

# Background Materials February 24, 2025– Planning Board Meeting

Prepared by Anne Capra, Director of Planning and Conservation, 2/21/25

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### AGENDA ITEM #1 Open Comment Period

This 10-minute period is set aside for the public to offer comments on items not on the posted agenda, in accordance with the adopted policy, as amended 9/11/23, posted on the Town of South Hadley Planning and Conservation Department webpage here:

<https://www.southhadley.org/DocumentCenter/View/11705/Policy-on-Open-Comment-Period---As-Adopted-2023-09-11>

**Action Needed:** Allow members of the public to offer comments to the Board.

### AGENDA ITEM #2 Minutes

Planning and Conservation Coordinator Colleen Canning will forward minutes separately.

**Action Needed:** Vote to approve the minutes.

### AGENDA ITEM #3 Correspondence

Correspondence are attached.

**Action Needed:** No action required.

### AGENDA ITEM #4 Discussion of Recommendation to Town Meeting for Acceptance of Ethan Circle

The owner of Ethan Circle is seeking to have the Town accept Ethan Circle as a town road. The Planning Board needs to make a recommendation to the Selectboard on this matter. The background is as follows:

- At the 2/26/24 meeting, the Planning Board voted to release the full Performance Guarantee for the Definitive Subdivision in the amount of \$20,875 (plus any interest). A Definitive Subdivision Plan for a 6-lot subdivision was approved by the Planning Board in 2016. At that time, a cash performance guarantee was submitted to the Town in the amount of \$123,877. As construction of the subdivision progressed, partial releases of the performance guarantee were

made in August 2017 (\$70,357) and March 2020 (\$33,520). Construction of the roadway and the stormwater system were completed by the Fall 2024 with the project in compliance with both the Conservation Commission's Order of Conditions #288-0429 and the Definitive Subdivision Approval issued by the Planning Board.

- An as-built plan was submitted in January 2021, and certified the road and utilities were constructed as specified by the following entities:
  - Chris Bouchard, DPW (1/25/2021) - "Viv and John have looked at the plans and have no comments at this time. Chris"
  - Mark Aiken, FD2 Water Dept.(1/28/2021) "Thanks Richard The revised as-built plan is acceptable to us Thank You. "
  - Mark Gilmore, SHED (1/26/2021) "Richard, the as built plan is acceptable to SHELD."
- Stormwater Management Permit remains in effect in perpetuity and the Homeowner's Association will be responsible for the Operation and Maintenance Plan implementation for the system outside of the roadway right-of way.

**Action Needed:** The Board needs to vote as to whether or not to recommend the Town accept Ethan Circle as a public way.

**Recommended Motion:** I motion that the Planning Board recommend Ethan Circle be accepted by Town Meeting as a public way.

#### AGENDA ITEM #5 Discussion of Updates to Open Meeting Law

Please refer to the attached memo from Mead, Talerman, and Costa LLC providing a refresher and checklist for the current provisions of the OML regarding remote participation. There is current legislation *pending* that would allow boards to permit their members to attend public meetings remotely permanently.

**Action Needed:** Discuss legal memo and ask any questions.

#### AGENDA ITEM #6 Discussion of Accessory Dwelling Unit (ADU) Regulations under 760 CMR 71.00

Links to background materials here:

255-50 Accessory Dwelling Units Zoning Bylaw – Proposed Amendments 2/20/25: [255-50-ADU-Bylaw---Proposed-Amendments-22025](#)

255-50 Accessory Dwelling Units Zoning Bylaw: <https://ecode360.com/44060663#44060663>

MTC Legal Guidance for Affordable Homes Act Compliance:

<https://southhadley.org/DocumentCenter/View/13201/MTC-Legal-Advisory-for-Zoning-Changes---Affordable-Homes-Act>

Affordable Homes Act: <https://malegislature.gov/Laws/SessionLaws/Acts/2024/Chapter150>

The new ADU law (part of the Affordable Homes Act St. 2024, c. 150, § 8) went into effect on 2/2/25 and at this time, our local bylaw is not fully in compliance with the new Regulations as promulgated under [760 CMR 71.00](#). In summary:

1. The Act amends M.G.L. c. 40A, § 3 to encourage the production of accessory dwelling units throughout the Commonwealth.
2. The Act establishes that in certain circumstances the use of land or structures for ADUs are protected from zoning restrictions by providing that zoning shall not prohibit, unreasonably restrict or require a special permit or other discretionary zoning approval for the use of land or structures for a single ADU, or the rental thereof, in a single-family residential zoning district, and imposes protections on ADUs through M.G.L. c. 40A, § 3, the Dover Amendment.
3. The Act explicitly prohibits municipalities from imposing owner-occupancy of either the ADU or the principal dwelling and impose limitations on parking requirements in excess of that defined in 760 CMR 71.03(2)(b). 255-50 has an owner occupancy requirement that will need to be removed.
4. Municipalities may impose reasonable restrictions and regulations, but may not exceed the limitations set for dimensional standards required for principal dwellings or single-family residential dwelling or accessory structure in zoning districts where ADUs are permitted, which ever results in more permissive regulation. [760 CMR 71.03(3)(b)(2)] 255-50 has restrictions on the number of bedrooms, number of occupants, height limitations, and set back requirements. These restrictions are either not applicable to single-family dwellings or are more restrictive than that allowed for single-family dwellings within zoning districts which permit single-family residential dwellings.

Based on the regulations as promulgated in 760 CMR 71.00, and the Board's discussion at their meeting on 2/10/25, draft proposed amendments are identified below. I have also submitted the proposed draft amendments to the Attorney General's Office for preliminary review, an invitation they put out to all municipalities prior to them going to Town Meeting; and, Town Counsel who has not yet responded:

1. Delete B(1)(c) owner occupancy provision.
2. Delete B(1)(e) limitation on occupancy of no more than three people nor no more than 2 bedrooms. There is no such regulation of single-family dwellings elsewhere in the zoning bylaw.
3. Delete B(1)(i) height limitation of 1 ½ stories. Replace with regulation requiring compliance with dimensional standards for single-family principal dwellings in the zoning district subject to the ADU.
4. Delete B(1)(g) off street parking requirements. Replace with language from 760 CMR 71.03 (2)(b). **NOTE – I requested clarification from the AG's Office about the definition of "Bus Station" in 760 CMR 71.02 which is below.**

Hurley, Margaret (AGO)

to me ▾

Thank you Anne. The regulations define "bus station" as:

Bus Station. A location serving as a point of embarkation for any bus operated by a Transit Authority.

As I understand it the intention is that any fixed point along the route where bus passengers can board a bus – not just the bus station where the route starts.

5. Delete B(1)(H) and B(1)(H)(i) building setbacks requirement compliance with principal dwelling.  
Per 760 CMR 71.03(3)(b)(2), the more permissive setback would be that of the accessory structure. Replace with regulation requiring compliance with setbacks for accessory structures in the zoning district subject to the ADU.
6. Delete B(3-5) owner occupancy provision documentation.

**Action Needed:** Discuss edits and schedule public hearing for March 24, 2025.

## AGENDA ITEM #7 Discussion of Subdivision Regulations

In July 2023, the Planning Board began working on updates to the 1995 Subdivision Regulations. The updates to these regulations were being undertaken as part of a comprehensive revision that included coordinated review and amendment of the Flexible Development Bylaw. Subdivisions are allowed by right and have no requirements for the protection of open space, natural, scenic or historic resources on the site (local, state and federal laws and regulations do apply). Flexible Developments do require open space and natural/scenic/historic resource protections but are permitted through discretionary Special Permits. The intended approach was to reverse this and allow for the preferred development scheme (clustered housing with open space conservation) to be permitted by right with Site Plan Review to incentivize its use and thereby discourage the less desirable form of residential development in the form of standard subdivisions. However, Town Meeting didn't support this strategy and the amendments to the Flexible Development Bylaw, and associated supporting bylaws, were not adopted.

In updating the Subdivision Regulations, the approach should continue to be to address shortcomings identified in the Subdivision Regulations through recent project permitting and strengthen review standards with up-to-date design standards and best practices.

A revised package of Articles I thru XII was sent to Board members on 12/6/2024 and on 1/21/25. The revised package includes the following changes:

- Article VIII Submission and Approval of Plans for More Than One Building for Dwelling Purposes Per Lot has been added. This is Article VI in the current Town of South Hadley Subdivision Regulations.
- Articles VIII thru XII have been renumbered to accommodate the insertion of Article noted above.
- Article XI Required Improvements for Subdivisions has been expanded to include "and Developments for More than One Building for Dwelling Purposes per Lot"
- Updated page numbers for Articles IX thru XII.

- **Article VIII – I have edited this section (date 2/21/2025) to address more than one “principal” building for dwelling purposes. Posted online here:**  
<https://southhadley.org/DocumentCenter/View/13824/Article-VIII---Rev-22125>

Status of Proposed Regulations Review by Article

In past meetings, the Board completed review of the following:

- Articles I thru VI, and Article VII, 360-26 and 360-27
- Article IX Design Principles and Standards (*renumbered as Article X*)
- Article X Required Improvements for Subdivisions (*renumbered as Article XI*)

**\*\*Meeting dates below are linked to the recording of that meeting; posted minutes link below date.**

Meeting Date	Topic
<a href="#">July 24, 2023</a> <a href="#">Minutes</a>	Introductory presentation
<a href="#">September 11, 2023</a> <a href="#">Minutes</a>	Article IX Design Principles and Standards ( <b>currently Article X</b> )
<a href="#">September 25, 2023</a> <a href="#">Minutes</a>	Article IX Design Principles and Standards ( <b>currently Article X</b> )
<a href="#">October 2, 2023</a> <a href="#">Minutes</a>	Article IX Design Principles and Standards ( <b>currently Article X</b> )
<a href="#">November 27, 2023</a> <a href="#">Minutes</a>	Article X Required Improvements for Subdivisions ( <b>currently Article XI</b> )
<a href="#">December 4, 2023</a> <a href="#">Minutes</a>	Article I Authority and Purpose Article II General Article III Definitions Article IV Pre-submission Review Article V Plan Believed Not to Require Approval (ANR Plans) Article VI Preliminary Plans
<a href="#">December 18, 2023</a> <a href="#">Minutes</a>	Article VII Definitive Plan (360-26 General, 360-27 Submission)  <i>* At the 12/18/23 meeting, the Board decided to table review of the regulations to begin work on the Flexible Development Bylaw and associated bylaws.</i>

**Action Needed:**

1. Review Article VIII Submission and Approval of Plans for More Than One Building for Dwelling Purposes per Lot. This section was added back into the Regulations. Discuss potential changes to Article VIII to address ADU allowance for parcels with more than one dwelling for residential purposes per lot.
2. Review Article IX Pre-Endorsement, Endorsement, Performance Guarantees, and Implementation of Definitive Plan

3. Review Article XI Required Improvements for Subdivisions for the addition of “and Developments for More than One Building for Dwelling Purposes”
4. Review Article XII Administration
5. Review Appendices (at a future meeting)

## AGENDA ITEM #8 Planning & Conservation Department Report on Planning Projects and Development Updates

### A. Next Planning Board Meetings and Other Important Dates

*Planning Board typically meets the 2<sup>nd</sup> and 4<sup>th</sup> Mondays of the month.*

<b>3/1/15</b>	<b>Town Budget Community Meeting 9am-noon</b>
<b>3/10/25</b>	Route 202/33 Zoning Recommendations Discussion
<b>3/24/25</b>	ADU Bylaw Amendments – Public Hearing
<b>4/14/25</b>	<del>Route 202/33 Zoning Recommendations – Public Hearing</del> Route 202/33 Zoning Recommendations Discussion
<b>4/28/25</b>	Route 202/33 Zoning Recommendations Discussion
<b>5/5/25</b>	Business A-1 Design Guidelines & Route 202/33 Corridor Design Guidelines Discussion
<b>5/14/25</b>	<b>Annual Town Meeting</b>
<b>5/19/25</b>	<ul style="list-style-type: none"> <li>• Business A-1 Design Guidelines Public Hearing</li> <li>• <del>Route 202/33 Corridor Design Guidelines Public Hearing</del></li> </ul>
<b>6/1/2025</b>	<b>Business A-1 Mixed Use Permitting Moratorium Expires - Design Guidelines Adoption Due</b>
<b>June – 6/9 &amp; 6/23</b>	Sign Bylaw Amendment Discussion Agricultural Uses Amendment Discussion

## B. Planning Board 2025 Priorities

The following items are on the docket for FY25:

Item	Comments
<b>Business A-1 Design Guidelines</b>	Due by June 1, 2025; Moratorium on permitting under the amendment expires 6/1/25
<b>ADU Bylaw Amendments</b>	Amendments required for compliance with the Affordable Homes Act ( <a href="#">Chapter 150 of the Acts of 2024</a> ). Changes to MGL c40A go into effect 2/2/25. EOHLC has issued final regs: <a href="#">ADU-Regulations-CMR-71---FINAL-1172025</a>
<b>Route 202/33 Corridor Zoning Bylaw Amendments and Design Guidelines</b>	The project schedule has the Advisory Committee sending these to the Planning Board in February/March for review and discussion, finalizing a draft, public hearing, and then to Town Meeting for May 2025. This timeframe is not feasible at this point. Fall Town Meeting seems more realistic.
<b>Sign Bylaw Amendments</b>	255-85 is in conflict with a 2014 Supreme Court decision ( <a href="#">Reed v. Town of Gilbert</a> ) which addresses neutral content of signs. Planning Consultant Richard Harris has prepared a detailed review and recommendations. The Board needs to identify when they want to take this up.
<b>Agricultural Uses in Zoning Bylaw Amendments</b>	Agricultural uses within the zoning and general bylaws, as well as Board of Health regulations, are in conflict. Planning Consultant Richard Harris has prepared a detailed review and recommendations. The Board needs to identify when they want to take this up.
<b>Water Supply Protection Bylaws</b>	PVPC prepared a review of zoning and general bylaws in regards to water supply protection in 2021 (issued January 2022). Advisory Committee to be reconvened.

**SOUTH HADLEY PLANNING BOARD  
LIST OF CORRESPONDENCES  
FEBRUARY 24, 2025 REGULAR MEETING**

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**Letters and Memos**

- February 11 email (attached) from Martha Terry, 25 Brainerd Street, regarding the Board's Special Permit decision for 3 Roundelay Road with response from Town Counsel.
- February 14 email (attached) from Martha Terry, 25 Brainerd Street, with article regarding variance requirements for alterations/expansion to nonconforming single- and two-family dwellings.

**Legal Notices**

*Amherst*

- Notice from the Amherst Planning Board for a public hearing on March 5 to consider an amended site plan for construction of a building addition, parking lot, and solar canopy for PV Squared at 742 Main Street.

*Chicopee*

- Notice from the Chicopee Planning Board for filing the following decisions: 1) approval of waiver of frontage to allow construction of a single family home at 1230 Montgomery and 2) approval of waiver of frontage to create single family building lot and leave existing house at 39 Polaski Ave on a lot with reduced frontage.

*Granby*

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*Hadley*

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*Holyoke*

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## Fwd: letter

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**Colleen Canning** <ccanning@southhadleyma.gov>  
Draft

Thu, Feb 20, 2025 at 2:30 PM

----- Forwarded message -----

From: **Lisa Mead** <>

Date: Tue, Feb 11, 2025 at 6:44 PM

Subject: RE: letter

To: Anne Capra <acapra@southhadleyma.gov>

Cc: Lisa Wong <lwong@southhadleyma.gov>

Anne,

Your bylaw provides as follows:

Preexisting nonconforming structures or uses may be changed, extended or altered only upon approval of a special permit for such purpose by the Planning Board acting as the special permit granting authority, provided that the Planning Board shall find that such change, extension or alteration will not be substantially more detrimental than the existing nonconforming use to the neighborhood in which it is located. This shall not apply to billboards, signs, and other advertising devices subject to the provisions of MGL c. 93, §§ 29 through 33, inclusive, and to MGL c. 93D.

Under G.L. c. 40A sec 6 par. 4 there is a different standard for single and 2 family structures, vs. commercial or multifamily structures. However, it appears as though the Town combines them all.

To that point, it appears that in fact, the plan extends the existing nonconforming front setback of 32 feet in both directions which is permitted under the zoning provision above and under 40A sec. 6 with a special permit from the planning board upon a determination that it will not be substantially more detrimental to the neighborhood than the existing structure.

The Powers Test applies to commercial and multifamily structures and uses and therefore would be inapplicable in this instance.

Ms. Terry is correct, where a new "non-conformity" is created a variance would be required. Here however, the applicant was extending and potentially intensifying the existing non-conforming setback.

Regards,

Lisa

Lisa L. Mead

[she/her/hers]



Mead, Talerman & Costa LLC

30 Green St

Newburyport MA 01950

978 463 7700

978 463 7747 (fax)

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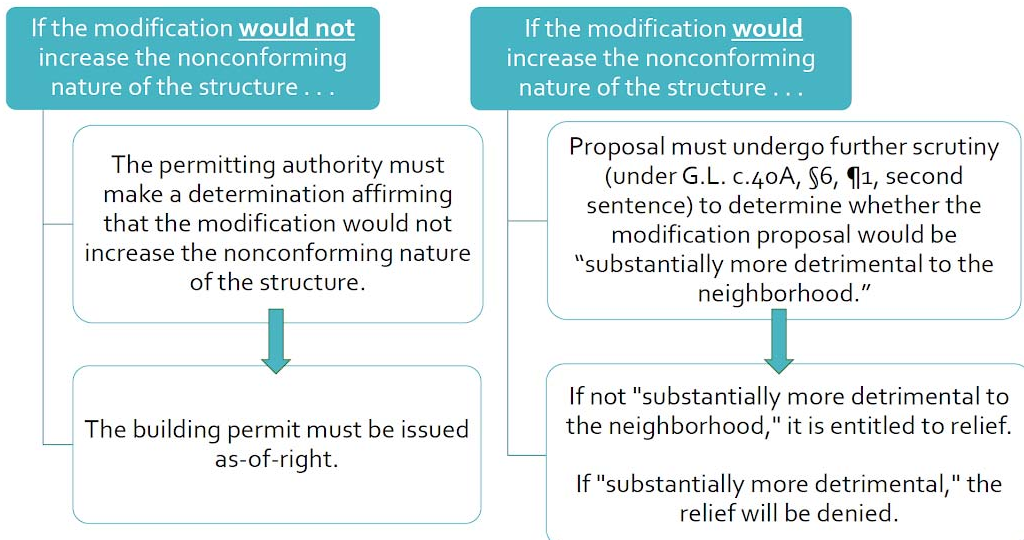


Think before you print.

**From:** Anne Capra <acapra@southhadleyma.gov>  
**Sent:** Tuesday, February 11, 2025 2:31 PM  
**To:** Lisa Mead  
**Cc:** Lisa Wong <lwong@southhadleyma.gov>  
**Subject:** Fwd: letter

Attorney Mead,

Could you provide some clarity on preexisting nonconformities. The project before the Board was a 504 SF addition to a preexisting nonconforming single-family dwelling in the RA-1 zoning district. The existing structure is within the 40' front setback on both Roundelay and Chapel Hill Road, per the site plan linked below. South Hadley's zoning bylaw establishes a front setback on corner lots on both roads. The addition maintained the nonconforming setback on Roundelay Road, and expanded it in the front setback on Chapel Hill Road. The Board voted 4-1 to approve the Special Permit with a finding that the expansion or alteration is not more detrimental to the neighborhood. Further, I also used the so-called Powers Test as part of my analysis for the Board in review of the request. Please see attached. It is my understanding that single-family, based on the same training Ms. Terry is referring to that for an increase in the nonconformity for a single-family dwelling, so long as the Board makes the Sec 6 finding, the nonconformity can be increased. Did I get this wrong? Your guidance would be greatly appreciated.



Anne

<https://www.southhadley.org/DocumentCenter/View/13642/Site-Plan?bidId=>

<https://www.southhadley.org/1466/16083/Roundelay-Road-3---AlterationExpansion-o?activeLiveTab=widgets>

----- Forwarded message -----

From: **Martha Terry** <[marthaterry25@gmail.com](mailto:marthaterry25@gmail.com)>

Date: Tue, Feb 11, 2025 at 1:19 PM

Subject: letter

To: Anne Capra <[acapra@southhadleyma.gov](mailto:acapra@southhadleyma.gov)>

Dear Ms. Capra and Members of the South Hadley Planning Board,

Regrettably, I could not attend or speak out virtually at last evening's Planning Board meeting because my voice is still recovering from a surgical procedure. However, I did watch the meeting virtually and am very disappointed at and frankly horrified by what I saw regarding the application you approved for the house on Roundelay Road.

Before the meeting, I had hand delivered to Anne Capra, for her to distribute to each of you, a copy of the lengthy manual from two trainings I had attended, which were sponsored by the Citizen Planner Training Collaborative concerning state laws on pre-existing, nonconforming structures and uses. For ease of the Board's review, I provided copies of the pages from this manual that dealt in particular with the extension of nonconforming, pre existing structures, including a one-page diagram of what is permissible under the law and what is prohibited. I am shocked that neither Ms. Capra nor the Planning Board followed the law as clearly spelled out and delineated in this authoritative training manual.

The law is clear. The Roundelay Road property already has a pre-existing nonconformity because the structure is 32 feet from the road instead of 40 feet as required under the current Zoning By Laws of South Hadley. Therefore, the proposed addition must maintain this 32-foot setback from the street; the addition cannot decrease the 32-foot setback from the street. The special permit the Board approved last night reduces the setback from 32 feet to 14 feet, which creates a new nonconformity.

This new nonconformity requires a variance from the Zoning Board of Appeals. The law is clearly spelled out in detail on page 19 of the manual from the two trainings and states that, if a new nonconformity is created, such would require variance relief, which is under the purview of the Zoning Board of Appeals, per MGL Chapter 40A Section 10. Note also that page 22 of the CPTC training manual shows a diagram of the difference between the expansion/extension of a pre-existing nonconforming dimension and the creation of a new nonconforming dimension.

Furthermore, Ms. Capra erroneously used the so-called 'Powers Test' to guide the Board. The Powers Test is strictly for the expansion of or a change to a preexisting, nonconforming *use*. It does not apply to the extension of preexisting, nonconforming structures or to the creation of new nonconformities of that structure because these are dimensional issues.

I wish to speak at the next Planning Board meeting during the Open Comment Period to this issue. In my humble, yet informed opinion, a motion should be made by a Planning Board member to reopen discussion and voting on this issue as the Planning Board's decision is clearly erroneous and based on faulty advice from the Director of Planning and Conservation.

I also recommend that the Planning Board and the Director of Planning and Conservation contact the Citizen Planner Training Collaborative for a complete and thorough training on pre-existing, nonconforming structures and uses, and that this training be mandatory for the Director of Planning and Conservation and the Planning Board member and the associate.

Also to clarify, I am writing this letter as a concerned, private citizen. I am concerned that all decisions by the Planning Board are consistent with state law and therefore humbly offer clarification and suggest the means to

rectify what I see as an erroneous decision by the Board.

Martha Terry

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## Fwd: correspondence

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**Anne Capra** <acapra@southhadley.ma.gov>  
To: Colleen Canning <ccanning@southhadley.ma.gov>

Thu, Feb 20, 2025 at 10:23 AM

Please add to the Board's correspondence, including a full print out of the article.

----- Forwarded message -----

From: **Martha Terry** <marthatterry25@gmail.com>  
Date: Fri, Feb 14, 2025 at 12:20 PM  
Subject: correspondence  
To: Anne Capra <acapra@southhadley.ma.gov>

Dear Anne

I kindly and humbly request that you share this article with members and the associate members of the Planning Board. It is an excellent clarification of the issue on pre-existing nonconforming structures and is entirely consistent with the training manual that accompanied the two separate trainings by Attorney St. Andre and Attorney Quirk.

<https://www.k-plaw.com/wp-content/uploads/2015/02/Appeals-Court-Decision-Clarifies-Variance-Requirements-for-Altering-or-Expanding-Nonconforming-Dwellings.pdf>

Thank you.

Martha Terry

--  
Anne Capra, AICP  
Director, Planning & Conservation  
Town of South Hadley  
116 Main Street | South Hadley, MA 01075  
(413) 538-5030 x6128  
[acapra@southhadley.ma.gov](mailto:acapra@southhadley.ma.gov)

**Learn more about South Hadley's community plans [HERE](#).**

## Appeals Court Decision Clarifies Variance Requirements for Altering or Expanding Nonconforming Single- and Two-Family Dwellings

*Prepared for the 2015 Massachusetts Municipal Association Annual Meeting*

In 2011, the Massachusetts Appeals Court's decision in Gale v. Zoning Board of Appeals of Gloucester, et al., 80 Mass. App. Ct. 331 (2011), concerning alteration or reconstruction of nonconforming structures, raised questions for many municipal officials, board members and attorneys active in land use matters. On June 25, 2014, the Appeals Court answered these questions in Deadrick v. Zoning Board of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014). In Gale, the Appeals Court held that a project that proposed replacement of a small, nonconforming seasonal cottage with a year-round home nearly triple the size could be allowed with a special permit and without a variance. Many observers wondered if the ruling in Gale was intended to apply to so-called "new nonconformities." In Deadrick, the Appeals Court made clear that new nonconformities will indeed require a variance. The Supreme Judicial Court ("SJC") declined to review the Appeals Court's decision. Therefore, Deadrick stands as the "last word" on the subject of whether variances are required to permit new nonconformities.

The so-called "second-exception clause" in the first paragraph of G.L. c.40A, §6 states that no zoning ordinance or bylaw can apply to a pre-existing nonconforming single- or two-family dwelling if the "alteration, reconstruction, extension or structural change . . . does not increase the nonconforming nature of said structure." The statute further provides that "pre-existing non-conforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." In Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21 (1987), the SJC clarified that the reference to "nonconforming use" must also include nonconforming structures.

In Gale, the Appeals Court reaffirmed the two-part inquiry required under G.L. c.40A, §6. The building inspector or special permit granting authority (depending on the local bylaw or ordinance) must: (1) identify the particular respect(s) in which the existing structure does not conform to local zoning; and (2) determine whether the proposed alteration or addition would intensify the existing nonconformities or result in new ones. See Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852, 858 (2005), *citing Willard*, 25 Mass. App. Ct. at 21. If it is determined that the project would not intensify the existing nonconformities and would not result in new nonconformities, then the applicant is entitled to the issuance of a building permit (or special permit as local zoning may require) without any additional zoning relief. However, if the answer to the second inquiry is in the affirmative, the permit granting authority must proceed to make a finding as to whether the proposed change, extension or alteration would be substantially more detrimental to the neighborhood than the existing nonconforming structure.

**THE LEADER IN PUBLIC SECTOR LAW**

The Gale decision clearly rules that once there is a finding under G.L. c.40A, §6 that the proposed change, extension or alteration would not be substantially more detrimental to the neighborhood, an applicant cannot be required to take the additional step of obtaining a variance to make the proposed changes. The Appeals Court in Gale, at 337-338, stated:

The two-part framework does not include application of a local by-law or ordinance as an additional step when proceeding to the substantial detriment finding under the second sentence. That finding stands alone as sufficient to proceed with the proposed project, if the permit granting authority deems that no substantial detriment will result from the extension or alteration. This conclusion is in keeping with the special treatment explicitly afforded to single or two-family residential structures under the statute. Thus, we hold that the board's finding in this case was all that was required: no variance under the ordinance was needed to proceed with the proposed reconstruction.

The Deadrick decision clarifies Gale by addressing the question of whether a land owner requires a variance to alter a pre-existing nonconforming single- or two-family residential structure in a manner that will result in a new, additional nonconformity. In Deadrick, the new structure was proposed to maintain the nonconformities of the pre-existing one, but the new home would exceed the Town's height limit, while the original was conforming as to height. The Appeals Court ruled that the logical interpretation of the first and second sentences of G.L. c.40A, §6 requires the statute to be construed "to allow the extension of existing nonconformities upon a showing of no substantial detriment, but to require a variance for the creation of any new nonconformity." Deadrick, at 553.

In reaching this conclusion, the Appeals Court noted the inequity and logical inconsistency that would result from interpreting G.L. c.40A, §6 to allow a landowner with a nonconforming structure to create a new nonconformity with only a "finding" or special permit under G.L. c.40A, §6, but would require a neighboring landowner with a conforming structure to obtain a variance to create an identical nonconformity. Deadrick, at 553. Requiring a variance for the creation of new nonconformities is consistent with the long-standing policy, most recently stated in Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852, 859 (2005), that "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases."

The result of the Deadrick decision is that no distinction should be drawn between nonconforming single- and two-family dwellings (to which the second-except clause applies) and other residential and non-residential structures with respect to the creation of new nonconformities. All nonconforming structures, regardless of residential classification, will require a variance when a proposed alteration, reconstruction, extension or structural change will result in the creation of a new nonconformity.

If you have further questions concerning the implications of the Deadrick decision, please contact Attorney Joel Bard or Attorney Katherine Laughman at [jbard@k-plaw.com](mailto:jbard@k-plaw.com) or [klaughman@k-plaw.com](mailto:klaughman@k-plaw.com), respectively, or at 617-556-0007.

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**for the planning board for the February 24th meeting**

1 message

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**Martha Terry** <marthaterry25@gmail.com>

Fri, Feb 21, 2025 at 2:49 PM

To: Anne Capra <acapra@southhadleyma.gov>

Cc: Lisa Wong <LWong@southhadleyma.gov>, Martha Terry <marthaterry25@gmail.com>

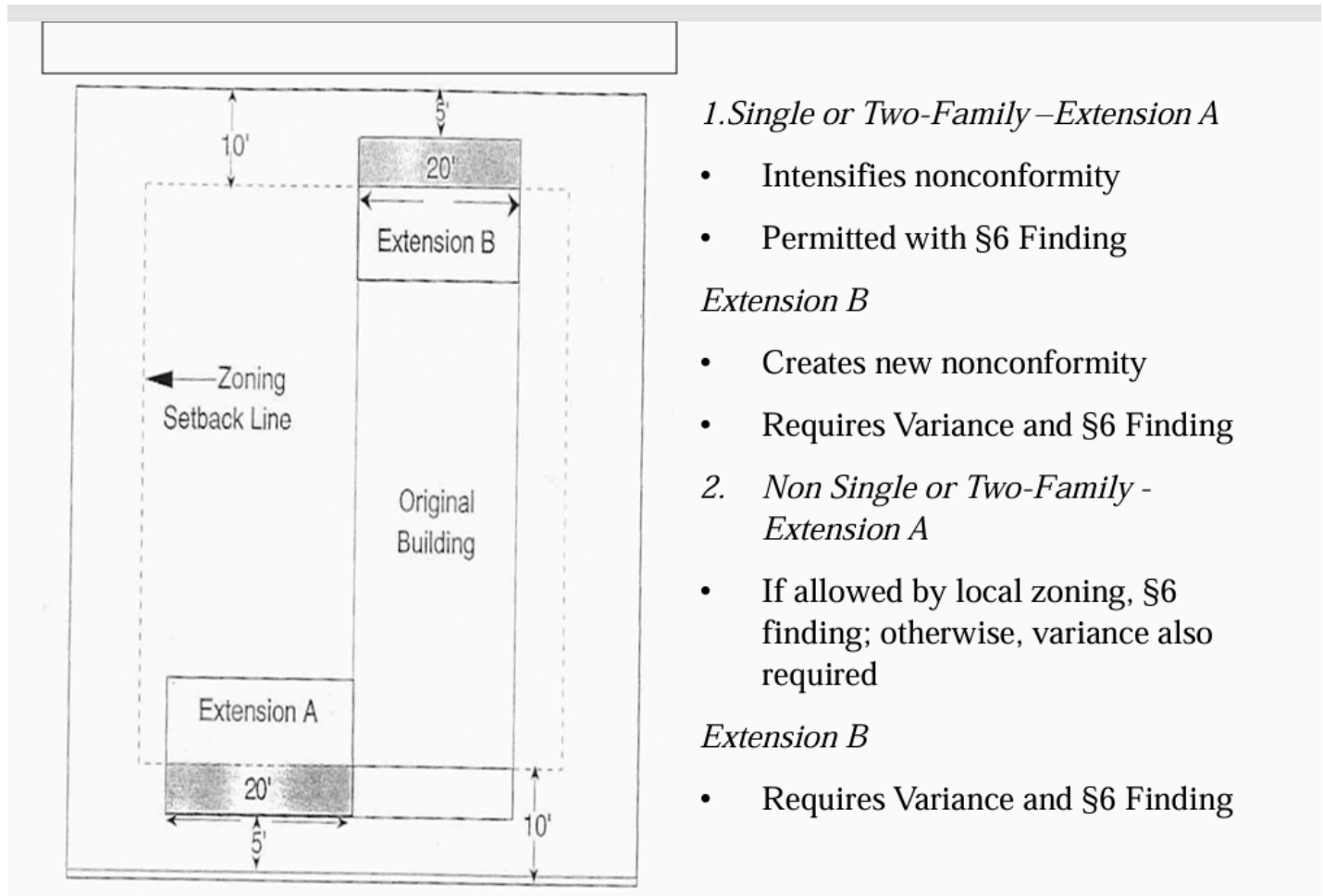
Dear Anne,

Please include these in the correspondence to the PB for the next meeting, Monday, February 24th.

Also I will be speaking during the Open Comment Period.

Thank you,

Martha Terry



*1. Single or Two-Family – Extension A*

- Intensifies nonconformity
- Permitted with §6 Finding

*Extension B*

- Creates new nonconformity
- Requires Variance and §6 Finding

*2. Non Single or Two-Family - Extension A*

- If allowed by local zoning, §6 finding; otherwise, variance also required

*Extension B*

- Requires Variance and §6 Finding