

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX, SS.
Case No. FAR 18771

PETER K. FREI
Plaintiff-Appellant
v.

TOWN CLERK OF HOLLAND et al.,
Defendants-Appellees

Application for Further Appellate Review
Of Appeals Court Case No. 2009-P-0827

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

Explanation of Abbreviations

- "Add.FAR." Addendum attached to this Application for Further Appellate Review. Pages are numbered with two digits 01-07.
- "Add." Addendum to Frei's Brief filed in the Appeals Court and reproduced after the text of his brief. Pages are numbered with two digits 01-15.
- "A." Appendix to Frei's Brief filed in the Appeals Court and reproduced after the Addendum in said Brief. 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

Explanation of Abbreviations..... ii

TABLE OF AUTHORITIES..... iv

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW. 1

STATEMENT OF PRIOR PROCEEDINGS..... 2

STATEMENT OF THE FACTS RELEVANT TO THE APPEAL..... 4

STATEMENT OF POINTS..... 7

ARGUMENT IN SUPPORT OF FURTHER APPELLATE REVIEW..... 9

1. Public Officials are at all times accountable to the people. Frei is one of the people.9

2. The public has a right to know the truth of Johnson's and other involved official's 20 year illegal property scheme that culminated in the erection of two dwellings without frontage.11

3. Corruption is not only of interest to the public, it is the Courts' obligation to expose it by upholding the rule of law, and thus, prevent corruption perpetrated by elected officials holding public office.12

4. Frei exhausted all prescribed administrative remedies in a timely fashion and is entitled to the constructive grant of his section 8 appeal, mandated by the Legislature pursuant section 15.13

5. The Appeals Court abused its discretion by failing to vacate the lower court's erroneous dismissal of Frei's complaint. This Honorable Court now has jurisdiction over the matter.17

CONCLUSION AND RELIEF SOUGHT..... 17

Certificate of Compliance.....	18
Certificate of Service.....	19
ADDENDUM.....	20

TABLE OF AUTHORITIES

Cases

<i>Bingham v. City Council of Fitchburg</i> , 52 Mass. App. Ct. 566 (2001)	15
<i>Iodice v. Newton</i> , 397 Mass. 329, 333 (1986).....	15
<i>Lord v. Board of Appeals of Somerset</i> , 30 Mass. App. Ct. 226 (1991)	16

Statutes

G.L. c.211A, s.10(A).....	1
G.L. c.231A.....	3
G.L. c.40A, s.15.....	passim
G.L. c.40A, s.17.....	passim
G.L. c.40A, s.6.....	5
G.L. c.40A, s.7.....	passim
G.L. c.40A, s.8.....	2, 7, 9
G.L. c.41, s.81L.....	10
G.L. c.41, s.81O.....	10
G.L. c.41, s.81R.....	10

Other Authorities

Appeals Court Rule 1:28.....	14, 15, 20
Constitution of the Commonwealth, Bill of Rights, Article V	1, 10, 17
Constitution of the Commonwealth, Bill of Rights, Article VII	1, 11
M.R.Civ.P. 12(b)(6).....	3
M.R.Civ.P. 57.....	3
section 7.0 of the Holland Zoning By-Laws.....	5
The Federalist (Ed. 1864) No. 51, p. 401.....	13

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Peter K. Frei requests leave to obtain further appellate review because the issues presented will affect the public. Thirteen of the defendants in this case are elected public officials. The local press is covering the matter and the public has an interest and the right to know whether their elected officials perpetrated the alleged illegal acts.

The Legislature unequivocally mandates a legal remedy for Frei's request. The Lower Court abused its discretion by shortening the time limitation to file Frei's request to enforce the zoning laws from six years to two weeks and by further claiming Frei failed to file two documents he actually did file.

The interest of justice which will be affected is the right of all present and future parties to rely on the Massachusetts Declaration of Rights, specifically Article V and Article VII. This is a substantial reason bound to affect the public interest and the interests of justice, G.L. c.211A, s.10(A) par. 2 and 3.

The interest of justice will also affect future parties to rely on the constructive grant provision included in section 15, and the six year, respectively

ten year statute of limitation defined by the Legislator in section 7 of chapter 40A.

STATEMENT OF PRIOR PROCEEDINGS

March 4, 2008, Peter K. Frei (Frei) filed two requests with the building inspector to enforce the zoning laws of the zoning act C.40A and local zoning by-laws. Frei's request was pursuant section 7. A. 033-036.

March 17, 2008, the building inspector denied the two requests. A. 037-040.

March 31, 2008, Frei filed two appeals pursuant section 8 and section 15 with the Zoning Board of Appeals of the town of Holland (ZBA) appealing the building inspectors denials. A. 041-044.

July 4, 2008, Frei filed two required notices pursuant G.L. c.40A, s.7 with the Registry of Deeds. A. 049-050.

July 9, 2008, Frei's appeals pursuant section 8 became constructively granted due to the ZBA's failure to take action, section 15.

July 15, 2008, Frei notified all interested parties of the constructive approval, section 15. A. 051-055. Frei's notices informed interested parties of their opportunity to appeal his constructively granted appeal

and that such appeal would have to be filed pursuant section 17. A. 051.

July 17, 2008, Frei notified the town clerk of the constructive grant of his appeal. A. 056-057.

August 7, 2008, the town clerk confirmed that no appeals were filed pursuant section 17. A. 058.

August 11, 2008, the town clerk refused to issue the certificate of approval of Frei's constructive approval as mandated pursuant section 15. A. 058.

September 2, 2008, 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. 007-018. 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. Defendants' motion alleged other defects as well. A. 070-080.

On November 6, 2009, Frei filed his opposition to the town's rule 12(b)(6) motion. A. 081-087.

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.

The Appeals Court affirmed the Superior Court's dismissal on March 18, 2010, for another reason. Add.FAR. 01.

Frei filed a petition for rehearing on March 29, 2010.

STATEMENT OF THE FACTS RELEVANT TO THE APPEAL

See the facts (A. 007-018) in the Verified Complaint which Frei incorporates herein in its entirety.

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 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 one of the three selectmen.

Over the years, the property was conveyed several times within the Johnson family. Earl Johnson has three

sons, Brian, Carl, and Eric, all of whom ended up as owners of a part of 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 unanimously 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 alleged tax bills from the 1850s. A. 021.

Eric Johnson subsequently constructed a dwelling on the landlocked Johnson-parcel based on the special permit that was unanimously 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.

The Johnson-parcel thereafter was not landlocked any longer but still had no frontage.

On February 7, 2006, Eric Johnson applied for a special permit for a common driveway with the Planning Board of Holland (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 hearing. A. 031.

Other than the common driveway, the lots do not have any access and the lots have no frontage on a way.

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.

Not one of the three lots created by the ANR has one foot of frontage.

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 (Add. 06), 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.

STATEMENT OF POINTS

This case is not about an individual (Frei); this case is about corruption, corruption that is well above and beyond the usual favoritism of the "good old boy" culture prevalent in little towns throughout the North-East. This case is about thirteen town officials who repeatedly granted themselves permits in violation of the General Laws, thus breaking their oath of office and the trust of the community.

It is important not to lose sight of the fact that **the two dwellings in question were built by two sons of longtime selectman Earl Johnson, and that the two dwellings are in violation of provisions of the General Laws of the Commonwealth** and not (merely) local zoning bylaws. The third son of Earl Johnson, Brian Johnson, who is also the elected highway surveyor, is the owner of the third building lot without frontage. If this Honorable

Court fails to grant FAR, **a third dwelling without frontage will be built on this lot.**

The Courts have an obligation to protect democratic principles and the rule of law, especially when it affects an entire community.

In 2007, Frei's attempt to fight corruption by running for the seat on the PBH was blocked by the Board of Selectmen and other officials. During Frei's campaign, the Board of Selectmen repeatedly accused Frei at televised board meetings of financially ruining the town with his "frivolous" lawsuit, costing the town large sums of money. Frei's "frivolous" lawsuit was decided in his favor on appeal (case no: 2007-P-1255) long after misinformed voters re-elected the incumbent Christine McCooe, who is also one of the defendants in this action. After the Superior Court dismissed Frei's action, one of the selectmen claimed during an interview with a reporter that Frei's fight against corruption "intimidated people away from serving on town boards and committees." Southbridge Evening News, February 4, 2009, Add.FAR. 03.

It would be a tragedy for the community of Holland if the erroneous dismissal of Frei's action would go uncorrected. The corrupt town officials would reassure

Holland residents of their innocence and backup their claim with the erroneous Appeals Court ruling.

The Appeals Court clearly misapprehended Frei's course of action by falsely treating his action as an appeal pursuant section 17, instead of a request to enforce the zoning laws, section 7, and section 8.

Furthermore, Frei in fact actually filed the two documents appealing the building inspector's denials of his request in a timely fashion and not late as the three Appeals Court Justices claim.

ARGUMENT IN SUPPORT OF FURTHER APPELLATE REVIEW

1. Public Officials are at all times accountable to the people. Frei is one of the people.

As a member of his community, Frei was repeatedly forced to litigate against the tight knit small group of corrupt town officials of which many hold up to four offices at a time. While Earl Johnson arbitrarily refused to endorse two Approval Not Required (ANR) applications Frei submitted to the PBH in 2002, Earl Johnson illegally conveyed town owned property to his family. Thereafter, he illegally created a right of way to the landlocked parcel; he illegally subdivided the property into three "building lots"; and finally, he built two homes without the frontage required by G.L. c.41, section 81L, section

810, and section 81R. He also created a third "building lot" for his third son.

All necessary permits were issued by unanimous votes by his cronies sitting on the various involved Boards, and did so in total disregard of the laws.

Frei sacrificed his time and money and filed this action to expose Earl Johnson and thirteen other corrupt town officials. Informed voters would be given the opportunity to reject corruption at the polls and reinstate the rule of law at the town hall by electing law obeying candidates.

Furthermore, other members of the community would be spared having to endure future capricious actions by the corrupt officials named as defendants in this matter.

Other than helping the community, Frei has nothing to gain; his actions are following the spirit of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts:

Article V proclaims:

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.

2. **The public has a right to know the truth of Johnson's and other involved official's 20 year illegal property scheme that culminated in the erection of two dwellings without frontage.**

The Bill of Rights proclaims under 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.

In the media, which is covering this matter with interest, selectmen James Wettlaufer and Earl Johnson blame Frei of having "a political agenda," and of "tormenting people of Holland." Wettlaufer further called Frei one of the "biggest pains the town's got," and even made an implied threat:

Sooner or later they're [Frei and another outspoken individual] going to [mess] with the wrong person and we're going to have tragic consequences in the town.

Southbridge Evening News, February 4, 2009. Add.FAR.

03.

In another news article, Earl Johnson accused Frei of being "vindictive," and referred to Frei as a "dirt bag;" selectman Wettlaufer referred to Frei as a "moron."

The same news article further stated:

Wettlaufer later took the opportunity to criticize the media presence at the hearing [motion to dismiss], saying that coverage of such an event was 'aiding and abetting,' individuals attacking the town.

Southbridge Evening News, January 14, 2009,

Add.FAR. 02.

Defendant Brian Johnson, highway surveyor and son of Earl Johnson, called Frei during a chance encounter inside the town clerk's office a "scum bag," and "white trash." Add.FAR. 04-05.

Selectmen James Wettlaufer justified the behavior of Brian Johnson as his "right to freedom of speech," and sympathized with him stating, "we [the Board of Selectmen] understand them [Brian Johnson's actions]."

Add.FAR. 06.

A denial of FAR will publicly proclaim Frei to be the "whipping-boy" instead of holding elected officials responsible for their illegal actions.

3. Corruption is not only of interest to the public, it is the Courts' obligation to expose it by upholding the rule of law, and thus, prevent corruption perpetrated by elected officials holding public office.

Frei closed his Brief to the Appeals Court with quoting Hamilton:

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.

The pursuit of liberty akin to a civil society depends on a judiciary that doesn't look the other way if the executive branch is accused of corruption. It is imperative that voting individuals who form the society can depend on a functioning judiciary to make informed decisions at the polls. If the judiciary fails its people, corrupt town officials have nothing to fear and operate with impunity.

4. Frei exhausted all prescribed administrative remedies in a timely fashion and is entitled to the constructive grant of his section 8 appeal, mandated by the Legislature pursuant section 15.

Frei is entitled to the legal remedy the Legislature prescribed for his situation. There is no equity involved and no other remedy lies.

The Superior Court abused its discretion by ruling that Frei had no standing to file his mandamus action in Superior Court. The constructive grant provision the

legislature included in G.L. c.40A, s.15 is not pegged to any standing requirements as the Superior Court in error claimed.

The Appeals Court affirmed on other grounds.

The Panel of Justice (Kantrowitz, Green & Meade, JJ.) misconceived the nature of Frei's action and claimed his appeal was untimely, applying, in error, the twenty day time limitation included in section 17 for filing an appeal.

Frei's action was not a section 17 appeal, Frei filed a request to enforce the zoning laws pursuant section 7. The time limitation to file such a request is six years and not twenty days.

Frei then appealed the denial of his enforcing action. Frei's appeal to the building inspector was pursuant section 8 and not section 17.

The Appeals Court stated in its rule 1:28 Memorandum and Order:

We affirm the judgment of the Superior Court dismissing the plaintiff's complaint for the reason (among others) that the plaintiff's appeals to the defendant zoning board of appeals were untimely. The plaintiff in 2008 sought enforcement of the zoning laws against structures and uses authorized by two special permits issued in 2004 and 2006, respectively. Any challenge to either special permit was required to have been filed within twenty days after its issuance.

See G. L. c. 40A, § 17. Moreover, the plaintiff did not file an appeal from the letters denying his request for enforcement within thirty days following such denials, as required by G. L. c. 40A, § 15. Because he failed timely to pursue the denial of his requests for enforcement, the defendant zoning board of appeals was under no obligation to consider them, and the plaintiff accordingly is not entitled to an order mandating the defendant town clerk to issue a certificate of constructive grant. Timely commencement of an appeal is a jurisdictional requirement. See *Bingham v. City Council of Fitchburg*, 52 Mass. App. Ct. 566, 569 (2001). Furthermore, a plaintiff may not use an action seeking a declaratory judgment to circumvent the procedural requirements imposed by G. L. c. 40A, § 17. See *Iodice v. Newton*, 397 Mass. 329, 333-334 (1986).

Rule 1:28 Memorandum and Order. Add.FAR. 01.

The Appeals Court envisioned an action that was not before them. By mistake, the Appeals Court assumed that Frei had filed an appeal pursuant section 17.

However, Frei did not. Frei's action included an appeal pursuant section 8, appealing the building inspector's denial of Frei's requests to enforce the zoning laws under the General Laws and the local bylaws. Such enforcing requests pursuant section 7 can be filed within six years.

The Appeals Court recognized the prescribed six year limitation period of section 7 before correctly in *Lord*

v. Board of Appeals of Somerset:

The second paragraph of G. L. c. 40A, Section 7, as amended through St. 1987, c. 481, Section 1, contains two separate limitations periods for actions brought to redress zoning violations: the first, six years, applicable to actions complaining of structural violations or use violations if "real property has been improved and used in accordance with the terms of the original building permit"; the second, ten years, applicable to actions complaining of structural violations for which no permit was given. (The limitations period runs in each case from the commencement of the alleged violation.)

Lord v. Board of Appeals of Somerset, 30 Mass. App. Ct. 226, 227 (1991).

After erroneously claiming Frei failed to timely file his appeal - pursuant section 17 - the Appeals Court then erroneously claimed that Frei failed to appeal the denial of his "requests for enforcement."

The two alleged deficiencies pertain to two different courses of actions and defy logic in itself. The procedure to file a section 17 appeal does not include under any circumstances the appeal of a building inspector's denial of an enforcing request. An appeal pursuant section 8 does. Frei filed an appeal pursuant section 8. The procedural details to file a section 8 appeal are prescribed in section 15.

Frei in actuality timely filed his two documents appealing the building inspector's denial of his two requests as prescribe in section 15.

The allowed time to file these documents is 30 days. Frei filed the documents on the 14th day (March 31, 2008). The two letters are included in logical order as exhibit 10 (A. 041-042), and exhibit 11 (A. 043-044) in the Appendix to his brief.

5. The Appeals Court abused its discretion by failing to vacate the lower court's erroneous dismissal of Frei's complaint. This Honorable Court now has jurisdiction over the matter.

Article V of the Massachusetts Declaration of Rights refers to people. It guarantees accountability by people in all three branches of government. This Honorable Court must respect the explicit, unambiguous command of the Constitution, and must respect the people. This is why further appellate review is appropriate.

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 substantial miscarriage of 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 thirteen accused officials for their illegal activity, promote corruption, and leave the community in the false believe that town officials did no wrong.

Plaintiff-appellant Frei respectfully requests that his application for further appellate review be allowed.
Respectfully submitted

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

Certificate of Compliance

I certify that this application for further Appellate Relieve complies with the rules of Court that pertain to the filing of FAR requests.

Peter K. Frei

Certificate of Service

I, Peter K. Frei, certify that I served a copy of the foregoing application for further Appellate Relieve, on this 7th day of April 2010, in person to the following recipient;

Appeals Court of the Commonwealth
Clerk's Office
John Adams Courthouse
1 Pemberton Square
BOSTON, MA 02108-1705

and per first class mail, postage prepaid to the following recipients:

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

Memorandum and Order pursuant to rule 1:28.....01
Southbridge Evening News, January 14, 2009.....02
Southbridge Evening News, February 4, 2009.....03
Frei's letter to the Board of Selectmen.....04
Town of Holland, Board of Selectmen letter.....06