

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 07-P-1255

PETER K. FREI

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vs.

PLANNING BOARD OF HOLLAND.

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Pending in the Superior

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Court for the County of Hampden

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Ordered, that the following entry be made in the docket:

The judgment is vacated,  
and a new judgment shall  
enter directing the  
planning board to endorse  
the plaintiff's  
application for ANR  
status for his plan.

By the Court,

*Lena M. Wong*, *Asst*  
Clerk

Date June 27, 2008.

**NOTE:**

The original of the within rescript  
will issue in due course, pursuant  
to M.R.A.P. 23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-1255

PETER K. FREI

vs.

PLANNING BOARD OF HOLLAND.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals the denial of his petition for a writ of mandamus, in which he sought an order directing the town of Holland's planning board (board) to grant a constructive endorsement of his application for an "approval not required" (ANR) status for his plan under G. L. c. 41, § 81P.<sup>1</sup>

We conclude that this case is similar in all material aspects to Kupperstein v. Planning Bd. of Cohasset, 66 Mass. App. Ct. 905 (2006). Specifically, Kupperstein, applying the well-established law of mandamus relief, concluded that the language of § 81P concerning constructive endorsements is mandatory, and that the judge's exercise of discretion in denying mandamus

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<sup>1</sup> This court, in an unpublished decision pursuant to rule 1:28, addressed an earlier appeal in this case, but did not reach the merits of the issue that is currently before us. Frei v. Planning Bd. of Holland, 70 Mass. App. Ct. 1115 (2007). Rather, we affirmed a single justice decision denying the plaintiff's request for a stay of judgment based on his failure to demonstrate any irreparable harm that would flow from waiting to perfect his appeal on the merits. Now that he has perfected his appeal, we reach the merits of his claim.

despite the plaintiff's entitlement to a constructive endorsement constituted error. Id. at 905-906. Here, as in Kupperstein, the judge found that the plaintiff was entitled to a constructive endorsement of the application for ANR status with respect to his plan. The board does not appeal the finding that the plaintiff was so entitled, and that finding is supported by the record. Given that the plaintiff was entitled to a constructive endorsement, the judge erred in exercising discretion with respect to the mandamus action.

We decline to consider the plaintiff's request for "clarification" as to the allowance of a voluntary dismissal of some, but not all, remaining portions of his complaint. If there is a live portion of the complaint remaining, that issue is best resolved in the trial court. Furthermore, as the board prevailed below, we decline to allow attorney's fees or double costs as requested by the plaintiff.

The judgment is vacated, and a new judgment shall enter directing the board to endorse the plaintiff's application for ANR status for his plan.

So ordered.

By the Court (Rapoza, C.J.,  
Graham & Meade, J.J.),

*A. M. Hong*  
Clerk

Entered: June 27, 2008.