

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

Superior Court Department  
Civil Action No.: 08-843

PETER K. FREI, )  
Plaintiff )

v. )

TOWN CLERK, PLANNING BOARD, )  
and ZONING BOARD OF APPEALS, )  
of the Town of Holland, )  
Defendants )

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION TO DISMISS

I. PROCEDURAL HISTORY

On or about March 20, 2006 the Zoning Board of Appeals for the Town of Holland ("ZBA") issued a decision granting a special permit to allow a common driveway. (Ex. 4 to Complaint). The decision was issued following a public hearing conducted on March 7, 2006. The approval was granted subject to certain conditions. Pursuant to Massachusetts General Laws, c. 40A § 17, an appeal by any person aggrieved by the decision must have been brought by April 10, 2006, which is twenty (20) days following the date of the filing of the notice of decision.

On or about March 4, 2008, the Plaintiff filed two purported requests to enforce the zoning laws pursuant to G.L. c. 40A, § 7. The Plaintiff does not provide any explanation as to his failure to file a timely appeal in 2006.

On or about March 4, 2008, nearly two (2) years following the decision of the ZBA, the Plaintiff filed two (2) requests to order enforcement of the zoning laws purportedly pursuant to G.L. c. 40A, § 7. By letter dated March 17, 2008, the Building Commissioner/Zoning Officer denied the Plaintiff's requests specifically referencing to the special permit issued by the ZBA as the basis for his denial.

On or about March 31, 2008, the Plaintiff attempted to file appeals of the denials by the Zoning Officer. The attempted appeals were not accompanied by either the One Hundred Sixty-Five (\$165.00) Dollar filing fee or the procedure sheet as required by the ZBA procedures. The Plaintiff was notified of his failure to properly file his appeal.

On or about May 27, 2008, which was seventy-one (71) days following the denial by the Zoning Officer, Plaintiff attempted to pay the required filing fee which was to accompany his appeal. Plaintiff never made any effort to file the required procedure sheet. His appeal was rejected as untimely and the check was returned to the Plaintiff.

On May 22, 2008, the Plaintiff was advised by the ZBA that his petitions for appeal were not properly filed. (Ex. 12 to Complaint). On July 1, 2008 the Plaintiff was further advised by the ZBA that any appeal had not been filed in a timely fashion. (Ex. 14 to Complaint).

On July 17, 2008, the Plaintiff filed notices of constructive appeal with the Town Clerk. The filing of such notices was beyond the one hundred (100) day period by which any hearing on the denial by the Zoning Officer would be conducted.

On or about September 2, 2008, this cause of action was initiated. Plaintiff has failed to timely file this matter and further has failed to file the required affidavit of service with this Court within twenty-one (21) days of the entry of the complaint as required by G.L. c. 40A, § 17, which constitutes an independent bases for dismissal.

## **II. LEGAL ARGUMENT**

### **A. The Plaintiff Lacks Standing To Bring This Cause Of Action.**

Standing as a "person aggrieved" is a jurisdictional requirement in a proceeding to challenge special permits and approvals under Mass. General Laws, c. 40A, § 17 and the Subdivision Control Act, G.L. c. 41, § 81BB. See *Green v. Board of Appeals of Provincetown*, 404 Mass. 571, 574, (1989); *Rattner v. Planning Bd. Of W. Tisbury*, 45 Mass. App. Ct. 8, 10 (1998)' *Watros v. Greater*

*Lynn Mental Health & Retardation Assn.*, 421 Mass. 106, 108-109 (1995).  
Decisions derived under the Zoning Act, G.L. c. 40A, § 17 provide guidance as to who is a person aggrieved in the subdivision context. *Rattner, supra*, at 10.

To have standing the Plaintiff must suffer "some infringement of [a] legal right [ ]." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). The infringement must cause an injury particular to the plaintiff, and not merely a concern general to the community. See *Bell v. Zoning Bd. of Appeals of Gloucester*, 429 Mass. 551, 554 (1999); *Harvard Square Defense Fund, Inc., v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989). To qualify for that limited class of persons aggrieved, "a plaintiff must establish - by direct facts and not by speculative personal opinion - that his injury is special and different from the concerns of the rest of the community. He must show that his legal rights have been, or likely will be, infringed or his property interests adversely affected." *Barvenik v. Board of Aldermen of Newton*, 33 Mass.App.Ct. 129, 131-133 (1992) (footnotes omitted), abrogated on other grounds by *Marashlian, supra*. "Even when positing legitimate zoning-related concerns, including possible vehicular traffic increases, anticipated parking problems, and the potential for litter, a plaintiff must nonetheless offer more than conjecture and hypothesis." *Id.*

There is a rebuttable presumption of standing given to certain abutters who are entitled to notice of the public hearing under G.L. c. 40A, § 11. That class of persons consists of "abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list." It is undisputed that Plaintiff does not qualify in the class of owners entitled to the presumption under c. 40A, § 11. In fact, Plaintiff's property is located several miles away from the Johnson lot. Thus, "the presumption disappears and the question of standing will be determined on all the evidence without benefit to the abutter from the presumption." *Denneny v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 212 (2003).

Once standing is challenged, “the plaintiff must put forth credible evidence to substantiate his allegations.” *Marashlian v. Zoning Bd. Of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). The plaintiff’s evidence “must be more than unsubstantiated claims or speculative personal opinions.” *Denneny, supra* at 212. Although Plaintiff fails to allege any legitimate zoning concerns, courts have routinely denied standing to appeal zoning permits when posited on generalized notions of aesthetics, noise, traffic, and “quality of the neighborhood.” See *Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 493 (1989). “Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.” *Barvenik*, 33 Mass.App.Ct. at 131-133. Nor are general concerns of impacts to the neighborhood sufficient to confer standing. *Bell*, 429 Mass. at 554; *Harvard Square Defense Fund, supra*. “Mere inconvenience” to the plaintiff, when others in the community are similarly affected by increased traffic, is not sufficient to confer standing. *Nickerson*, 53 Mass. App. Ct. at 683-684 (plaintiff’s hardship of maneuvering through increased traffic “not substantially different” from that of other members of community).

Plaintiff completely fails to allege any particularized injury to himself or his property caused by the issuance of the special permit and approvals to the Johnsons in this matter. There is no allegation that the approvals given to the Johnsons have any legitimate zoning relating impacts on him as a private property owner. Nor can there be as Plaintiff’s property is located miles away from the Johnson property. Simple logic dictates that given the distance between the two properties, there can be zero zoning related impacts on Plaintiff’s property. While Plaintiff does allege some sort of underlying corruption in the issuance of the permits by town officials, these are not concerns qualifying him as being aggrieved under the zoning and subdivision laws. In sum, Plaintiff has failed to allege any facts establishing his legal standing in this action. For this reason, his complaint must be dismissed.

**B. The Complaint Should Be Dismissed As The Plaintiff Failed To Comply With Relevant Procedural Requirements.**

The complaint should be dismissed as the Plaintiff failed to comply with the following procedural and/or statutory requirements:

- failure to appeal the March, 2006 decision of the ZBA issuing the Special Permit;
- failure to properly and timely appeal the decision of the Zoning Officer by neglecting to pay the filing fee in the amount of One Hundred and Sixty-Five and no/100 (\$165.00) Dollars and to complete the Special Procedure form as required by the ZBA;
- failure to file a copy of the notice of appeal of the denial by the Zoning Officer, including the date and time of filing certified by the town clerk with the officer or board whose order or decision is being appealed as required by G.L. c. 40A, § 15;
- failure to file the affidavit that is required by G.L. c. 40A, § 17 which requires dismissal of this action; and
- failure to file this cause of action within twenty (20) days of any decision filed in the Clerk's Office as required by G.L. c. 40A, § 17.

Plaintiff's request to the Zoning Office in essence constitutes a challenge to the special permit which was granted by the ZBA in 2006. In fact the Zoning Officer expressly referred to and incorporated the 2006 decision of the ZBA in his denial of the Plaintiff's requests for enforcement. This cause of action and the attempted appeals which preceded this filing is in effect an attempt to appeal a decision issued in 2006. This cause of action is clearly beyond any applicable statute of limitations periods.

In *Murphy v. Planning Board of Hopkinton*, 70 Mass. App. Ct. 385, 389 (2007) the Appeals Court, quoting the motion judge, noted that the Subdivision Control Law "aims to establish clear procedures and time-frames for appealing planning board action." The policy underlying this standard is that parties

affected by planning board action should be able to rely upon those actions that have not been promptly challenged.

This policy should apply equally to the issuance of special permits. The Plaintiff was clearly aware of the 2006 decision as he relates a long history in his complaint. He offers no justification for failing to appeal that decision prior to construction. Nor does he offer any explanation for filing his requests for enforcement in 2008 which seek the extraordinary remedy of destruction of the structures.

Plaintiff's cause of action should also be dismissed as he failed to timely file his appeal of the Zoning Officer's decision as he failed to timely pay the filing fee and failed to complete and file the form required for appeals to the ZBA. Just as Plaintiff offered no justification for failing to timely appeal the decision of the ZBA in 2006, Plaintiff offers no explanation for failing to comply with the rules and regulations of the ZBA. The rules and regulations of the ZBA, the form required by the ZBA, and an affidavit of the Town Clerk confirming the documents associated with Plaintiff's complaint are attached hereto as Exhibits "1", "2", and "3", respectively.

In addition, Plaintiff was aware as early as May 22, 2008 that his petition for appeal was improperly filed and certainly had been fully advised on July 1, 2008 that any appeal had not been timely filed. Therefore, any cause of action should have been filed no later than July 21, 2008 and a notice of the action with a copy of the complaint should have been given to the town clerk no later than July 21, 2008 pursuant to G.L. c. 40A, § 17.

"Timely filing in court is a jurisdictional prerequisite in appeals from administrative decisions." *Calnan v. Planning Bd. of Lynn*, 63 Mass. App. Ct. 384, 389 (2005) citations omitted. Thus, courts have dismissed appeals for failure to comply with the notice requirement of G.L. c. 40A, § 17 despite the affidavit of counsel stating that the clerk misinformed him of the last day for appealing the decision. *Id* at 391. The Supreme Judicial Court refused to excuse a late filing by one day because "the public interest requires 'strict enforcement of statutory notice requirements.'" *Id.* citations omitted.

As of May 22, 2008 and certainly by July 1, 2008, Plaintiff knew that his appeal had not been timely filed and yet he delayed filing this cause of action. It is well established that "[f]ailures in meeting the twenty (20) day deadline are not forgiven." *Bingham v. City Council of Fitchburg*, 52 Mass. App. Ct. 566, 569 (2001) citations omitted.

In this case the Plaintiff has exhibited a complete disregard for appeal deadlines and procedures commencing with his failure to file an appeal following the 2006 decision and finishing with the late filing of this cause of action.

WHEREFORE, for the foregoing reasons, the Defendants respectfully move this Honorable Court to dismiss this matter in its entirety.

Respectfully submitted,

THE DEFENDANTS,  
BRIAN JOHNSON,  
AMY JOHNSON,  
CARL JOHNSON,  
KIMBERLY JOHNSON,  
By their attorney,

10/29/08 Joseph R. White (JES)  
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THE DEFENDANTS,  
TOWN OF HOLLAND,  
KRISTEN LaPLANTE,  
DONALD BEAL,  
SARTO CARON,  
CHRISTIAN PETERSON,  
DEBRA BENVENISTE,  
STEVE ROSS,  
LYNN ARNOLD,  
JOANNE MAY,  
CHRISTINE McCOOE and  
EARL JOHNSON, in their  
capacities as employees of the  
Town of Holland,  
By their attorney,

Tani E. Sapirstein  
Tani E. Sapirstein, Esq.  
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THE DEFENDANTS,  
ALBERT WEST, and  
RENEE THIBAUT,  
By their attorney,

~~Richard D. Vetstein (TES)~~  
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100 Front St.  
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Fax (508) 791-8502

Dated: October 28, 2008

**CERTIFICATE OF SERVICE**

Pursuant to Superior Court Rule 9A, I hereby certify that a true copy of the above document was served upon the following via first class mail, postage prepaid, to:

Mr. Peter K. Frei  
101 Maybrook Road  
Holland, MA 01521

Dated: October 28, 2008

  
\_\_\_\_\_  
Tani E. Sapirstein



A TRUE COPY

*Justin M. Halloran*  
ATTEST

**RULES AND REGULATIONS OF THE  
ZONING BOARD OF APPEALS  
OF THE TOWN OF HOLLAND**

The Zoning Board of Appeals is established under the provisions of Chapter 40A of the Massachusetts General Laws and is authorized by the Zoning Bylaw of the Town of Holland, under certain circumstances, to hear and determine appeals from decisions of certain officials affecting enforcement of the zoning bylaw, to grant variances pursuant to Section 10 of the Zoning Act (MGL, Ch. 40A, /10), and to grant certain special permits pursuant to provisions of the Zoning Bylaw.

1. The Building Inspector will initiate a Procedure Sheet. He will approve or disapprove the application. The Procedure Sheet will guide the applicant through the process of meeting the Town agencies necessary to complete the application. The Building Inspector will indicate on the sheet which agencies must be contacted. If the building application is disapproved because of existing bylaw(s), a proceeding before the Zoning Board may be started by filing a petition with the Town Clerk on a form provided by the Town Clerk.
2. The petition shall contain the following:
  - a. The name of the owner of record of the property to which the petition relates.
  - b. The name, address and telephone number of the petitioner and mailing address.
  - c. The Assessors' map, block and lot number of the property.
  - d. A brief description of the relief requested.
  - e. Detailed Building Plans showing all outside dimensions, proposed additions and/or alterations (8 copies).
  - f. A Plot Plan showing 4 visible corner pins. (8 copies). The Board reserves the right to ask for an Instrument Survey when it deems necessary. Mortgage plot plans are not acceptable.
  - g. A copy of a current Tax Bill. No hearing can be scheduled until all of the above information is complete.
- ✓ 3. The petitioner shall deposit with the Town Clerk \$165.00 (non-refundable) to cover the costs incurred in advertising, mailings and conducting a public hearing.
4. The Board's hearings will normally be conducted on Tuesday evenings at the Town Hall. Notice of all hearings will be posted at the Town Hall and the Republican at least two weeks before the hearing date.
5. Petitions and appeals will normally be scheduled for hearing at the first regular hearing date that will allow time for the required legal notice to be published and distributed.
6. At the public hearing the petitioner should submit all documents relied upon in support of the petition and should be prepared to present any testimony or argument in its support.
7. Technical errors in the wording of the petition concerning the form or relief requested does not justify withholding relief the Board finds the petitioner is entitled to based upon the facts known to the Board.
8. The Board may, in its discretion, adjourn any hearing to the next convenient hearing date in order to give the Board, petitioner or any other interested party time to present additional material.
9. The original petition and all documents submitted by the petitioner or by other interested parties and any other documents designated by the Board shall be included as part of the public record of the Board's proceedings.
10. The Board of Appeals will file with the Town Clerk a detailed record of its proceedings and its official actions with respect to each hearing after the decision is made. The Town Clerk date stamps the Appeals Board Decision. This date starts a 20-day period during which a Notice of Appeal may be received. Copies with the time of filing noted thereon will be delivered to the Board of Selectmen, the Planning Board, the Building Inspector, and other interested officials and will be mailed to the petitioner and, upon request, to other interested parties. After the 20-day waiting period, the petitioner will obtain from the Town Clerk the original signed and dated decision and present it to the Registry of Deeds, Hampden County. Return the proof of the Recorded Deed to the Building Inspector who will issue a building permit.

TOWN OF HOLLAND  
Variance/ Special Permit Application

This Form To Be Filed with the Town Clerk with Fee Payment of \$165.00

Date \_\_\_\_\_

TO THE ZONING BOARD OF APPEALS:

*The undersigned hereby petitions the Board of Appeals to vary the terms of the Zoning By-Laws of the Town of Holland*

in the following respect: due to a \_\_\_\_\_ non-conforming lot  
or \_\_\_\_\_ other reason please explain:

Please give Chapter and Section of the Zoning By-Laws for which a variance is requested:

*or any limitation, extension, change, alteration or modification of use, or method of use as may at the hearing appear as necessary or proper in the premises.*

For the following property: Street \_\_\_\_\_

Map & Lot Number \_\_\_\_\_

State Briefly Reason for Variance  
Attach Pertinent Plans & Drawings

**A TRUE COPY**  
*Justin M. Kallant*  
**ATTEST**

Property Owner \_\_\_\_\_

Petitioner \_\_\_\_\_

Address \_\_\_\_\_  
\_\_\_\_\_

Phone \_\_\_\_\_

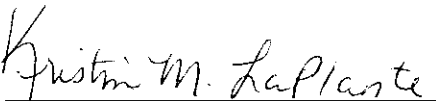
# EXHIBIT #3

## AFFIDAVIT

I, Kristin M. LaPlante, make the following statements under the pains and penalties of perjury:

1. I am the Town Clerk of the Town of Holland, Massachusetts, with offices at 27 Sturbridge Road, Holland, Massachusetts, and am the custodian of the records of that office.
2. I have made a diligent search of said records during the period November 1, 2003 to date, and find the only the following matters, including, but not limited to, complaints filed by Peter K. Frei of said Holland in any court and notices of appeal, relative to premises at Stafford Road, Holland, owned by Carl Johnson, Kimberly Johnson, Brian Johnson, and Amy Johnson, or any of them, involving decisions, determinations, or any actions of the Town of Holland Planning Board, Board of Appeals, Building Commissioner, and Zoning Officer:
  - A. Request for an order to enforce zoning laws, Lot 21, dated May 4, 2008.
  - B. Request for an order to enforce zoning laws, Lot 20, dated May 4, 2008.
  - C. Response of Building Commissioner/Zoning Officer re 166B Stafford Rd. dated March 17, 2008.
  - D. Response of Building Commissioner/Zoning Officer re 166 Stafford Rd. dated March 17, 2008.
  - E. Appeal from denial, Lot 21, dated March 31, 2008.
  - F. Appeal from denial, Lot 20, dated March 31, 2008.
  - G. Letter, Zoning Board to Mr. Frei dated May 22, 2008.
  - H. Letter from Mr. Frei to Zoning Board of Appeals dated May 29, 2008.
  - I. Letter, Zoning Board of Appeals to Mr. Frei dated July 1, 2008.
  - J. Notice of constructive approval dated July 15, 2008.
  - K. Notice of constructive approval dated July 17, 2008.
  - L. Letter from Mr. Frei to Town Clerk dated August 11, 2008.
  - M. Plaintiff's Verified Complaint, Peter K. Frei v. Town Clerk, et als, Hampden Superior Court Civil Action.
3. I further certify that the attached documents are true, exact, complete, and unaltered copies made by me from the documents listed above in my possession.

Signed under the pains and penalties of perjury this 7<sup>th</sup> day of October 2008.



KRISTIN M. LAPLANTE

Town Clerk

Town of Holland