appeal to the ZBA, the First Case was stayed until the ZBA rendered its decision. When the ZBA affirmed the PB's decision, Plaintiff initiated the Second Case on April 4, 2011. The complaint in the Second Case reasserts counts I through III of the complaint filed in the First Case and additionally asserts an equal protection claim against the members of the ZBA and the PB.²

On April 25, 2011, a Motion to Intervene as Joint Party Defendants was filed by twenty-five individuals who describe themselves as the "Benton Road Neighbors" (BRN). This came on for hearing on June 28, 2011, and was denied by the court at the hearing, followed by an order on June 30, 2011, that set forth the following reasons: (1) the BRN failed to show that their interests were not adequately represented by the City Solicitor; (2) the Motion to Intervene was not supported by a pleading; (3) the BRN made claims of general civic concern, and not distinct from the community at large, and were speculative and conclusory claims; (4) it would be prejudicial to Plaintiff to argue standing for all twenty-five intervenors at this stage in the proceedings; and (5) if the Second Case is decided in favor of Plaintiff, BRN would have an opportunity to file an appeal after remand to the PB, if the decision on remand is adverse to the interests of the members of the BRN and they could establish their standing. Following disposition of the motion to intervene, Defendants filed an answer alleging eighteen affirmative defenses.³

¹ Count V, an action under G. L. c. 249 § 4 for certiorari, is not at issue in this Motion for Summary Judgment.

² Count VII, denial of the subdivision resulted in a regulatory taking, is not at issue in this Motion for Summary Judgment.

³ The eighteen affirmative defenses are: failure to state a claim upon which relief can be granted; lack of subject matter jurisdiction; defendants' actions were not in excess of statutory authority, not based on error of law, not made upon unlawful procedure, and not an abuse of

On July 15, 2011, Plaintiff filed its Motion for Summary Judgment.⁴ A hearing was held on August 10, 2011, at which all parties were heard. The summary judgment record includes affidavits of Robert Mitchell, David Giangrande, Thomas F. Reilly, Esq., Frank A. Marinelli, Esq., and numerous exhibits consisting of the City of Somerville Zoning Ordinance, plans, permits, reports, letters, and photographs, as set forth in Plaintiff's Summary Judgment Motion Index and in Plaintiff's Affidavit Index, in addition to the parties' briefs and submissions filed in compliance with Land Court Rule 4.

The material undisputed facts are as follows:

1. Locus is located at 1 Benton Road, Somerville. MLM took title to Locus by deed dated July 29, 2009, recorded with the Middlesex (South) Registry of Deeds, in Book 53301, at Page 554.
2. Locus is at the corner of Benton and Summer Streets, both of which are public ways.
3. Locus is located in the Residence B (RB) Zone. It is not in an overlay district nor in the Westwood Historic District; therefore, no dimensional requirements supersede the RB dimensional requirements.
4. The RB Zone allows three family residences as of right. See Table of Permitted Uses, § 7.11.
5. An as-of-right or by-right use is defined as, "[w]hen applied to land use, those uses permitted in a zoning district that do not require a Special Permit (including Special Permit with Design Review), Special Permit with Site Plan Review, or Planned Unit Development review. A by-right use must, however, comply with applicable dimensional standards of this Ordinance." § 2.2.25.

discretion; defendants did not act arbitrarily or capriciously; defendants' actions were discretionary; plaintiff is estopped from asserting it is entitled to equitable or monetary relief; waiver; plaintiff has an adequate remedy at law; plaintiff is not entitled to equitable relief because it does not have clean hands; Plaintiff has not mitigated its damages; plaintiff's claims against the City of Somerville are barred by qualified immunity; Somerville acted in good faith and its actions were justified; and any damages suffered by Plaintiff were not caused by Somerville.

⁴ Defendants opposed this motion through a written opposition filed August 2, 2011, with Plaintiff subsequently filing a Reply. Plaintiff also filed a Motion to Strike Affidavit of Kristenna Penney Chase. The Motion to Strike was not ruled on at the hearing on August 10, 2011. As this court does not base its decision on anything set forth in the affidavit, the court declines to rule on the motion.

6. On September 17, 2009, Plaintiff received a building permit, No. 09-4788, to convert the single family structure on Locus into three residential units (Existing Three Family Residence).
7. There was no site plan review or approval required for the Existing Three Family Residence built pursuant to building permit No. 09-4788. Site plan approval is defined in Section 2.2.146 of the SZO as “[a] process providing for public review and approval of development plans within certain zoning districts of the City where dimensional and design standards are set forth which supersede the normally applicable standards.”
8. Under Section 5.4.1, the purpose of site plan approval is:

To provide for public review and approval of: . . . [s]ubdivisions in all zoning districts. Site plan approval is intended to further the purposes of this Ordinance and those set forth in Section 2A of Chapter 808 of the Acts and Resolves of 1975; . . . The Planning Board shall serve as the reviewing authority for all site plan approvals. Where required, a site plan shall be submitted and approved in accordance with this section. No application for a building or occupancy permit shall be submitted until after the required site plan approval is obtained and any stipulated appeal period thereafter has terminated.
9. On December 29, 2009, Plaintiff submitted an application to subdivide Locus into Lot 1 and Lot 2 as shown on the proposed plan for the subdivision of land (Plan) prepared by Design Consultants, Inc., Consulting Engineers & Surveyors (DCI) and sought to construct a three family residence on Lot 2.
10. The City of Somerville is exempt from the provisions of G. L. c. 41, §§ 81K through 81GG (the subdivision control law (SCL)).⁵
11. Subdivision of land is defined in § 2.2.163 of the SZO as:

“[a]ll divisions of a tract or parcel of land into two (2) or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, legacy, or development, and including all division of land in which a new street or access way is needed to provide access to a parcel(s) which would otherwise be landlocked or involve a change in existing streets and access ways. Subdivision shall also include resubdivision and, where appropriate, the process of subdividing and the land area

⁵ In 1993, the City of Somerville submitted a home rule petition to exempt the City from the SCL. This petition was later approved by the Legislature. See Chapter 288 of the Acts of 1993. The City submitted the petition because of concerns regarding the impact of the SCL on the City’s planning goals in the early 1990s, and because the City has little remaining open space, negating the need for regulations setting standards for new roads and undeveloped land. See Planning Board Decision dated August 24, 2010.

subdivided.” Subdivision does not take into account the proposed use to be made upon the lot.

12. All division of land, including what otherwise would be endorsed pursuant to an ANR endorsement under the SCL, is considered a “subdivision” in Somerville, and is subject to site plan review.
13. The Plan shows Lot 1 having 12, 296 square feet of land, hosting the Existing Three Family Residence, and Lot 2 having 9,622 square feet of land with no existing structures.
14. Both Lot 1 and Lot 2 comply with Somerville’s dimensional requirements set forth in Article 8 of the SZO, both lots are buildable lots as defined by § 2.2.87 of the SZO, and three family residences are uses permitted as-of- right in the RB Zone.
15. Article 8 of the SZO requires:
 - a. A minimum lot size of 7,500 square feet;
 - b. A minimum lot area/dwelling unit for a three family unit as 1,500 square feet;
 - c. A maximum ground coverage of 50%;
 - d. Floor to area ratio at 1.0;
 - e. Maximum height of three stories at forty (40) feet;
 - f. Minimum front yard setback of 15 feet;
 - g. Minimum side yard setback of 10 feet, with several specific requirements;
 - h. Minimum rear yard setback of twenty (20) feet; and
 - i. Minimum frontage of fifty (50) feet.
16. A buildable lot is defined in § 2.2.87 as a lot that “satisfies the dimensional requirements found in Article 8. A lot that does not meet these dimensional requirements shall be deemed unbuildable unless Special Permits or Variances are obtained as set forth in Article 5, and shall not include land area from any other lot that is required to satisfy another lot’s dimensional requirements.”
17. Somerville’s SZO and site plan review rules classify Plaintiff’s proposal as a minor project.
18. A minor project is defined in § 5.4.5 which states:

The Planning Board shall normally conduct full review of development projects requiring site plan approval. However, as allowed under SZO Section 5.4.5, the Planning Board hereby establishes a class of minor development projects under site plan approval for which full Board review shall not be necessary, unless requested by at least two (2) members of the Board. The minor project classification is limited to the following cases where special

permit review, special permit with design review, or special permit with site plan review are not required under the SZO: . . . 5. Subdivision resulting in the creation of only one (1) additional lot (e.g. an existing lot divided into two (2) lots – creating one (1) new lot). Site plan approval for the above listed minor projects shall not be subject to public hearing requirements. Minor projects shall, however, be subject to full compliance with approval standard and criteria of SZO Section 5.4.6 and all other applicable standards of the SZO.

19. Section 5.4.6 of the SZO, titled “Site Plan Approval Standards and Criteria,” sets forth twelve (12) criteria with which a site plan must comply. The twelve criteria are:

- (1) The development complies with all standards set forth for the overlay district in which it is located.
- (2) The development shall be integrated into the existing terrain and surrounding landscape. Building sites shall, to the extent feasible:
 - a. Minimize use of wetlands, steep slopes, floodplains, hilltops;
 - b. Preserve natural or historic features;
 - c. Maximize open space retention;
 - d. Preserve scenic views from publicly accessible locations;
 - e. Minimize tree, vegetation and soil removal, blasting and grade changes;
 - f. Screen objectionable features from neighboring properties and roadways.
- (3) The development shall be served with adequate water supply and sewage disposal systems. For structures to be served by sewage disposal systems, the applicant shall document the status of Department of Environmental Management (DEM) and/or other sewage permits.
- (4) The development shall incorporate measures that are adequate to prevent . . . pollution of surface and groundwater, to minimize erosion and sedimentation, and to prevent changes in groundwater levels, increased rates of run-off and minimize potential for flooding. Drainage shall be designed so that groundwater recharge is maximized, and at the project boundaries the run-off shall not be increased in amount or velocity.
- (5) To the extent feasible, development shall minimize demands placed on municipal services and infrastructure.
- (6) The development shall provide for safe vehicular and pedestrian movement within the site and to adjacent ways, including sidewalks, cross-walks and the like.
- (7) Building design and landscaping shall be in harmony with the prevailing character and scale of buildings in the neighborhood through the use of appropriate building materials, screening, and other architectural techniques.
- (8) Electric, telephone, cable TV and other such utilities shall be underground . . . except where this cannot be accomplished because it is physically or environmentally infeasible, in which cases such utilities shall be screened.

- (9) Exposed storage areas, machinery, service areas, truck loading areas, utility buildings and structures and other unsightly uses shall be set back and/or screened to protect neighbors from objectionable features.
 - (10) To the extent feasible, proposed projects shall be designed in such a way as to minimize shadows on neighboring properties.
 - (11) There shall be no unreasonable glare onto public roads and other public ways into the night sky, or onto neighboring properties from lighting or reflection.
 - (12) The site plan shall comply with all zoning requirements.
20. On March 16, 2010, three members of the Somerville Planning Board decided that the Plan would not be decided administratively by the Planning Director, Notwithstanding the language of Section 5.4.5, they decided the PB should conduct a public hearing.
 21. Thereafter, the PB held a public hearing that extended to several sessions over approximately five months, beginning on April 1, 2010, to consider Plaintiff's Plan to divide Locus.
 22. The PB requested a traffic impact analysis from Plaintiff, and Plaintiff submitted three traffic impact analyses during the course of the hearing process.
 23. Traffic impact analyses concluded that vehicle trips/impact arising from the new conforming lot, Lot 2, with three residential units, would be negligible.
 24. The City Traffic Engineer characterized the Summer Street/Benton Road intersection as a safe intersection.
 25. The DCI expert report, dated May 3, 2010, concluded that accident data for the pertinent intersection showed a collision rate "lower than the state average and therefore does not indicate a safety concern." It also concluded that "[p]eak hour site traffic (2 vehicles per hour) will amount to approximately one vehicle every 30 minutes either entering or exiting the driveway" of Lot 2.
 26. On April 12, 2010, the Planning Staff submitted to the PB an additional report recommending conditional approval of the Plan, finding that the "[a]pplicant has provided a complete application, reasonable conditions can be placed on the proposal to ensure that the project conforms to the standards and criteria set forth in Section 5.4.6, and the project complies with applicable requirements of the Somerville Zoning Ordinance."
 27. On April 15, 2010, PB members requested a legal memorandum from the Assistant City Solicitor concerning "whether the Planning Board may deny an application for site plan approval involving a use permitted as-of-right under the Somerville Zoning Ordinance

- relative to the subdivision of an existing parcel into two separate parcels.” On or about May 1, 2010, Somerville’s law department provided the PB with the requested memorandum.
28. At the time of the request to Somerville’s law department, all of the PB members listed on the decision knew or had reason to know that construction of a structure with three residential units on Lot 2 was a “use by right” in the RB zone and that Lot 2 contained 9,622 square feet and was a “buildable lot” complying with all dimensional requirements of Article 8.
29. At the time of request to Somerville’s law department, all of the PB members knew or had reason to know that Lot 1 contained 12,296 square feet and was a “buildable lot” complying with all dimensional requirements of Article 8 of the SZO, the Existing Three Family Residence on Lot 1 was a “use by right” in the RB zone, and that the Existing Three Family Residence complies with all dimensional requirements of the SZO.
30. On May 1, 2010, the Assistant City Solicitor, responded to the PB’s April 15, 2010 request in a memorandum to the PB stating that “in light of the case law, in my opinion, site plan approval may be withheld for a use permitted as of right only where the problem cited by the board is ‘so intractable that it could admit of no reasonable solution.’”
31. In its Planning Staff Report, dated May 4, 2010, the Planning Staff reported to the PB that the City’s Traffic and Parking Staff has no objections to Plaintiff’s application.
32. On May 18, 2010, the Planning Staff issued a memorandum to the PB regarding the subdivision of Locus to address the questions raised at the May 6, 2010 meeting regarding “pedestrian and vehicular safety mitigation, closing of curb cuts, the impact of property values on the subdivision, and the applicable sections of the City’s ordinances that relate to noise.” The Planning Staff noted it had “found studies that commented on the value of buildings in historic districts; however, staff have not found studies that address the impact of new construction on historic districts.”⁶
33. A separate traffic consultant, Fort Hill Infrastructure Services (Fort Hill), was also hired to complete a traffic and safety analysis. In its July 15, 2010 report, Fort Hill concurred with DCI’s findings, stating that a safety problem does not exist based on the accident history and accident rate at Locus.

⁶ While not located within the Historic District, Locus is nearby the local historic district.

34. The City Traffic Engineer concluded in his August 19, 2010 email to the Planning Director that “[o]ther proposed courses of action at this intersection as outlined in the submitted memo would be of benefit to an already safe intersection.”⁷
35. On August 24, 2010, the PB went into Executive Session. After emerging, it voted 5-0 to deny Plaintiff’s Plan.
36. On September 7, 2010, the PB’s written decision, No. 2009-17, was filed with the City Clerk denying Plaintiff’s Plan.
37. In denying the Plan, the PB found that Lot 2 was a dimensionally compliant, buildable lot, and that Lot 1 was also dimensionally compliant. It also found that a three family residential unit was allowed by right on Lot 2.
38. There are no previous subdivision denials by the PB of a single new buildable, conforming lot in the RB zone or anywhere else in Somerville.
39. On September 22, 2010, Plaintiff appealed the decision to the ZBA, and filed the First Case.
40. The ZBA held sessions of its public hearing or scheduled the matter on the following dates: November 17, 2010, December 1, 2010, December 15, 2010, January 15, 2011, January 19, 2011, February 2, 2011, February 16, 2011, and March 2, 2011.
41. At the March 2, 2011 hearing the five members present voted to deny the appeal and uphold the PB’s decision, giving rise to the filing of the Second Case.
42. Except for Somerville’s exemption from the SCL, approval of the Plan and the creation of the lot line between Lots 1 and 2 would be considered an “approval not required” plan and require only an endorsement to that effect by the Planning Board, without a full review of the Plan under the SCL. See G. L. c. 41, § 81P.⁸

* * * * *

“Rule 56 (c) of the Massachusetts Rules of Civil Procedure . . . provides that a judge shall grant a motion for summary judgment ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

⁷ Although not entirely clear in the email, dated August 19, 2010 from Terrance Smith to George Proakis, it appears that the “memo” Mr. Smith is referring to is the Traffic Memorandum submitted by Fort Hill, dated July 15, 2010.

⁸ There are other facts that are not mentioned in this section either because the facts were disputed or because the facts, while undisputed, are not material to this court’s disposition of the summary judgment motions.

to any material fact and that the moving party is entitled to a judgment as a matter of law.” Attorney General v. Bailey, 386 Mass. 367, 370 (1982) (quoting Mass. R. Civ. P. 56(c)). A motion for summary judgment will not be granted “merely because the facts . . . [the movant] offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial.” Bailey, 386 Mass. at 370 (quoting Hayden v. First Nat'l Bank, 595 F.2d 994, 997 (5th Cir. 1979)) (internal quotation marks omitted).

In considering the materials in support of any motion for summary judgment, “the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.” Hub Assocs. v. Goode, 357 Mass. 449, 451 (1970) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). “Also, all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.” Bailey, 386 Mass. at 371 (quoting Gross v. Southern Ry., 414 F.2d 292, 297 (5th Cir. 1969)) (internal quotation marks omitted). The moving party bears the burden of affirmatively showing that there is no triable issue of fact, even if that party would not have such a burden if the case were to go to trial. See Ng Bros. Constr., Inc. v. Cranney, 436 Mass 638, 644 (2002).

Under the SZO, in evaluating whether to approve a subdivision, the PB evaluates the subdivision to determine whether it complies with the twelve criteria set out in § 5.4.6. If no reasonable conditions would bring the proposal into compliance with the criteria, the PB can deny the proposal.⁹ Otherwise, the PB has two options; it may either approve the proposal as is, or impose reasonable conditions pertaining to the purpose of § 5.4 if doing so would bring the subdivision in compliance with the twelve criteria set forth in § 5.4.6. Here, the PB simply denied the Plan outright.

Plaintiff argues that Somerville’s zoning scheme, as applied to Plaintiff, is invalid because: 1) the creation of a single conforming lot is considered a “minor project,” 2) Lot 2 is a buildable lot under the SZO because it meets all dimensional and zoning requirements, and 3) a three-unit residential structure is a by-right use in an RB district. As a result, Plaintiff contends, the subdivision proposal should have been approved, with the proposed use subject to reasonable conditions, if any were required. Furthermore, Plaintiff asserts that if Somerville was subject to

⁹ The two other reasons for denying a proposal other than noncompliance with the twelve criteria are that 1) the submission is incomplete, or 2) the project does not comply with other applicable requirements in the SZO, neither of which is applicable here.

the SCL, Plaintiff's Plan would be classified as a plan entitled to the endorsement "approval under the subdivision control law not required" (ANR). In that case, the Plan would have been endorsed as a ministerial act because both lots shown on the plan have the requisite frontage on a public way. Lastly, Plaintiff asserts that the PB's denial of the proposed subdivision violates the rule of uniformity in G. L. c. 40A, § 4, and that the twelve criteria established in § 5.4.6 of the SZO serve no legitimate valid zoning purpose where, as here, the proposed lot and structure are completely compliant with all dimensional and use regulations of the SZO.

Defendants argue that the zoning scheme, including consideration of the twelve criteria, is a valid regulatory scheme that serves a legitimate zoning purpose. Defendants contend that as Somerville has numerous multi-family dwellings on small lots and limited vacant land, subdivision of existing lots may have a direct impact on the character of a surrounding neighborhood. Further, the twelve criteria, which include consideration of the architectural and historic character of any proposed development, seek to address the impacts of a subdivision on the neighborhood. Defendants argue that subdivisions in Somerville are only subject to the case law relating to the procedural aspects of site plan approval; and not subject to the substantive law relating to conditions imposed by the PB under the Section 5.4.6 of the SZO.¹⁰

Based on the material facts established by the summary judgment record, this court is persuaded by the arguments articulated by Plaintiff in Plaintiff's Memorandum in Support of Motion for Summary Judgment (Plaintiff's Memorandum). For the reasons set forth below, and more substantially delineated on pages 6 through 10, 14 through 15, and 22 through 25 of Plaintiff's Memorandum, this court finds and rules pursuant to Plaintiff's count under G. L. c. 240, § 14A, that Section 5.4.6 of the Somerville Zoning Ordinance cannot be applied to Plaintiff's Plan in such a way as to permit the PB to deny the Plan.¹¹ Accordingly, the boards' decisions must be annulled.

In reviewing an application for site plan approval that concerns an as-of-right use, the scope of the board's review is narrow. Wolcott-Marshall, Inc. v. Town of Rutland, 7 LCR 119, 121 (1999) (citing Prudential Ins. Co. v. Bd. of Appeals of Westwood, 23 Mass. App. Ct. 278, 281-82 (1986)). If the proposal meets all applicable zoning ordinances or by-laws, the board

¹⁰ Defendants cite to St. Botolph Citizens Comm. Inc. v. Boston Redevelopment Authority, 429 Mass. 1, 8 n.9 (1999) ("Because site plan review is created by local ordinance or bylaw and not State statute, we recognize that the term does not have one meaning nor is the review process uniform from municipality to municipality.").

¹¹ In regard to Plaintiff's claim that Defendants acted in bad faith, the court does not reach a decision on that issue as there are material facts in dispute.

must approve the site plan application, but can impose reasonable terms and conditions on the proposed use. Prudential Ins. Co., 23 Mass. App. Ct. at 281-82 (quoting SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 105 n.12 (1984)); see also Castle Hill Apartments Ltd. P'ship v. Planning Bd. of Holyoke, 65 Mass. App. Ct. 840, 841 (2006) (“The use being one permitted as of right in the relevant zoning district, the board was limited to imposing reasonable conditions on the use.”); Quincy v. Planning Bd. of Tewksbury, 39 Mass. App. Ct. 17, 21-22 (1995) (“[W]here the proposed use is one permitted by right the planning board may only apply substantive criteria consistent with Prudential Ins. Co. of America v. Board of Appeals of Westwood, . . . (i.e., it may impose reasonable terms and conditions on the proposed use, but it does not have discretionary power to deny the use).”). Only if the “problem [cited by the board] was so intractable that it could admit of no reasonable solution” is the board allowed to deny a site plan application. Prudential Ins. Co., 23 Mass. App. Ct. at 283.

Here, Lot 2, as shown on the Plan, is a conforming lot that complies with all dimensional requirements of the SZO, and the proposed three-unit residential structure is a permitted as-of-right use in the RB Zone. In its decision, the PB articulated two “intractable” problems - traffic and the impact of the three-unit residential structure on the historical features of Locus and the surrounding neighborhood. The traffic concerns are not supported in any way in the summary judgment record, which establishes that the traffic impacts of the proposed new lot and use will be negligible. Even read generously, the PB’s decision simply expresses the view that the fact that Lot 2 will no longer be a vacant lot is per se the intractable problem that can have “no reasonable solution.” See Planning Board Decision. The PB’s reasoning, adopted by the ZBA, misconstrues site plan case law and overreaches the authority of the boards under the Zoning Act and the case law interpreting the Zoning Act, all of which applies to Somerville, notwithstanding the fact that the City is not subject to the provisions of the SCL.

The PB’s basis for its denial of the Plan cannot support the boards’ actions. An “as-of-right” use cannot also be an intractable problem because these two concepts are mutually exclusive. An as-of-right use under the SZO is one the City has determined is appropriate within a zoning district without special permission through a discretionary process. An intractable condition is one that “admit[s] of no reasonable solution,” a condition “so intrusive on the needs of the public in one regulated aspect or another that rejection by the board would be tenable.”¹²

¹² Prudential Ins. Co. v. Bd. of Appeals of Westwood, 23 Mass. App. Ct. 278, 283, 283 n.9 (1986).

Intractability and offensiveness to the neighborhood is directly contradictory to the concept of an as-of-right use. Since the PB (and by extension the ZBA) pointed to nothing intractable other than the existence of a three family residence on a vacant Lot 2 as the problem, the decisions cannot stand.

Although Somerville is exempt from the SCL, the parties have stipulated that there is no record of any case in Somerville, except for the present cases, where a subdivision application and plan that creates a single new dimensionally conforming lot has been denied by the PB. Without prior precedent in Somerville, or case law construing the SZO scheme, analogy to ANR plans in the context of the SCL informs this court's analysis.

The purpose of the SCL is to protect the "safety, convenience and welfare of the inhabitants of the cities and towns . . ." MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING 501 (3rd ed. 2002). The ANR process, which provides a procedure to deal with plans which do not need complete review under the SCL is set out in G. L. c. 41 § 81P, which in turn incorporates the provisions of G. L. c. 41, § 81L. ANR does not concern itself with zoning requirements other than frontage. Once an ANR plan is endorsed, an owner seeking to build on a newly created lot is subject to all manner of dimensional and use requirements of the local zoning by-law or ordinance, just as it is subject to the provisions of the State Building Code, the Wetland Protection Act, and other regulations. The endorsement of an ANR plan under the SCL does not transform an otherwise unbuildable lot into a buildable one. The endorsement concerns itself only with the local planning board's determination that the division of the property shown on the ANR plan does not require approval under the SCL because frontage (as defined in § 81L) is adequate. In the case before the court, the issue of adequate frontage on a public way is not in issue. The Plan creates one new lot which has adequate frontage on a public way, as does Lot 1, which is already improved by a conforming residential structure. SCL jurisprudence instructs that under the circumstances presented here, a plan must be endorsed without delay. See *id.* § 14.05.

Section 5.4.6 of the SZO Violates the Uniformity Provision in G. L. c. 40A, § 4, where, as here, it has been used to deny an otherwise compliant project

Chapter 40A, § 4 states that "[a]ny zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." The purpose behind this provision is two-fold; predictability and equal treatment.

See SCIT, Inc. v. Planning Bd. of Braintree, 19 Mass. App. Ct. 101, 107 (1984). Predictability in the sense that everyone knows what land uses are allowed on a specific lot without special permission, and equal treatment in the sense that land of similar character will be treated alike. See id. The basic assumption behind the uniformity provision is that “if anyone can go ahead with a certain development [in a district], then so can everybody else.” Id. (quoting I WILLIAMS, AMERICAN LAND PLANNING LAW § 16.06 (1974)) (internal quotation marks omitted). Exceptions aside, zoning ordinances are meant to apply uniformly to all property owners within each district, subjecting them to the same rules.¹³ Id. at 108. There is no provision in chapter 40A, § 4 that confers on local zoning boards the power of discretion “of a roving and virtually unlimited power to discriminate as to uses between landowners similarly situated.” Id. To do so would violate the purposes of uniformity.

In SCIT, the Appeals Court held that a provision of Braintree’s zoning by-laws violated Section 4’s uniformity provision. Id. at 110-11. Braintree allowed offices as-of-right in business districts, but still required all proposed development to obtain a special permit. Id. at 104. Thus, all development in the business district was subject to the special permit granting authority’s discretion, even if the development was allowed as-of-right by the by-laws. SCIT held that the board’s discretionary power, granted by the Braintree by-laws, violated the uniformity provision of chapter 40A, § 4 and was void. See id. at 110-11.

Here, the Somerville zoning scheme establishes a structure similar to one struck down in SCIT, but does so in the context of a site plan process, as opposed to a special permit process.¹⁴ Somerville allows subdivision of property in the RB Zone and three family residences as-of-right, but conditions both on compliance with twelve criteria set forth in § 5.4.6 of the SZO. While couched as site plan review (which would require approval, sometimes with conditions, under all but extraordinary circumstances), § 5.4.6 gives the PB a wide latitude of discretion in determining whether a proposal will be approved. In its decision, the PB denied Plaintiff’s proposal on the basis that the three family residence would not conform to the historical character of the neighborhood and would not preserve the historic features and open space of the lot. See PB Decision. Although a three family residence is an as-of-right use that would be

¹³ These exceptions include uses and structures that are legally nonconforming or allowed by special permit or variance, none of which are at issue in this case.

¹⁴ The relevant provisions of the SZO pertaining to this case are: Section 5.4.1 (Purpose of Site Plan Review); Section 5.4.5 (Site Plan Approval for Minor Projects); and 5.4.6 (Setting forth Site Plan Approval and Criteria.)

constructed on a lot that complies with all applicable zoning requirements, and is located on a public street, the PB denied Plaintiff's proposal because of historical character and traffic. This court has determined that the PB's findings with respect to traffic impact were in error as a matter of law. To the extent it was permissible to find concerns regarding historical character, as to which this court does not make any findings, those concerns should have been addressed by the imposition of conditions, as they were not found to be "intractable." The outright denial of Plaintiff Plan, which was completely compliant with zoning, turned Somerville's site plan review process into exactly the type of process invalidated in SCIT. As such, it is violative of the protection of predictability and equal treatment afforded by chapter 40A.

Even viewing the relevant provisions of the SZO as constitutionally valid because they have a rational relation to a legitimate purpose, it is clear that they cannot be applied to Plaintiff's Plan in a way that allows the PB to deny the Plan. Application of the SZO provisions violate the uniformity provision of section 4 of the Zoning Act because they were invoked in the form of a denial, which is not an option for site plan review except in rare circumstances which are not presented in this case. Thus, this court finds that the decisions of the Planning and Zoning Boards must be annulled.

Accordingly, Plaintiff's Motion for Summary Judgment hereby is GRANTED in part, as set forth above. Plaintiff's application is remanded to the PB for its determination forthwith of what reasonable conditions, if any, may be imposed on Plaintiff's Plan incident to site plan approval. In view of the provisions of the SZO with respect to PB review of minor projects (See Section 5.4.5), the PB need not convene a new public hearing to discuss the remand issues, provided it complies in all respects with the provisions of the Open Meeting Law. The PB shall hold its hearing not later than May 23, 2012, and Defendants' counsel shall report to the court the date for such hearing as soon as it is set. Thereafter, the court will set dates for further action in this matter.

This court will retain jurisdiction, and no judgment in either case will issue at this time.


Karyn F. Scheier
Chief Justice

Dated: April 18, 2012