CLERK'S NOTICE	DOCKET NUMBER 1583CV00914	**Trial Court of Massachusetts** **The Superior Court**
CASE NAME: Daniel DaRosa et al vs. Mattapoisett Zoning Board of Appeals et al		Robert S. Creedon, Jr., Clerk of Courts
TO: Jonathan Silverstein, Esq. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110		COURT NAME & ADDRESS Plymouth County Superior Court - Brockton 72 Belmont Street Brockton, MA 02301

You are hereby notified that on 09/16/2016 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER:

For the foregoing reasons, it is hereby ORDERED that the Plaintiffs' Motion for Summary Judgment be DENIED and that the Defendants' Request for Entry of Summary Judgment pursuant to MRCP 56 (c) be ALLOWED

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
09/19/2016	**Hon. Raymond P Veary, Jr.**	**(508)583-8250**

CLERK'S NOTICE	DOCKET NUMBER 1583CV00915	Trial Court of Massachusetts The Superior Court
CASE NAME: Daniel G DaRosa et al vs. Susan Akin et al		Robert S. Creedon, Jr., Clerk of Courts
TO: Jonathan Silverstein, Esq. KP Law, P.C. 101 Arch Street 12th Floor Boston, MA 02110		COURT NAME & ADDRESS Plymouth County Superior Court - Brockton 72 Belmont Street Brockton, MA 02301

You are hereby notified that on 09/16/2016 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER:

For the foregoing reasons, it is hereby ORDERED that the Plaintiffs' Motion for Summary Judgment be DENIED and that the Defendants' Request for Entry of Summary Judgment pursuant to MRCP 56 (c) be ALLOWED
Copied from linked case: 1583CV00914

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
09/19/2016		(508)583-8250

SCV016_X1\ 08/2014

Date/Time Printed: 09-19-2016 11:33:35

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT
CIVIL ACTIONS NOS.
1583CV00914 and
158300915

DANIEL G. DAROSA, ET AL., [1]
Plaintiffs

vs.

MATTAPOISETT ZONING BOARD OF APPEALS, ET AL.,[2]
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' REQUEST FOR ENTRY OF JUDGMENT PURSUANT TO MRCP 56 (c)

INTRODUCTION

The plaintiffs, Daniel G. DaRosa and Laurie B. DaRosa, ("the DaRosas"), have appealed to this court pursuant to G.L. c. 40A, § 17 from two separate decisions of the defendant Mattapoisett Zoning Board of Appeals ("the Board"), affirming denials by the Town Building Inspector/Zoning Enforcement Officer of permission to the DaRosas to construct a 250-foot pier from their property to Mattapoisett Harbor. The Board's two decisions were issued on identical grounds. Agreeing that few, if any, issues of material fact are in genuine dispute, each side claims it is entitled to judgment as a matter of law, and both now seek summary relief pursuant to Mass.R.Civ. 56 (c). For the reasons herein set forth, the DaRosas' motion is DENIED, and the Board's motion is ALLOWED.

BACKGROUND

The DaRosas own and reside in a single-family dwelling at 3 Goodspeed Island in Mattapoisett, Massachusetts, upon a 30,027-square foot lot which is now identified as Lot-28 on

[1] Laurie B. DaRosa

[2] Susan Akin; Pail Millot, Jr.; Norman Lyonnais; Kenneth R. Pacheco; and Anthony Tranfaglia, members

the Mattapoisett Assessors' Map. Their house, with its attached garage, is the main building upon the lot. Lot-28 is separated from Mattapoisett Harbor by a strip of beachfront property owned by another and which is part of another lot identified on the Mattapoisett Assessors' Map as Lot-28A. The entirety of Lot-28A is undeveloped, with no existing structures. The DaRosas' deed to Lot-28 includes "an easement upon, over and across [Lot-28A] for the purpose of erecting, maintaining, improving, replacing and using a float, pier, wharf, jetty, groin, dock, outhaul, or bridge and usual appurtenances thereto…."

Lot-28 is within the Marine Residence (MR) zoning district of the Town of Mattapoisett. According to the 2012 Mattapoisett Zoning By-Law (applicable to the instant case), under Section 5.6.1, the "permitted uses" for lots in the MR district include: "Detached one family dwelling with private garage, barn, boathouse, wharves, and other accessory private structures." The By-Law also permits these same uses for properties zoned "Waterfront 30;" "Residence 40" and "Residence 80." These last two categories are further referred to in the By-Law as "rural." According to the Zoning Map appearing in Exhibit 10 of the parties' Joint Appendix, numerous Mattapoisett properties zoned "Residence 40" and "Residence 80" are in the northern "rural" portion of the town, separated from Mattapoisett Harbor by several miles and many roadways, including two heavily-travelled highways.

The DaRosas propose to build a pier, commencing upon their Lot-28 and extending 15 feet to their seaward property line, then crossing over Lot-28A for a distance of 88 feet to the mean low water line, and then continuing 147 feet into Mattapoisett Harbor, where it would end with an additional 45-foot L-shaped section running parallel to the shoreline.

In furtherance of their proposal, on August 4, 2014, the DaRosas submitted an application to the Massachusetts Department of Environmental Protection (DEP) for a Chapter 91 waterways

license. The process calls for certification by the local building inspector/zoning enforcement officer that the project is in compliance with local zoning ordinances and by-laws. Initially, on August 4, 2014, Mr. Andrew J. Bobola, the building inspector/zoning enforcement officer had certified such compliance. However, subsequently, on May 5, 2015, Mr. Bobola issued a revised statement, saying that the project would not be in compliance with local zoning requirements and recommending that the licensure be denied. In his letter, Mr. Bobola stated, among other things, that, when he signed his earlier letter, he hadn't realized that "the parcel was land-locked." The DaRosas appealed this determination to the Board, and the Board, after hearing, denied the appeal and affirmed Mr. Bobola's determination of May 5, 2015. The instant case, 1583CV00914, is the DaRosas' timely Chapter 40A appeal from that decision by the Board.

On June 18, 2015, Mr. Bobola denied the DaRosas' application for a building permit for the proposed pier. The DaRosas appealed the denial to the Board, and the Board, after hearing, denied the appeal and affirmed Mr. Bobola's determination on grounds identical to those offered in the DEP waterways licensure matter. The instant case, 1583CV00915, is the DaRosas' timely Chapter 40A appeal from that later decision by the Board.

The Board's above-mentioned decisions rested in part upon its view of the Zoning By-Law's requirements concerning "*accessory use*," defined as "[a] use customarily incident to that of the main building or to the primary use of the land," and "*accessory structure*," defined as "[a] detached subordinate structure located on the same lot with the main building the use of which is customarily incidental to that of the main building or the use of the land." Article 2, Sections 2.2 and 2.1 respectively. The Board's above-mentioned decisions also rested in part upon its view of the By-Law's setback requirements relative to structures and a lot's boundary lines.

In 1994, the Mattapoisett Building Inspector approved the application of another lot owner for the construction of a pier making use of an easement over adjacent waterfront property in the vicinity of 49 Mattapoisett Neck Road.

DISCUSSION

The court will allow summary judgment where there are no genuine issues of material fact and where the record entitles the moving party to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 553 (1976). The moving party bears the burden of establishing that there is no issue of material fact on every relevant issue. See *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who or which does not bear the burden of proof at trial may demonstrate the absence of a genuine dispute of material fact for trial either by submitting affirmative evidence negating an essential element of the non-moving party's case, or by showing that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). It is necessary, however, for the summary judgment movant "to show by credible evidence from affidavits and other supporting materials that there is no genuine issue of material fact and that [the party is] entitled, as matter of law, to a judgment." *Smith v. Massimiano*, 414 Mass. 81, 85 (1993) (citations omitted).

"Review of a board's decision in the Superior Court pursuant to G. L. c. 40A, § 17, involves a 'peculiar' combination of de novo and deferential analyses." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Bilerica*, 454 Mass. 374, 381 (2009).

Though the fact finding in the Superior Court is de novo, a judge should review with deference the legal conclusions made by the local board within its authority. *Cameron v. DiVirgilio*, 55 Mass. App. Ct. 24, 29 (2002) ("reasonable construction that a zoning board of appeals gives to the by-laws it is charged with implementing is entitled to deference"). The local zoning board is also entitled to deference because of its special knowledge of "the history and purpose of its town's zoning by-law." *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999). The reviewing judge must then "determine[] the content and meaning of statutes and by-laws and ... decide[] whether the board has chosen from those sources the proper criteria and standards to use in deciding to grant or to deny the … application." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Bilerica*, 454 Mass. at 474-475, quoting *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73-74 (2003). Judicial review under G.L. c. 40A "involves a highly deferential bow to local control over community planning." *Ibid.* at 73. The board is entitled to deny a permit even "if the facts found by the court would support its issuance." Unless a board's determination is supported by "no rational view of the facts" or appears to be based upon an application of the relevant law or by-law that is "unreasonable, whimsical, capricious or arbitrary," its decision should be upheld. *Shirley Wayside Limited Partnership v. Board of Appeals of Shirley*, 461 Mass. 469, 475 (2012), quoting *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, 454 Mass. at 382-383.

In the instant case, the Board's decision to twice affirm the denial of the DaRosas' pier project by the Town's building inspector/zoning enforcement officer is appropriately supported by the Town's Zoning By-Law. By operation of Article 5, Sections 5.6.1; 5.4.1; 5.2.1; and 5.1.1, lots in various zoning districts, including an MR district such as that owned by the DaRosas, are

permitted a "[d]etached one family dwelling with private garage, barn, boathouses, wharves, and other accessory private structures." A fair reading of the section is that all listed uses following the word "with" are intended by the By-Law to be accessory structures. As discussed above, Section 2.1 of Article 2, of the By-Law defines an "accessory structure" as "[a] detached subordinate structure located *on the same lot with the main building* the use of which is customarily incidental to that of the main building or the use of the land." (emphasis added). Starting with the plain language of that definition and considering it in the context of the By-Law's express purpose set forth at Article 1,[3] see *Commonwealth v. Welch*, 444 Mass. 80, 85 (2005), the requirement is clear enough: an accessory structure, such as the DaRosas' proposed pier (or wharf), must be on the very same lot as the main building to which it is intended to be incident --- in this instance, the DaRosas' single-family house on Lot 28. The DaRosas' proposal implicates much more than Lot 28. Indeed, the majority of the proposed 250-foot pier runs beyond their own lot. Eighty-eight feet of it intrude upon Lot-28A. Accordingly, the DaRosas' proposed pier (or wharf) is not a permitted use of their lot under the By-Law.

Additionally, the proposed pier fails to satisfy the Section 2.1 definition of an accessory structure because a pier cannot reasonably be said to be "customarily incidental" to land-locked property.

Moreover, any argument that the "accessory structure" definition should be read to apply to Lot-28A, rather than Lot 28, would be unavailing. Lot-28A is entirely undeveloped.

[3] Article 1 of the Mattapoisett Zoning By-Law (2012) enumerates eleven elements of its "purpose" as being to: "(1.11) Lessen congestion in the streets; (1.2) Conserve health; (1.3) Secure safety from fire, flood, panic and other dangers; (1.4) Provide adequate light and air; (1.5) Prevent overcrowding of land; (1.6) Avoid undue concentration of population; (1.7) Encourage housing for persons of all income levels; (1.8) Facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements; (1.9) Conserve the value of land and buildings, including the conservation of natural resources and the prevention of blight and pollution of the environment; (1.10) Encourage the most appropriate use of land; (1.11) Preserve and increase amenities."

Consequently, Lot-28A contains no structure (i.e. main building) to which the proposed pier would be subordinate and incidental, as is required by the By-Law definition appearing at Section 2.1. See *Willis v. Falmouth Zoning Board of Appeals*, 14 LCR 573 (Mass.Land Ct. 2006) (upholding ZBA's decision that, where pier was upon a lot without a dwelling house, it became the lot's principal structure and therefore not a permitted use under the local bylaw).

The DaRosas' argument that the definition is satisfied because the pier would be incidental to "the use of the land" of Lot-28A is also unavailing because of the pre-condition clearly set forth in Section 2.1 that an accessory structure be "located on the same lot *with the main building.*"

The fact that the DaRosas held an easement to cross over Lot-28A for purposes of a pier is of no consequence where such use, as here, is prohibited by zoning. See *Goren v. Town of Weston*, 14 LCR 473, 478 (Mass.Land Ct. 2006), affirmed 71 Mass.App.Ct. 1104 (2008), further app.rev.denied 451 Mass. 1103 (2008) ("[t]he possession of an easement does not automatically confer a right to use it, and its location does not dictate the place of access. In these circumstances, the community's zoning rights prevail").

The DaRosas further argue that the Board's decision leads to the absurd result of invalidating all or most private coastal piers in Mattapoisett. The DaRosas reason that piers by their nature will likely extend off dry land and into the water, beyond the low mean tide line, and consequently off the owner's property. See *Michaelson v. Silver Beach Improvement Association, Inc.*, 342 Mass. 251, 253 (1961) (private ownership along tidal water extends to the low water mark, where the State then holds as owner of the fee and repository of sovereign power). Such coastal piers, they argue, must extend beyond "the same lot with the main building." The court disagrees. A by-law must be interpreted in accord with its intent,

ascertained from all its words being construed by ordinary and approved usage, and considered in light of the cause for its enactment with the use of sound reason and common sense. *Harvard Crimson v. President and Fellows of Harvard College,* 445 Mass. 745, 749 (2006). Had the drafters of the Town's Zoning By-Law intended that the low mean tide line be used to implicate the "same lot" language of Section 2.1, they would not have explicitly included "wharves" among the permitted uses for various zoning districts, including "Waterfront 30," in Article 5. With certainty, the drafters did not intend that a wharf would invalidate itself by performing nothing more than its essential function. The DaRosas' proposed wharf or pier, by critical distinction, performs more than its essential function: it crosses over the lot of another.

Additionally, the Board offers the counterargument, which perhaps may be paraphrased as: "We can only work with what we have to work with." Because the ownership of land beyond the low water mark is held by the Commonwealth and regulation of those areas is assigned to certain state and Federal agencies (e.g. Massachusetts Department of Environmental Protection, U.S. Army Corps of Engineers, etc.), the Town's By-Law is not directly applicable to portions of piers or similar structures located beyond those points. The By-Law, however, is clearly applicable to those portions of Mattapoisett on dry land, and it is the portion of the proposed pier planned to be constructed over the dry land of Lot-28A which is the focus of the Board's decision. The Board argues that it should not be precluded from enforcing the Town's Zoning By-Law out of extra-jurisdictional concerns about what would occur before some state or Federal agency if the offending pier were ever to be built. The court agrees.

Furthermore, the court agrees with the Board's position that the proposed pier would not comply with the By-Law's mandatory "minimum street, rear and side setback requirements" because, of necessity, it would cross a lot line and encroach upon the lot of another. Although the

DaRosas argue that a pier must be treated exceptionally because, by its nature, it crosses past a lot line when it extends beyond the low water mark, the situation here presented is distinctly different. Setbacks are established to further the By-Law's express purposes, including "[p]revent(ing) overcrowding of land," "[c]onserv(ing) the value of land and buildings," and "[e]ncourag(ing) the most appropriate use of land." Those concerns are implicated by an intended encroachment upon another's lot; they are considerably less so when a pier extends into an open harbor.

In ruling as indicated, the court is not unmindful of the DaRosas' energetic argument that the Board should not be permitted to ground its denial upon the fact that the DaRosas' water access would be afforded only by an easement over an adjoining lot of separate ownership, when the Board approved another zoning certification in 1994 in what they assert to be a similar situation.[4] The court notes, however, that the two locations appear to be separated by an appreciable distance as well as the mouth of the Mattapoisett River. Wading further into the marsh of similarities and distinctions in the context of a local zoning bylaw is a matter for which a local board is much better suited than the court. It is why courts give such boards due deference. See *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. at 669. This court finds no circumstance in the instant case which would justify disturbing that due deference.

The court accordingly concludes that the Board's decisions were based upon a "rational view of the facts" and a reasonable application of the relevant law and zoning by-law and, accordingly, should be upheld. See *Shirley Wayside Limited Partnership v. Board of Appeals of Shirley*, 461 Mass. at 475.

[4] Selwyn-Smith pier at 47-49 Mattapoisett Neck Road.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Motion for Summary Judgment be **DENIED** and that the Defendants' Request for Entry of Summary Judgment Pursuant to MRCP 56 (c) be **ALLOWED.**

Dated: September 16, 2016

Raymond P. Veary, Jr.
Justice of the Superior Court