COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

MIDDLESEX, ss.

MISCELLANEOUS CASE
No. 17 MISC 000160 (HPS)

AEDIN C. CULHANE, JOY A. BARON, Trustee of the Baron Trust of 2013, and SIMON J. FRENCH,

Plaintiffs,

v.

BROOKE K. LIPSITT, VINCENT FARINA, HARVEY A. CREEM, WILLIAM M. McLAUGHLIN, BARBARA HUGGINS CARBONI, TREFF LaFLECHE, MICHAEL J. ROSSI, and MICHAEL J. QUINN, as they are members of the ZONING BOARD OF APPEALS OF THE CITY OF NEWTON, JOHN D. LOJEK as COMMISSIONER OF INSPECTIONAL SERVICES FOR THE CITY OF NEWTON, and ECW REALTY, LLC,

Defendants.

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this G. L. c. 40A, § 17 appeal, the remaining plaintiffs[1] challenge the decision of the Zoning Board of Appeals of the City of Newton (the "Board"), upholding the issuance, as of right, of a building permit by the Commissioner of Inspectional Services for construction of a two-family residence at 45 Glen Avenue in Newton. The plaintiffs challenge the Board's decision on the basis that the Board exceeded its authority because the dimensions of the

[1] The claims asserted by Joy A. Baron, trustee of the Baron Trust of 2013, were dismissed with prejudice in a joint stipulation of dismissal pursuant to Mass. R. Civ. P. 41(a)(1)(ii) on November 3, 2017.

property do not conform to the applicable sections of the Newton Zoning Ordinance (the "Ordinance"). The dispute centers on whether dimensional regulations applicable to lots created before December 7, 1953, apply, or whether the applicable regulations are those for lots formed at a later date. This in turn depends in part on whether the plaintiffs' claim in a related adverse possession case is sufficiently ripe to render a post-1953 change in the property. The related adverse possession claim has not yet been reduced to judgment, and the plaintiffs moved to stay the summary judgment hearing for this instant action until a final decision is rendered in the adverse possession case. On November 29, 2017, the court denied the plaintiffs' motion.

On December 18, 2017, the court held a hearing on the parties' cross-motions for summary judgment. For the reasons set forth below, the defendant ECW Realty, LLC's motion for summary judgment is ALLOWED, and the plaintiffs' cross-motion for summary judgment is DENIED.

FACTS

The material undisputed facts pertinent to this motion for summary judgment are as follows:

1. Plaintiffs Aedin Culhane and Simon French own and reside at 47 Glen Avenue in Newton.
2. Defendant ECW Realty, LLC ("ECW") owns property at 45 Glen Avenue in Newton (the "Property").
3. Defendant John D. Lojek is Newton's Commissioner of Inspectional Services (the "Commissioner").

The Property

4. The Property is part of a five-lot subdivision consisting of 41, 45, 47, and 51 Glen Avenue, as shown on "Plan of Land in Newton Centre - Mass." by Wm. E. Leonard, dated August 15, 1949, and recorded with a deed recorded on June 21, 1950, at the Middlesex So. Registry of Deeds in Book 7596, Page 597, and numbered Plan No. 1050 of 1950 (the "Subdivision Plan").[2] The Property is shown as Lot D on the Subdivision Plan; the plaintiffs' property is shown as Lot E and abuts the Property.

5. Essentially, the configuration of the subdivision is that Lots B and C (as well as Lot A) have frontage on Glen Avenue, while Lot D is located behind Lot C and Lot E is located behind Lot B. Lots D and E are provided with access to Glen Avenue by "panhandle" driveways about ten feet in width. Lot D is 11,294 square feet in size and is bounded by Lot C in front for a distance of 87.60 feet. The "panhandle" or driveway sections of Lots D and E abut each other for a distance of 205.64 feet.[3]

6. At the time of the Subdivision Plan's recording in 1950, the Revised Ordinances of 1939, as amended by Ordinance No. 25, dated November 25, 1940, and renumbered and restated by Ordinance No. 220, dated July 19, 1948 (collectively, "1940s Zoning"), governed zoning in the city of Newton (the "City").[4]

7. Under the 1940s Zoning, the Property was located in a Private Residence district, which required a minimum lot area of 7,000 square feet and a minimum lot width of 70 feet to constitute a buildable lot.[5]

[2] Complaint, Exhibit 4. A copy of the Subdivision Plan is attached as Addendum A to this Decision.
[3] Complaint, Exhibits 3, 4.
[4] Laurance Lee Affidavit ¶ 7, Exhibits 1, 2, 3.
[5] Laurance Lee Affidavit, Exhibits 2, 4.

8. On June 28, 1950, a building permit issued for the construction of a single-family dwelling on the Property, and the Property was subsequently improved with a single-family dwelling in or about 1951.[6]

9. On or about December 13, 2016, ECW razed the single-family dwelling on the Property.[7]

10. The Property is currently located in a Multi-Residence 1 (MR-1) zoning district.

Relevant Sections of the Ordinance

11. Under the Ordinance as in effect pursuant to the Revised Ordinances of 1939, there were no specific frontage requirements for residential building lots. In 1940, the Ordinance was amended by Ordinance No. 25, dated November 25, 1940, to add a new Section 577(C), which provided, in relevant part:

> "In the case of a rear lot not having the required frontage on the street . . . the required lot width shall be measured respectively along the rear line of the lot or lots in front of it or along the set back line; and in all other cases along the street line."

12. Section 577(C) was further amended in 1948, by Ordinance No. 220, dated July 19, 1948, which struck the 1940 amendment and replaced it with the following:

> "In the case of a rear lot not having the required width on a street . . . the required lot width shall be measured respectively along the rear line of the lot or lots in front of it or along the set back line."[8]

13. Section 1.5.2.G, which requires the issuance of a special permit for a lot, like Lots D and E, which has its "frontage" along the rear lot line of a lot in front of it, and depends on a panhandle or easement for street access, was adopted in 1973, well after the recording of the Subdivision Plan and the construction of the single-family dwelling on Lot D.

[6] An Assessors Database Property Record Card states that the original residence was built in 1951. Exhibit 12, Plaintiffs' Appendix of Exhibits.
[7] Simon J. French Affidavit, Exhibit 16, ¶ 11, Plaintiffs' Appendix of Exhibits.
[8] The 1948 amendment appears to be a correction of the 1940 amendment, in that it changed the word "frontage" to "width", where the 1940 amendment had added a lot width requirement, but not a lot frontage requirement.

14. Section 1.5.5.A.1 provides that floor area ratio ("FAR") is "[t]he gross floor area of all buildings on the lot divided by the total lot area."

15. Section 1.5.5.D provides:

> "Mass Below First Story. For the purposes of calculating gross floor area, any cellar, crawl space, basement, or other enclosed area lying directly below a first story in a residential structure.
>
> 1. Standards. The lesser of 50 percent of the floor area of mass below first story OR:
>
> ((X/Y) floor area of mass below first story)
>
> Where:
>
> - X = Sum of the width of those sections of exposed walls below the first story having an exterior height ≥ 4 feet as measured from existing or proposed grade, whichever is lower, to the top of the subfloor of the first story.
>
> - Y = Perimeter of exterior walls below first story."

16. Section 3.2 of Ordinance regulates dimensional controls in multi-residence districts. Under § 3.2.3, a lot created prior to December 7, 1953, and currently located in the MR-1 district is subject to the following dimensional requirements: 7,000 square feet minimum lot area; 3,500 square feet minimum lot area per unit; 30% maximum lot coverage; 70 feet minimum frontage (which may be measured along the rear of the lot in front of it), and 50% minimum open space. Section 3.2.5, imposes a higher lot area requirement of 12,000 square feet for a "two-family detached rear lot."

17. Under § 3.2.11.A, a two-family structure in the MR-1 district on a lot measuring between 10,000 square feet and 14,999 square feet is subject to a maximum FAR of 0.48. Section 3.2.11.A.1 contains the following exception to the FAR requirement:

> "For construction on lots created before 12/7/1953, an additional increase in FAR of .02 above the amount shown in Table A shall be allowed, provided that the new construction proposed using additional FAR granted under this paragraph shall comply with setback requirements for post-1953 lots. Any increase in FAR granted

through this paragraph may not create or increase nonconformities with respect to lot coverage or open space and may not be used in conjunction with Sec. 7.8.2.B."

18. Section 7.3.4, entitled "Special Requirements for Rear Lots in Residential Zoning," provides in relevant part, in subsection A, as follows:

> "Creation of rear lots in residential districts requires a special permit. The rear lot development density and dimensional controls in . . . Secs. 3.2.5 and 3.2.12 for Multi redience [sic] districts . . . shall apply to the proposed reat [sic] lot . . . ."

19. Section 7.8.4, entitled "Alteration, etc.., of Structure When Shape or Size of Lot is Changed," provides in subsection B as follows:

> "For purposes of this Sec. 7.8.4, the size or shape of a lot shall be deemed to have been changed only if the lot was combined, merged, subdivided, or resubdivided by recording a deed, plan, or certificate of title in the Registry of Deeds for the Southern District of Middlesex County or the Land Court Registry of Deeds for the Southern District of Middlesex County. The date of such change shall be the date of recording."

The Proposed Dwelling

20. On October 14, 2016, ECW submitted an application to the City's Inspectional Services Department (the "Department") for a building permit to construct a two-family dwelling on the Property (the "Proposed Dwelling").

21. The proposed grade for the Proposed Dwelling is lower than the existing grade. Using the proposed grade to calculate the exterior height of the walls from grade to the top of the subfloor of the first floor, no walls will exceed four feet between grade and first floor, thereby excluding the basement area from the FAR calculation.[9]

22. The Proposed Dwelling's first and second floors will each contain 2,624 square feet, for a total of 5,248 square feet, resulting in an FAR of 0.465.[10]

[9] Edmond Spruhan Affidavit and accompanying exhibits.
[10] Complaint, ¶ 21, 22; Exhibit 9, Plaintiffs' Appendix of Exhibits.

23. The Property, with the Proposed Dwelling, will have a lot coverage of 25.5% and open space amounting to 50.1%.[11]

The Appeal

24. On November 1, 2016, the Department issued Building Permit #16100460 for the construction of the Proposed Dwelling on the Property.

25. On November 30, 2016, the plaintiffs filed an appeal to the Board, pursuant to G. L. c. 40A, §§ 8, 15, appealing the issuance of the building permit.

26. On January 24, 2017, the Board held a public hearing on the plaintiffs' appeal. The Board voted to uphold the Commissioner's decision granting the building permit for the Property.

27. On March 8, 2017, the Board filed its decision with the City Clerk.

28. On March 27, 2017, the plaintiffs filed a timely appeal pursuant to G. L. c. 40A, § 17.

DISCUSSION

SUMMARY JUDGMENT STANDARD

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56(c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." *Ng Bros. Constr.*, supra, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986);

[11] Edmond Spruhan Affidavit, Exhibit B.

Ng Bros. Constr., supra, 436 Mass. at 648. When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

STANDARD OF REVIEW FOR ZONING APPEAL

When reviewing a decision of a board of appeals pursuant to G. L. c. 40A, § 17, the court engages in a "combination of de novo and deferential analyses." *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, 454 Mass. 374, 381 (2009), citing *Pendergast v. Bd. of Appeals of Barnstable*, 331 Mass. 555, 558 (1954). Unlike a G. L. c. 30A, § 14, appeal, where the court is confined to the administrative record, in a G. L. c. 40A, § 17, appeal the court determines the facts while "hear[ing] all evidence pertinent to the authority of the board . . . ." G. L. c. 40A, § 17; *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, supra, 454 Mass. at 381 n.20. Based upon the facts the court finds, the court annuls the decision of the board "if found to exceed the authority of such board . . . or make[s] such other decree as justice and equity may require." G. L. c. 40A, § 17.

Although the court makes its own findings of fact, "deference [is given] to a local board's reasonable interpretation of its own zoning bylaw." *Shirley Wayside Ltd. P'Ship v. Bd. of Appeals of Shirley*, 461 Mass. 469, 475 (2012). This is so because the local board possesses "special knowledge of 'the history and purpose of its town's zoning by-law.'" *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeal of Billerica*, supra, 454 Mass. at 381, quoting *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass. App. Ct. 664, 669 (1999). "The decision of the board cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 639 (1970). A legally untenable ground is a "standard, criterion, or consideration not

permitted by the applicable statutes or by-laws." *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003). Only if the court first determines that the decision was not based on a legally untenable ground does it proceed to consider, on a more deferential basis, "whether any 'rational view of the facts the court has found supports the board's conclusion . . . .'" *Sedell v. Zoning Bd. of Appeals of Carver*, 74 Mass. App. Ct. 450, 453 (2009), quoting *Britton v. Zoning Bd. of Appeals of Gloucester*, supra, 59 Mass App. Ct. at 75.

THE BOARD CORRECTLY DETERMINED THAT THE PROPERTY IS NOT SUBJECT TO THE REAR LOT PROVISIONS OF THE ORDINANCE.

The plaintiffs argue that the building permit was improperly issued because the Property is a rear lot as defined by § 1.5.2.G of the Ordinance, and therefore, they argue, the Property does not: 1) meet the requisite dimensional requirements for an MR-1 two-family detached rear lot as provided in § 3.2.5; or 2) meet the FAR requirement for rear lots in § 3.2.5. The plaintiffs further contend that construction of the Proposed Dwelling requires review by the City Council pursuant to the rear lot special permit process in §§ 1.5.2.G, 3.2.12, and 7.3.4.[12]

The plaintiffs point to references to rear lots in the 1940s Zoning as indicative of the City's separate regulation of rear lots. However, the 1940s Zoning merely provided that a rear lot could be measured from the rear line of the lot in front for purposes of determining width and setbacks, and no other special provisions applied to such lots, nor was there any special permit requirement. Although the plaintiffs argue that the 1940s Zoning regulated rear lots separately, a plain reading of the Newton zoning ordinance as in effect at the time indicates that rear lots were not regulated separately at all. Lots in Single Residence A, B, and C districts, Private Residence districts, and General Residence districts were only subject to dimensional requirements based on lot area and lot width. In the Private Residence district the required lot width was a minimum

[12] The City Council is the special permit granting authority for the City.

70 feet. If a rear lot did not have 70 feet of frontage on a street to meet the width requirement at the street line, as was otherwise required, the 1940s Zoning allowed the rear lot to substitute the rear line of the lot in front to meet the lot width requirement. Otherwise the dimensional requirements for rear lots were no different than for lots *with* the required a lot width at the street line. See, e.g., § 587(A) (providing setback line in Private Residence districts as twenty-five feet and buildings on rear lots not to be located nearer than twenty-five feet of rear line of lots in front).

The defendants contend that the Property is not a "rear lot," but rather is simply a pre-December 7, 1953 lot and therefore is subject to the Ordinance's separate dimensional requirements for lots created prior to that date. The Board and ECW correctly point out that the definition of "rear lot" did not appear in the Ordinance until 1973, and that §§ 3.2.12 and 7.3.4, requiring special permit review for rear lots in multi-residence districts, did not appear until 2004. More significantly, the Ordinance plainly requires a special permit, and the application of the stricter dimensional requirements urged by the plaintiffs and found in Section 3.2.5, only for *proposed* rear lots, and not for new construction on rear lots created prior to December 7, 1953. Section 3.2.12.C explicitly provides that "the dimensional controls in Sec. 3.2.5 shall apply to the *proposed* rear lots . . . ." (emphasis added), while § 7.3.4, which imposes the procedure for issuance of rear lot special permits, also makes it incontrovertible that its special permit procedure is applicable to the creation of rear lots, rather than to proposed new construction on existing rear lots. The section, entitled "Special Requirements for Rear Lots in Residential Zoning" provides that "*[c]reation* of rear lots in residential districts requires a special permit" (emphasis added). The section further provides, "[t]he rear lot development density and

dimensional controls in . . . Secs. 3.2.5 and 3.2.12 for Multi resdience [sic] districts, repectively [sic], shall apply to the *proposed* reat [sic] lot . . .” (emphasis added).

Accordingly, the provisions in the Ordinance requiring a special permit for the creation of rear lots and imposing stricter dimensional requirements for rear lots are not applicable to the Property, because the Property is not a proposed rear lot, to be carved out of an already existing residential lot, but rather is a lot in existence prior to December 7, 1953, and is subject to the dimensional controls for pre-December 7, 1953 lots only. The Board did not err when it determined that the Property is not subject to the provisions in the Ordinance for rear lots. As such, the applicable dimensional requirements for the Property are those set forth in § 3.2.3 for lots in the MR-1 district that were created before December 7, 1953. Likewise, the Proposed Dwelling is subject to the provisions for FAR found in § 3.2.11 of the Ordinance.

THE PLAINTIFFS’ ADVERSE POSSESSION CLAIM DID NOT CHANGE THE SHAPE OR SIZE OF THE PROPERTY.

The plaintiffs next argue that, even if the Property was otherwise a pre-December 7, 1953 lot that would not be subject to the rear lot provisions of the Ordinance, it became subject to those provisions because it changed in size as a result of the plaintiffs’ exercise of their adverse possession claim and the demolition of the previously existing single-family dwelling on the Property. The plaintiffs point out that § 7.8.4.D.4 of the Ordinance provides that if an existing single-family house is demolished and the size or shape of the lot was changed at any time after January 1, 1995, the Property will be subject to the dimensional requirements for rear lots provided in § 3.2.5. ECW argues that neither the size nor the shape of the Property has changed within the meaning of the Ordinance. The Board additionally takes the position that this court cannot consider the plaintiffs’ subsequent success on their adverse possession claim -- which has not yet been reduced to judgment -- because when the plaintiffs’ G. L. c. 40A, § 17 appeal came

before the Board the adverse possession claim was still pending; therefore, the Board determined that the issue was not properly before the Board. The court agrees with ECW and does not need to reach the argument of the Board.

Section 7.8.4.B provides that "the size or shape of a lot shall be deemed to have been changed only . . . by recording a deed, plan, or certificate of title in the Registry of Deeds . . . . The date of such change shall be the date of recording." § 7.8.4.B. The plaintiffs must concede that at no time prior to the hearing before the Board and continuing at least to the date of the hearing of the present motions, no such deed, plan, or certificate of title has been recorded with respect to any change in the size or shape of the Property. Without the recording of a deed or plan implementing a judgment concerning the plaintiffs' adverse possession claim, the Board could not have considered the effect of the plaintiffs' adverse possession claim on the Commissioner's decision to issue the building permit, as there was no "change" in the size or shape of the Property within the meaning of the Ordinance in the absence of such a recorded deed, plan or certificate of title. Nor can the court consider the possible effect of such a recording subsequent to the hearing before the Board because it is conceded that there has been no such subsequent recording. Consequently, there was no occasion for the Board to consider the effect of the plaintiffs' adverse possession claim, since any such consideration was, and remains, premature.[13]

Even in the absence of the provision requiring the recording of a deed or plan to effect a change in the size or shape of a lot, the Board could not properly, nor would the court, give effect to a court decision not yet reduced to a final judgment. As the court stated in its November 29, 2017 decision denying the plaintiffs' motion to stay the instant action, "it is also anybody's guess

[13] It is unnecessary under the present facts to reach the question whether, had there been a final judgment in the adverse possession case, and a recorded plan effecting a change in the Property's dimensions as a result of that judgment, such change would be a cognizable change in the size or shape of the Property under Section 7.8.4.B.

whether the pending adverse possession decision is likely, following an inevitable appeal, to result in a final judgment favorable to the plaintiffs . . . .” The plaintiffs, arguing that their claim based on the change in lot size is appropriate for a zoning appeal because there is a “near-certain issuance of an adverse possession judgment and plan for recording,” ignore the possibility that they could lose their adverse possession case on appeal. It was legally tenable for the Board to exclude the plaintiffs’ adverse possession claim from their deliberation over whether to uphold the Commissioner’s issuance of the building permit and the court declines to remand this issue to the Board for the consideration of a hypothetical, future event.

THE PROPERTY MEETS THE DIMENSIONAL REQUIREMENTS PROVIDED IN § 3.2.3.

The court’s conclusion that the Property is properly treated as a pre-December 7, 1953 lot, and that it is not subject to the special permit requirements for newly-created rear lots, effectively disposes of all but one of the plaintiffs’ claims with respect to dimensional noncompliance of the Property.[14] Section 3.2.3 of the Ordinance provides dimensional requirements for single-family detached and two-family detached residences located in the MR-1 district. Lots created before December 7, 1953, in the MR-1 district, are required to have a minimum lot area of 7,000 square feet, a minimum lot area per unit of 3,500 square feet, maximum lot coverage of 30%, minimum frontage of 70 feet, and minimum open space of 50%. The Property has a lot area of 11,294 square feet and contains the required lot area minimum of 3,500 square feet per unit. The Property’s frontage, measured using the rear lot line of Lot C, is 87.60 square feet. With the Proposed Dwelling, the Property will have a lot coverage of 25.5% and open space measuring

[14] Parties’ Combined Concise Statement of Facts, ¶ 19. The plaintiffs concede that their arguments as to compliance with minimum lot size requirements fail if the Property is subject to requirements for pre-December 7, 1953 lots.

50.1%.[15] The undisputed evidence reflects that the Property meets all of the requirements provided in § 3.2.3, and the Board reasonably applied the dimensional requirements in § 3.2.3 to the Property.

THE BASEMENT IS PROPERLY EXCLUDED FROM THE FAR CALCULATION AND THE PROPOSED DWELLING MEETS THE FAR REQUIREMENT PROVIDED IN § 3.2.11.

The court having concluded that the Property is a pre-December 7, 1953 lot, and is not a "rear lot," the only argument by the plaintiffs left for consideration is their contention that the Proposed Dwelling does not comply with the maximum FAR requirements because all or parts of the basement should have been included in the gross floor area measurement. The plaintiffs do not argue that the structure, as currently proposed, fails to comply with the FAR requirements. Rather, the plaintiffs contend that an earlier plot plan submitted by ECW, which has been superseded by a more recent plan, should be considered as the operative plan for purposes of measuring FAR.

The plaintiffs argue that the measurement of FAR should be based on the plot plan as submitted by ECW in support of its application for a building permit and as it was considered by the Board at its hearing on January 24, 2017, and should not be based on a March 16, 2017 revision of the plot plan, on which the proposed finish grade of the Property and the elevation of the first floor of the Proposed Dwelling were modified from the earlier iteration of the plan. The March 16, 2017 revisions of the plan modified the proposed grade and the first floor elevation so as to eliminate any question as to whether the height of the first floor above grade was at all points less than four feet, and thereby allowed the Property to qualify for a full exclusion of the basement from the calculation of FAR. The plaintiffs do not contend otherwise. The plaintiffs

[15] These measurements are taken from the most recent plot plan, as revised on March 16, 2017. The plot plan before the Board, dated September 5, 2016, had a lot coverage of 22.94% and minimum open space measuring 54.97%, still meeting the minimum requirements of § 3.2.3. See Complaint, Exhibit 7.

contend instead that the court should not consider the March 16, 2017 revision to the plot plan, which was prepared after the building permit issued and after the Board's January 24, 2017 hearing. Rather, the court should consider only the unrevised September 5, 2016 plot plan that was submitted with the original building permit application and that was before the Board. The court disagrees. The court's review of the Board's decision is de novo. See *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Board of Appeal of Billerica*, supra, 454 Mass. at 381. There is no proper basis for prohibiting ECW from subsequently revising its plans after submission to correct possible discrepancies in an effort to ensure that the Proposed Dwelling complies with the Ordinance. It is common and proper for applicants for as-of-right building permits to make changes to plans and to correct possible violations pointed out by building inspectors as part of the approval process, or to make changes to a plan before or after issuance of a building permit (provided that, if afterwards, an appropriate amendment to the building permit is issued) to address questions raised by a building inspector or even raised by the applicant's own concerns, as long as the final result actually complies with the applicable zoning ordinance or bylaw and the state building code. Moreover, since the court has concluded that there is no basis here for the requirement of a special permit, there is no arguable basis for remand to the Board to reconsider the plaintiffs' appeal in light of the revised plot plan. The only issue is whether the plot plan, as revised, complies with the FAR requirements of the Ordinance.

Section 3.2.11 of the Ordinance provides that the maximum FAR for lots between 10,000 and 14,999 square feet in an MR-1 district is 0.48.[16] It is undisputed that the Proposed Dwelling's FAR, when not including the basement in the gross floor area calculation, is 0.465. Section 1.5.5.D provides standards for determining whether "any cellar, crawl space, basement,

[16] Section 3.2.11 further allows an additional increase in FAR of 0.02 above the maximum allowable FAR for lots created before December 7, 1953, subject to certain conditions not relevant here.

or other enclosed area lying directly below a first story in a residential structure" is included when calculating gross floor area. § 1.5.5.D. The applicable standard is "[t]he lesser of 50 percent of the floor area of mass below first story OR: ((X/Y) floor area of mass below first story)." *Id*. The value X is the "[s]um of the width of those sections of exposed walls below the first story having an exterior height ≥ 4 feet as measured from existing or proposed grade, whichever is lower, to the top of the subfloor of the first story" and Y is equal to the "[p]erimeter of exterior walls below first story." *Id*.

To ensure compliance with the Ordinance, ECW lowered the elevation of the first floor, so that no portion of the basement walls will equal or exceed four feet between the lower of the existing and proposed grade and the top of the subfloor of the first story of the Proposed Dwelling, resulting in a value of "zero" when plugged in to the applicable formula. As such, the floor area of the basement was properly excluded from the calculation, and the FAR for the Proposed Dwelling is 0.465.

In support of its argument that there is no genuine dispute as to the FAR calculation, ECW submitted evidence in the form of plans and an affidavit of Edmond Spruhan, a registered professional engineer, who averred that on March 16, 2017, he revised the proposed finish grades. Spruhan included measurements of the existing grade taken in June, 2015, at eighteen locations around the Proposed Dwelling's footprint and the proposed grade for the same eighteen locations, which reflect that the proposed grade will be less than the existing grade. Accordingly, the height of the exterior walls below the first story is measured from the proposed grade to the top of the subfloor of the first story. Spruhan's affidavit provides the requisite measurements for the same eighteen locations used to determine the existing and proposed grades and consistent with the data, Spruhan avers that the exterior height of the exposed walls beneath the top of the

subfloor of the first story will not equal or exceed four feet. The plaintiffs do not dispute these conclusions when the March 16, 2017 revision to the plot plan is used to make the measurements. The plaintiffs' assertion that only the September 5, 2016 plot plan applies is insufficient to defeat ECW's motion for summary judgment on this point, as "an adverse party may not manufacture disputes by conclusory factual assertions." See *Anderson v. Liberty Lobby, Inc.*, supra, 477 U.S. at 248 (1986); *Ng Bros. Constr.*, supra, 436 Mass. at 648.

Based upon the court's finding that ECW is not required to include the basement in the FAR calculation, the court finds that the FAR for the Proposed Dwelling is 0.465, and is in compliance with § 3.2.11 of the Ordinance.

CONCLUSION

For the reasons stated above, the defendant ECW's motion for summary judgment is **ALLOWED**, and the plaintiffs' cross-motion for summary judgment is **DENIED**.

Judgment will enter in accordance with this Decision.

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Howard P. Speicher
Justice

Dated: March 15, 2018.

ADDENDUM "A"

Exh. 4