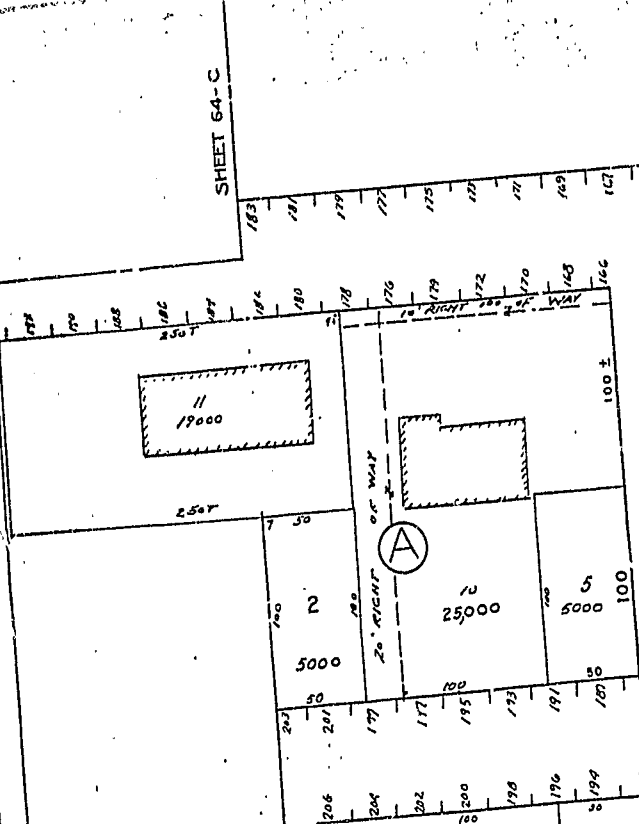
SHEET 64-C
10' RIGHT OF WAY
11
19000
A
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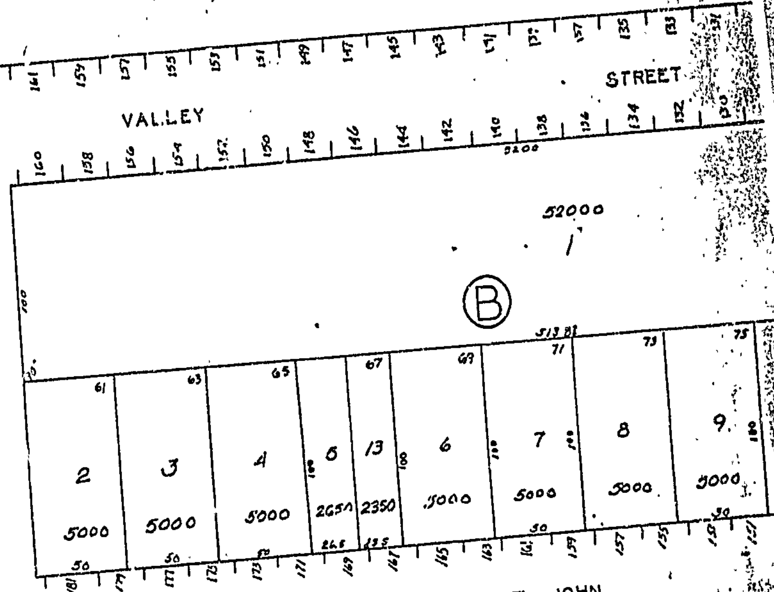
D STREET


VALLEY
STREET
52000
1
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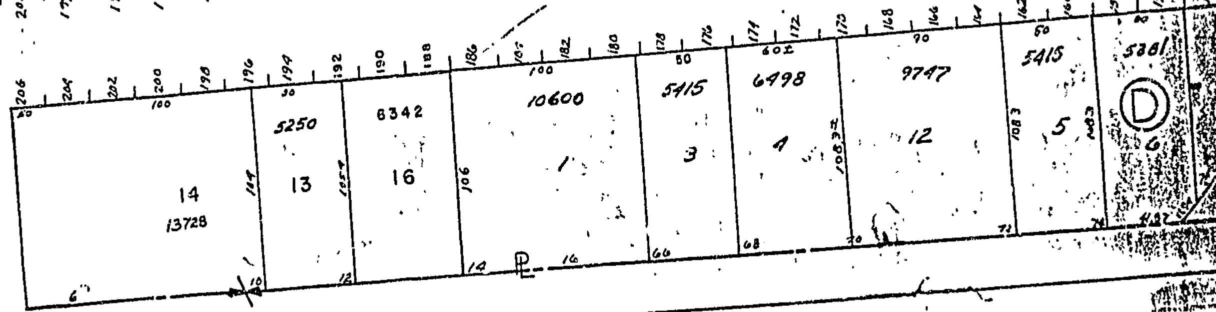
ST. JOHN
14
13728
13
5250
16
6342
1
10600
3
5415
4
6498
12
9747
5
5415
6
5381
D

MAP #______ LOT#______

PERMIT # ______ TOWN OF Portland BUILDING PERMIT APPLICATION

Please fill out any part which applies to job. Proper plans must accompany form.

Owner: Michael A. Valente, III c/o Harday Equities

Address: 181 St. John Street Portland, Maine 04102

LOCATION OF CONSTRUCTION______

CONTRACTOR:______ SUBCONTRACTORS:______

ADDRESS:______

Est. Construction Cost:______ Type of Use: Residential

Past Use:______

Building Dimensions L___ W___ Sq. Ft.___ # Stories:___ Lot Size:___

Is Proposed Use:___ Seasonal___ Condominium___ Apartment

___ Conversion - Explain Interpretation Appeal so two bldgs. may be soid separately

COMPLETE ONLY IF THE NUMBER OF UNITS WILL CHANGE

Residential Buildings Only:

\# Of Dwelling Units___ # Of New Dwelling Units___

Foundation:
1. Type of Soil:___
2. Set Backs - Front___ Rear___ Side(s)___
3. Footings Size:___
4. Foundation Size:___
5. Other___

Floor: Sills must be anchored.
1. Sills Size:___
2. Girder Size:___ Size:___
3. Lally Column Spacing:___ Spacing 16" O.C.
4. Joists Size:___ Size:___
5. Bridging Type:___ Size:___
6. Floor Sheathing Type:___
7. Other Material:___

Exterior Walls:
1. Studding Size___ Spacing___
2. No. windows___
3. No. Doors___ Span(s)___
4. Header Sizes___
5. Bracing: Yes___ No.___
6. Corner Posts Size___
7. Insulation Type___ Size___
8. Sheathing Type___ Size___
9. Siding Type___ Weather Exposure___
10. Masonry Materials___
11. Metal Materials___

Interior Walls:
1. Studding Size___ Spacing___
2. Header Sizes___ Span(s)___
3. Wall Covering Type___
4. Fire Wall if required___
5. Other Materials___

Appeal Granted 12-14-89

For Official Use Only

Date November 9, 1989
Inside Fire Limits___
Bldg Code___
Time Limit___
Estimated Cost___
Value/Structure___
Fee $50.00 pd11/3/89

Subdivision: Yes / No
Name___
Lot___
Block___
Permit Expiration:___
Ownership: ___ Public ___ Private

Ceiling:
1. Ceiling Joists Size:___
2. Ceiling Strapping Size___ Spacing___
3. Type Ceilings:___ Size___
4. Insulation Type___
5. Ceiling Height:___

Roof:
1. Truss or Rafter Size___ Span___
2. Sheathing Type___ Size___
3. Roof Covering Type___
4. Other___

Chimneys:
Type:___ Number of Fire Places___

Heating:
Type of Heat:___

Electrical:
Service Entrance Size:___ Smoke Detector Required Yes___ No___

Plumbing:
1. Approval of soil test if required Yes___ No___
2. No. of Tubs or Showers___
3. No. of Flushes___
4. No. of Lavatories___
5. No. of Other Fixtures___

Swimming Pools:
1. Type:___ Square Footage___
2. Pool Size : ___ x ___
3. Must conform to National Electrical Code and State Law.

Zoning:
District___ Street Frontage Req.___ Provided___
Required Setbacks: Front___ Back___ Side___ Side___

Review Required:
Zoning Board Approval: Yes___ No___ Date:___
Planning Board Approval: Yes___ No___ Date:___
Conditional Use:___ Variance___ Site Plan___ Subdivision___
Shore and Floodplain Mgmt.___ Special Exception___
Other___ (Explain)___
Date Approved___

Permit Received By Latini

Signature of Applicant___ Date 11/9/89

Signature of CEO ___ Date___

Inspection Dates___

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White-Tax Assesor Yellow-GPCOG White Tag -CEO

Interpretation

Valente
175-177 St John St

68-A-5 Suzanne Willard & James Yalouris
189 St John St 04102

68-A-10 Alan Grosser
167 St John St 04102

68-B-1 John G & ~~Dotha~~ Jr. John G Morse & Sons
Bath Maine 04530

68-B-4 Marion F Jellison
123 St John St 04102

68-D-1 Anita C Stickney 04103
135 Walton St

68-D-3 Dana G & Barbara H Williams
14 Titcomb Rd Yarmouth 04096

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS

MERRILL S. SELTZER
Chairman
JOHN C. KNOX
Secretary
PETER F. MORELLI
THOMAS F. JEWELL
DAVID L. SILVERNAIL
MICHAEL E. WESTORT
CHRISTOPHER DINAN

175-177 St. John Street

All persons interested either for or against this Interpretation Appeal will be heard at a public hearing in Room 209, City Hall, Portland, Maine on Thursday evening, December 14, 1989 at 7:00 P.M. This notice of required public hearing has been sent to the owners of property directly abutting and directly across a street or alley from the subject property as required by the Ordinance.

Mr. William S. Kany, Attorney, on behalf of Michael A. Valente, III, owner of the property at 175-177 St. John Street, is seeking an opinion from the Board of Appeals regarding the possible division of a parcel into two separate lots, pursuant to the principle of "functional division."

LEGAL BASIS OF APPEAL: The Board of Appeals may reverse said action of the Building Inspector only if it finds that said action is based on an erroneous interpretation of said Ordinance.

John C. Knox
Secretary

/el
11/14/89

389 CONGRESS STREET · PORTLAND, MAINE 04101 · (207) 874-8300

REVISED FLOOR PLAN

Not To Scale

1st floor

2nd floor

Front bldg

Rear bldg

encl. porch

1st floor

2nd floor

3rd floor

REVISED FLOOR PLAN

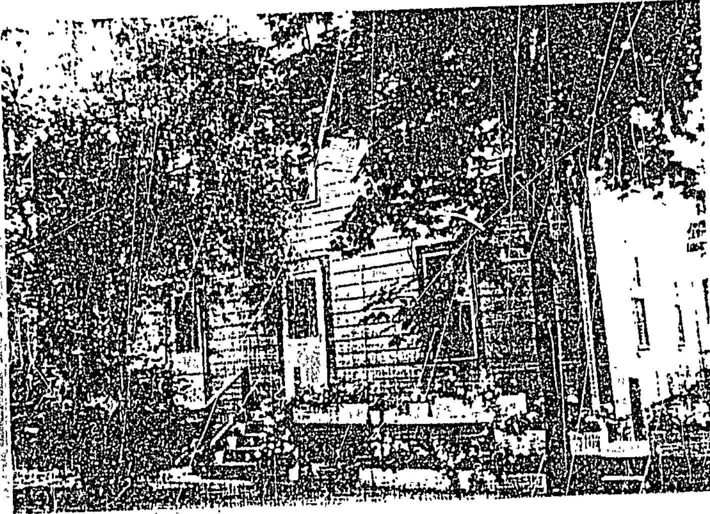
Not to Scale

New Bldg

APPRAISAL ASSOCIATES INC.

PHOTOGRAPH ADDENDUM

Borrower/Client Libbey Williams
Property Address 177 St. John Street
City Portland County Cumberland State Maine Zip Code 04102
Lender



FRONT VIEW OF REAR BUILDING

REAR VIEW OF REAR BUILDING

To ~~Copy~~ Kony
Copy 1st Page To 177 File

8/18/89

#177

Proposed description of a 1600 sq. ft. lot at Portland

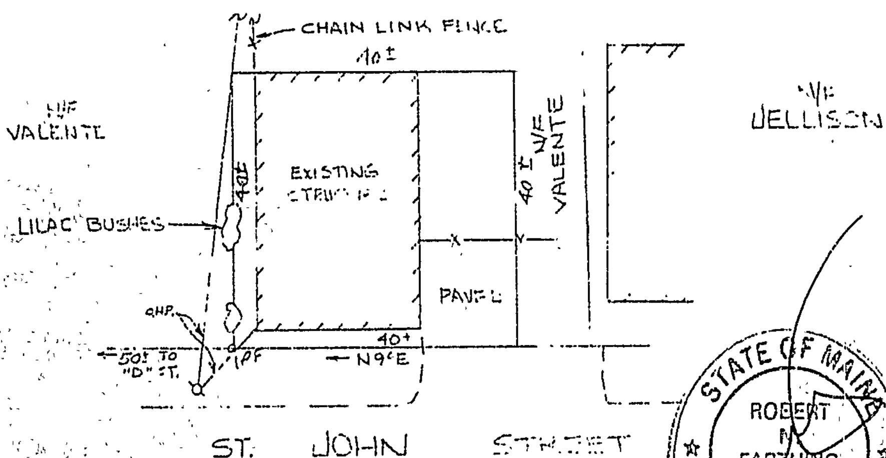
Beginning at an iron pipe located on the easterly sideline of St. John Street; said iron pipe is located 50 feet southerly from the southerly sideline of "D" street; thence easterly at a right angle to St. John Street, 40 feet more or less, to a point; thence southerly at right angles to the last described course, 40 feet, more or less, to a point; thence westerly at right angles to the last described course, 40 feet, more or less, to a point located on the easterly sideline of St. John Street; thence northerly along the easterly sideline of St. John Street, 40 feet, more or less, to the point of beginning. Said parcel contains 1600 sq. ft. Said parcel is a portion of lot 63 a shown in plan book 4, page 21 C.C R. D. and is a portion of land as described in deed book 7800, page 55 C.C.R.D.

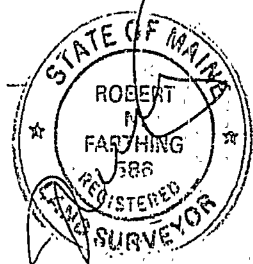
Proposed description of a 3400 sq. ft. lot at Portland

Beginning at an iron pipe located on the easterly sideline of St. John Street; said iron pipe is located 90 feet southerly from the southerly sideline of "D" street; thence easterly at a right angle to St. John Street, 40 feet, more or less, to a point; thence northerly at right angles to the last described course, 40 feet more or less, to a point; thence easterly at right angles to the last described course, 60 feet more or less, to a point; thence southerly at right angles to the last described course, 50 feet± to a point; thence westerly at right angles to the last described course, 100 feet more or less to a point on the easterly sideline of the St. John Street; thence northerly along the easterly sideline of St. John Street, 10 feet more or less, to the point of beginning. Said parcel contains 3400 sq. ft. Said parcel is a portion of lot 63 as shown in plan book 4, page 21 C.C.R.D. and is a portion of land as described in deed book 7800, page 55 C.C.R.D.

MORTGAGE LOAN INSPECTION

177
St. John





CERTIFICATION TO:
ITS MORTGAGE TITLE INSURER

1) THIS PLAN WAS NOT MADE FROM AN INSTRUMENT SURVEY AND IS NOT FOR RECORDING PURPOSES. THE PLAN SHOWS CONDITIONS EXISTING AS OF THE DATE SHOWN HEREON. CERTIFICATION IS FOR MORTGAGE PURPOSES ONLY. PROPERTY LINES AS SHOW ARE APPARENT ONLY. "THIS IS NOT A BOUNDARY SURVEY."
2) I HAVE CONSULTED THE HUD-FIA FLOOD HAZARD BOUNDARY MAP AND THE ABOVE-DESCRIBED PROPERTY (IS, (IS NOT)) IN A DESIGNATED FLOOD HAZARD AREA.
3) I HEREBY CERTIFY THAT THE BUILDING SHOWN ON THIS PLAN IS LOCATED ON THE GROUND AS SHOWN, AND CONFORMS TO THE ZONING LAWS OF THE TOWN OF PORTLAND AT THE TIME OF CONSTRUCTION.
4) I HEREBY CERTIFY TO ITS TITLE INSURER THAT THIS PLAN DEPICTS THE RESULTS OF A CURRENT EXAMINATION OF THE PREMISES DESCRIBED IN BOOK ______ PAGE ______ OF THE CUMBERLAND COUNTY REGISTRY OF DEEDS AND THAT ALL EASEMENTS, ENCROACHMENTS AND BUILDINGS ARE LOCATED ON THE GROUND AS SHOWN THEREON.

PREPARED FOR:
MICHAEL A. VALENTE III
ST. JOHN STREET
PORTLAND, MAINE

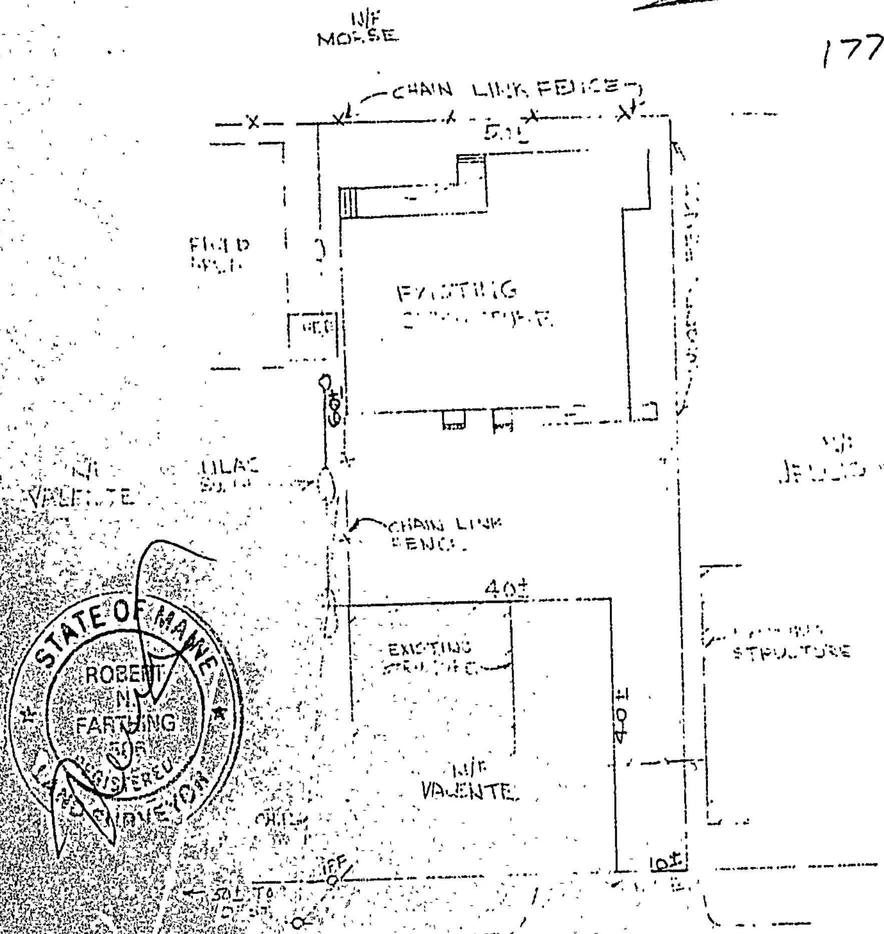
SCALE: 1"=20' DATE: 8/15/89

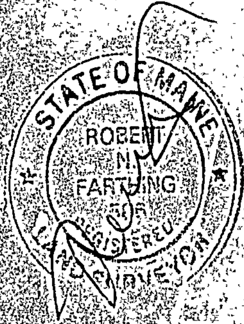
SURVEY INC.
No. WINDHAM, MAINE

MORTGAGE LOAN INSPECTION

MAG. 1987

177½ + 175





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2) I HAVE CONSULTED THE HUD-FIA FLOOD HAZARD BOUNDARY MAP AND THE ABOVE DESCRIBED PROPERTY (IS, IS NOT) IN A DESIGNATED FLOOD HAZARD AREA.

3) I HEREBY CERTIFY THAT THE BUILDING SHOWN ON THIS PLAN IS LOCATED ON THE GROUND AS SHOWN, AND CONFORMS TO THE ZONING LAWS OF THE TOWN OF ______ AT THE TIME OF CONSTRUCTION.

I HEREBY CERTIFY TO ______ THAT THIS PLAN DEPICTS THE RESULTS OF A CURRENT ITS TITLE INSURER EXAMINATION OF THE PREMISES DESCRIBED IN BOOK ______ PAGE ______ OF THE ______ COUNTY REGISTRY OF DEEDS AND THAT ALL EASEMENTS, ENCROACHMENTS AND BUILDINGS ARE LOCATED ON THE GROUND AS SHOWN THEREON.

PREPARED FOR:

MICHAEL [illegible]

175 + 177½ [illegible]

PORTLAND, MAINE

SCALE: [illegible] DATE: 4/15/87

SURVEY INC.
No. WINDHAM, MAINE

Applicant: Michael A. Valente III   Date: Dec 1, 1989

Address: 175-177 St. John St.

Assessors No.: 68-B-3 (2 Bldgs)

CHECK LIST AGAINST ZONING ORDINANCE

Date -

Zone Location - I-2

Interior or corner lot -

Use - Interpretation appeal for functionally

Sewage Disposal - dividing two bldgs on the same

Rear Yards - lot

Side Yards -

Front Yards -

Projections -

Height -   L $10,620

Lot Area - 5,000 sq.ft.   B 46,130 (2)

Building Area -   T 56,750

Area per Family -

Width of Lot -

Lot Frontage -   Taxes $1,972.06

Off-street Parking -

Loading Bays -

Site Plan -

Shoreland Zoning -

Flood Plains -

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS

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JOHN C. KNOX
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THOMAS F. JEWELL
DAVID L. SILVERNAIL
MICHAEL E. WESTORT
CHRISTOPHER DINAN

175-177 St. John St.

November 3, 1989

Mr. William S. Kany, Attorney
Smith & Elliott, P.A.
Attorneys at Law
P. O. Box 1179
Saco, Maine 04072

Dear Mr. Kany:

Receipt of one complete copy of an interpretation appeal on behalf of Michael A. Valente, III regarding property located at 175-177½ St. John Street in Portland is hereby acknowledged. This office will require nine additional copies of your submission, in order to forward this matter to the several members of the Board of Appeals.

We understand that your client is seeking an opinion from the Board of Appeals regarding the possible division of a parcel into two separate lots, pursuant to the principle of "functional division."

Upon receipt of the additional copies of your application, this matter will be scheduled for consideration by the Board of Appeals at their December 14th meeting. A copy of the agenda for that meeting will be sent to you as soon as copies become available for distribution.

Sincerely,

Warren J. Turner
Warren J. Turner
Administrative Assistant

cc: P. Samuel Hoffses, Chief, Inspection Services
William D. Giroux, Zoning Enforcement Officer
Mark Mitchell, Code Enforcement Officer
Charles A. Lane, Associate Corporation Counsel

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS

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THOMAS F. JEWELL
DAVID L. SILVERNAIL
MICHAEL E. WESTORT
CHRISTOPHER DINAN

175-177 St. John St.

December 15, 1989

Mr. William S. Kany, Attorney
Smith & Elliott, P.A.
Attorneys at Law
P. O. Box 1179
Saco, Maine 04072

Dear Mr. Kany:

At the meeting of the Board of Appeals on Thursday evening, December 14, 1989, the Board voted by a vote of six in favor to one opposed to grant your interpretation appeal for approval of the functional division of two buildings on separate lots which had previously shared the same lot at 175-177 St. John Street, in the I-2 Industrial Zone.

Based upon this finding by the Board of Appeals, two smaller sized lots can now be created as proposed in the plans presented by you in behalf of your client, Mr. Michael A. Valente III.

Sincerely,

Warren J. Turner
Administrative Assistant

Enclosure: Copy of Board's Decision

cc: Merrill S. Seltzer, Chairman, Board of Appeals
Joseph E. Gray, Jr., Director, Planning & Urban Development
P. Samuel Hoffses, Chief, Inspection Services
Mark Mitchell, Code Enforcement Officer
William D. Giroux, Zoning Enforcement Officer
Charles A. Lane, Associate Corporation Counsel

12/14/89

CITY OF PORTLAND

INTERPRETATION APPEAL

DECISION

1 5-177 St. John Str.

For the Record

Names and addresses of witnesses (proponents, opponents and others):

William S. Kany ______ Alan Prosser ______

Exhibits admitted (e.g., renderings, reports, etc.):

______

Findings of Fact

1. The Board finds as fact that: ______
______.

2. The finding(s) of fact above-stated is(are) based on the following reasons: ______
______.

Determinations of Law

1. The Board determines as a matter of law that: ______
______.

2. The determination(s) of law above-stated is(are) based on the following reasoning: ______
______.

Conclusion

After public hearing on Dec. 14, 1989, and for the reasons above-stated, the accompanying application is hereby (check one)

6 granted.

____ granted subject to the following condition(s):

____

____.

1 denied.

Dated: Dec. 14, 1989

[signature]
Secretary of the Board

Granted

[signatures]

Denied

[signature]

Smith & Elliott, P.A.

ATTORNEYS AT LAW

199 MAIN STREET - P. O. BOX 1179

SACO, MAINE 04072

207-282-1527

ROGER S. ELLIOTT
ALAN S. NELSON
RANDALL E. SMITH
CHARLES W. SMITH JR.
TERRENCE D. GARMEY
KAREN B. LOVELL
PETER W. SCHROETER
RICHARD P. ROMEO
ROBERT H. FURBISH
THOMAS S. COWARD
WILLIAM S. KANY
JOHN H. O'NEIL, JR
HARRY B. CENTER II
SUSAN G. SCHWARTZ
DAVID S. ABRAMSON

CHARLES W. SMITH
(1915-1983)

DANIEL E. CROWLEY
OF COUNSEL

SANFORD
207-324-1560

PORTLAND
207-774-3199

KENNEBUNK
207-985-2690

FAX
207-283-4412

November 7, 1989

Warren J. Turner
Administrative Assistant
City of Portland
Zoning Board of Appeals, Room 315
389 Congress Street
Portland, Maine 04101

Re: Interpretation Appeal of Michael A. Valente, III
Property at 175-177½ St. John Street, Portland

Dear Mr. Turner:

Pursuant to your letter of November 3, 1989 I am enclosing nine additional copies of the documents that were forwarded to your office along with my letter of November 3, 1989 regarding the above referenced Interpretation Appeal.

If there is any additional information that you require please do not hesitate to contact my office.

Sincerely,

William S Kany

William S. Kany

/wmc
Enclosures

Smith & Elliott, P.A.

ATTORNEYS AT LAW

199 MAIN STREET - P.O. BOX 1179

SACO, MAINE 04072

207-282-1527

ROGER S ELLIOTT
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RANDALL E SMITH
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DANIEL E CROWLEY
OF COUNSEL

SANFORD
207 324 1560

PORTLAND
207 774 3199

KENNEBUNK
207-985 2820

FAX
207 283 4412

November 1, 1989

City of Portland
Zoning Board of Appeals
Zoning Office, Room 315
Portland City Hall
389 Congress Street
Portland, Maine 04101

Re: Interpretation Appeal of Michael A. Valente, III
Regarding Property Located at 175-177½ St. John Street
Portland, Maine

Dear Members of the Portland Board of Appeals:

Pursuant to your Board of Appeals' submission requirements for an Interpretation Appeal I am writing to set forth what Michael Valente would like to do with the above referenced property and the basis for his right to do so.

On September 1, 1989 this office, on behalf of Michael Valente, sent a letter to the Code Enforcement Officer of the City of Portland requesting permission to divide the property located at 175-177 St. John Street into two separate lots pursuant to the principle of "functional division". For your information I am enclosing a copy of that September 1, 1989 letter with its enclosures. I am also enclosing copies of the plot plans related to the subject property which I understand were forwarded to the Code Enforcement Officer by Michael Valente.

The property in question contains two buildings which have existed for decades. They are currently utilized as rental units and have been utilized in that fashion for many years. Under the principle of "functional division" it is recognized that a single piece of property containing separate structures which have been utilized as rental units since prior to the adoption of zoning can be divided into separate pieces related to the separate structures even if the resulting lots are non-conforming.

The concept of "functional division" is fully spelled out in my September 1, 1989 letter, and therefore, I will not reiterate the principle at length in this letter. Basically, however, the Courts have recognized the principle of "functional division" based on the practical realization that if individual buildings on a single piece of property have been used separately over a period of years, dividing the ownership of the property will have no greater impact on it than exists at the present time. "Functional division" is a method of changing ownership and nothing else related to the property.

Pursuant to this Appeal, the Applicant is requesting that the Board of Appeals find that the property can be functionally divided and order that a certificate of occupancy be issued for both dwellings on their individual lots.

In addition to the enclosures already referenced in this letter, I am also enclosing the following:

a. An indication on the enclosed plot plans of the location of the parking and proposed parking for the two proposed lots.

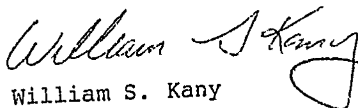
b. Floor plans of the existing two buildings.

c. Photos of both buildings.

d. A copy of the actual deed to the premises and copies of the proposed deed descriptions for the proposed lots.

Your consideration of this matter will be greatly appreciated.

Sincerely,



William S. Kany

WSK/wmc
Enclosures
cc: Michael Valente

CITY OF PORTLAND

INTERPRETATION APPEAL

APPLICATION

Applicant's name and address: Michael A. Valente, III, c/o Hardy Equities, 181 St. John Street, Portland, Maine 04102

Applicant's interest in property (e.g., owner, purchaser, etc.): Owner

Owner's name and address (if different): Michael A. Valente, III, c/o Hardy Equities, 181 St. John Street, Portland, Maine 04102

Address of property (or Assessor's chart, block and lot number): 175 and 177½ St. John Street, Portland, Maine (68-B-3)

Zone: I-2 Present use: Residential

Order, decision, determination, or interpretation complained of: October 11, 1989 letter of William D. Giroux (see attached copy)

Disputed provision: Section 14- 422 .

Type of relief requested: Permit functional division of property .

The undersigned hereby makes application for the relief above-described, and certifies that all information herein supplied by him is true and correct to the best of his knowledge and belief.

Dated: Nov 2, 1989 William D. Kany
Signature of Applicant's Attorney

Smith & Elliott, P.A.

ATTORNEYS AT LAW

199 MAIN STREET - P.O. BOX 1179

SACO, MAINE 04072

207-282-1527

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OF COUNSEL

SANFORD
207-324-1560

PORTLAND
207-774-3199

KENNEBUNK
207-985-2690

FAX
207-283-4412

B11 Grant

September 1, 1989

Fred Williams, Code Enforcement Officer
Portland City Hall
389 Congress Street, Room 315
Portland, Maine 04101

Re: Property at 177 St. John Street, Portland, Maine

Dear Mr. Williams:

This office represents Michael Valente who owns certain property located at 177 St. John Street in Portland, Maine. On the property in question are two residential dwelling units which have existed on the lot since prior to the adoption of zoning in Portland. Mr. Valente would like to split the lot located at 177 St. John Street and sell each residential unit separately.

The history of use of the two buildings on the subject property is that of independent residential rental units for decades. Mr. Valente would now like to split the lot and sell the residential buildings separately pursuant to the concept of "functional division" which is an accepted method of dividing an improved lot in the State of Maine.

The primary case on "functional division" in the State of Maine is Keith vs. Saco River Corridor Commission, 464 A.2d 150 (Me. 1983). In the Keith case the owner of the property (Keith) sought permission from the Saco River Corridor Commission to divide her single lot into three lots based upon the fact that the lot had been "functionally divided" into separate lots by tenant occupancy since before the enactment of the Saco River Corridor Act.

The Superior Court in the Keith case found that the property had in fact been "functionally divided" into separate lots by tenant occupancy which predated the Corridor Act, the premises were lawful existing non-conforming uses and the proposed shift from tenant-occupation to owner occupation of the separate lots

did not constitute an extension, expansion or enlargement of the existing non-conforming use so as to defeat the grandfathered status of the property. The Maine Law Court agreed with the conclusion of the Superior Court.

In this case, like the Keith case the dwellings predate zoning and have been separately occupied and used by tenants. Each dwelling is served by its own utilities. It is clear that the houses on the subject property are legally non-conforming under the terms of the Portland Zoning Ordinance (§14-381 et seq. of the Portland Zoning Ordinance) and may continue to exist in their present unified ownership. Mr. Valente now proposes to divide the lot into two lots with fixed boundaries and a house on each accessible from St. John Street. Neither lot would conform to the present dimensional requirements in the Portland Zoning Ordinance.

In ruling on the Keith appeal, the Law Court held that a mere change from one owner of a lot with tenant occupancy to three separate lots with owner occupants would not be an extension, expansion or enlargement of existing buildings or of non-conforming uses prohibited by the Saco River Corridor Act. Similarly, the division of the subject lot into two lots as proposed by Mr. Valente will not violate any of the non-conforming structure/use provisions in the Portland Zoning Ordinance.

The only real change Mike Valente wishes to make is a change in ownership of each dwelling unit. The Law Court held that a mere change in ownership without clear language to the contrary in the statutes or ordinance is not violative of the non-conforming structure and/or use provisions under the circumstances in the Keith case which are identical to the facts in this case.

The Law Court set forth the following test:

"Indeed, the test to be used to determine whether the questioned use of property fits within the 'grandfathered' or exempted use granted to nonconforming uses is: (1) whether the use reflects the 'nature and purpose' of the use prevailing when the zoning legislation took effect; (2) whether there is created a use different in quality or character, as well as in

degree, from the original use, or (3) whether the current use is different in kind in its effect on the neighborhood."

The Law Court then reiterated that a mere change in ownership is not an extension, expansion or enlargement of a previously existing non-conforming buildings, structures or uses.

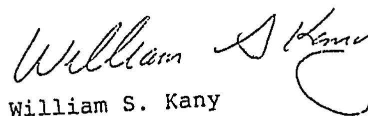
The Law Court went on to state:

"The post-sale fragmented title in no way would modify the nature or purpose of the preexisting nonconformity of the respective buildings on the land, nor would it reflect any alteration in the land use itself prevailing at the time the Saco River Corridor Act took effect, nor would it under any view of the factual situation create a new use different in quality, character or degree, from the original use; no change in intensity of use would result. Had the Keith holdings as functionally divided been owned by three different individuals at the time of the Act and each of them desired to convey his separate lot, there would be no zoning impediment to the sale. We cannot see wherein a different result should obtain simply because all the already functionally divided lots are owned by only one person.

The identical reasoning applies in this case which gives Mr. Valente the right to functionally divide the subject lot into two separate, distinct lots and to sell each lot individually.

For your information and convenience I have enclosed a copy of the Keith vs. Saco River Corridor Commission decision as well as the Beers vs. Board of Adjustment of the Township of Wayne, 183 A.2d 130, 75 N.J. Super 305 (1962) and Maclean vs. Planning Board of Township of Brick, 228 A.2d 85, 94 N.J. Super 288 (1967) decisions both of which are cited with approval in the Keith decision. If I can provide you with any additional information please do not hesitate to contact me.

Sincerely,



William S. Kany

WSK/wmc
Enclosures
cc: Michael Valente

in its answer to the "amended complaint," it abandoned any interest adverse to plaintiffs. That answer was directed to plaintiffs' assertion that the new party defendant "claims or may claim an interest in said equipment." As such, it reasserted the position taken in the original answer and left unaffected the counterclaim. A trial court cannot be expected to divine the abandonment of a claim of right by implication from a pleading apparently consistent with previous pleadings.

[3,4] The award of declaratory relief is ordinarily a matter resting in the discretion of the trial court. Utility Blade & Razor Co. v. Donovan, 33 N.J.Super. 566, 570, 111 A.2d 300 (App.Div.1955); In re Badenhop, 61 N.J.Super. 526, 533, 161 A.2d 18 (Cty.Ct.1960); In re Seabrook, 90 N.J. Super. 553, 558, 218 A.2d 648 (Ch.Div. 1966). As our Supreme Court has observed in Untermann v. Untermann, 19 N.J. 507, 117 A.2d 599 (1955):

> "Justice and equity do not require an equity court to act in a factual vacuum. Equities arise and stem from facts which call for relief from the strict legal effects of given situations. A litigant should fully disclose in its pleadings the actual factual and legal situation whether the relief is sought under the general equity jurisdiction or under the Declaratory Judgment Act. It would be an anomaly if the hands of an equity court should be circumscribed by a deliberately restricted pleading which fails to disclose the true situation. Condonation by the court of such conduct would not be instrumental in the preservation of justice and the integrity of the court." (at p. 518, 117 A.2d at p. 605)

Were we to recognize Dommerich's jurisdictional contentions on appeal, we would place our imprimatur upon a practice designed to subvert the judicial proceeding. This we should not do. Cf. Roberts Elec., Inc. v. Foundations & Excavations, Inc., 5 N.J. 426, 432, 75 A.2d 858 (1950). On the record before the trial court the case presented a controversy between adverse interests and it was a proper exercise of judicial discretion to grant the declaratory judgment.

The judgment, insofar as it determines the legal and equitable rights of the parties in and to the property in controversy, is affirmed substantially for the reasons stated in the opinion of the trial court.

94 N.J.Super. 288

Edna MAC LEAN, John Mac Lean, Marion Chapman and Stanley Chapman, Plaintiffs-Respondents,

v.

PLANNING BOARD OF the TOWNSHIP OF BRICK, Defendant-Appellant.

No. A-107.

Superior Court of New Jersey Appellate Division.

Argued March 13, 1967.

Decided March 22, 1967.

Action to compel planning board to approve application for subdivision. From judgment of Superior Court, Law Division, declaring that plaintiffs had right to convey dwellings on separate lots without violating ordinances of township, an appeal was taken. The Superior Court, Appellate Division, held that where plaintiffs before adoption of zoning requirements had erected four bungalows for summer occupancy on one tract, plaintiffs, as prior nonconforming users, had right to subdivide tract and

convey bungalows to separate buyers, notwithstanding zoning ordinance specifications as to minimum lot size, frontage, or setbacks but, inasmuch as lots did not front on public streets, planning board of township had authority to require dedication of roadway as condition for approval of subdivision.

Reversed and remanded to planning board for further proceedings.

1. Towns ⟹4
Zoning ⟹322

Where plaintiffs before adoption of zoning requirements had erected four bungalows for summer occupancy on one tract, plaintiffs, as prior nonconforming users had right to subdivide tract and convey bungalows to separate buyers, notwithstanding zoning ordinance specifications as to minimum lot size, frontage, or setbacks but, inasmuch as lots did not front on public streets, planning board of township had authority to require dedication of roadway as condition for approval of subdivision. N.J. S.A. 40:55–1.20

2. Towns ⟹4

Whether one of lots shown in subdivision application could be rendered more in conformance with zoning size requirements by use of remaining land of owners was for board of adjustment. N.J.S.A. 40:55–1.20.

3. Towns ⟹4

After planning board acted on application for subdivision, its permissive determination should properly be made conditional on applicants' securing from board of adjustment a variance in respect of lot sizes, setbacks and yards, but board must be guided by applicants' substantive rights as nonconforming users. N.J.S.A. 40:55–1.20.

———

Samuel M. Morris, Bricktown, for appellant.

Edward J. Turnbach, Bricktown, for respondents Starkey & Turnbach, Bricktown, attorneys, Charles E. Starkey, Bricktown, on the brief.

Before Judges CONFORD, FOLEY and LEONARD.

PER CURIAM.

Plaintiffs inherited an oceanside tract of land in Brick Township with dimensions of approximately 670′ x 88′. The short dimension fronts on Route 35 and the tract extends easterly to the Atlantic Ocean. About 16 years ago, before adoption of the existing requirements of the municipal zoning ordinance for minimum lot size, setbacks and side and rear yards, four bungalows were erected for summer occupancy on the tract and have been seasonally occupied by tenants. Access to the easterly three bungalows is afforded by a private 20′ driveway, 10′ belonging to plaintiffs and 10′ to property owners to the south. The municipality recently paved the driveway after installing utilities.

Having prospective purchasers for the separate bungalows, plaintiffs submitted a subdivision application to the defendant planning board. The map submitted by plaintiffs sets out the bungalows on lots apparently suited to the location of the structures thereon, with approximate 62′ frontages for three of the lots and one narrower. The application was denied without a statement of reasons, upon the basis of an opinion by counsel to the board.

In this action to compel the board to approve the application the trial court filed an opinion captioned "Decision and Judgment" which, without directing any action, declared "the plaintiffs may as a matter of law convey these dwellings as separate lots without being in violation of the ordinances of the Township of Brick." In so doing the court relied upon our decision in Beers v. Bd. of Adjust. of Wayne Tp., 75 N.J. Super. 305, 183 A.2d 130 (App.Div.1962).

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in *Beers*.

[2,3] Concerning the easte
which defendant contends can

ant where, as here, the workman's skill is such as not to require control (Marcus v. Eastern Agricultural Ass'n, Inc., 32 N.J. 460, 161 A.2d 247 (1960), which adopted the dissenting opinion in 58 N.J.Super. 584, 597, 157 A.2d 3 (App.Div.1959); Brower v. Rossmy, 63 N.J.Super. 395, 164 A.2d 754 (App.Div.1960), certif. den. 34 N.J. 65, 167 A.2d 54 (1961)), the facts nevertheless must justify an inference of the right of control, even though not exercised in fact in the particular case. Mahoney v. Nitroform Co., Inc., 20 N.J. 499, 506, 120 A.2d 454 (1956).

The following words used in Berkeyheiser, supra, 71 N.J.Super. at p. 177, 176 A.2d at p. 500, are apt here:

> "The present plaintiff had a regular and permanent full-time job elsewhere at a substantial salary. He had no expectation of regular and steady employment by the respondent. The odd jobs he did for respondent occurred at irregular and isolated occasions and only when the need arose. Petitioner did not perform the repairs on a regular schedule, but he himself chose the times when he would appear to make the repairs. The very irregularity of the work and petitioner's economic independence distinguish this case from Marcus.
>
> We conclude that the character of the work was such as to preclude petitioner from the right to compensation under the Workmen's Compensation Act. We have accepted all his factual contentions as true, but they do not establish the essential existence of an employer-employee relationship. Whether he was more a casual employee or an independent contractor need not be decided. There is no merit to petitioner's claim that would justify an award, either within the letter or spirit of this remedial legislation."

The judgment is affirmed.

75 N.J.Super. 305

Walter A. BEERS, Plaintiff-Appellant,

v.

BOARD OF ADJUSTMENT OF the TOWNSHIP OF WAYNE and the Township of Wayne, Defendants-Respondents.

No. A-736.

Superior Court of New Jersey
Appellate Division.

Argued Dec. 18, 1961.

Preliminary Opinion Filed April 17, 1962.

Resubmitted June 13, 1962.

Decided July 5, 1962.

Action in lieu of prerogative writs presenting attack on refusal of township board of adjustment to grant variance from minimum residential lot line and frontage requirements of zoning ordinance, and, alternatively, upon reasonableness and constitutionality of those provisions as applied to the plaintiff's property. The Superior Court, Law Division, held for the defendants and the plaintiff appealed. The Superior Court, Appellate Division, Conford, S. J. A. D., held that subdivision authority of planning board did not extend to prevent owner of dwellings which were in single tract and which constituted valid nonconforming use under zoning ordinance from making separate conveyances to tenant-vendees of such dwellings within suitable curtilages of land, not complying with minimum residential lot size and frontage requirements of zoning ordinance.

Reversed and remanded with directions.

1. Municipal Corporations ⟹43

Subdivision authority of planning board did not extend to prevent owner of dwellings which were in single tract and which constituted valid nonconforming use under zoning ordinance from making separate conveyances to tenant-vendees of such dwellings within sui[illegible] not complying with [illegible] size and frontage r[illegible] ordinance. N.J.S.[illegible] 55:14A-1 et seq., 14[illegible]

2. Municipal Corpora[illegible]

Nothing in Pla[illegible] tention that planning[illegible] proval of subdivisio[illegible] venting separate o[illegible] units, to secure su[illegible] ment of police powe[illegible]

3. Zoning ⟹328, 329

Mere change f[illegible] to owner occupancy [illegible] teration of previous dwellings. N.J.S.A. 14A-1 et seq., 14B-1 [illegible]

4. Zoning ⟹327

Property, along [illegible] nonconforming use, [illegible]

Walter A. Beers, [illegible] (Robert E. Beers, [illegible]

Peter J. Van N[illegible] spondent, Township [illegible]

Walter F. Hoffma[illegible] ent, Board of Adjust[illegible] of Wayne.

Before Judges C[illegible] and LABRECQUE.

The opinion of th[illegible] by

CONFORD, S. J. [illegible]

This is an action [illegible] writs which as tried consisted of an att[illegible] of the Wayne Towns[illegible] ment to grant plainti[illegible] minimum residential requirements of the z[illegible]

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comparable situation there the planning
d had denied the application for sub-
ion for the sole reason that it would
ate the zoning ordinance as to minimum
izes, etc. A consequent application to
board of adjustment for variance was
vise denied. Upon judicial review of
atter action, and in the context of what
transpired, we held the property owner
led as a matter of law to convey the
galows separately by deed descriptions
itable curtilages by virtue of the prior
onforming use of the structures as
lings and the incidental right of alien-
ty thereof.

] To the extent of the foregoing hold-
plaintiffs have a similar substantive
: as prior nonconforming users to con-
the present bungalows to separate buy-
nsofar as anything to the contrary may
ht to be based on the ordinance speci-
ns to minimum lot size, frontage,
.c.., etc. However, the situation here
rs from that in *Beers* in one important
ect. In *Beers,* all the subdivided lots
ted on public streets. Here they do not.
he extent that the board has statutory
diction and responsibility to assure
er access to each of the rear bungalows
S.A. 40:55-1.20, within the reasonable
city of plaintiffs to do so under the
ent circumstances, the board ought to
forded an opportunity to propose rea-
ble steps in that regard to plaintiffs
, by an effort to achieve a public dedi-
n of the roadway jointly with the other
rty owners to the south), as a condi-
for approval of the subdivision. If, as
ested by the board on this appeal, it
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age, it may request it. However, in
ising its jurisdiction the board may
impose requirements not reasonably
ble or which would in effect destroy
tiffs' nonconforming rights as declared
rs.

: Concerning the easternmost lot,
ı defendant contends can be rendered
more in conformance with zoning size re-
quirements by use of plaintiffs' remaining
land, this is subject matter appropriately for
cognizance by the board of adjustment.
After the planning board acts on the sub-
division application, its permissive deter-
mination should properly be made condi-
tional on plaintiffs' securing from the board
of adjustment a variance in respect of lot
sizes, setbacks, yards, etc. Cf. Imperato v.
Zoning Bd. of Adjust. of Tenafly, 91 N.J.
Super. 540, 221 A.2d 751 (App.Div.1966).
But that body will in that regard similarly
be guided by plaintiffs' substantive rights
as nonconforming users, agreeably with the
decision in *Beers.*

Reversed and remanded to the planning
Board for further proceedings consistent
with this opinion. No costs.

94 N.J.Super. 292

Albert M. HOFFMAN, Plaintiff-Appellant,
v.
Annette M. HOFFMAN, Defendant-Respondent.

No. A-23.

Superior Court of New Jersey
Appellate Division.

Argued March 13, 1967.
Decided March 22, 1967.

Divorce action. The Superior Court, Chancery Division, dismissed the suit, and plaintiff appealed. The Superior Court, Appellate Division, Sullivan, S. J. A. D., held that where acts of extreme cruelty and constructive desertion committed by defendant and on which plaintiff based his suit for divorce occurred while the parties were domiciled in a state which did not recognize such acts as constituting a cause

dwellings within suitable curtilages of land, not complying with minimum residential lot size and frontage requirements of zoning ordinance. N.J.S.A. 40:55-21.1 et seq., 55:14A-1 et seq., 14B-1 et seq.

2. Municipal Corporations ⚷43

Nothing in Planning Act revealed intention that planning board could deny approval of subdivision for purpose of preventing separate ownership of dwelling units, to secure supposed better enforcement of police power regulations.

3. Zoning ⚷328, 329

Mere change from tenant occupancy to owner occupancy is not extension or alteration of previous nonconforming use of dwellings. N.J.S.A. 40:55-21.1 et seq., 55:14A-1 et seq., 14B-1 et seq.

4. Zoning ⚷327

Property, along with its attendant valid nonconforming use, is alienable.

Walter A. Beers, Newark, for appellant (Robert E. Beers, Newark, attorney).

Peter J. Van Norde, Wayne, for respondent, Township of Wayne.

Walter F. Hoffman, Wayne, for respondent, Board of Adjustment of the Township of Wayne.

Before Judges CONFORD, FREUND and LABRECQUE.

The opinion of the court was delivered by

CONFORD, S. J. A. D.

This is an action in lieu of prerogative writs which as tried in the Law Division consisted of an attack upon the refusal of the Wayne Township Board of Adjustment to grant plaintiff a variance from the minimum residential lot size and frontage requirements of the zoning ordinance, and, alternatively, upon the reasonableness and constitutionality of those provisions as applied to plaintiff's property. Since 1955 plaintiff has owned a corner tract of land on which five bungalow-type dwellings were erected prior to 1930, before the zoning ordinance in question was adopted, which have been used as such ever since by tenants. Four of these structures front on Water Street and one on Island Street. Plaintiff sold these homes to their tenant-occupants on installment contracts, but when he delivered a deed to one of them by a description not according with any previously fixed lot lines he was informed by the board of assessors that "this is a subdivision and must be referred to the Planning Board for approval." That body upon consequent application refused plaintiff's request for approval of subdivision of the tract into five lots, one for each dwelling, on the ground "it does not meet present zoning requirements." Whereupon the unsuccessful application to the board of adjustment and the action in the Law Division. That court held for defendants.

[1] On the original briefing and argument of the appeal before us the only issues debated were those mentioned above—error in the ruling of the board of adjustment and the invalidity of the zoning ordinance lot area and frontage requirements. On subsequent deliberation over the matter by the court, we concluded that the root problem here was the question of the statutory jurisdiction of the planning board over the matter in the particular circumstances presented, or, alternatively viewed, the reasonableness or validity of a denial of approval of subdivision of this fully developed tract of land, in the light of the exempted nonconforming use of the property insofar as the zoning ordinance is concerned. We directed submission of affidavits bearing upon the facts in relation to these issues and supplemental briefs on these points. These have been filed and have received our further study. The additional facts so supplied are not disputed. Our conclusion, for the reasons hereinafter stated, is that plaintiff

is legally free to make separate conveyances to vendees of these dwellings within suitable curtilages of land, without regard for the action of the planning board. This disposes of the controversy and renders the other issues in the case unnecessary of resolution. The more detailed references to the facts *infra* are partly taken from the supplemental affidavit submitted by plaintiff, which has not been disputed by defendants.

The properties in question are situated in a residence B district under the zoning ordinance wherein residential use is confined to single-family dwellings. Minimum lot area and frontage requirements have from time to time been increased by zoning amendments since the first zoning ordinance, adopted in 1930, set the area and frontage requirements at 2500 square feet and 25 feet respectively. The structures here involved are conceded by defendants to have been built prior to that time. As of June 1, 1955, when plaintiff acquired title to these properties, and ever since, the said lot requirements were 15,000 square feet and 100 feet, respectively, subject to certain qualifications not here applicable.

The *locus in quo* is situated near the southerly end of a residential B zoning district pocket having approximate median dimensions of 2600 feet by 500 feet, lying lengthwise along the Pequannock River, which borders its westerly side. It is abutted along its easterly side by the Erie-Lackawanna Railroad, and beyond that, and also on its north and south ends, by districts zoned industrial. In other words, it is a small residential pocket surrounded by the river and industrial areas. A map in evidence (Ex. P-7) shows the existing lot and building development of the southerly two-thirds of the pocket, including the property here in litigation. The evidence discussed hereinafter applies to the area shown on that map. The section is dominated by one north-south street, Fayette Avenue. Island Street runs from Fayette Avenue to the river, and Water Street is a dead-end street making a "T" intersection with Island Street near the river. All the lots on the westerly side of Fayette Avenue run down to the river.

About 85% of the land area in question is built up with small dwellings on lots averaging about 25 feet in width. It appears these were all built in the 1920's as recreation bungalows primarily for summer occupancy. Beginning during the housing shortage of the last war, however, they were converted to all-year occupancy by installation of heating plants and insulation. There is evidence that there has been a demand for this type of housing in the area, and we infer from the proofs that many if not most of these properties are now owner-occupied. Some 82 such structures are shown on the map, in several cases more than one on a lot (some on rear areas of 25-foot lots). The market values per house and lot appear to run from $10,000 down to $3,000. An expert witness for defendants conceded this was a "very highly built up area." He further stated: "this area can be and at some day in the very near future should be considered a blighted area and that all structures within that area be torn down and the area be redeveloped." There is occasional flooding from the river. No sanitary sewer system exists here, and the houses are all served by septic tanks. According to the health officer of the township, the water table and soil conditions are such as to preclude any further installations of septic tanks for new construction, and emergency plans are being prosecuted by the municipality for construction of a sanitary sewer system for the area. There have been no sewerage complaints by or on behalf of the municipality, however, as to any of plaintiff's houses. Three of them have individual septic tanks, two share another.

The defendants expressly concede the fact that the buildings of the plaintiff are valid nonconforming uses and entitled to the status accorded such uses by the statute and the ordinance.

The entire general area under discussion was originally platted as shown by a "Map

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,f Lots at Island Park, Mountainview, Passaic Co., N. J., owned by Victor Haviser," lated April 1919, approved by the municipal ·overning body, and filed in the office of he Register of Passaic County May 10, 919. Most of the lots shown thereon are, s noted above, about 25 feet in width. 'laintiff's holding consists of all of original ›t #27 (frontage 32.28 feet) and a portion ·f original lots #25, #23, #21 and #19 n said map (all with frontages of 25 feet), he rear segments of the latter lots, which ack on Fayette Avenue, having been coneyed away long ago by a predecessor in itle. All these lots fronted on Water street. The irregular tract as a whole ieasures 132.28 feet on Water Street, 136.-3 feet along Island Street, 127.13 feet on ie northerly boundary and 81.69 feet on ie easterly boundary.

'lthough the erection of the structures olaintiff's property ignored the original ›t lot lines as filed, it is clear this was one to afford less crowding of the buildigs. If erected within the original lot nes, five bungalows could have been built n the Water Street frontage. Instead, our were built on that frontage, affording .ore space between them, and one on the land Street side fronting 35.66 feet on .at street (lot width 33.13 feet), using the ar portion of the Water Street lots for at purpose. As now proposed by plaintiff be subdivided to accommodate the five vellings on separate lots in separate ownship, the parcels would have the following mensions: (a) 32′ x 94′; (b) 32.94′ x 94′; :) 27.53′ x 94′; (d) 39.81′ x 94′ x 101.17′; ·) 33.13′ x 94.87′ x 35.66′ x 81.69′. It is obous that such subdivision would result in :s deficient in size and frontage under the esent ordinance. Since, however, it is nceded that plaintiff may continue the esent use of the dwellings on the land as ey stand, being nonconforming uses, the lv practical difference between the result ioned by the Law Division, and defendbefore us by defendants, on the one hand, d relief plaintiff seeks, on the other, that the former relegates the dwellings now and for the foreseeable future to occupancy by tenants while the latter would permit them to be owned by their occupants.

According to testimony adduced in the Law Division, the properties sold by plaintiff have been improved by their contractvendees since purchase. The occupants have painted, repaired roofs and redecorated, and some have replaced heating plants.

Within the area shown on Exhibit P–7 there are only two or three parcels of vacant land large enough to satisfy the ordinance requirements. A real estate expert testified that plots of 100′ x 150′ in the area would not be saleable for purposes of improvement with a "proper home on it that would go with a 100 by 150"; further: "I can't see where you can have such conditions as you have here on the small plots and expect a man to come in and buy a 100 by 150 lot and put up that type of home. You spend 15 or 16 thousand dollars for a house in a 5 thousand neighborhood, how are you going to get your money out of it?" These parcels of vacant land not now built on are unsuitable for building because low and swampy. No new homes have been built in the area for 30 years or more. The same witness said plaintiff's properties have had no septic tank problem since a catch basin was installed.

Plaintiff offered in evidence a number of photographs of his dwellings and of others in the area, with which they appear to compare favorably in general appearance. They are modest but not unattractive.

The health officer of the municipality testified for defendants as to flooding and sewerage problems which the general area had suffered during his five-year tenure of office. Applications for certain building permits in 1956 and 1957 were rejected because the properties could not pass percolation tests for septic tanks required by the health ordinance. However, he has no health complaints on record as to plaintiff's buildings.

Harvey Moskowitz, associated with the planning firm which recently developed a master plan for the township, discussed it as a witness for defendants. He explained the rationale of his firm's recommendations for planning of areas having problems of deterioration as being to upgrade or rezone them for a different use, although consideration is also given to existing uses. Although general theory is that "the zoning ordinance itself implements the portions of the land-use plan that can safely or reasonably be expected to occur within the future five years," yet "there is no justification for freezing existing uses if the land use in the future should be developed for something else." On cross-examination, the witness did not know whether any property in the area here involved "could be developed in accordance with the present zoning requirements." In response to the question as to why his firm had recommended that the general area here involved should be zoned for 100 x 150 foot lots, he said, in essence, that since this was a blighted, substandard and overcrowded development, aggravated with problems of a high water table and consequent sewerage difficulties, there was "required a much larger lot than existed there now." Moreover, they wanted to "stabilize development in the area until such time as the municipality was ready to move in to eliminate some of the shacks."

Upon our original consideration of this appeal we entertained considerable doubt as to the reasonableness or validity of the application against plaintiff's property of the minimum lot size and frontage requirements of this ordinance in view of the obviously incompatible character of the existing use-development not only of plaintiff's property, but of the entire surrounding area. See Zampieri v. River Vale Tp., 29 N.J. 599, 152 A.2d 28 (1959). But this question is not reached if it is concluded, as we do, that the subdivision authority of the planning board does not extend to proscription of plaintiff's proposed conveyances of these residences in the circumstances here obtaining.

While we do not find it necessary to deal with the question whether the subdivision jurisdiction of a planning board can under any circumstances extend to an already fully improved parcel of land, cf. Sinilow v. Orange Planning Board, 58 N.J.Super. 108, 155 A.2d 560 (App.Div.1959) (precluding resort to subdivision to validate illegal extension of nonconforming use); Ardolino v. Florham Park Board of Adjustment, 24 N.J. 94, 130 A.2d 847 (1957) (where one of three lots sought to be realigned was vacant), there is a plenitude of recent authoritative opinion that the basic motivating objective of the subdivision control provisions of the Municipal Planning Act (1953) is to prevent deleterious future development of vacant land. The most recent relevant expression of the Supreme Court is found in Levin v. Livingston Tp., 35 N.J. 500, 506, 173 A.2d 391, 394 (1961), where Mr. Justice Hall stated:

> "Subdivision control, like zoning, is a tool of overall community planning. They are 'closely related * * * in that both are preventive measures intended to avert community blight and deterioration by requiring that *new development* proceed in defined ways and according to prescribed standards. Zoning relates to the type of building development which can take place on the land; subdivision control relates to the way in which the land is divided and *made ready for building development.*' Cunningham, 'Control of Land Use in New Jersey Under The 1953 Planning Statutes,' 15 Rutgers L.Rev. 1, 45-46, n. 175 (1960)." (Emphasis supplied)

In Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958), the court felt impelled to discuss, although it did not there have to decide, the question whether at any given stage of development or conveyance-out of portions of a tract prior to adoption of the 1953 act the subdivision controls of the latter were inoperative by reason of the fruition of vested rights of the property

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owner. It said (at p. 439, A.2d):

> "Thus, at least where are concerned, the Plan 1953 is applicable to insi a plat plan of the tract h been approved and filed pu Old Map Act. But a prol with respect to situation owner of a filed plat pl Old Map Act has taken ac other than merely filing Where, for instance, the conveyances of lots, deve developed, to individual suant to the filed plan in the nature of noncon may be created. Cf. Rod pra, [14 N.J.Super. 188, (Law Div.1951)]. The r lem is to determine under stance, a tract *may be cl developed and hence te exercise of planning po* phasis supplied)

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> "What may be appropr where *a small virgin trac* into a small number of lo appropriate where a s carved out of a larger poses of further subdivis larger tract has already a characteristics. The qu applicability of the Pla 1953 to situations where occurred, other than the a plat plan under the O one which is in need clarification. It is wortl the two reports of the Commission, previously classified undeveloped su into two categories, i. e which were *totally* those which were *sparsel* latter being defined as tr one to five houses per phasis supplied)

ner. It said (at p. 439, at p. 37 of 147 A.2d):

"Thus, at least where virgin lands are concerned, the Planning Act of 1953 is applicable to instances where a plat plan of the tract had previously been approved and filed pursuant to the Old Map Act. But a problem emerges with respect to situations where the owner of a filed plat plan under the Old Map Act has taken additional steps other than merely filing the plat plan. Where, for instance, there have been conveyances of lots, developed or undeveloped, to individual owners pursuant to the filed plan vested rights in the nature of nonconforming uses may be created. Cf. Rodee v. Lee, supra, [14 N.J.Super. 188, 81 A.2d 517 (Law Div.1951)]. The resulting problem is to determine under what circumstances a tract *may be classified as undeveloped and hence to require the exercise of planning powers.*" (Emphasis supplied)

and also, (pp. 439–440, p. 38 of 147 A.2d):

"What may be appropriate regulation where *a small virgin tract is subdivided* into a small number of lots may not be appropriate where a small tract is carved out of a larger tract for purposes of further subdivision, where the larger tract has already assumed certain characteristics. The question of the applicability of the Planning Act of 1953 to situations where further action occurred, other than the mere filing of a plat plan under the Old Map Act, is one which is in need of legislative clarification. It is worthy of note that the two reports of the State Planning Commission, previously referred to, classified undeveloped subdivided lands into two categories, i. e., those tracts which were *totally unoccupied* and those which were *sparsely occupied,* the latter being defined as tracts containing [illegible] five houses per block." (Emphasis supplied)

These expressions, as well as the source materials for interpretation of the subdivision control provisions of the Planning Act cited therein, make it evident that the Legislature did not envisage that particular legislation as a substitute for the use-zoning functions of the municipal governing body or board of adjustment but as a complementary land-development control technique, prophylactic in nature and purpose. Most pertinently for present purposes, there is no evidence that subdivision control authority was conceived by the Legislature as an antidote against the sometimes unpalatable consequences of the protection of nonconforming uses under the zoning act. R.S. 40:55–48, N.J.S.A. As a court, we have no right to apply in advance of enactment the policy behind recently proposed legislation calling for the mandatory abatement of nonconforming uses within a given period of time. Yet one senses some such attitude underlying the reaction of the municipal authorities to plaintiff's attempt to sell off his properties separately. And see Grundlehner v. Dangler, 29 N.J. 256, 263, 148 A.2d 806 (1959).

[2] Defendants' supplemental brief undertakes to defend the assumption of subdivision jurisdiction by the planning board in the instant situation on the ground that police power regulations (presumably health, sewerage and the like) can be enforced more easily against a single owner of the five buildings than against separate owners of each. First, we see no factual merit in the premise. Even as to the two bungalows which share one septic tank, the authorities can clearly visit sanctions for violation of any applicable ordinance upon two separate owners as effectively as against one joint owner. Second, and more to the point, nothing in the Planning Act remotely indicates that a planning board may deny approval of a subdivision for the purpose of preventing separate ownership of dwelling units in order to secure the supposed better enforcement of police power regulations. The mere statement of the hypothesis exposes its discordance with the

whole idea of subdivision legislation and administration.

It may be noted that the planning board did not here condition approval of the requested subdivision upon specified ameliorative measures relative to drainage, sewerage or the like. Cf. Ardolino v. Florham Park Board of Adjustment, supra. The denial was outright, and merely because there "was no compliance with present zoning requirements" (presumably as to the dimensional specifications). Nor do defendants suggest a remand to the planning board for imposition of such conditions for approval.

Denial of subdivision cannot practically or legally prevent the continued use of these structures for dwelling purposes, nor do defendants so contend. Such denial, moreover, obviously cannot effect salutary control over undesirable future development of the property so long as these buildings stand. When and if they are removed the statutory rights attendant upon the nonconforming use will automatically cease, and any reasonable zoning regulation may then properly be brought to bear upon the property. Moreover, in that event, the vacancy of the land will then legally justify appropriate subdivision controls. However, it is obvious that the problem of improvement of land use is here area-wide, not confined to plaintiff's single tract. Toward that end, various types of legislation to eliminate blighted areas are available to meet the problem on a comprehensive basis, with fair compensation to the property owners affected. See, e. g., N.J.S.A. 55:14A-1 et seq.; 55:14B-1 et seq.; N.J.S.A. 40:55-21.1 et seq. In the meantime, there is no impediment to adoption or enforcement of suitable police power regulations over the manner of use of these properties, whether or not they become owner-occupied.

There is another cogent consideration. We ought not lightly to indulge the notion that anything in the Planning Act was intended to undermine so fundamental a concept under the zoning statute as the principle of protection of nonconforming uses. The two pieces of legislation are cognate, and they should be applied consistently. Defendants do not even suggest, nor do we believe they properly could, that owner-occupation of a dwelling is a different use of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family. As recently stated by this court, "The test [of nonconforming use] is 'use' and not ownership or tenancy." Arkam Machine & Tool Co. v. Lyndhurst Tp., 73 N.J.Super. 528, 533, 180 A.2d 348, 350 (App.Div.1962). The combined effect of the actions of the municipal agencies in this case, if approved, would in our judgment be to impair the statutory immunity of the nonconforming use of the property in question. Cf. Morris v. City of Los Angeles, 116 Cal.App.2d 856, 857, 254 P.2d 935 (D.Ct.App.1953).

[3,4] In a realistic sense, every point of disparity between the improved lots as demarcated by plaintiff's proposed conveyances and the regulations of the zoning ordinance are inherent in the long existing use and situation of the land and buildings. The mere drawing of appropriate lot lines between the structures to replace the old map lines which were ignored (to the advantage of the placement of the buildings) when they were erected, or to ratify for conveyance purposes the *de facto* lines of possession presumably intended as between the owner and the respective tenants during the tenancies, surely would not create substantial as distinguished from theoretical discrepancies with the zoning ordinance *not existing before* such new lines were drawn and before the zoning ordinance was adopted. The defendants' attitude towards plaintiff's program is seen actually to come down in essence to dictation of combined as against separate ownership of the dwellings. As indicated, we do not regard a mere change from tenant occupancy to owner occupancy as an extension or alteration of the previous nonconforming use of the dwellings. And there is no question as to the right of alienability of property along

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ith its attendant valid nonconforming use. ee Arkam Machine & Tool Co. v. Lyndurst Tp., supra. Thus, any defense of the ction of the planning board as supposedly reventive of violation of the zoning ordiance, within the theory of Smilow v. range Planning Board, supra, is illusory, nd would but hide an attempt by indirecon to impair the integrity of the legal onconforming use by abolishing an ingral incident of ownership in such use—nfettered alienability. Cf. the commentary n Smilow in Cunningham: "Control of and Use in New Jersey," XV Rutg.L.Rev. 47–49 (1960).

We add a word as to defendants' insistent eme that plaintiff bought the property in 5 with knowledge of the zoning status the property, thus bringing down upon s head the weight of the Spartan adage at having made his bed he should be made lie in it. For whatever force that idea legitimately have in a variance case hardship is pleaded, it is irrelevant either the construction of the Planning t in the present context or the extent of e rights of an owner of a property with nonconforming use. Even as to a variance case the rigor of the doctrine has been nsiderably softened. See Ardolino v. orham Park Board of Adjustment, supra articularly at 24 N.J., pp. 107–108, 130 2d 847). And note the persuasive attack on the rationale of the rule in 1 Rathof, Law of Zoning and Planning (3d ed. 0), c. 48, pp. 48–13 et seq.

For the reasons stated, we conclude and d that plaintiff may as a matter of law vey these dwellings within suitable lot s to his vendees without being in violan of the Planning Act or the planning zoning ordinances of Wayne Township. are cognizant that the planning board not a party to this action. However, we ard the defendant township and its atney in this case to have virtually repnted it and deem the public interests lved adequately defended by that repation, particularly in view of the supl briefs. The interests of justice and of the expeditious determination of this controversy in entirety are best served by the making, in effect, of the declaratory judgment of the rights of plaintiff *vis a vis* the authorities of the municipality set forth in this determination. See Vacca v. Stika, 21 N.J. 471, 122 A.2d 619 (1956).

Judgment reversed; the cause is remanded for entry of judgment in conformity with this opinion; no costs.

75 N.J.Super. 319

STATE of New Jersey, Plaintiff-Respondent,

v.

Walter L. EVANS, Defendant-Appellant.

No. A-90.

Superior Court of New Jersey
Appellate Division.

Argued March 19, 1962.

Decided July 6, 1962.

Prosecution for possession of narcotic drugs. From an adverse judgment, the defendant appealed. The Superior Court, Appellate Division, Lewis, J. A. D., held that defendant, who was convicted about 11 months before the "Mapp decision", timely raised constitutional issue as to validity of search which could be considered on a direct appeal and record of his conviction was reviewable in the light of the "Mapp decision" notwithstanding his trial predated such decision, and a remand was necessary for a determination of the validity of search and seizure which produced evidence upon which defendant was convicted.

Case remanded.

Carolyn Smart KEITH

v.

SACO RIVER CORRIDOR COMMISSION.

Supreme Judicial Court of Maine.

Argued March 8, 1983.

Decided Aug. 3, 1983.

Property owner appealed from decision of the Saco River Corridor Commission denying her request for determination that her property was "grandfathered" and as such was not subject to restrictive provisions of Saco River Corridor Act. The Superior Court, York County, granted summary judgment to property owner, and Commission appealed. The Supreme Judicial Court, Dufresne, A.R.J., held that: (1) no legislative intendment could be inferred from any of the provisions of Saco River Corridor legislation which would prohibit separate conveyance of parcels of land on which nonconforming buildings and structures have previously and continuously been factually treated separately simply because they happen to exist in common ownership at time zoning law was enacted, and (2) mere change from tenant occupancy to owner occupancy in proposed sale and division of three separate nonconforming lots and buildings thereon was not an extension, expansion or enlargement of previously existing nonconforming buildings, structures or use within meaning of restrictive provision of the Act, and thus property owner could as a matter of law convey dwellings with lots without being in violation of Act.

Judgment affirmed.

1. Zoning and Planning ⇐747

Where superior court justice, in deciding motion for summary judgment in appeal from Saco River Corridor Commission decision, did not take or receive any additional evidence, but made his decision entirely from record developed before Commission, Supreme Judicial Court would review administrative record directly, same as superior court did, and determine whether Commission abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record. 38 M.R.S.A. §§ 951-968.

2. Zoning and Planning ⇐327

Proposed division and sale of three functionally divided nonconforming lots and buildings thereon continuously rented to tenants as separate lots for dwelling purposes was not prohibited by Saco River Corridor Act and property owner did not have to satisfy legal standards for variances from frontage and setback requirements of Act before she could obtain Saco River Corridor Commission's approval of proposed division and sale of lots. 38 M.R.S.A. §§ 951-968.

3. Zoning and Planning ⇐321

Policy of zoning is to gradually or eventually eliminate nonconforming uses as speedily as justice will permit; but implementation of goal must be carried out within legislative intendment.

4. Zoning and Planning ⇐335

Saco River Corridor Act does not contemplate complete adherence to goal of gradually or eventually eliminating nonconforming uses, since Act expressly authorizes repair, maintenance and improvement of existing nonconforming buildings or structures and permits, without a permit from Saco River Corridor Commission, reconstruction of such buildings or structures in substantially the same location and in the same size when decreased in value less than 75% by flood, fire or other casualty. 38 M.R.S.A. § 958.

5. Zoning and Planning ⇐321

Central point to be kept in mind when dealing with nonconforming buildings or uses is that it is building or land that is "grandfathered" and not the owner.

6. Zoning and Planning ⇐323

Once a nonconforming use or building is shown to exist, neither is affected by

user's title or possessory right in relation to owner of land.

7. Zoning and Planning ⇐323

Where a nonconformity legally exists, it is a vested right which adheres to the land or building itself and right is not forfeited by a purchaser who takes with knowledge of regulations which are inconsistent with existing use.

8. Zoning and Planning ⇐336

Property owner who sought determination by Saco River Corridor Commission that her property was "grandfathered" and as such was not subject to requirements of Saco River Corridor Act did not, by merely invoking Commission's power to decide whether proposed division and sale of her three nonconforming lots were permissible, thereby relinquish her rights to existing nonconforming uses. 38 M.R.S.A. §§ 951–968.

9. Zoning and Planning ⇐10

Supreme Judicial Court could not infer legislative intendment from any provisions of Saco River Corridor legislation which would prohibit separate conveyance of parcels of land on which nonconforming buildings or structures have previously and continuously been factually treated separately, simply because they happened to exist in common ownership at time zoning law was enacted. 38 M.R.S.A. §§ 951–968.

10. Zoning and Planning ⇐327

Test to be used to determine whether questioned use of property fits within "grandfathered" or exempted use granted to nonconforming uses is whether use reflects nature and purpose of use prevailing when zoning legislation took effect, whether there is created a use different in quality or character, as well as in degree, from original use, or whether current use is different in kind in its effect on the neighborhood.

11. Zoning and Planning ⇐329

Mere change from tenant occupancy to owner occupancy in proposed division and sale of three nonconforming lots and buildings thereon was not an "extension, expansion or enlargement" of the previously existing nonconforming buildings, structures or use within meaning of restrictive provision of section of Saco River Corridor Act. 38 M.R.S.A. § 958.

See publication Words and Phrases for other judicial constructions and definitions.

Smith & Elliott, Roger S. Elliott (orally), Karen B. Lovell, Saco, for plaintiff.

Hugh Calkins, Dover-Foxcroft (orally), for defendant.

Before McKUSICK, C.J., GODFREY, NICHOLS, CARTER * and WATHEN, JJ., and DUFRESNE, A.R.J.

DUFRESNE, Active Retired Justice.

The defendant-appellant, Saco River Corridor Commission (the Commission), appeals from the order of the Superior Court, York County, granting summary judgment to the plaintiff-appellee, Carolyn Smart Keith, in her appeal from a Commission decision denying Keith's request for a determination by the Commission that the premises located at 520–524 Ferry Road, in the City of Saco, were grandfathered and as such were not subject to the requirements of 38 M.R.S.A. § 957–B.3.E(3) and (5), or, in the alternative, for the grant of a variance from the requirements of the Act.[1] The Superior

* Carter, J., sat at oral argument and participated in the initial conference but resigned before this opinion was adopted.

1. The Saco River Corridor Act, 38 M.R.S.A. §§ 951–968, provides as follows:

§ 957–B. *Limited Residential District*

3. *Uses allowed by permit.* Uses within the Limited Residential District which may be allowed by permit shall include:

E. Single family residences and accessory structures meeting all of the following performance standards:

(3) The combined river frontage and setback of any building shall be not less than 500 feet;

Court found that the property in question had been "functionally divided" as separate lots by tenant occupation since before the enactment of the Act and concluded that, as such, the premises were lawful existing nonconforming uses under 38 M.R.S.A. § 958 and that the proposed shift from tenant-occupation to owner-occupation of the delineated lots did not constitute an extension, expansion or enlargement of the existing nonconforming use so as to defeat the grandfathered status of the property. The Superior Court did not reach the issue respecting Keith's entitlement vel non to a variance. We agree with the Superior Court's decision and affirm the judgment below.

Facts

Carolyn Smart Keith is the owner of land on the Ferry Road in Saco which she purchased in the early 1950's as one lot. From that time to the present, the structures thereon, together with appropriate curtilage, were separately occupied and used by tenants. The plot contained a duplex residence, and two detached single-family houses with garage, each dwelling being served by its own utility and sewage disposal system. The parties concede that the three dwelling houses and other structures on the land were lawful as such and in their use on March 19, 1974,[2] and thus, if the land remains undivided, "may continue although such use of structure does not conform to this chapter," etc. 38 M.R.S.A. § 958.

Keith proposes to divide the land into four separate lots with fixed delineated boundaries; each one of the three lots closest to the Ferry Road will have one of the dwelling-houses thereon. These three lots, she proposes to sell, while the fourth lot situated in the rear and vacant, she would keep for herself. Situated on their separate smaller lots which Keith proposes to sell, none of the dwellings would conform to the aggregate frontage and setback requirements of the Act, nor would they ever be able to conform in the future; the vacant lot could be built on without problem.

Faced with this situation, Keith sought from the Commission a determination that her proposed division and sale of the three separate lots and buildings thereon were not subject to the restrictions of the Act on the ground that, prior to the enactment of the Act and continuously thereafter, the three lots were treated as functionally divided and used as such under separate tenanted occupancies. As alternative relief, Keith requested variances under the Act which would permit the project to go through. The Commission rejected Keith's contention that her land was exempt from the strictures of the Act and denied her relief by way of granting her the variances she was requesting. On appeal, the Superior Court reviewed the administrative record before the Commission, the pleadings and argument of counsel, which resulted in a decision in favor of the plaintiff-appellee on her contention that the strictures of the Act did not apply to her nonconforming property.

The issue raised by the Commission's appeal is, whether the mere change from tenant occupancy of the three separate lots to owner occupancy under Keith's lot division and sale proposal would be an extension, expansion or enlargement of existing buildings, structures or of nonconforming uses

(5) Where there is an accepted road or public right of way, as of March 19, 1974, within 500 feet of the normal or mean high water mark of the river with different land ownership on either side of the road or public right of way, the landowner on the far side of the road or public right of way from the river shall have an aggregate of setback from the river and frontage on the far side of the road or public right of way equal to 500 feet.

2. The Saco River Corridor, enacted in 1979, c. 459, § 1, effective September 14, 1979, was a re-enactment of previous private and special legislation which became effective originally October 3, 1973. (See P & SL 1973, c. 150, as amended by P & SL 1973, c. 208, and by PL 1977, c. 276).

prohibited by 38 M.R.S.A. § 958 except on permit from the Commission.[3]

Preliminary considerations

[1, 2] Initially, we note that the Superior Court justice, in deciding the motion for summary judgment, did not take or receive any additional evidence, but made his decision entirely from the record developed before the Commission. Under such circumstances, we review the administrative record directly, the same as the Superior Court did, and determine whether the Commission abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record. *Driscoll v. Gheewalla,* 441 A.2d 1023, 1026 (Me.1982). *See Thornton v. Lothridge,* 447 A.2d 473 (Me.1982). Here, we say that the Commission committed error of law when it ruled against the plaintiff-appellee's contention. The proposed division and sale of the three functionally divided nonconforming lots and buildings thereon continuously rented to tenants as separate lots for dwelling purposes was not prohibited by the Act and the plaintiff-appellee did not have to satisfy the legal standards for variances from the frontage and setback requirements of the Act before she could obtain Commission approval of the proposed division and sale of the lots. The Commission ruling to the contrary was based largely on the stated reason that

> "Division of the parcel as proposed would eliminate any future possibilities for conformance to the requirements of the Act."

Having ruled that it had authority to approve or disapprove Keith's project *only* on the basis of variances legally allowable from the setback and frontage requirements of the Act, the Commission denied the relief sought by the plaintiff-appellee. We do not reach the variance issue on this appeal.

We further note that the Saco River Corridor legislation was expressly stated to be a comprehensive chart regulating the *use* of land and water in the area of the so-called Corridor.[4] Although one of the purposes of the Act is said to be—to prevent overcrowding—nowhere in the Act is the Commission given express authority to regulate subdivisions of land as such. As a matter of fact, the Act contemplates full compliance with

3. 38 M.R.S.A. § 958 provides in pertinent part as follows:

§ 958. *Existing uses*

Any existing building or structure or use of building or structure lawful March 19, 1974, or of any subsequent amendment of this chapter or of any regulation adopted hereunder, may continue although such use of structure does not conform to this chapter or the regulations adopted hereunder. Any existing building or structure may be repaired, maintained and improved, *but an existing building, structure or nonconforming use may be extended, expanded or enlarged only by permit from the commission.* A nonconforming use, other than a single family residential use, which is discontinued for any reason for a period of one year shall be deemed abandoned and may not be resumed thereafter except on compliance with the requirements of this chapter.

If, as a result of flood, fire or other casualty, the value of a nonconforming building or structure is reduced by more than 75%, it may be rebuilt and the nonconforming use housed therein may be continued only by permit from the commission. If a nonconforming building or structure is decreased in value less than 75% by flood, fire or other casualty, it may be rebuilt in substantially the same location and in the same size without a permit from the commission, even though it would otherwise violate the requirements of this chapter, provided that the rebuilding shall be commenced within 12 months of the casualty. (Emphasis supplied).

4. The purposes as listed in 38 M.R.S.A. § 951 are enumerated as follows:

In view of the dangers of intensive and poorly planned development, it is the purpose of this chapter to preserve existing water quality, prevent the diminution of water supplies, to control erosion, to protect fish and wildlife populations, to prevent undue extremes of flood and drought, to limit the loss of life and damage to property from periodic floods; to preserve the scenic, rural and unspoiled character of the lands adjacent to these rivers; to prevent obstructions to navigation; to prevent overcrowding; to avoid the mixture of incompatible uses; to protect those areas of exceptional scenic, historic, archaeological, scientific and educational importance; and to protect the public health, safety and general welfare by establishing the Saco River Corridor and by regulating the *use* of land and water within this area. (Emphasis added).

all federal, state and municipal regulations. See 38 M.R.S.A. §§ 959 and 961. The parties agree that the instant proposed division was not subject to control by the Board of Environmental Protection which is given authority over large subdivisions of land in excess of 20 acres. Also, the Planning Board of the City of Saco has determined that Keith's proposed division of land is exempt from subdivision review under the provisions of 30 M.R.S.A. § 4956.

[3, 4] True, as relied on by the Commission, the policy of zoning is to gradually or eventually eliminate nonconforming uses as speedily as justice will permit. *Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548, 552–53 (Me.1966); *Vermont Brick v. Village of Essex Junction*, 135 Vt. 481, 380 A.2d 67, 69 (1977); *Taylor v. Metropolitan Development Commission*, 436 N.E.2d 1157, 1159 (Ind.App.1982). But the implementation of this goal must be carried out within legislative intendment. Here, the Act does not contemplate complete adherence to such objective, since the Act expressly authorizes the repair, maintenance and improvement of existing nonconforming buildings or structures and permits the reconstruction of such buildings or structures in substantially the same location and in the same size when decreased in value less than 75% by flood, fire or other casualty, and this, without a permit from the Commission.

[5–7] Also, the central point to be kept in mind when dealing with nonconforming buildings or uses is, that it is the building or the land that is "grandfathered" and not the owner. *Stewart v. Inhabitants of Town of Durham*, 451 A.2d 308, 310 (Me.1982); *Appeal of E & G Auto Parts*, 22 Pa.Cmwlth. 171, 348 A.2d 438, 440 (1975); *State ex rel. Keeven v. City of Hazelwood*, 585 S.W.2d 557 (Mo.App.1979). Once a nonconforming use or building is shown to exist, neither is affected by the user's title or possessory rights in relation to the owner of the land. *Your Home, Inc. v. City of Portland*, 432 A.2d 1250, 1260 (Me.1981); *County of Fayette v. Cossell*, 60 Pa.Cmwlth. 202, 430 A.2d 1226, 1229 (1981); *Graham Court Associates v. Town Council*, 53 N.C.App. 543, 281 S.E.2d 418, 420 (1981). Where a nonconformity legally exists, it is a vested right which adheres to the land or building itself and the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent with the existing use. *Johnny Cake, Inc. v. Zoning Board of Appeals*, 180 Conn. 296, 429 A.2d 883, 885 (1980); *Petruzzi v. Zoning Board of Appeals*, 176 Conn. 479, 408 A.2d 243, 246 (1979); *People v. Smith*, 38 Ill.App.3d 798, 349 N.E.2d 91, 92 (1976).

[8] The plaintiff-appellee acted reasonably in seeking Commission approval of her proposed plan to divide and sell her property. In so doing, she sought an official determination of the legality of her proposal from the agency whose duty it is to enforce the Act. She merely invoked the Commission's power to decide whether the proposed division and sale of the three nonconforming lots were permissible. She thereby did not relinquish her rights to the existing nonconforming uses. *Abbadessa v. Board of Zoning Appeals*, 134 Conn. 28, 54 A.2d 675, 678 (1947). *See also Watts v. City of Helena*, 151 Mont. 138, 439 P.2d 767, 769 (1968). The plaintiff-appellee's initial application to the Commission followed the directive of this Court in *State ex rel. Brennan v. R.D. Realty Corporation*, 349 A.2d 201, 206 (Me.1975), which suggested a determination first by the administrative agency, whether a project is subject to regulation by the pertinent authority or exempt therefrom by the "grandfather clause."

Merits

[9] The only real difference in the change contemplated by the division and sale of the three reference lots is a change in ownership. Without clear language to the contrary, we cannot infer a legislative intendment from any of the provisions of the Saco River Corridor legislation which would prohibit the separate conveyance of parcels of land on which nonconforming buildings or structures have previously and continuously been factually treated sepa-

rately, as in the instant case, simply because they happened to exist in common ownership at the time the zoning law was enacted. *See LaPointe v. City of Saco,* 419 A.2d 1013, 1016 (Me.1980). This is consistent with our holding in *Wickenden v. Luboshutz,* 401 A.2d 995 (Me.1979). This case is distinguishable from *Barnard v. Zoning Board of Appeals of Town of Yarmouth,* 313 A.2d 741 (Me.1974), where the alleged functional division of a large lot into two separate lots was found to exist only in the owner's subjective plan to erect a second dwelling on the land in order to maximize the potential return of her land holdings. In the instant case, the three nonconforming buildings preexisted the legislation.

Section 958 of title 38 provides that an existing [nonconforming] building, structure or nonconforming use may be extended, expanded or enlarged *only* by permit from the commission. The issue is whether Keith's planned separate conveyances of her three separate nonconforming dwellings with suitable curtilages of land as continuously functionally used by tenants prior to and since the enactment of the Saco River Corridor legislation, without resulting compliance with aggregate of setback and frontage requirements of 38 M.R.S.A. § 957–B.3.E.5, constitutes an unlawful extension, expansion or enlargement of a previously existing nonconforming use. We are aware that, in construing legislation dealing with nonconforming uses recognized as a valid means of preserving particular uses of property existing prior to the enactment of a zoning law, the accepted legal standard has been to strictly construe zoning provisions relating to the extension, expansion or enlargement of nonconforming buildings or uses. *See Abbot v. Commonwealth,* 56 Pa.Cmwlth. 482, 425 A.2d 856, 858 (1981). But the plaintiff's proposed conveyance of three separate lots with their respective nonconforming buildings thereon in the instant case does not come into conflict with the stated principle.

[10] Indeed, the test to be used to determine whether the questioned use of property fits within the "grandfathered" or exempted use granted to nonconforming uses is: (1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning legislation took effect; (2) whether there is created a use different in quality or character, as well as in degree, from the original use, or (3) whether the current use is different in kind in its effect on the neighborhood. *Town of Bridgewater v. Chuckran,* 351 Mass. 20, 217 N.E.2d 726, 727 (1966). Examples of unlawful extensions, expansions or enlargements of nonconforming uses will be seen in cases such as *Appeal of Veltri,* 355 Pa. 135, 49 A.2d 369 (1946); *Fulford v. Board of Zoning Adjustment,* 256 Ala. 336, 54 So.2d 580 (1951); *Salerni v. Scheuy,* 140 Conn. 566, 102 A.2d 528, 530–31 (1954); *Council of the Town of Los Gatos v. State Board of Equalization,* 141 Cal.App.2d 344, 296 P.2d 909 (1956); *Jasper v. Michael A. Dolan, Inc.,* 355 Mass. 17, 242 N.E.2d 540 (1968); *New Castle County v. Harvey,* 315 A.2d 616 (Del.Ch., 1974); *Hooper v. Delaware Alcoholic Beverage Control Commission,* 409 A.2d 1046 (Del.Supr., 1979). *But see Schneider v. Board of Appeals,* 402 Ill. 536, 84 N.E.2d 428 (1949); *Keller v. City of Bellingham,* 92 Wash.2d 726, 600 P.2d 1276 (1979).

[11] The mere change from tenant occupancy to owner occupancy in the instant case is not an extension, expansion or enlargement of the previously existing nonconforming buildings, structures or use within the meaning of the restrictive provision of section 958. *Beers v. Board of Adjustment of Township of Wayne,* 75 N.J.Super. 305, 183 A.2d 130 (1962); *Town of Seabrook v. Tra-Sea Corporation,* 119 N.H. 937, 410 A.2d 240, 244 (1979); *Town of Coventry v. Glickman,* 429 A.2d 440, 442 (R.I.1981). *See also Graham Court Associates v. Town Council,* 53 N.C.App. 543, 281 S.E.2d 418 (1981) (conversion to condominium style of ownership). The case of *Isabelle v. Town of Newbury,* 114 N.H. 399, 321 A.2d 570 (1974), is distinguishable from the instant case, since in *Isabelle* the town had specific subdivision regulations properly

enacted under enabling legislation, whereas the Saco River Corridor Act does not purport to regulate land subdivisions. The post-sale fragmented title in no way would modify the nature or purpose of the preexisting nonconformity of the respective buildings on the land, nor would it reflect any alteration in the land use itself prevailing at the time the Saco River Corridor Act took effect, nor would it under any view of the factual situation create a new use different in quality, character or degree, from the original use; no change in intensity of use would result. Had the Keith holdings as functionally divided been owned by three different individuals at the time of the Act and each of them desired to convey his separate lot, there would be no zoning impediment to the sale. We cannot see wherein a different result should obtain simply because all the already functionally divided lots are owned by only one person. *See Goldstein v. Lincoln Park Planning Board,* 52 N.J.Super. 44, 144 A.2d 724, 727 (1958). *See also Appeal of E & G Auto Parts,* 22 Pa.Cmwlth. 171, 348 A.2d 438, 440 (1975).

For the reasons stated, we conclude and hold that the plaintiff-appellee may as a matter of law convey the reference dwellings with the proposed suitable delineated lots without being in violation of the Saco River Corridor Act and do affirm the judgment of the Superior Court, to the extent that it declares the rights of the plaintiff-appellee as the following entry indicates:

Judgment affirmed.

The proposed change of occupancy from tenant-occupation to owner-occupation is not a change of use, nor does it constitute an extension, expansion or enlargement of the existing lawful nonconforming use in violation of 38 M.R.S.A. § 957–B.3.E(3) and (5) or § 958.

All concurring.

The HANOVER INSURANCE COMPANY

v.

Clinton R. HAYWARD, Jr.

Supreme Judicial Court of Maine.

Argued May 9, 1983.

Decided Aug. 8, 1983.

Appeal was taken from a judgment of the Superior Court, Washington County, denying insurer punitive damages in action to recover insurance it paid defendant convicted of arson relative to fire for which he was paid insurance. The Supreme Judicial Court, Nichols, J., held that: (1) trial court did not abuse its discretion in refusing to award insurer punitive damages in light of defendant's lack of assets and deterrent effect served by defendant's three-year sentence for arson, and (2) for purposes of civil action, prior criminal action for arson was conclusive proof of all facts necessarily adjudicated in earlier criminal conviction.

Appeal and cross appeal denied; judgment affirmed.

1. Damages ⇐91(1)

Award of punitive damages, when available, is within sound discretion of fact-finder after weighing all relevant aggravating and mitigating factors; aggravating factors may include whether defendant's conduct was intentional, wanton, malicious, reckless or grossly negligent, while mitigating factors may include defendant's good faith, defendant's lack of assets to satisfy award of punitive damages, or any other factor indicating that award of punitive damages would not serve deterrent function beneficial to society.

2. Damages ⇐181

Fact finder may consider defendant's wealth in making award of punitive damages.