COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Docket No. 2009-P-0827

PETER K. FREI
Plaintiff-Appellant
v.

TOWN CLERK OF HOLLAND et al.,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE HAMPDEN SUPERIOR COURT

APPELLANT'S BRIEF AND APPENDIX

Peter K. Frei,
pro se
101 Maybrook Road
Holland, MA 01521
(413) 245 4660

Explanation of Abbreviations

"Add."	Addendum reproduced after the text of the brief. Pages are numbered with two digits 01-15.
"A."	Appendix reproduced after the Addendum. pages are numbered with three digits 001-092.
"PBH"	Planning Board of the town of Holland.
"ZBA"	Zoning Board of Appeals of the town of Holland.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTION PRESENTED FOR REVIEW

After Frei's appeal became constructively granted pursuant to G.L. c.40A, s.15 and no appeal was filed under section 17 appealing the constructive grant, did the Superior Court err dismissing Frei's action for lack of standing since the constructive grant is not pegged to any standing requirement under the General Laws?

PRIOR PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On September 2, 2008, Peter K. Frei (Frei) filed a complaint in the Hampden Superior Court seeking a writ of mandamus ordering the town clerk of Holland to issue the certificate of finality on the constructive grant of Frei's appeal. A. 007. The Zoning Board of Appeals (ZBA) failed to take action on Frei's appeal which appealed the denial of his two requests for enforcing orders by the zoning enforcing officer, G.L. c.40A, s.15. A. 037-040. Frei's complaint is also seeking declaratory relief pursuant to G.L. c.231A and M.R.Civ.P. 57.

On November 17, 2008, the town filed its rule 12(b)(6) motion to dismiss Frei's complaint, claiming Frei has no standing to bring this action. A. 070.

On January 29, 2009, the Superior Court granted the town's motion to dismiss and issued its final judgment on February 19, 2009. Add. 01, A. 088-090.

Frei filed a timely appeal on March 10, 2009. A. 090.

STATEMENT OF THE FACTS

Earl Johnson, defendant to this suit, was at relevant times simultaneously member of the Board of Selectmen, member of the Planning Board (PBH), and member of the Board of Assessors in the town of Holland.

The property (Johnson-parcel) subject to this suit was formerly town property conveyed on December 22, 1980 to Earl Johnson's mother in law in deed book 5049, page 455. Earl Johnson was co-signor of the deed in his function as selectman. Earl Johnson has three sons, Brian, Carl and Eric, all of whom have been transferred a lot divided off the Johnson-parcel.

Eric Johnson was the subsequent owner of the Johnson-parcel on December 16, 2003, when the ZBA held a public hearing "on the application for a special permit for the replacement of an old structure with a new home on a non-conforming lot as provided by section 7.0 of the Holland Zoning By-Laws."

The ZBA granted grandfather status pursuant to G.L. c.40A, s.6 (Add. 02) for the landlocked Johnson-

parcel solely based on a structure that allegedly existed according to tax bills from the 1850s. A. 021.

Eric Johnson subsequently constructed a dwelling on the Johnson-parcel based on the special permit granted by the ZBA. A. 019-021. The dwelling is shown in the upper right side in the photograph showing an aerial view of said Johnson-parcel. A. 024.

Gibson conveyed his adjoining parcel (Gibson-parcel) to Eric Johnson on February 24, 2004 in deed book 13995, page 74.

On February 7, 2006, Eric Johnson applied for a special permit with the PBH. A. 025.

The PBH unanimously granted Eric Johnson's special permit for a common driveway. A. 031.

The PBH granted the special permit for a common driveway for his ANR plan (A. 033) before the ANR plan was endorsed by the PBH during the same public meeting. A. 031.

On April 27, 2006, Eric Johnson conveyed one of the lots of his "ANR" to his brother Brian, deed book 15889, page 315, and the third lot to his brother Carl, deed book 15889, page 317.

Carl Johnson thereafter built a dwelling on his lot.

Carl Johnson's dwelling is shown in the upper left in the photograph showing an aerial view of said Johnson-Gibson-parcel. A. 024.

On March 4, 2008, Frei started his case by filing two separate requests to enforce the zoning laws with the town clerk and the building inspector/zoning enforcing officer pursuant to G.L. c.40A, s.7. A. 034-036. He also filed all other required documents following proper procedures, c.40A, section 7 (Add. 05), section 8, and section 15. A. 037-069.

Frei is a permanent resident of Holland and a citizen of the U.S. He is not an abutter to the Johnson- or Gibson-parcel subject to this suit.

ARGUMENT

Because the constructive grant provision of G.L. c.40A, s.15 is not pegged to any standing requirements under the General Laws, the Superior Court abused its discretionary powers by dismissing Frei's action for lack of standing.

The convoluted statutory scheme of G.L. c.40A, section 7, section 8, and section 15 required Frei to file multiple documents in a timely fashion. The lower court's ruling did not find any error with Frei's procedure filing the required documents. There is therefore no need to repeat the procedure Frei

meticulously followed and already described in detail in his complaint. A. 007. The filed documents are attached as exhibit 6-19 to the complaint. A. 033-058.

Whereas here, a local board fails to act within one hundred days, the Legislature crafted a single, mandatory remedy: "Deemed" grant of the appeal. G.L. c.40A, s.15 is unambiguous on this point:

> The board of appeals shall hold a hearing on any appeal, application or petition within sixty-five days from the receipt of notice by the board of such appeal . . . The decision of the board shall be made within one hundred days after the date of the filing of an appeal . . . Failure by the board to act within said one hundred days or extended time, if applicable, shall be deemed to be the grant of the appeal, application or petition. Add. 07.

This language leaves no wiggle room. The repeated use of the mandatory word "shall" means just one thing: Failure by the board to act within said one hundred days shall be "deemed" or grant of the appeal.

The judge's view that it is necessary "assessing the 'standing' status" of Frei ignores the plain language of the statute itself. Add. 01.

Accordingly, other than a constructive grant of his appeal, Frei has no other available or adequate remedy.

This court correctly upheld a lower court's grant of a constructive approval of an appeal in Cameron v. Board of Appeals of Yarmouth,[1] 23 Mass.App.Ct. 144 (1986). In Cameron the ZBA of Yarmouth failed to file their decision in a timely fashion. This court opined:

> We perceive no reason why the failure of the board […] to file its decision with the town clerk in timely fashion may not be treated as a "constructive" approval of the appeal of those who sought relief from the board […]. Id. at 148.

As here, the plaintiffs in Cameron appealed the denial by the building inspector of their request for an enforcing order.

---

[1] Cameron Id. was overruled by Uglietta v. City Clerk of Somerville, 32 Mass.App.Ct. 742 (1992) on other grounds. In Cameron, the parties appealing the enforcing order failed to notify interested parties of the constructive grant of their appeal as required under section 15. Frei satisfied this notification requirement and mailed the notice as mandated under section 15. A. 051-057. Uglietta was distinguished by Town of Scituate v. Bjorklund, 2005 WL 1618789 (Mass. Land Ct., 2005). The Land Court made the finding in Town of Scituate v. Bjorklund that conducting the mandated hearing on the 66th day instead on the 65th day does not effectuate a constructive approval since the mandatory remedy of a constructive approval is only pegged to "failure to take final action." This difference is irrelevant in Frei's action because not only did the ZBA altogether fail to hold a public hearing, they also failed to take final action within the prescribed one hundred days, section 15. This Land Court case involves section 9, whereas Frei's action involves section 15. Both sections provide a mandatory constructive grant provision.

The purpose of the constructive grant provision of section 15 "is to induce the board to act promptly." Capone v. Zoning Bd. of Appeals of Fitchburg, 389 Mass. 617, 623 (1983), citing Noe v. Board of Appeals of Hingham, 13 Mass.App.Ct.103, 110 (1982).

The legislature provided in its language of section 17 to aggrieved parties the right to appeal a constructive grant to prevent a potential hardship; section 17 provides in part:

> Any person aggrieved by . . . the failure of the board of appeals to take final action concerning any appeal . . . may appeal . . . by bringing an action within twenty days . . . Add. 09.

As required in section 15, Frei filed the necessary documents and informed all of the 24 interested parties of their right to appeal the constructive grant of his appeal pursuant section 17. A. 051-057, par. 83-87.

None of the 24 notified defendants or other interested parties filed an appeal pursuant section 17 appealing the constructive grant of Frei's appeal.

After Frei's constructive grant became final, the statute commands the Town Clerk to issue a

certificate to that effect, "and such certificate shall be forwarded to the petitioner." G.L. c.40A, s.15 is unambiguous on this point:

> The petitioner who seeks such approval by reason of the failure of the board to act within the time prescribed shall notify the city or town clerk, in writing, within fourteen days from the expiration of said one hundred days or extended time, if applicable, of such approval and that notice has been sent by the petitioner to parties in interest. The petitioner shall send such notice to parties in interest, by mail and each notice shall specify that appeals, if any, shall be made pursuant to section seventeen and shall be filed within twenty days after the date the city or town clerk received such written notice from the petitioner that the board failed to act within the time prescribed. After the expiration of twenty days without notice of appeal pursuant to section seventeen, or, if appeal has been taken, after receipt of certified records of the court in which such appeal is adjudicated, indicating that such approval has become final, the city or town clerk shall issue a certificate stating the date of approval, the fact that the board failed to take final action and that the approval resulting from such failure has become final, and such certificate shall be forwarded to the petitioner. Add. 07.

Advised by town counsel, the Town Clerk refused to issue the mandated notice certifying the finality of the grant of Frei's appeal of his two separate requests for, "the removal, dismantling, or demolishment of the dwelling."

The defendants habitually "solve" purported improprieties by inaction. While town officials deny members of the community who are critical of the government their rights, they grant themselves benefits that are clearly outside the law. Frei was recently forced to go through the motions and expense of a sure-fire appeal and waste judicial resources, everyone's time and money to get a simple "approval not required" (ANR) plan endorsed. Peter K. Frei v. Planning Board of Holland et al., 2007-P-1255.

Disagreement with the statutory policy of the constructive grant provision is again —— as in Frei's last suit —— at the heart of the judge's decision in favor of the town. Where mandamus is "the only effective remedy" for securing an absolute legal right, a judge is "not justified in refusing the writ on discretionary grounds," and his grant of the town's rule 12(b)(6) motion is "arbitrary" as a matter of law. Massachusetts Soc. Of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601, 605-606 (1953). "To deny the writ in such cases is to quarrel with the policy of the law which creates the right." Id. at 605.

Frei has a legal right to the mandamus and declaratory relief he is seeking.

In a recent case whereby a house was in violation of provisions under G.L. and zoning by-laws, this Court upheld a Superior Court Judge's decision:

> [W]e have no occasion to disturb the judge's order for final judgment and . . . order[ed] that the house and foundation constructed on the land of the Bear Hill trustees be removed and that the site be restored as nearly as practicable to its undeveloped state.

Wells v. Zoning Bd. of Appeals of Billerica, 68 Mass App. Ct. 726, 737 (2007). This court upheld the lower court's decision despite the defendant's complaint that the Judge's order, to "order that the house be removed is 'draconian,'" Id. at 737.

The issue of standing

The constructive grant provision included in section 15 is not pegged to the standing requirement of section 8 or to any other standing requirements.

The following argument is therefore superfluous in Frei's opinion.

The Superior Court judge granted the town's rule 12(b)(6) motion stating, "(There is required) some infringement (that) must cause an injury particular to the plaintiff and not merely a concern general to the community," citing Bell v. Zoning Board of Appeals of Gloucester, 429 Mass. 551, 554 (1999). Add. 01.

The lower court errs, In Bell, this court considered Bell's standing requirement pursuant to section 17. Bell appealed the constructive approval of a permit to the Superior Court.

In Frei's case, no such appeal was filed. The constructive approval of Frei's appeal went unchallenged. Frei himself had no reason to appeal the constructive grant to the Superior Court. Section 17 does therefore not apply to Frei's case.

Frei's appeal to the ZBA was pursuant to section 8, which provides in part:

> An appeal to the permit granting authority . . . may be taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative officer under the provisions of this chapter . . . or by any person aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder. Add. 06.

Section 8 defines the reason a person is aggrieved in plain English, "aggrieved by reason of his inability to obtain a permit or enforcement action, . . ."

Frei was also "aggrieved by an order or decision of the inspector of buildings, or other administrative official, in violation of any provision of this chapter or any ordinance or by-law adopted thereunder."

There is **nothing** in any provision under the G.L. or the Holland by-laws that would require Frei to be an aggrieved party as defined under section 17.

However, Frei could even meet the threshold for "person aggrieved" outlined in section 17, and here is why:

Permit granting authorities have the power to vary the terms of local zoning by-laws or ordinances

to remedy hardships of individual landowner's pursuant to G.L. c.40A, s.10. These Boards do not have the authority to grant one of their own permits outside the General Laws of Massachusetts. Section 10 provides in part:

> The permit granting authority shall have the power . . . to grant upon appeal or upon petition . . . a variance from the terms of the applicable zoning ordinance or by-law […]. Add. 06.

Permits issued or denied based on discretionary decisions by permit granting authorities —— as well as constructive grants —— can be appealed pursuant section 17. Courts hear and decide such appeals de novo applying equitable principles.

To file an appeal under section 17, the well settled law restricts standing to claim status as an "aggrieved person" —— in most cases —— to abutters, and rightfully so.

Whereas here, the permit granting authorities did not vary the terms of their own by-laws; instead, they granted one of their own repeatedly —— by anonymous vote —— permits outside the provisions of G.L. This conduct by officials violates each individual's right

to be governed by law abiding elected or appointed officials, officials who are free of corruption.

The ZBA granted the replacement of a non-existing dwelling[2] and the PBH endorsed an Approval Not Required plan[3] (ANR) that created lots without frontage.

The unlawful conduct by the involved town officials is so egregious and beyond the usual nepotism and cronyism found in small towns throughout New England that there is no case law that would even come close to the abuses of official power documented in Frei's case.

---

[2] It is unlawful to confer pre-existing non-conforming status to an undeveloped parcel of land based on a dwelling that allegedly existed on the parcel 100 years ago. Equally unlawful is it to allow the reconstruction of a nonexistent dwelling based on a local by-law that allows the reconstruction of a pre-existing nonconforming structure. If there would have been a structure, the structure itself would have been conforming as the 12 acre plus Johnson-parcel was more than sufficient in size; the problem is that the parcel had, and still has, no frontage. A none-conforming parcel is required to have at least 50 feet of frontage, G.L. c.40A, s.6. The undeveloped parcel had not one foot of frontage; in fact the parcel was landlocked.

[3] The subsequent endorsement of an Approval Not Required (ANR) plan by the PBH creating three buildable lots, none of which had one single foot of frontage, is equally unlawful, G.L. c.41, section 81L (Add. 12), and section 81P (Add. 14). All three created lots have no frontage at all.

Frei can not think of a better or other way to fight corruption than to expose it.

The Bill of Rights of the Constitution of the Commonwealth of Massachusetts grants Frei a constitutional right to do so.

Article V:

> All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

Article VII:

> Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

To be aggrieved (under section 17) a person must assert "a plausible claim of a definite violation of a private right, a private property interest, or a private legal interest." Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge, 27 Mass.App.Ct. 491, 492-493 (1989).

Frei is “aggrieved” by the unanimous illegal actions by the members of involved Boards and is entitled to standing under Article V and VII.

Whereas here, officials stray from the duties they swore to lawfully perform and instead grant each other and themselves permits outside the law, it is not only the right of each citizen to stop such illegal conduct; it is each citizen’s duty to do so.

Corruptibility is a matter of humans' having choice of volition. Corruptibility is the reason people institute governments in the first place.

The purpose for which courts are established is to do justice. A fundamental principle of free institutions was stated by Hamilton in these words:

> Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be attained or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger.

The Federalist (Ed. 1864) No. 51, p. 401.

CONCLUSION AND RELIEF SOUGHT

The strict constructive grant requirement mandated in section 15 by the legislature is impervious to judicial discretion. Section 15 prescribes a full and adequate legal remedy for the factual circumstances of this case.

The Superior Court's order dismissing Frei's action is a miscarriage of substantial justice. Frei has a legal right to the relief he is entitled to by the unambiguous language of section 15.

Denying Frei his statutory right to the constructive grant would reward the officials for their illegal activity and promote corruption.

Frei requests that the Superior Court's judgment be vacated and the case remanded for further proceedings.

Peter K. Frei
Appellant pro se

Certificate of Compliance

I certify that this brief complies with the rules of court that pertain to the filing of briefs.

Peter K. Frei

Certificate of Service of Service

I, Peter K. Frei, certify that I served two copies of the foregoing Appellant's Brief with Appendix, on this 26th day of May 2009, per first class mail, postage prepaid to the following recipient:

Tani E. Sapirstein, Esq.
at Sapirstein & Sapirstein, P.C.
1350 Main St., 12 Floor
SPRINGFIELD, MA 01103

Joseph R. White, Esq.
3 Converse St., Ste. 104
PALMER, MA 01069

Richard D. Vetstein, Esq.
Mirick, O'Connell, DeMallie & Lougee, LLP
100 Front St.
WORCESTER, MA 01608

Peter K. Frei

ADDENDUM