



Planning and Land Use Services

Building ▪ Health ▪ Historic District Commission ▪ Planning Board ▪ Zoning Board of Appeals

STAFF REPORT

Date: January 12, 2016

To: Zoning Board of Appeals

From: Eleanor W. Antonietti
Zoning Administrator

Re: January 14, 2016

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I. APPROVAL OF THE MINUTES:

- December 10, 2015

II. OLD BUSINESS:

- 32-15 Paul S. Jensen, Trustee, 23 Sankaty Road Rlty. Tr. 23 Sankaty Road Jensen
Action deadline February 12, 2016 *Sitting Members:* ET LB MJO SM MP

FROM 10/8/2015 STAFF REPORT:

The applicant subdivided the property at 23 Sankaty Rd into two non-conforming lots based on existence of two dwellings that existed before 1954 (41 81L subdivision). The applicant needs zoning relief to allow the demolition and construction of new dwelling on Lot 2. When the dwelling is demolished, Lot 2 will be a vacant undersized nonconforming property adjacent to Lot 1, another undersized nonconforming property in common ownership with Lot 2. The applicant also controls 1 Rosaly Lane with has a common boundary with Lot 2. (As previously stated, case law has generally indicated that *separate ownership and control* are required to prevent the merger of undersized vacant lots in common ownership.) The applicant proposes to demolish the home on Lot 2 in order to build a dimensionally conforming house more in scale with neighborhood.

If the Board does not find the reasoning sufficiently compelling to warrant the requested finding, the applicant requests either Special Permit or Variance relief from the provisions of Section 139-33.E which read:

Any increase in area, frontage, width, yard or depth requirements shall not prohibit an unimproved lot, which at the time of recording or endorsement of such lot, whichever occurred sooner, or at any time thereafter, was not held in common ownership with any adjoining land and conformed to then-existing

Zoning Bylaw requirements, from being built upon for a conforming use or for single- and two-family purposes as provided by MGL c. 40A, § 6, as may be amended from time to time.

FROM 11/10/2015 STAFF REPORT:

At the October 8th hearing, Applicant explained that he is seeking relief to tear down a building on a lot created under 81P. The existing bldg. sits in side and rear setbacks. The owner intends to demolish it and build a conforming dwelling which will temporarily create a vacant lot. They have HDC approval for new structure that is about 23.5' tall and does not have 2nd floor decks overlooking neighbors. The lot is nonconforming because it has the bldg. on it. There is common ownership with adjacent lots. If the owner were simply renovating the structure, this would not be before the Board.

At that hearing, the Board was reluctant to grant either Special Permit or Variance relief given that that the applicant could potentially place each adjoining commonly owned/controlled lot into separate ownership which would make this project allowable according to new bylaw definition of ownership. The Board requested that applicant take action to convey other lots into separate record title to meet the criteria as established by passage of Article 65 at 2015 ATM.

OWNERSHIP Record title to land, as shown upon deeds or other muniments of title on file at the Nantucket Registry of Deeds, the Nantucket Registry District of the Land Court, the Registries of Probate, or other applicable public offices.

On 11/6, the applicant submitted a letter explaining the continued request to validate the lots as separate and buildable lots during the transitional period when one lot will be left vacant as a result of demolition of the pre-existing nonconforming structure. Applicant has concerns that Case Law (he cites several examples) could over-ride the recently added definition of OWNERSHIP and that this definition would not withstand a legal challenge thereto. In order to avert the risk of merger, applicant continues to request Special Permit or Variance relief to allow the proposed demolition and construction of a new dwelling.

On 11/9, applicant submitted (per request of Staff in response to above letter) one of the aforementioned Case Law decisions. This, along with applicant's cover letter, is included with this Staff Report.

UPDATE:

No new information has been provided.

- 34-15 NHA Properties, Inc., d/b/a Housing Nantucket School View Cottages Kuszpa/Mervis
 Action deadline April 4, 2016 7 Surfside Road *Sitting Members:* ET LB MJO SM KK
 The Applicant is applying for a Comprehensive Permit in accordance with M.G.L. Chapter 40B and pursuant to the Local Initiative Program as approved by the Department of Housing and Community Development. Applicant proposes to relocate and construct two additional dwellings upon the Locus, for a total of four (4) affordable rental units. The Applicant is requesting the Board grant waivers from the Code of the Town of Nantucket as provided in M.G.L. Chapter 40B. The property is permanently deed-restricted for the purpose of providing affordable year-round housing. The Locus is situated at 7 Surfside Road, is shown on Assessor's Map 55 as Parcel 254 and upon Plan Book 13, Page 55. Evidence of owner's title is recorded in Book 1467, Page 6 on file at the Nantucket County Registry of Deeds. The site is zoned Commercial Neighborhood (CN).

WITHDRAWN WITHOUT PREJUDICE

Anne Kuszpa will come to the hearing to explain the reasons for withdrawal.

III. NEW BUSINESS:

- 01-16 Anne N. Apgar & Mahlon Apgar, Trustees of 22 Broadway Trust Jensen
 Action deadline April 13, 2016 22 Broadway *CONFLICTS:* NONE KNOWN
 Applicant is requesting Special Permit relief pursuant to Zoning Bylaw Section 139-33.A(1) to allow the alteration of the pre-existing nonconforming dwelling by adding a second story dormer and window within the setback area. The Locus, having double frontage on Center Street and Broadway, is nonconforming as to lot size and frontage and the dwelling is non-conforming with respect to all setbacks. The proposed

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alteration will result in an upward extension of the pre-existing nonconforming southerly side yard setback. The Locus, an undersized lot situated at 22 Broadway, is shown on Assessor’s Map 73.1.3 Parcel 117. Evidence of owner’s title is recorded at Book 1503, Page 116 on file at the Nantucket County Registry of Deeds. The site is zoned Sconset Old Historic (SOH).

See above description for relief requested. Applicant could have obtained the necessary relief through Zoning Administrator approval but chose to come to the ZBA. The scope of the work proposed is minor in nature. The southern elevation of the structure where the dormer is proposed abuts an unconstructed and grassed-over “Way”. The applicant did not furnish any information as to HDC approval. The only abutter to comment (20 Broadway directly to the south of locus) has sent an email stating that they have no objection.

- 02-16 Daniel G. Counihan 11 Swain Street Jensen
 Action deadline April 13, 2016 CONFLICTS: NONE KNOWN
 Applicant is requesting Special Permit relief pursuant to Zoning By-law Section 139-33.A(1) to allow the alteration of a pre-existing nonconforming dwelling by relocating the building eleven (11) feet closer to the front yard lot line, placing the building on a new higher foundation, and building a small addition to the northwest corner of the dwelling. The dwelling, as so altered, will not increase the pre-existing nonconformities. In addition, a pre-existing nonconforming shed which is currently sited over the westerly lot line will be removed, thus eliminating said nonconformity. The Locus is nonconforming as to lot size and frontage and the dwelling is non-conforming with respect to side yard setbacks. The Locus, an undersized lot of record created pursuant to M.G.L. Chapter 41 Section 81L, is situated at 11 Swain Street (portion), is shown on Assessor’s Map 42.4.1 as Parcel 77 (portion), and as Lot A on Plan No. 2015-90. Evidence of owner’s title is recorded at Book 1186, Page 296 on file at the Nantucket County Registry of Deeds. The site is zoned Residential 1 (R-1).

This undersized lot was recently created pursuant MGL 41 81 L. The pre-existing nonconforming structure (predating 1955) is being renovated and relocated. The proposed relocation will not change the pre-existing side yard setback intrusions. The shed, which straddles the lot line, will be removed. The increase in height to accommodate the flood zone will result in a roof-peak elevation of 23.3 feet. The plans submitted as prepared by Val Oliver Design indicate that there is HDC approval (COA#64121).

There is an email from an abutter asking the Board to impose a construction moratorium on the work proposed. Staff recommends approval with above condition as well as standard “no further intrusion in the setbacks without further relief from this Board.”

- 03-16 Brandt C. Gould & Gabrielle M. Gould 15 Margaret’s Way Cohen
 Action deadline April 13, 2016 CONFLICTS: NONE KNOWN
 Applicant is requesting Special Permit relief pursuant Zoning Bylaw Section 139-16.C(2) to validate an unintentional westerly side yard setback intrusion. The siting of a pool and associated equipment, installed in 2015, was reasonably based on a licensed survey. The pool is sited as close as 18.4 feet from the side yard lot line and the pool equipment as close as 17.7 feet, where a twenty (20) foot setback is required. In the alternative, and to the extent necessary, Applicant requests relief by Variance pursuant to Section 139-32 to allow said setback intrusions. A thirty-four (34) square foot shed, currently sited within the southerly rear yard setback, will be moved out of the twenty (20) foot required setback. The Locus is situated at 15 Margaret’s Way, is shown on Assessor’s Map 20 as Parcel 64, and as Lot 86 upon Land Court Plan No. 6283-8. Evidence of owner’s title is registered at Certificate of Title 21420 on file at the Nantucket County District of the Land Court. The site is zoned Limited Use General 3 (LUG-3).

The Locus is improved with a 2-story 1,716 SF primary dwelling, a 761 SF cottage, and 3 sheds for a total ground cover ratio of 2.1%± where 3% is allowed. The 34 SF shed, raised off the ground on skids and sited as close as 4.5’ from the rear yard lot line where the required rear yard setback is 20’, will be moved out of the setback.

In 2015, the Applicant installed a 16’ x 32’ pool and associated equipment and reasonably based the siting of the on a 2007 licensed survey. However, the pool company installed the pool and equipment within the 20’ side

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yard setback required in the LUG-3. The intrusion is 1.6' for the pool and 2.3' for the pool equipment, and therefore not more than 5' into the setback and not closer than 4' from a lot line. As such, the Applicant seeks Special Permit relief pursuant to Bylaw Section 139-16.C(2) which reads:

The Board of Appeals may grant a special permit to validate unintentional setback intrusions not greater than five feet into a required yard and not closer than four feet from a lot line, provided that it shall first find that the burden of correcting the intrusion substantially outweighs any benefit to an abutter of eliminating the intrusion and, if the intruding structure was so sited after 1990, the siting of the structure was reasonably based upon a licensed survey.

The burden of correcting the intrusion would require entirely removing and re-installing the pool and equipment (which are at grade and behind a hedge/fence) and would thus substantially outweigh any benefit to an abutter of eliminating the intrusions. Furthermoe, the abutter on the effected side (west), whose dwelling is approximately 350 feet away from the pool, submitted a letter in support of the relief.

- 04-16 Donald J. Mackinnon, Trustee of Nantucket 106 Surfside Realty Trust – a/k/a SURFSIDE COMMONS 40B 106 Surfside Road Mackinnon
Close of Public Hearing deadline July 6, 2016 (180 days from Initial Public Hearing)
Decision Action deadline August 17, 2016 (40 days from close of Public Hearing)

CONFLICTS: GT

The Applicant is seeking a Comprehensive Permit in accordance with M.G.L. Chapter 40B, as approved by Massachusetts Housing Partnership, in order to allow a multi-family project consisting of 56 rental apartments with fourteen (14) to be designated as affordable units. The apartments will be arranged in two 2 ½ story buildings with thirteen units each and two 3 ½ story buildings with fifteen (15) units each. There will be a total of two 1-bedroom units, forty two 2-bedroom units, and twelve 3-bedroom units. The project will also include a clubhouse and pool. If approved, the property will be permanently deed-restricted for the purpose of providing affordable year-round housing. The file with a copy of the complete list of requested waivers is available at the Zoning Board of Appeals office at 2 Fairgrounds Road between the hours of 7:30 A.M. and 4:30 P.M., Monday through Friday or via link to posting on Town of Nantucket website below:

<http://www.nantucket-ma.gov/DocumentCenter/Home/View/10990>

The Locus, situated at 106 Surfside Road, is shown on Assessor's Map 67 as Parcel 80. Locus is also shown as Block 22 on Plan File 3-D and as Parcels 7 -11 (inclusive) on Plan No. 2014-52. Evidence of owner's title is recorded in Book 1410, Page 205 and Book 1488 Page 213, both on file at the Nantucket County Registry of Deeds. The site is zoned Limited Use General 2 (LUG-2) and Limited Use General 3 (LUG-3).

The application requests numerous and wide-ranging waivers, from zoning standards, various permitting requirements, and financial obligations to the Town. The Board will need to get clarification on these waivers (i.e. Building Permit; Water Commission; Sewer Commission; DPW permits & fees; HDC approval ...). Approval will require substantial modifications as to matters of density, massing, design, screening, layout, parking configuration, all of which relate to the public health and welfare and overall safety of the community. The ability to connect to the local sewer, which may not even be able to support the proposed density, is the lynchpin to any approval. Town Counsel and the applicant disagree as to whether or not Town Meeting approval is required. We expect further testimony and written opinions from Town Counsel on this subject.

There are **OPTIONS TO BE EXPLORED RELATIVE TO VARIOUS DESIGN CONCERNS.**

- HEIGHT The applicant could, for example, alter the design by creating garden-level apartments as opposed to full-basements. This would potentially minimize the mass of the building above 30-feet. They could also taper the roofline of dormers at a 30 foot height while allowing gable pitch above the 30-feet, or propose a mansard roof. In short, there are alternative designs to mitigate height that may be contemplated and suggested by the Board.

- DENSITY
 - The pool and fitness club, currently proposed as a separate building, could be incorporated in one of the apartment buildings at basement level. This would allow buildings to be more centrally located and increase buffers to surrounding properties.
 - Interior layout could be reduced by consolidating interior space (removing dens or 2nd full-bathrooms or walk-in closets). There could be more micro-units, or a different mix of units to accommodate smaller households.

- AESTHETICS
 - Balconies are a problematic design feature, although less so on the rear of the building where they are less visible. They are not found in any residential-style or multi-family buildings on island. An alternative could be a simple community outdoor space or perhaps roof decks.
 - The window and door arrangements are disorganized. There is a double gable facing Surfside Road. The rear façade of the 13-unit building seems to have more architectural continuity and should perhaps be replicated with the other buildings/elevations where possible.

- SCREENING Perimeter planting should be detailed with species comprised of a mixture of deciduous and coniferous plants to maximize a solid screen to abutting properties. Would solid board fencing on north and south perimeter be suitable screening, or would that involve too much maintenance?

- PARKING Where possible, some of the parking could be located underground to move some of the surface-level parking from site.

- ON SITE TRAFFIC FLOW A one-way loop to keep incoming traffic separate from outgoing traffic could improve flow, site lines and visibility. Adding another access on west side of 13-unit building could be efficient.

- TRAFFIC MITIGATION
 - The community would benefit from a bike-path extension from Fairgrounds Rd. to front of this site to eventually connect to future bike path on northern side of Boulevard a bit further down Surfside Rd.
 - TRAFFIC STUDY (SEE Pages 51 – 73 of Packet Part II). Specifically, se Page 71 (or Page E-20 of the Traffic Study) regarding the deficient intersection. The Board could ask the applicant to pay for 3% (approximately \$30,000) of the cost of installing a round-about at the Fairgrounds and Surfside Rd. intersection.

- MISCELLANEOUS
 - Storage units will need to be restricted to residents only.
 - There is only one Dumpster which may not be adequate for the proposed density.
 - Are there elevators?

The Board will need to make a motion to formally request (in a letter signed by Chairman Toole) WRITTEN COMMENTS AND RECOMMENDATIONS FROM OTHER TOWN BOARDS which should include:

- DPW
- Planning Board
- HDC
- Board of Water Commissioners
- Board of Health

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Staff has obtained funds from the applicant and set up an Engineering Escrow account (53G) to cover costs of Peer Review. Therefore, the Board will need to officially request:

PEER REVIEW FROM:

- Traffic Study consultant to Town, Tetra Tech
- Engineering consultant, Ed Pesce
- 40B consultant, Edward Marchant

Staff has obtained Town approval of a Request for Legal Services from Town Counsel. Therefore, the Board will want to request:

WRITTEN OPINION FROM Town Counsel on various matters, most prominently that of the sewer connection process.

SUPPLEMENTAL

MATERIALS TO

FILE No. 32-15

23 SANKATY RD.

PROVIDED BY APPLICANT ON

11/9/2015

From: Paul Jensen
To: Eleanor Antonietti
Subject: RE: 23 Sankaty Rd._anything new for ZBA Packet
Date: Monday, November 09, 2015 1:06:27 PM
Attachments: Savery v. Duane LC Case 12 Mlsc 474707.pdf

Eleanor

Attached please find Land Court Case that you may be familiar with concerning the merger of undersized lots owned by different entities, but controlled by the same people. Given that this Court and many others have consistently found that 'common ownership' involves not only the form of record ownership the properties, but also whether or not underlying owners have control over adjacent non-conforming lots.

I will send you copies of all the cases, I cited in the my letter, but this case cites the same cases and involves Nantucket properties. I hope the Planning Board staff advises the ZBA that the ownership definition in the Bylaw does completely answer the question of whether or not two lots are 'common ownership' under the Bylaw and that there is still a risk that a Court will find two undersized non-conforming properties on Nantucket, which are owned by different entities, but controlled by same people, will be merged into single buildable lot

Paul

From: Eleanor Antonietti [mailto:eantonietti@nantucket-ma.gov]
Sent: Friday, November 06, 2015 11:49 AM
To: Paul Jensen <paul@cohenlegal.net>
Subject: RE: 23 Sankaty Rd._anything new for ZBA Packet

I will include this but I would ask that you please include the excerpted or highlighted relevant language you found in the court Decisions on those cases you cite? I do not have a Legal Library nor do I have access and/or time to go fishing for the information. If you are going to cite this – it would help you to furnish the material you reference. I will be posting late this afternoon.Thank you.

Eleanor W. Antonietti

Zoning Administrator
Land Use Specialist

Planning and Land Use Services (PLUS)
Nantucket Planning Office
2 Fairgrounds Road
Nantucket, MA 02554
telephone 508.325.PLUS(7587) ext. 7010
facsimile 508.228.7298
eantonietti@nantucket-ma.gov

www.nantucket-ma.gov

SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NANTUCKET, ss.

MISCELLANEOUS CASE
NO. 12 MISC 474707 (GHP)

RICHARD A. SAVERY
and JANICE SAVERY,

Plaintiffs,

v.

WILLIAM B. DUANE, as trustee of the
W. DUANE REALTY TRUST;
WILLIAM B. DUANE, as trustee of the
W&C DUANE REALTY TRUST;
KEVIN L. HARMON, JR.; and the
TOWN OF NANTUCKET,

Defendants.

DECISION

Plaintiffs Richard A. Savery and Janice Savery brought this action on December 13, 2012. They seek declaratory relief pursuant to G.L. c. 231A and G.L. c. 240, § 14A, asking the court to determine that the parcel of land at 21 Austine Locke Way, Nantucket, Massachusetts ("Lot 2") has merged for zoning purposes with one or more adjoining parcels of land, and so is not on its own entitled to have a new house built upon it, something current zoning regulations would not allow. Plaintiffs, who own an improved lot alongside Lot 2, also seek a declaration as to the status of the registered right of first refusal they hold as to Lot 2, which was placed under

agreement to be sold to defendant Kevin L. Harmon, Jr., and then purchased by him from the defendant William B. Duane, trustee of the W. Duane Realty Trust, within days after this lawsuit began. The Saverys say that that conveyance was made without honoring properly their first refusal right.

On December 13, 2012, the day they filed their complaint, plaintiffs submitted ex parte a motion for endorsement of a memorandum of lis pendens. The court denied the request because plaintiffs had presented it ex parte, and instead heard it, with notice afforded to the defendants, on December 17, 2012. The defendants did not appear. The court (Piper, J.), finding title to real estate very much involved in this case, allowed plaintiffs' motion and endorsed the proffered memorandum. Plaintiffs filed an amended complaint on January 15, 2013. On February 5, 2013, defendants filed an answer and a crossclaim against the Town of Nantucket pursuant to G.L. c. 240, § 14A.¹

Defendants filed a motion for summary judgment on April 16, 2013, and plaintiffs filed a cross motion on June 28, 2013. The court (Piper, J.) held a hearing July 29, 2013. For the reasons expressed from the bench and set forth on the court's docket for this case, the court denied both motions. The court did at the conclusion of that hearing address and narrow the issue of the burden of proof regarding the availability to the Duane defendants of the so-called "grandfathering" provisions of G.L. c. 40A, § 6. As memorialized in the July 29, 2013 docket entry:

¹The Town of Nantucket has opted not to participate actively in this litigation. Notice of the claim under G.L. c. 240, s. 14A was published in the Nantucket Inquirer and Mirror, and no one has sought to intervene in this case.

Adhering to the Reasons Set Forth in Harrington v. Mashpee Zoning Bd. of Appeals, 13 LCR 350, 357 (2005) (Misc. Case No. 00 MISC 262740) (Piper, J.), the Burden of Proving that Locus (Lot 2) Is Entitled to the Protections of G.L. c. 40A, § 6, para. 4, Rests with the Defendants In This Case. Applying that Burden, and Given the Close Family and Trust Relationships Holding Interests in the Lots During the Relevant Years, There Exists a Question of Fact that is Material as to Whether Lot 2 Was at Any Relevant Time Under Common Control with Lot 1, So That, Despite Title to Lot 1 and Lot 2 Standing of Record in Separate Ownership, the Two Parcels May Have Merged for Purposes of Zoning.

The parties submitted a joint pretrial memorandum on August 13, 2013, and a pretrial conference was held on August 16, 2013. Counsel filed a revised joint pretrial memorandum on October 21, 2013, at the start of trial.

The parties appeared on October 21, 2013 and January 14, 2014 for two days of trial. The parties introduced on the first day fifty-two exhibits into evidence, some in subparts, mostly by agreement, and as reflected in the trial transcripts. Plaintiff Richard A. Savery, defendant B. William Duane, defendant Kevin L. Harmon, Jr., and Attorneys Richard Glidden and Jessie Glidden testified. A court reporter, Wendy L. Thomas, was sworn and present throughout, and has filed transcripts of the trial testimony and proceedings.

Following receipt of the transcript for the first day of trial, the parties submitted post-trial briefs and requests for findings of fact and rulings of law, and on January 14, 2014, trial resumed for closing arguments. Once the final transcript came to the court, I took the matter under advisement. Taking into account all of the evidence, as well as the written submissions and argument of counsel, I now decide the case.

On all the testimony, exhibits, stipulations, and other evidence properly introduced at

trial or otherwise before me, and the reasonable inferences I draw therefrom, and taking into account the pleadings and the argument of the parties, I find the following facts and rule as follows.

FACTS

1. Plaintiffs Richard A. Savery (“Richard” or “Savery”) and Janice Savery (together the “Saverys”) are husband and wife, residing approximately half the year at the improved lot Savery owns at 19 Austine Locke Way, Nantucket, Massachusetts (“Lot 3”), and most of the rest of the year at a home they rent in Dover, Massachusetts.
2. Defendant William Duane (“William” or “Duane”), who is named as a party in this case individually, as trustee of W. Duane Realty Trust (“W Trust”), and as trustee of the W. and C. Duane Realty Trust (“W&C Trust”), resides at 121 Lowell Road, Wellesley, Massachusetts, and the current owner, as trustee of the W Trust, of the improved land at One Caroline Way, Nantucket, Massachusetts (“Lot 1”).
3. Defendant Kevin L. Harmon, Jr. (“Harmon”) is an individual residing at 14 Devon Road, Westport, Connecticut and current owner of Lot 2, the unimproved land at 21 Austine Locke Way, Nantucket, Massachusetts.²

² The lot numbers I use to refer to each of the three lots now held by each of the three parties correspond to the numbers assigned the lots on the court’s plan 14341D, the outstanding plan showing them and other parcels. Lot 2 was owned by defendant William B. Duane as trustee of the William Duane Realty Trust until Duane conveyed Lot 2 to defendant Kevin L. Harmon, Jr. by deed dated December 18, 2012 and filed with the Nantucket Land Registration District of this court (“District”) on Christmas Eve of 2012. While this action is before the court, the purchase price sits in escrow, under the terms of an agreement struck and subsequently modified by the buyer and seller.

4. Defendant Town of Nantucket ("Town") is a municipality in the Commonwealth of Massachusetts; G.L. c. 240, § 14A requires it be a party to this proceeding .
5. On January 8, 1971, the owner of a parcel of registered land on the south shore of Nantucket filed with the District a division plan approved by the court as Plan No. 14341D. Three of the many lots created pursuant to that plan are those involved in this lawsuit, and now are known as One Caroline Way (Lot 1), 21 Austine Locke Way (Lot 2) and 19 Austine Locke Way (Lot 3).
6. Lot 1 is approximately 29,000 square feet in area, and Lots 2 and 3 are each approximately 31,500 square feet in area.
7. By Quitclaim Deed dated November 1, 1971 and filed with the District on November 19, 1971, as Document No. 13805, noted on Certificate of Title No. 5757, in Registration Book 29, Page 137, Charles F. Davis conveyed Lots 2 and 3 to William and his wife, Carolyn B. Duane ("Carolyn" and together with William, the "Duanes"), as tenants by the entirety (Document No. 13805). The stated consideration for this conveyance was \$27,000.00.
8. William and Carolyn purchased Lots 2 and 3 with the assistance of a real estate broker, Terry Maury, but did not hire an attorney. The only attorney involved in the closing of Lots 2 and 3 was Robert Mooney, a Nantucket lawyer and counsel for Davis, the seller.
9. After purchasing Lots 2 and 3, William and Carolyn hired an architect to draw plans for a house to be built on Lot 2. Between 1972 and 1973, the Nantucket Historic District Commission rejected the Duanes' house construction plans for Lot 2 nine times.

10. William Duane contacted an attorney from Robert Mooney's office some time prior to July 18, 1972. This attorney assisted the Duanes in conveying Lots 2 and 3 separately to William and Carolyn as individuals. Duane testified that these conveyances, as well as the others by he and his wife described below, were for "estate planning purposes," a contention I consider critically in this decision.
11. By Quitclaim Deeds dated July 18, 1972 and filed in the District on July 20, 1972, noted on Certificate of Title No. 6356, in Registration Book 32, Page 156, with the assistance of the attorney from Robert Mooney's office, William and Carolyn conveyed Lot 2 to William, individually (Document No. 13663) and Lot 3 to Carolyn, individually (Document No. 13664). The deeds stated consideration of only \$1.00 for each of these conveyances.
12. The Town first adopted a Zoning Bylaw on March 13, 1972. That law, which brought zoning to Nantucket, became effective July 27, 1972. That Zoning Bylaw established zoning districts, including a Limited Use, General ("LUG") zoning district in which the Lots shown on the 14341D division plan were located. At that time, the LUG zoning district required a minimum lot size of 50,000 square feet. This zoning district now carries the designation "LUG-2" and requires a minimum lot size of 80,000 square feet.
13. By Quitclaim Deed dated September 24, 1973 and filed with the District on September 28, 1973 as Document No. 14835, noted on Certificate of Title No. 6310, in Registration Book 32, Page 176, W. Mark Murphy and Grace D. Murphy conveyed Lot 1 to Carolyn, individually. The deed stated consideration of \$20,000. As of September 28, 1973,

Carolyn of record owned Lots 1 and 3, entirely separated from each other by the intervening land, Lot 2, which William of record owned.

14. William and Carolyn had greater success getting a house constructed on Lot 1. They built a vacation home there, moving in on May 17, 1974.
15. William paid the municipal property tax bills for Lots 1, 2, and 3 (until Lot 3's sale to Richard Savery), always by three separate checks. The tax payments as well as payments for well permitting and related work came from a joint checking account of William and Carolyn. The funds in this account were joint funds of William and Carolyn. There was really no general maintenance required on the vacant lots (Lot 2 and, until its transfer to Savery, Lot 3).
16. By Quitclaim Deed dated April 10, 1992 and filed with the District on June 12, 1992 as Document No. 056920, noted on Certificate of Title No. 6976, in Registration Book 35, Page 176, Carolyn conveyed Lot 1 to William and Carolyn, as co-trustees of the W. and C. Trust, under a Declaration of Trust filed at that time as Document No. 056921, noted on Certificate of Title No. 15321. The stated consideration for this conveyance was \$1.00. The beneficiaries of the W&C Trust were the trustee of the William B. Duane Revocable Trust ("WR Trust") and the trustee of the Carolyn B. Duane Revocable Trust ("CR Trust"), each holding fifty percent of the beneficial interest in the W&C Trust. The WR Trust was a revocable trust with William as grantor, and the CR Trust was a

revocable trust with Carolyn as grantor.³

17. By Quitclaim Deed dated April 10, 1992 and filed with the District on June 12, 1992 as Document No. 056922, noted on Certificate of Title No. 6568, in Registration Book 33, Page 168, William conveyed Lot 2 to William and Carolyn, as co-trustees of the W Trust, under a Declaration of Trust filed at that time as Document No. 056923, noted on Certificate of Title No. 15322. The stated consideration for this conveyance was \$1.00. The trustee of the WR Trust held 100 percent of the beneficial interest in the W Trust.
18. By Quitclaim Deed dated April 10, 1992 and filed with the District on June 12, 1992 as Document No. 056924, noted on Certificate of Title No. 6569, in Registration Book 33, Page 169, Carolyn conveyed Lot 3 to William and Carolyn, as co-trustees of the C. Duane Realty Trust ("C Trust"), under a Declaration of Trust filed at that time, noted on Certificate of Title No. 15323 as Document No. 056925. The stated consideration for this conveyance was \$1.00. The trustee of the CR Trust held 100 percent of the beneficial interest in the C Trust.
19. As of June 12, 1992, ownership of Lots 1, 2, and 3 was as follows: the trustees of the W&C Trust held legal title to Lot 1, on which the Duanes had their vacation home, with fifty percent of the beneficial interests held by the trustee of the WR Trust, and fifty percent held by the trustee of the CR Trust. The trustees of the W Trust held legal title to unimproved Lot 2, with 100 percent of the beneficial interest held by the trustee of the

³ The beneficiaries of the WR Trust and CR Trust were not put into evidence during this litigation.

WR Trust. The trustees of the C Trust held legal title to Lot 3, also then unimproved; the trustee of the CR Trust held 100 percent of the beneficial interest.

20. In 2005, William and Carolyn, in consultation with their children, decided to hire a real estate broker to put Lot 3 on the market; they listed this vacant parcel for \$2,000,000. Richard Savery made an initial offer, but the Duanes instead decided to take Lot 3 off the market. Soon after, the Duanes put Lot 3 back on the market for \$2,300,000. Richard Savery and the Duanes negotiated the price down to \$2,150,000, and, as part of those negotiations, the parties agreed that in selling Lot 3 to him, Richard would obtain registered rights of first refusal as to Lots 1 and 2 from their respective owners.
21. On May 26, 2005, the Saverys as buyers executed a Purchase and Sale Agreement to purchase Lot 3 for \$2,150,000 from the trustees of the C Trust.
22. In a letter from William to Richard dated December 15, 2005, William informed Richard that it was "important th[at] this entire transaction [for Lot 3] be correctly made payable to: the C. Duane Realty Trust, Carolyn B. Duane, Trustee. My name should not appear as trustee. Caroline is the sole owner of the lot." (emphasis in original).
23. By Quitclaim Deed dated September 20, 2005 and filed with the District on January 5, 2006 as Document No. 114789, noted on Certificate of Title No. 22086, Carolyn and William, as co-trustees of the C Trust, conveyed Lot 3 to Richard Savery.
24. In connection with the conveyance of Lot 3, William and Carolyn, as co-trustees of the W&C Trust, and William and Carolyn, as co-trustees of the W Trust, granted to the Saverys rights of first refusal ("ROFR") on Lots 1 and 2, respectively. The Grant of

Right of First Refusal as to Lot 1 was dated January 4, 2006, and filed in the District on January 6, 2006 as Document No. 114812, noted on Certificate of Title No. 15321. The Grant of Right of First Refusal as to Lot 2—granting the ROFR at issue in this case—was dated January 4, 2006, and filed in the District as Document No. 114796 on January 5, 2006, noted on Certificate of Title No. 15322.

25. In connection with the 2005 conveyance of Lot 3, the Duanes were represented by Attorney Jessie Glidden, and the Saverys were represented by Attorney Alison Zieff, both Nantucket practitioners.
26. On August 17, 2005, Jessie Glidden sent a “lawyer’s letter”⁴ to the Town Building Inspector, copying Alison Zieff, stating that in Glidden’s professional opinion she found Lot 3 to be buildable.
27. On August 24, 2005, Alison Zieff sent a facsimile message to Jessie Glidden expressing concern regarding the “merger” doctrine and its effects on the buildability of the parcel Zieff’s client, Savery, was buying, Lot 3, under the Nantucket zoning bylaws. Zieff’s facsimile referred Glidden a recent Land Court decision, Harrington v. Mashpee Zoning Bd. of Appeals, 13 LCR 350, 357 (2005) (Misc. Case No. 00 MISC 262740) (Piper, J.).
The attorneys later had a discussion regarding the facsimile and its contents.

⁴A “lawyer’s letter,” in the parlance of the real estate bar on the Island of Nantucket, is a document sent to the Town Building Inspector representing, ostensibly upon counsel’s professional opinion, that a particular lot’s status under local zoning laws warranted the issuance of a building permit. The lawyers’ testimony, which I accept, is that this was and is a common practice among lawyers in Nantucket to deal with lots undersized under then current zoning, but claiming the benefit of earlier, less demanding dimensional requirements.

28. On October 17, 2005, Jessie Glidden sent a letter to Attorney Greg Eaton, counsel for the Saverys' mortgage lender, enclosing the lawyer's letter sent to the Building Inspector, as well as a copy of the schedules of beneficial interest for the C Trust and the W Trust.
29. The Saverys received the requisite local approvals, including from the Nantucket Historic District Commission, and received a building permit and built a home on Lot 3 some time thereafter. There was no difficulty raised by municipal officials concerning Lot 3's ability to be built upon in a manner compliant with local zoning law, notwithstanding that Lot 3 was markedly smaller than the minimum lot size then in effect in the zoning district.
30. Carolyn Duane died on August 9, 2009.
31. On January 24, 2011, pursuant to an Assignment of Beneficial Interest executed on that date, the trustees of the CR Trust, at that time the holders of fifty percent of the beneficial interest in the W&C Trust, divided that interest by assignment to three separate entities as follows: (1) twenty percent to the trustees of the "Carolyn B. Duane Revocable Trust—Federal and Massachusetts Marital Fund, (Non-exempt)" ("Carolyn Non-exempt Trust"); (2) 7.3538 percent to the trustees of the "Carolyn B. Duane Revocable Trust—Massachusetts Marital Fund, (Exempt)" ("Carolyn MA Marital Fund"); and 22.6462 percent to the trustees of the "Carolyn B. Duane Revocable Trust—Family Fund, (Exempt)" ("Carolyn Family Fund"). A Revised Schedule of Beneficial Interests executed on the same date reflected that the beneficial interest in the W&C Trust, the trustees of which owned of Lot 1, then stood with fifty percent in the trustee of the WR Trust, twenty percent in the trustees of the Carolyn Non-exempt Trust, and the remaining

thirty percent in the trustees of the other two Carolyn sub-trusts.

32. On June 1, 2012, pursuant to an Assignment of Beneficial Interest executed on that date, William Duane, as trustee of the WR Trust, at that time the holder of 100 percent of the beneficial interest in the W Trust, assigned an undivided eighty percent beneficial interest in the W Trust to the trustees of the Duane Irrevocable Family Trust ("Family Trust"). A Revised Schedule of Beneficial Interests executed on the same date reflected that the beneficial interest in the W Trust, the trustees of which owned Lot 2, rested with eighty percent in the trustees of the Family Trust and twenty percent in the trustee of the WR Trust.
33. William Duane put Lot 2 on the market in the summer of 2012.
34. Defendant Kevin H. Harmon, Jr. ("Harmon") became interested in Lot 2, and he and his wife visited William Duane on one occasion in connection with the purchase of the property.
35. William Duane was represented by real estate broker Linda Bellevue and attorney Jessie Glidden in the sale of Lot 2. Harmon dealt with real estate broker Lisa Winn. Richard and Janice Savery were represented locally by attorney Sarah F. Alger in their attempts to exercise their ROFR as to Lot 2.
36. In an electronic mail message to Kevin Harmon dated July 30, 2012, Lisa Winn said:

The best way to handle something like this is to have a very quick cash closing so Savery doesn't have time to put something together or might not have the means to act quickly. So for instance if you are able, the best thing to do would be to have a closing within 11 to 14 days, in cash, after the offer, in other words as soon as possible after the 10 days runs out so it will be difficult for him to

put it together. The listing broker says that she doesn't know Savery's intentions but the word on the street is that he is interested.

37. In an electronic mail message to Kevin Harmon dated August 3, 2012, Lisa Winn, referring to a conversation she had with Linda Bellevue, stated: "Her thought was the cleanest and fastest offer you could do the better to throw off Savery, which is basically what we did. She will do her best. As I said she is a very experienced broker, the top at Congdon and Coleman."
38. In an electronic mail message to Lisa Winn dated August 6, 2012, Linda Bellevue wrote: "Anything that can make the offer stronger might prevent [Savery] from moving on the option. Mr. Duane will honor the counter-offer until tomorrow at 4 p.m. Let me know, hope it works."
39. On August 8, 2012, Harmon made an offer to purchase Lot 2 for \$2,100,000.
40. On August 9, 2012, counsel for Duane as trustee of the W Trust, sent a letter ("August 9 Offer") to the Saverys disclosing the offer from Harmon to purchase Lot 2 for \$2,100,000.00, with the terms of the offer attached to the notice and a form titled "Release of Right of First Refusal" enclosed. The letter stated: "In the event you elect not to exercise your right of first refusal, I have enclosed a Release of Right of First Refusal for your review and execution."
41. On August 10, 2012, Richard Savery attended a meeting at the offices of counsel for Duane. Savery received a copy of the August 9 Offer at this meeting. The parties disagreed as to whether the personal service of the August 9 Offer at the

meeting constituted effective service pursuant to the Grant of Right of First Refusal as to Lot 2. On August 22, 2012, counsel for the Saverys sent a letter to counsel for Duane acknowledging receipt by certified mail of the August 9 Offer. That letter stated the Saverys' intent to exercise their ROFR.

42. In an August 29, 2012 letter from Sarah Alger to Jessie Glidden, countersigned by her the following day, the parties agreed to establish a deadline of August 30, 2012, 5:00 P.M., for exercise of the Saverys' ROFR in response to Harmon's August 9 Offer. The parties also established a deadline of October 1, 2012 for Harmon's closing on Lot 2. By a Notice of Exercise dated August 30, 2012, the Saverys exercised their ROFR.
43. Some time in September, the Saverys requested additional information regarding the beneficial interest in the W&C and W Trusts. On September 25, 2012, counsel for Duane responded by letter, stating, "Based upon my review of the various trusts, it is my opinion that ultimate control of the parcels held by the W. Duane Realty Trust and the W&C Duane Realty Trust is sufficiently different such that there is no merger of title resulting from contiguous ownership."
44. On September 28, 2012, counsel for the Saverys sent counsel for Duane a letter asserting that the Saverys were "rescind[ing] the Notice of Exercise and the Underlying Offer to Purchase" because they "[had] not been provided with sufficient information as to the ownership of the Locus and the adjacent property owned or controlled by the Owner to determine if the Locus is separately

buildable under current zoning regulations or has merged with such adjacent property for zoning purposes.” The letter also stated that the information that had been provided to the Saverys as of that time “raise[d] serious questions as to the buildability of the Locus separate and apart from the adjacent land.”

45. On November 14, 2012, counsel for Duane sent the Saverys notice of Harmon’s second offer to purchase Lot 2, accepted by Duane, with the terms of that offer attached (“November 14 Offer”). That notice stated that the ten business day time period for exercise of the ROFR would expire on November 30, 2012. The November 14 Offer gave Harmon a right to have his purchase money, to be held in escrow by the seller’s lawyer, returned to Harmon should he be unable within four months to get a building permit and historic district approval. The four months could be extended three more months if litigation with Savery was filed and underway still. The Saverys through counsel responded on November 28, 2012, saying that the Saverys did not accept that the W Trust’s acceptance of a new offer to purchase Lot 2 had in fact triggered the Saverys’ ROFR, because of concerns they had raised and which they considered inadequately addressed, about the zoning merger status of Lot 2.
46. The Saverys filed this action in the Land Court on December 13, 2012.
47. On December 18, 2012, a two-step assignment took place in the beneficial interests of the W&C Trust:

- a. In step one, the trustee of the Carolyn Non-exempt Trust assigned its interest in the W&C Trust to the trustee of the WR Trust. A Revised Schedule of Beneficial Interests executed on the same date reflected that the beneficial interest in the W&C Trust (the owner of Lot 1) rested with seventy percent in the trustee of the WR Trust and thirty percent in the trustees of the remaining Carolyn sub-trusts.
 - b. In step two, the trustee of the WR Trust assigned its interest in the W&C Trust to the trustees of the Family Trust. A Revised Schedule of Beneficial Interests executed on the same date reflected that the beneficial interest in the W&C Trust then rested with seventy percent in the trustees of the Family Trust and thirty percent in the trustees of the remaining Carolyn sub-trusts
48. So, as of December 18, 2012, Lots 1 and 2 were owned as follows: the trustee of the W&C Trust held legal title to Lot 1, with a seventy percent beneficial interest in the trustees of the Family Trust, and thirty percent in the trustees of the two remaining Carolyn sub-trusts established upon her passing. The trustee of the W Trust held legal title to Lot 2, with an eighty percent beneficial interest in the trustees of the Family Trust, and twenty percent in the trustee of the WR Trust.
49. On December 24, 2012, counsel for Duane sent the Saverys and their counsel notice of a document titled "Offer Modification." This notice stated that if the Saverys wished to exercise the right of purchase under their ROFR based on the

Offer Modification, they needed to submit to counsel a formal Notice of Exercise, and a ten percent deposit, by January 10, 2013 (or such earlier date as might be required by the terms of the ROFR). This Offer Modification, executed with a December 18, 2012 date between Duane as trustee and Harmon, was prepared, I find, to respond to at least some of the objections the Saverys had raised, including in this litigation, about the meaning and adequacy of the last delivered version of Harmon's transaction with Duane reflected in the preceding offer tendered to the Saverys, the November 14 Offer, which the Offer Modification modified. The notice sent on December 24, 2012 also advised the Saverys in summary fashion about "the underlying ownership of the realty trusts which own the Property and the adjacent parcels..." The same day, on Christmas Eve at 8:20 a.m., the deed from Duane, as trustee of the W Trust, conveying Lot 2 to Harmon in consideration of \$1,785,000, had been registered with the District as Document No. 138482, noted on Certificate of Title 24595. The registered title to Lot 2 currently stands in Harmon, subject to an escrow agreement for the purchase price, and subsequent agreements concerning Harmon's right to return his title to his grantor and obtain funds back.

50. Harmon wired \$1,780,000.00 in funds into an escrow account at Nantucket Bank maintained by counsel for Duane. This followed a prior deposit payment of \$5,000, for a total purchase price of \$1,785,000 for Lot 2.

51. In July, 2013, Duane as trustee of the W Trust and Harmon agreed in writing to amend the last iteration of their purchase and sale arrangement. In this July, 2013 change to the deal, fashioned during this litigation and intended to address its pendency, among other things, the parties agreed to expand the rights Harmon would have pending this court's determination of the case. Harmon now acquired the right, at any time and without needing to specify a particular reason, to terminate his relationship with Duane on seven days' notice, and receive back the escrowed purchase funds.

* * * * *

The Merger Doctrine and Checkerboard Conveyancing

The Saverys allege Lots 1, 2 and 3 merged for zoning purposes because those lots were held under the common ownership and control of William and Carolyn Duane. According to the plaintiffs, the lots were conveyed by the Duanes using a "checkerboard" arrangement first in 1972-1973, when the lots were placed into individual ownership that kept them nominally physically separated one from the other, and then by revising the lots' ownership again in 1992. Plaintiffs contend that these were nothing other than attempts to avoid having to bring the land together to achieve better compliance with lot size dimensional provisions of the Nantucket Zoning Bylaws. Plaintiffs say that these were formalistic efforts to present the outward appearance of lot separateness, but that, given the effective common control of the three lots by the Duanes, it was well within their ability to unite the lots to achieve enhanced zoning compliance. Based on these

allegations, the Saverys argue the Duanes (and the current owner of Lot 2, Harmon) should not be treated to the exception to full compliance with current zoning set out in G.L. c. 40A, § 6.

“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.’ Preston v. Board of Appeals of Hull, 51 Mass. App. Ct. 236, 238 (2001), quoting from Seltzer v. Board of Appeals of Orleans, 24 Mass. App. Ct. 521, 522 (1987). ... The statutory ‘grandfather’ provision contained in G.L. c. 40A, § 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. ...” Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266, 268-269 (2008).⁵

When a zoning bylaw or ordinance is enacted or amended, G.L. c. 40A, § 6 allows for certain exceptions to its applicability to existing structures, uses, or lots. Paragraph four of Section 6 contains what is known as the “Single Lot Exception”:

Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage.

⁵ The record does not suggest to me any available relevant local zoning regulation more indulgent on the question of grandfathering than the provisions of G.L. c. 40A, s. 6.

This exception protects owners whose lots previously conformed with zoning requirements. Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, 258 (2003). This exception is not available to lots held in common ownership with an adjoining lot, which may be combined, or “merged” to reduce or eliminate nonconformity. Sorenti v. Board of Appeals of Wellesley, 345 Mass. 348, 353 (1963). The common ownership requirement in G.L. c. 40A, § 6 represents a “statutory codification of a principle of long-standing application in the zoning context: a landowner will not be permitted to create a dimensional nonconformity if he could have used his adjoining land to avoid or diminish the nonconformity.” Planning Bd. of Norwell v. Serena, 406 Mass. 1008, 1008 (1990).

When two abutting nonconforming lots are under common ownership, the lots merge for zoning purposes. Id. This merger doctrine embodies the zoning policy of minimizing nonconforming property: “the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases.” Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 859 (2005) (Greaney, J., concurring). Determining whether or not a lot is in “common ownership” with adjoining land requires a determination of control. Serena, 406 Mass. at 1008. When record title is held by different entities but controlled by the same owner, the merger doctrine requires a finding of common ownership. Id.

Our Supreme Judicial Court has found common ownership when a husband and wife owned one lot as tenants by the entirety, and an abutting lot as trustees of a trust of which they were the sole beneficiaries. Id. Notwithstanding the differences in record

ownership, the couple controlled both properties, and could not enjoy the benefit of the single lot exception in Para. 4 of Section 6. Id.; see also Russo v. Blanchard, 19 LCR 50, 55 (2011) (Misc. Case. No. 09 MISC 402750) (Sands, J.) (“*Serena* ... looks beyond the instrument of record and applies the test of whether the landowner has control or the legal power to combine the adjoining lots.”). This is because “an owner who has or has had adjacent land has it within his power, by adding such land to the substandard lot, to comply with the frontage requirement, or, at least, to make the frontage less substandard.” Sorenti, 345 Mass. at 353. The court further recognized that any alternative would simply be unjust: “an owner who owned adjacent lots with frontages of 19 feet and 20 feet, respectively, would have greater building rights than the owner of a single lot with a frontage of 39 feet.” Id.

Checkerboarding is the term applied to a “method sometimes employed to avoid zoning provisions that require lots held in common ownership to be combined for determining area and frontage. Through a series of conveyances a parcel can be divided so that no person named as an owner of a lot holds title to an adjacent lot.” Berg v. Lexington, 68 Mass. App. Ct. 569, 574 n.8 (2007). Ownership is “divided in a checkerboard pattern such that no person named as an owner of a lot holds title to an adjacent lot.” DiStefano v. Stoughton, 36 Mass. App. Ct. 642, 642 n.3 (1984). This practice is used as an attempt to avoid the merger doctrine, but Massachusetts courts have found it “highly doubtful” that such “sham conveyances” actually succeed in

circumventing zoning requirements. Lee v. Board of Appeals of Harwich, 11 Mass. App. Ct. 148, 151, n. 4 (1981).

Lot 2 is not a buildable lot because it merged with Lots 1 and 3 in 1972 and 1973. See Serena, 406 Mass. at 1008; DiStefano, 36 Mass. App. Ct. at 642 n. 3. Merger occurs when two abutting nonconforming lots are under common ownership. Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353. Here, William and Carolyn effectively held Lots 1, 2, and 3 in common ownership at all times since acquiring them in 1972 (Lots 2 and 3) and 1973 (Lot 1). These lots were under common ownership because William and Carolyn controlled their home (on Lot 1) and the surrounding land (Lots 2 and 3) jointly as husband and wife, notwithstanding the deeds registered to put the first two individual lots into their individual names in July 1972, the acquisition of Lot 1 by Carolyn the following year, and the subsequent on and off record transfers to and among various trusts much after that. See Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353. The merger doctrine applies because, I find, at all times relevant, William and Carolyn had the properties in their control so that they had the present ability to combine their lots to eliminate or reduce nonconformity. See Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353.

The checkerboard conveyancing by William and Carolyn Duane in 1972 and 1973 did not succeed in maintaining the single lot exception, and subsequent transfers, including those in the 1990's, could not and did not do anything to unbreak that glass. See Sorenti, 345 Mass. at 351; Lee, 11 Mass. App. Ct. at 151 n.4. Checkerboarding is the

conveying of land, often to close relatives or “straw” parties, in an attempt to avoid zoning requirements. Sorenti, 345 Mass. at 351; Lee, 11 Mass. App. Ct. at 151 n. 4; see also Harrington, 13 LCR at 358 (holding family members have sufficient control of lots to merge pursuant to G.L. c. 40A, § 6, despite different title ownerships: “Looking past the form of ownership of these two lots, it is clear that they were under the same control”).

A checkerboard scheme necessarily results in no abutting lots being owned, nominally at least, by the same party. Berg, 68 Mass. App. Ct. at 574 n.8. Here, William and Carolyn owned Lots 2 and 3 as tenants by the entirety until July 18, 1972, when Lot 2 was conveyed to William and Lot 3 was conveyed to Carolyn for the consideration of \$1.00. This constitutes checkerboard conveyancing because it was a conveyancing maneuver between husband and wife clearly designed to defeat the merger doctrine. Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353.

This court is authorized to infer intent from circumstantial evidence.⁶ I find it telling that the first of these conveyances occurred but days before Nantucket’s new zoning bylaws went into effect, and the pattern of lot titles they implemented conveniently avoided common ownership of abutting lots. The inference I draw is that these deeds were on advice of local counsel, who suggested a method to at least preserve

⁶ The court needs to consider the timing of conveyances when testing the intention underlying them, particularly when the transfers come just prior to the arrival of new more restrictive regulations. See Serena, 406 Mass. at 689 (transfers four days before by-law amendment); Sorenti, 345 Mass. at 350 (transfer one day before by-law amendment); DiStefano, 36 Mass. App. Ct. at 644 (transfers sixteen days before expiration of zoning freeze).

the argument that the lots kept separate zoning status under the looming new bylaw. The Duanes did not initially in November, 1971 take title to Lots 2 and 3 in separate names, because they were unaware of the impending zoning on the island, or not thinking clearly about its implications; they were unrepresented when they bought. That changed by the summer of 1972, when, advised by a lawyer, and having focused more on getting permits for their land, they parceled out those lots on the eve of the new zoning law. I infer that, guided by better advice, they put on the separate deeds. If the deeds had not been registered by the time the zoning changed, no amount of creative advocacy could have saved the two subsized lots from zoning merger.

When, in the following year, the parcel on which the Duanes' vacation home came to be constructed was purchased, the name on the deed conveniently was Carolyn's, not William's. This was done, I conclude, to lend support to the ability to take the position that the three lots were in distinct ownership, and so immunized from zoning change, something that could not have been said if the new Lot 1 had been taken in the same title as adjoining Lot 2. In this way, the colors of the checkerboard remained distinct.

I find it difficult to accept the defendants' version of what happened—that William and Carolyn, highly educated, with resources, business savvy, and access to legal counsel, intent on building a valuable new home on land near the water in a desirable island location, knew nothing about the zoning issues when they rearranged Lots 2 and 3's ownership and then took title to Lot 1. I do not credit that these conveyances, especially

the earliest ones in the 1970's, were solely for "estate planning purposes," nor primarily to respect the independence of assets and the autonomy of Mrs. Duane. While I do not doubt that, as her widowed husband testified, she was a remarkable woman of intelligence, independence and self-direction, I conclude, given, among other things, the revealing chronology of the lot titles and the adoption of the zoning laws, that this couple went about the conveyancing of these three lots driven by a desire to keep them free of Nantucket's increasingly demanding zoning laws.

I am led to the conviction that the Duanes at all relevant times had it within their power and control to unite these lots and thus reduce their dimensional zoning nonconformity. I see the Duanes as a harmoniously married couple throughout their long life together. I also see no satisfying reason, had it been in their mutual best interest to do so, that the titles to the three lots, right after they were acquired in the early 1970's, would not have been able, with only strokes of a pen, to be placed in a single record title.

In many respects, the analysis on these questions of zoning merger of lots asks: if the close family members holding separate record titles to these lots had a genuine incentive to bring them into one unitary ownership, could they not simply have done so? There is no satisfying explanation why, when the lots first were arrayed in William and Carolyn's noncontiguous ownership in the 1970's, the lots could not and would not have been brought easily back into a single ownership, if a reason to do so had presented itself. At that juncture, there was no meaningful estate planning agenda, and no other true reason other than defensive land use maneuvering, which would have stood in the way.

I conclude that Lot 2 and 3 merged on July 27, 1972, when the zoning bylaws went into effect, because at that moment, Carolyn and William's ownership of Lots 2 and 3 was separate only on paper; they in fact together controlled the lots as if they each were titled in both spouses' names. See Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353. There is no evidence I find at all persuasive that William and Carolyn could not have combined the lots to comply with the LUG 50,000 square foot requirement. There also is no evidence I credit that the rights and interests of any other party could have (or would have) stood in the way of such an effort.

Later, in September, 1973, Carolyn purchased in her own name Lot 1, which contained only 29,000 square feet. Here as well, she did this not for any independently compelling reason, but primarily, if not exclusively, acting with William, in a bid to keep Lot 1 available as a proper building site, even though the nascent zoning laws made that parcel materially too small to qualify for a building permit. As soon as Carolyn purchased Lot 1, it merged with the spouses' adjoining land, because all of it was controlled by William and Carolyn jointly, at a time when only by combining at least two of the lots could they achieve zoning compliance. See Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353.

William and his buyer, Harmon, cannot avail themselves of the protection of G.L. c. 40A, § 6 because the checkerboard conveyancing in 1972 and 1973 does not provide any separate zoning status to the individual Lots 1, 2, and 3. Prior decisions in this court led me to determine that in this case, the burden of proof falls on the defendants. When

they rely on lot conveyances by close family members, which have the surficial effect of keeping titles apart, so as to invoke the separate lot exception of section 6, it is the defendants who must show that those family members could not have combined the lots to reduce their nonconformity.⁷ Here, the Duanes failed to carry that burden because they did not provide any acceptable evidence to me, as trier of fact, showing any good reason why truly independent interests of a beneficiary at any relevant time would interfere with the Duane's ability to merge the lots to bring them into conformance with current zoning requirements. Sorenti, 345 Mass. at 351; Lee, 11 Mass. App. Ct. at 151 n.4; see also Harrington, 13 LCR at 358.

Having arrived at this determination about the merger which took place in the 1970's, it is unnecessary to spend much time on the effect of later transfers in the record title and beneficial ownership of these lots. In 1992, and subsequently, the Duanes conveyed to various trusts, retaining segregated record ownership of the lots, and keeping, at least at the levels of non-record ownership brought to light during this case, the beneficial interests of the lots distinct. Now that the buildability of Lot 2 is under close scrutiny, defendants point to these transfers to buttress their contention that these have been, at all times, separately controlled lots, exempt from the reach of later enacted zoning. But these arrangements do not insulate the lots from application of the merger

⁷ The court stated in its summary judgment docket entry dated July 29, 2013: "The Burden of Proving that Locus (Lot 2) Is Entitled to the Protections of G.L. c. 40A, § 6, para. 4, Rests with the Defendants In This Case," citing to Harrington v. Mashpee Zoning Bd. of Appeals, 13 LCR 350, 357 (2005) (Misc. Case No. 00 MISC 262740) (Piper, J.).

doctrine if their control was common at the time the more demanding zoning was put in place. See Berg, 68 Mass. App. Ct. at 574 n.8; DiStefano, 36 Mass. App. Ct. at 642 n.3 (1984); Lee, 11 Mass. App. Ct. at 151 n.4.

The Duanes conveyed their ownership to various trusts, with the beneficiaries of those trusts being, in turn, more trusts. The beneficiaries of the underlying revocable trusts never were disclosed. I find unsatisfying the lack of illumination provided by the defendants about the true, bottom-line ownership and control of these lots. The failure to articulate a convincing estate plan underlying the dispositions of these lots and of their beneficial ownership leaves the ultimate control of them vague and unproven. The lack of specific evidence about the estate planning keeps the court from accepting that there is an true independent reason why control of the lots may have been rendered so disparate as to treat them, for zoning purposes, as not capable of being brought back together to address zoning shortcomings.

Nothing shows that ultimate beneficial ownership and control of the lots was anywhere but in the spouses themselves. Even if I believed the true beneficiaries were anyone other than William and Carolyn, the inference I would draw is that these arrangements make no difference for zoning purposes, because the revocable trusts at the bottom of the ownership pile might have been, as their titles suggest, revoked at any time by the grantors, William and Carolyn. If that took place, and the trusts were to have been revoked, the further inference is that the owner of the lots then could have combined them to comply with the law. See Serena, 406 Mass. at 1008; Sorenti, 345 Mass. at 353. The

transactions of 1992, and those which followed, did not adequately transfer title or beneficial ownership to eliminate common control by William and Carolyn. Even if the control shifted, and took away William and Carolyn's autonomy to act to bring the lots together to address their size deficiencies, that shift came too late. To conclude otherwise would thwart a driving policy behind zoning laws, "the eventual elimination of nonconformities in most cases." Bransford, 444 Mass. at 859.

Ultimately, the conclusion I have reached—that these lots were in the common control of the Duanees from the time of acquisition in 1971 and 1973 forward—makes the question of the later dealings with the lots of no great moment. Having been merged in the 1970's for zoning compliance purposes, these lots could not thereafter become "unmerged" by later rearrangements of the record and beneficial ownership. Those who took their subsequent interests in these lots could not rise to a more favorable zoning status, because the merger, once accomplished, cannot be undone absent relaxation of the zoning law's requirements, something which never happened. Even if the later owners, record and beneficial, were sufficiently apart in their interests that bringing the lots together for zoning compliance no longer was realistically likely, the earlier merger remained in place, as a firm impediment to separate buildability of the individual lots. I decide that Lot 2 is not entitled to be built upon, having no protection under the separate lot exception of the fourth paragraph of G.L. c.40A, § 6.

Unclean Hands and Equitable Estoppel

Not surprisingly--understandably, in truth--William Duane and his buyer, Kevin Harmon, are greatly unhappy that the parties who now are raising challenges to Lot 2's ability to be built upon are the Saverys. They own and live in a house on the lot next door, Lot 3, which is well below the minimum lot size the Nantucket zoning bylaws have required since they first went into effect many years earlier. The Saverys' own ability to have built on Lot 3 rests on dubious grounds, because Savery's Lot 3 derives from the same Duane family history of title and control as Lot 2. Lot 3 appears to have the same inability as Lot 2 to earn a building permit, given the long-standing zoning merger of these lots. And yet, it is not the Town or some third party in the neighborhood who has challenged the right of the defendants to build a house on Lot 2, which is of the same size as the Saverys' Lot 3.

The Saverys alone stand in the way of plans to build on Lot 2. The defendants suggest, with some good basis, that the Saverys have taken this position for self-centered reasons--to keep Lot 2 an attractive open lot next to the Saverys' improved property, enhancing its views and its value, or even to render Lot 2 of such limited market value that William Duane's trust will be compelled to sell an unbuildable Lot 2 to the Saverys at a bargain price, to be added to their land, for short money. Alternatively, the defendants suggest that this challenge is brought by the Saverys so they can extract payment from the defendants to withdraw the zoning challenge and release the ROFR. It is not at all lost on the defendants that the Saverys claim the benefit of the statute of limitations that protects

the house they built on Lot 3 from direct enforcement by the Town. See G.L. c. 40A, § 7, second para. But for the statute of limitations, the house on the Savery Lot 3, having been built on an undersized lot, would face the risk of enforcement.

This case does not arise from any enforcement effort by the Town. The zoning issue presents in the Saverys' request for declaration as to the zoning status today of Lot 2. Ordinarily, a landowner other than the owner of land under review may access this court under G.L. c. 240, § 14A to learn if a local zoning "by-law or regulation affects a proposed use, enjoyment, improvement or development of ... [nearby] land...." The petitioner seeking the court's declaration need not be the owner of the land to be developed, as long as he or she is "a landowner on whose land there is a direct effect of the zoning enactment through the permitted use of [the] other land." Harrison v. Braintree, 355 Mass. 651, 655 (1969). The opportunity to get this court to make this kind of declaration "should not be restricted on narrow grounds...." Id., at 654-655. See Hanna v. Framingham, 60 Mass. App. Ct. 420, 422 (2004), in which the court, looking to Harrison, was "mindful that G.L. c. 240, § 14A is to be given a 'broad construction....'"

The Saverys do qualify to bring the action for declaration under G.L. c. 240, § 14A. First, they own or live directly next door to the site which will be improved by the house Kevin Harmon will build. While the record is scant about how the building intended for Lot 2 will be positioned and appear relative to Lot 3, that is a function of the stage at which this case arose, and the resulting absence of firm construction plans by Lot 2's new owner, who will have little use for this land if it will not support construction of any

residence under current zoning. G.L. 240, § 14A itself is plain that the “right to file and prosecute such a petition shall not be affected by the fact that no permit or license to erect structures or to alter, improve or repair existing structures on such land has been applied for, nor by the fact that no architects’ plans or drawings for such erection, alteration, improvement or repair have been prepared.”

There is a second basis for concluding that the Saverys should be able to have the court declare the ability to build on Lot 2 under Nantucket’s zoning laws. Plaintiffs hold a registered right of first refusal to meet offers to purchase Lot 2; this case of course has its genesis in a pitched dispute about that ROFR. The Saverys say that their ability to gauge their opportunities to act under the ROFR, and to assess the very buildability of Lot 2 in deciding to exercise or not their rights to buy it, also justifies a judicial resolution of that buildability question. This position seems fair, and, particularly given the breadth of the statute, I conclude the Saverys have a sufficient interest to ask this court to declare if Lot 2 suffers from zoning merger, rendering it unbuildable, or instead remains available as a lawful building site.

Nevertheless, William Duane argues that Richard Savery must be barred from seeking judgment as to the buildability of Lot 2 because he has unclean hands. Duane argues Savery should not be entitled to a declaration that Lot 2 is not buildable, because Savery himself built on Lot 3, a parcel of the same zoning and title provenance as Lot 2, and, but for the passage of time and the running of the statute of limitations, suffering from the same consequences now faced by Lot 2. Plaintiffs respond by pointing to their need to

know Lot 2's current zoning status in light of their ROFR dilemma, and dispute that they do have unclean hands.⁸

The Supreme Court of the United States has described the unclean hands doctrine as the “equitable maxim that ‘he who comes into equity must come with clean hands.’” Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945). The “maxim is more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” Id. An equitable remedy “should not be granted when the requesting party has engaged in conduct ‘savored with injustice touching the transaction.’” Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200, 208 (1993), quoting Economy Grocery Stores Corp. v. McMenemy, 290 Mass. 549, 552 (1935). When a party’s actions are so “inherently inequitable” as to offend the court, that party’s case “should not prevail.” Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266, 272-73 (2008).

Defendants rely heavily on Carabetta in their argument against plaintiffs’ standing. While there are obvious parallels, I am not convinced that this decision counsels me to apply the unclean hands doctrine in the case I now am deciding. In Carabetta, plaintiffs brought an appeal before the Land Court after their application for a building permit was denied by the local zoning board of appeals. 15 LCR 272, 275 (2007) (Misc. Case. Nos.

⁸ Plaintiffs also argue their action does not seek equitable relief, and so defendants are not entitled to equitable defenses, including that of unclean hands. I need not and does not address this argument, concluding that the record does not support a finding of unclean hands.

05 MISC 310546 and 05 MISC 314891) (Scheier, C.J.). Plaintiffs' abutting neighbors appeared before the court as intervenors, challenging the appeal. Id. at 274. This court held the local zoning bylaws did not require application of the merger doctrine. Id. at 275.

The Land Court alternatively based its decision on equitable grounds: "The result that would occur if this court finds that [the lots] merged would be exceedingly harsh given that the [plaintiffs] did all they could do to rectify a problem not of their making." Id. at 276 n. 29.

The Appeals Court vacated this court's judgment, holding that the particular exemptive provision of the local zoning bylaws on which this court had relied did not apply to the lots at issue, and the lots indeed had merged, because the lots came into being after the enactment of the zoning bylaws. Carabetta, 73 Mass. App. Ct. at 269-70. The Appeals Court did not disagree, however, with this court's sense that inequities were present in that case, and that "it very well may be that the [plaintiffs] should not be barred from constructing on their fully conforming lot." Id. at 272.

But the facts of Carabetta are in significant ways different from the case before me now. The Carabettas sought to build on a parcel, "Lot 3," which itself possessed more than enough land under then current zoning. But Lot 3, after its creation, had been held in common ownership with another parcel, "Lot 22," and, the court found, Lot 22 and Lot 3 had merged for zoning purposes to address Lot 22's dimensional shortcomings. Lot 3 later was conveyed out to the Carabettas. It was Lot 22's later owners, the O'Briens, who as neighbors objected to the Carabettas' building plans, even though the O'Briens themselves

lived in a house on their Lot 22 which had come about by counting some of the area of Lot 3 to meet the size minimum. And when the Carabettas offered to carve off from their Lot 3 and another parcel enough land to make up the O'Brien's Lot 22's area deficiency (a move that would still leave the Carabettas with more than enough land) the O'Briens, evidently motivated by a desire to prevent any house from going in on the Carabetta lot, rebuffed the Carabetta solution to both lots' zoning quandries. It was that refusal to cooperate which the Appeals Court considered "so intrinsically inequitable that it should not prevail." Carabetta, 73 Mass. App. Ct. at 273, quoting Hogan v. Hayes, 19 Mass. App. Ct. 399, 404 (1985).

The Saverys' posture is factually different. Although they managed to build on a lot that they should not have had permitted to improve--given its deficient size and the adjacent land, Lot 2, long held with Lot 3 in common control--there is in the case now before me no alternative apparent which would allow land from either Lot 1 or Lot 3 (or both) to be transferred to allow the vacant intervening parcel, Lot 2, to come into compliance. No creative solution like that tendered in Carabetta has been proposed here, and on the facts of this case, no such silver bullet suggests itself.

What Savery has done is insist upon Lot 2's compliance with the Town's zoning law, even though he earlier might himself have been stymied in his effort to build on an identically-situated Lot 3 had someone else raised objection at the time. Savery is insisting on Lot 2's compliance with the law not out of a civic-minded fervor for honoring zoning requirements, but because his objection to building on Lot 2 suits his self-interest.

I find, based on the evidence I heard, that Savery has gone through financial difficulties recently, and, as an accountant who heavily overinvested in real estate deals, confronted serious financial setbacks when the real estate market turned downward.⁹ Given the troubles he has had with his own finances, I doubt if he could on his own raise the funds needed to match the Harmon offer price. Perhaps, given his tortured financial condition, he could not even secure financing to buy the lot. The inference I make is that Savery has decided that he is not likely to be able to use his refusal rights to buy Lot 2 to acquire it. Rather, he has come to realize that his interest, both financial and personal, as an owner of Lot 3, is to see to it that Lot 2's zoning deficiency is established, and that Lot 2 remains unimproved.

The Savery position in this case does not demonstrate even a modicum of neighborly accommodation. To the contrary, Savery has demonstrated a calculating and unpretty use of this litigation to defeat the defendants' opportunity to sell and buy a valuable building lot. If Savery had not gotten involved, the Harmon house likely would have gotten constructed; neither the Town nor any third party appears to have any opposition to a house on Lot 2 going up.

⁹ Savery was forced to sell his Sherborn residence in a short sale, and now lives in a rented home in Dover. His Lot 3 on Nantucket is heavily encumbered by mortgages securing loans of many millions of dollars, at least some of which have needed to be restructured. A home in Siasconset Savery formerly owned is now in his wife's title, and has lost significant value given erosion of a nearby bluff, now on the market for a short sale well below the amount for which it was mortgaged. Savery was a principal in the development of a condominium project on Nobadeer Farm Road in Nantucket, which also ran into financial turbulence, requiring short sales of units.

But what is unseemly and unpleasant is not the same as what is, in the eyes of the legal system, so inherently inequitable that the courts must deny requested relief. That is particularly so where, as here, the judgment the court issues would declare that a parcel of land is, under the zoning laws, simply too small upon which to build a new house. The courts frequently hear cases brought by neighbors intent on stopping construction, and often they proceed out of selfish and personal interest, including simply to see that nothing gets built alongside their backyards. Motivation of this sort, by itself, does not disqualify these plaintiffs from having their cases heard and decided, and does not relieve the courts of the obligation to do so, even when the outcome the law requires might seem harsh.

I conclude that the unclean hands doctrine does not apply on the particular facts of this case to keep the court from rendering judgment on the declaratory judgment request. Plaintiffs have standing to seek a declaration pursuant to G.L. c. 240, § 14A as to the buildability of Lot 2.¹⁰

¹⁰ I also consider unavailing defendants' argument that Savery's purchase of Lot 3 in 2005, and the Saverys' construction of a house on Lot 3 despite the land's zoning merger and consequent size deficiency, when viewed in the context of the Duane grant of right of first refusal as to Lot 2, estops the Saverys from challenging Lot 2's buildability in the current case. The defendants argue to me that on those facts, Savery gave assurances to Duane that Savery would not in the future challenge the buildability of Lot 2, and that I now ought to hold Savery to those assurances. First, the argument fails because there is no proof supporting it. Nothing I credit in the evidence shows any undertaking by the Saverys respecting the zoning status of the land subject to the ROFR, nor any covenant to stand down from raising any otherwise meritorious challenge about land use compliance of either Lot 2 or Lot 1. And, strictly speaking, the declaratory judgment the Saverys now seek could be seen as a request to confirm, rather than refute, the buildability of Lot 2, to afford comfort to the Saverys in moving forward to match the Harmon offer and buy the land for themselves, or to profit by selling to a third party. Viewed this way (even though that is not what I determine is the motivation of the current litigation, see discussion supra), the idea that the Saverys might, when they received the ROFRs at the start of

The Right of First Refusal and Alleged Collusion between William Duane and Kevin Harmon

I turn now to the Saverys' claim Harmon's offers to purchase Lot 2 were not bona fide offers, and so were insufficient to trigger Savery's right of first refusal as to Lot 2. The Saverys

2006, have wanted to keep open the right to confirm judicially the zoning status of either Lot 2 or Lot 1 is likely. Even though I find Savery now wishes to torpedo the right to build on Lot 2, I cannot conclude that, when they received the ROFRs in 2006, before the real estate market brought the Saverys' finances into disarray, they would have covenanted in any way not to use the legal process at some future time to get judicial confirmation of Lot 2's buildability.

I also am not comfortable concluding that Savery's actions in buying and building on Lot 3 warrant the application of equitable estoppel to keep him from now raising issues about Lot 2's cognate zoning failings. The doctrine of estoppel is one of only limited applicability where the police power and municipal zoning are concerned. The Town certainly cannot be estopped from denying Lot 2 a building permit simply because a building inspector earlier granted the Saverys a Lot 3 building permit (or granted the Duanes a Lot 1 building permit in 1973), because a municipality's "governmental zoning power may not be forfeited by the action of local officers." Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 162 (1977). Municipalities are not estopped from enforcing zoning requirements as a result of prior leniencies. Id. ("the doctrine of estoppel cannot stay the hand of a municipality in enforcing its zoning laws."). There is of course a difference between the Town attempting to enforce the zoning law and being kept from that under a doctrine of estoppel, on one hand, and a private landowner being estopped from raising a zoning problem in litigation where he or she otherwise has standing, on the other. But there is something not right about applying the equitable doctrine of estoppel to keep a private citizen from entering the court to raise a valid zoning noncompliance issue of personal stake to him or her, simply because the municipality, who could never be estopped, has elected to abstain. And, in the end, if this case were to be dismissed on estoppel grounds, and the house Harmon wants to get built gets built, Savery would likely seek obligatory enforcement by the municipal zoning officials. It would be even less likely that any estoppel would ban him from resorting to the statutory process for demanding municipal zoning action at that time. Avoidance of these late stage zoning enforcement battles, after a building has been designed and permitted, and maybe even is under construction, is a chief goal of G.L. c. 240, s. 14A. By keeping Savery from going ahead in this action, the same issues likely would end up needing judicial resolution at a later, more costly, and acute posture.

say there was improper collusion between defendants William Duane and Kevin Harmon. Defendants argue no improper collusion took place, that they provided Savery with the appropriate opportunity to purchase Lot 2, observing the requirements of the instrument that created the ROFR, and that the Saverys' right of first refusal has expired.

"A right of first refusal is not an option to purchase property at a certain price, but a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price." Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 382 (2004). Once the property owner receives a "a bona fide third-party offer to purchase the property burdened by the right," the owner then must present that offer, with the same terms, to the holder of the right of first refusal for acceptance. Uno, 441 Mass. at 383. An offer is bona fide when "the offeror genuinely intends to bind itself to pay the offered price," and the offer is made "honestly and with serious intent." Id., citing Mucci v. Brockton Bocce Club, Inc., 19 Mass. App. Ct. 155, 158 (1985). The requirement of an honest and serious offer inherently suggests an absence of deceit or collusion. See Black's Law Dictionary (9th ed. 2009) (defining bona fide as "made in good faith; without fraud or deceit" or "sincere; genuine").

Collusion is defined as "[a]n agreement to defraud another or to do or obtain something forbidden by law." Black's Law Dictionary (9th ed. 2009). A real estate transaction between a third party buyer and a seller involving a holder of a right of first refusal gives rise to a form of competition between the third party and the holder of the right. Uno, 441 Mass. at 387. Even if motivated by a desire to defeat the right of first refusal, an offer still may be bona fide. Id. at 384. For a finding of improper collusion, there must be clear intent of the seller—not just the third

party—to defraud the holder of the right of first refusal, and not just an intention on the part of the third party to be successful, because the third party and the holder are by definition competing for the property. And a buyer who wants the property more than the holder of the right will offer a price and terms that will enhance the chances for the buyer to come out the winner of that competition. See *id.*, “Inherent in a right of first refusal is the fact that a third party, not the holder of the right, will dictate the price.”

There is insufficient evidence I credit to find improper collusion between William Duane and Kevin Harmon. Collusion certainly can be found when an agreement exists to thwart a holder’s right of first refusal unlawfully. See *Uno*, 441 Mass. at 380 (“no evidence of any collusion between [seller] and [buyer] to defeat or frustrate [holder’s] right of first refusal.”). The real question is whether the collaboration between buyer and seller was fraudulent, deceptive, or otherwise tainted. If it was not, but instead the buyer and seller simply agreed to a bona fide deal animated by the buyer’s strategy to make it hard for the holder to match that deal, then the buyer and seller’s dealings are not improper. That is what took place in this case.

Here, I find, there is no real evidence of intent to thwart Savery’s matching right by improper means—no impermissible backdoor dealings, kickback, or fraudulent offer, for example—and I do not find the behavior which took place to rise to the level of fraud or deceit required for a finding of improper collusion.¹¹ Duane and Harmon met once, and commenced a

¹¹ I treat, with one notable exception, discussed below, the deal tendered to the Saverys (and which invoked their obligation to respond with a notice of exercise) to be the one of which they received official word on Christmas Eve. The history of offers, notices of them, and dialog back and forth among Duane, the Saverys, and their brokers and lawyers, unfolded over some length of time before this. I agree with Savery that before the December 24th notice, the

transactions he and his spouse were given notice of (and asked to use their ROFR to step into) were flawed to one degree or another, and not in material ways the same as the one adopted by the buyer and seller and then tendered to the Saverys in December. Without elaborating on each of the iterations, it does appear that, for example, the last offer presented to the Saverys before this litigation began, the offer which was the subject of the November 14, 2012 notice, contained terms, contingencies, and conditions which in several respects were so untenably flawed that it would have been inequitable for the Saverys to have been put to the hard choice of matching or rejecting that offer. The November notice was as to an offer that, read at least one way, left the buyer with no way out, or at least no way to get the posted purchase price back, if the contingencies for judicial determination that Lot 2 was buildable hadn't been cleared in time. In equity, it is hard to see how the provision of notice of that deal was a bona fide one to put to the Saverys and then require them to take or leave.

The December transaction addressed many of the flaws and ambiguities of the preceding one. It set firmer time frames for getting through the permitting, and addressed the delay that might attend getting final judicial resolution of this then pending action. The December deal tendered to the Saverys gave the buyer the right to receive back all funds back, in exchange for reconveyance of Lot 2, if a final decision in the litigation had not issued within up to seven months after closing. The buyer could unilaterally extend this contingency period further, keeping the seller obligated, if the decision had not yet been rendered, but the buyer was under no obligation to do so. Given the realistic time frames for discovery, motion practice, trial, decision in the trial court, and any appeal, the window the parties established seemed highly optimistic. But this was the deal struck, and one clear enough that it was not unfair to put it to the Saverys under their ROFR.

The other objection the Saverys have to treating this December 24th notice as a valid one--as to a valid offer--is that, at the time the notice arrived, title had passed to Harmon; his deed had been registered that morning. Duane and Harmon did this, I find, to develop a tax reportable position about the date Harmon bought the property; a transfer in 2013 would have raised adverse tax consequences for the parties. The Saverys say that asking them to consider, for ROFR purposes, accepting an offer at a time when the title already had passed, was a violation of the ROFR, and left the Saverys free to disregard the December 24th notice. I do not agree. While the conveyance that day of Lot 2 without having cleared the ROFR process was highly unconventional, and not strictly in accordance with its terms, in light of the posture of the parties' relationship at the time, with this lawsuit already underway and a notice of lis pendens having been approved to register against Lot 2's title prior to the conveyance, and given the terms of the agreement itself, the better view is that Harmon was only holding title nominally, and subject fully to the rights of the Saverys and of Duane to compel Harmon to convey title, directly or indirectly, to the Saverys should they have exercised their right. That opportunity remained available because of the pendency of this litigation. Under these circumstances, I conclude that

real estate transaction, negotiated through two real estate brokers and then lawyers, for the purchase of Mr. Duane's property. The brokers agreed, and advised Harmon, that a fast cash sale would lead to the greatest likelihood of success for Harmon's purchase in the face of Savery's right of first refusal. The interactions between the buyer and seller, both directly and also among the real estate brokers and any lawyers involved, do not evince improper collusion between Duane and Harmon; they do not indicate intent to defraud Savery. "Any potential motive on behalf of a third-party bidder cannot be imputed to the property owner where there is no evidence of collusion between the owner and the third-party offeror." *Id.*, at 387. At most, the evidence shows Harmon's decided intent to defeat Savery's exercise of his right of first refusal, and Duane's awareness of this intention and his willingness to structure the transaction to oblige that goal. But this, without more (and I do not find more to have happened here), does not make the transaction less than bona fide, or rise to the level of forbidden collusion. See *id.*, "[e]ven if [the third-party offeror] were motivated by a desire to defeat [the holder's] right of first refusal, the offer may still be bona fide."

It may be that, by putting in play, as he had been advised, a firm cash offer calling for rapid closing, Harmon was able to call Savery's bluff. Given his apparent illiquidity, Savery might well have been unable to raise the needed purchase funds with the same ease and speed as

the offer as last set out following the December 18, 2012 Offer Modification, which was the subject of the December 24, 2012 notice, was effectively tendered to the Saverys to accept or not under their ROFR.

I address below the subsequent alteration of the deal as reflected in the Extension Agreement which Duane and Harmon signed in July of last year.

Harmon, if at all. But nothing in the law governing rights of first refusal obliges the parties to the purchase and sale transaction to tailor it to address the holder's financial limitations, at least if making such an accommodation was not part of the right bargained for in the establishment of the ROFR.

I conclude that the transaction struck between Harmon as buyer and Duane as seller, and presented to the Saverys for their acceptance, was a bona fide offer, and that the Saverys are not entitled to have the tender of the right of refusal as to that transaction set aside as improperly collusive.

The other aspect of the Saverys' challenge to the presentation of the offer to them pursuant to the ROFR has to do with the zoning question they say was overhanging the property. The Saverys argue that they could not make an intelligent decision about the opportunity presented to them under the ROFR without knowing that Lot 2 was buildable. They ask how they could decide to pay the high price Harmon's offer contained for a lot which might well turn out to be unbuildable, and thus worth dramatically less than that price.

This would be a fair point except for three things. First, the Harmon deal presented to the Saverys contained certain rights and contingencies for Harmon to escape his purchase obligation, and receive his funds back out of escrow, based on contingencies for zoning compliance and buildability. If Harmon was willing to pay cash and close quickly because he had preserved the opportunity to vet the legal right to build on Lot 2, such a contingency was to be made available, just as much, for the benefit of the Saverys as holders of the right of first refusal. It was. They, had they exercised, would have had the same protections that the buyer otherwise would have

received. To the extent that Harmon agreed to (or perhaps insisted on, for tax reasons) a deal in which he posted in cash the full purchase price up front, does not make the deal not a bona fide one, any more than a deal calling for a straight cash closing is not bona fide as to ROFR holders who need, or would prefer, to arrange financing. That a buyer is putting up money the holder would rather not, does not make the offer less than bona fide.

Second, the weight of the evidence is that the issue whether Lot 2 was buildable was entirely raised, and in fact pushed forward, by Savery. It was he who was aware of the overhanging concerns about zoning merger (something which had surfaced, and been surmounted somehow, when he bought his Lot 3 and then went ahead to build on it without difficulty). He chose to introduce this issue years later, when the ROFR was being activated by the impending Harmon purchase. Had he not, in all likelihood the Harmon purchase would have happened without incident, and the evidence shows me that, in the absence of any more involvement by the Saverys, a house on Lot 2 would have been permitted routinely. No one other than the Saverys seems to have seen the need to treat Lot 2 as anything other than buildable. It thus is less than fair for the Saverys to challenge the bona fides of the Harmon offer to purchase on the basis of a concern instigated and pressed hard by Savery alone.

Third, the December transaction, the one which I conclude was the one to which the Saverys needed to react, was noticed to them while this litigation already was underway. By then, the issues of zoning merger, and of whether or not Lot 2 could be built upon, were squarely presented to the court as part of the overall question whether the Saverys' rights under their ROFR had been frustrated somehow. The Saverys have no good grounds to say that, by the time the

December offer landed on them, they did not have a ready vehicle (this litigation) to settle their qualms about accepting or rejecting the offer, which itself was made contingent on the outcome of this case. By starting this action before title passed, and in it then seeking declaration about the zoning status of Lot 2, Savery's interests under the ROFR have been fully protected. Had the court reached the conclusion on the zoning question opposite the one it did reach, deciding that Lot 2 had not merged for zoning purposes with the other Duane land, then Savery would have had the opportunity, with that judicial reassurance, to buy Lot 2, had he exercised his ROFR.

There is one concern about the back and forth between Duane and Harmon since the initiation of this lawsuit which merits comment. While this case was underway, Duane and Harmon altered their deal. Harmon, who in December 2012 took title to Lot 2 with the purchase money safely placed in escrow, but subject to the obligation to see the litigation process through at least seven months after that closing, received in the Extension Agreement signed in July of last year the unconditional right, effectively, to rescind the purchase, return Lot 2's title to Duane, and get back the purchase money, at any time, and without having to meet any standard.

The defendants say, with considerable justification, that they restructured their deal in this manner to address the pendency of this litigation, and the need to spend the time it takes to have this case heard and decided on the merits. They take the position that this right of Harmon to get out upon his request and without cost was purely a reaction to the Savery challenge to the sale and the ensuing litigation it engendered.

I conclude that the change brought about by the July 16, 2013 Extension Agreement was not of any great significance. This is because the material change it on the surface seems to have

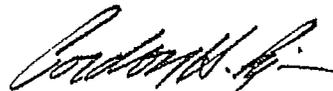
inserted into the prior transaction, the one set in December, 2012, to which the Saverys had a valid opportunity to react, was the explicit provision that Harmon could rescind the transaction merely by giving seven days notice to Duane. But by the time of the July, 2013 agreement, Harmon effectively had that opportunity already. Under the terms of the December, 2012 agreement, Harmon only was obliged to stay in the deal, with the litigation pending, for a maximum of seven months from the transfer of title. The deed was registered December 24, 2012. Harmon's mandatory participation in the transaction expired seven months later, on July 24, 2013, and by the time Harmon and Duane signed the July 16, 2013 Extension Agreement, which gave him the right to exit the transaction with a week's notice, he was already liberated from the deal under the terms of the December version which had been presented to the Saverys consistent with their ROFR.

Buyers and sellers cannot clear a holder's right of first refusal when they present to the holder a deal materially different (and materially less desirable) than the one the buyer and seller have between themselves. Just as the holder of a right of first refusal cannot exercise the right based on terms materially different from those in the buyer-seller transaction, see Fienberg v. Hassan, 77 Mass. App. Ct. 901, 903 (2010) (invalid exercise of right of first refusal when offer from third party and offer in front of holder of right of first refusal did not match), the buyer and seller cannot present the holder with one set of terms, and, having had the holder fail to exercise, then go ahead between themselves, but with materially different and, in fact better, terms from the buyer's perspective. That defeats the seller's obligation to afford the holder the right to act on a bona fide offer.

But given my determination that the July 16, 2013 Extension Agreement did not grant Harmon any materially better rights than he had by then already, this is not an occasion in which the court would conclude that a materially different deal had taken place between buyer and seller than had been presented fairly to the holder of the first refusal right. Because the July, 2013 agreement was not materially more advantageous to the buyer, there is no reason to require the transaction as modified last summer to be presented fresh to the Saverys.

The Saverys did have a bona fide offer presented to them, and have not exercised their rights to accept it and thus perform in place of the buyer, Harmon. The judgment in this case will make that declaration.¹²

Judgment accordingly.



Gordon H. Piper
Justice

Dated: July 7, 2014.

¹² Given the court's decision that Lot 2 is not available as a lawful building site in the wake of the zoning merger I have found took place, the entire question of the first refusal rights of the Saverys may reduce to very little significance. They would not have any good reason to purchase Lot 2 at the price Harmon paid (into escrow), nor would they seem to have any incentive to step into the transaction, as set out in the December 24, 2012 noticed agreement (even as modified by the July 2013 Extension Agreement), only to invoke the buyer's right to undo the transaction should Lot 2 prove to be incapable of being built upon. The case as pleaded and tried, however, required the court to address these ROFR questions, and the judgment that enters will deal with them.

SEAL

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

NANTUCKET, ss.

MISCELLANEOUS CASE
NO. 12 MISC 474707 (GHP)

RICHARD A. SAVERY)
and JANICE SAVERY,)
)
Plaintiffs,)
)
v.)
)
WILLIAM B. DUANE, as trustee of the)
W. DUANE REALTY TRUST;)
WILLIAM B. DUANE, as trustee of the)
W&C DUANE REALTY TRUST;)
KEVIN L. HARMON, JR.; and the)
TOWN OF NANTUCKET,)
)
Defendants.)

J U D G M E N T

This case, commenced in this court December 13, 2012, came on to be tried to the court (Piper, J.). In a decision ("Decision") of even date, the court has made findings of fact and rulings of law, and has decided that judgment granting declaratory relief is to enter.

In accordance with the court's Decision¹ issued today, it is

ORDERED, ADJUDGED, and DECLARED that as of the effective date of the zoning bylaws of the Town of Nantucket, July 27, 1972, 21 Austine Locke Way (Lot 2) and 19 Austine Locke Way (Lot 3) were held in common control and effective common ownership by William and Carolyn Duane so that these two lots did not separately qualify under the "single lot exception" of G.L. c. 40A, § 6, paragraph four, which benefits only lots "not held in common ownership with any adjoining land..." Those lots as of that date were "merged" for zoning purposes, and at all times thereafter continued to be merged and unentitled to the statute's single

¹ Terms not defined in this Judgment have, unless plainly indicated otherwise, the meaning assigned to them in the Decision.