COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-821

JULIUS JENSEN, THIRD, trustee[1]

vs.

NANTUCKET ZONING BOARD OF APPEALS & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We affirm for substantially the reasons discussed by the Land Court judge in his careful decision. The trial judge's findings that: (i) the locus was sufficiently identified as a separate lot on the so-called 1933 plan (Exh. 4, A. 32-34); and (ii) the proprietors appropriated the so-called Smith strip parcel as a road sometime before 1927 are well supported and entirely consistent with our earlier decisions. See and contrast Dowling v. Board of Health of Chilmark, 28 Mass. App. Ct. 547, 549 (1990). It is of no moment that the 1933 plan does not provide a metes and bounds description for the locus given that, as the judge observed, this information can be relatively easily gleaned from the scale provided on the plan, from other referents contained in the plan, and from other roughly contemporaneous and earlier recorded sources. This was sufficient to afford "reasonable notice to the public," id. at 551, that the locus was

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[1] Of Norwood Farm Trust.

[2] Emile P. Coulon and Beverly S. Coulon, trustees of Coulon Realty Nominee Trust.

potentially subject to grandfather protection.

We are not persuaded that, because it did not then "actually" exist "on the ground," the judge improperly concluded that the strip parcel was a road. First, whether the strip parcel had been laid out and constructed, was a mere "paper road," or was something in between those two extremes appears to be, on this record, more a matter of speculation than observed fact. Second, while actual conditions on the ground may in some cases properly inform the fact finder's decision, the judge in this case appropriately focused on whether the parcels were "adjoining," not whether Jensen could point to a surfaced artifact. For G. L. c. 40A, § 6, purposes, the "adjoining" question will normally be best answered by the relevant recorded documents. Adamowicz v. Ipswich, 395 Mass. 757, 764 (1985). Neither Heavey v. Board of Appeals of Chatham, 58 Mass. App. Ct. 401, 405 (2003), nor Hanson v. Cadwell Crossing, LLC, 66 Mass. App. Ct. 497, 502 (2006), are to the contrary.

Other matters require only brief comment. That a fact finder could reasonably have drawn other ultimate findings does not leave us "with the definite and firm conviction that a mistake has been committed." Starr v. Fordham, 420 Mass. 178, 186 (1995), quoting from First Pa. Mort. Trust v. Dorchester Sav. Bank, 395 Mass. 614, 621 (1985). Neither, whatever Jensen's burden of persuasion, did the judge err by making well-founded

inferences favoring Jensen's position. See Judge Rotenberg Educ. Center, Inc. v. Commissioner of the Dept. of Mental Retardation (No. 1), 424 Mass. 430, 452 (1997). The judge's comments concerning the zoning board of appeals's decision related to the board's zoning expertise, not its factual findings or legal conclusions. The judge's deference was entirely appropriate. See Simmons v. Zoning Bd. of Appeals of Newburyport, 60 Mass. App. Ct. 5, 10 (2003).

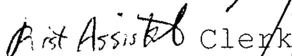
Even if the earlier Land Court judgment did not finally resolve the question, the state of Jensen's title was explicitly not at issue below; accordingly, we have no occasion to reconsider it now. For purposes here, it makes no difference that the locus was, in 1933, held by Smith in common with certain other property located immediately north of the strip parcel. To the extent this matter is relevant at all, by 1972, when the zoning bylaw went into effect, Jensen owned the locus, thus severing common ownership. See Adamowicz v. Ipswich, 395 Mass. at 762. The so-called derelict fee statute, G. L. c. 183, § 58, has no application because Smith held title only to "common and unappropriated land." (A. 37 at 103-481) Given the judge's well-supported finding that the proprietors appropriated the strip parcel as a public road, the judge also properly concluded that the § 58 presumption did not apply because Smith's grant "evidences a different intent by an express exception or

reservation." G. L. c. 183, § 58, as appearing in St. 1990, c. 378, § 1. That the judge did not specifically articulate that the 1933 plan showed an intent to use the locus for residential purposes is of no moment, the judge's discussion being redolent of such finding. Neither do Nineteenth Century descriptions of the locus's general area as a "swamp" necessarily preclude Twentieth Century residential use.

We have considered the Coulons' remaining arguments and have found them to be without merit.

Judgment affirmed.

By the Court (Grasso, Armstrong & Rubin, JJ.),



First Assistant Clerk

Entered: August 1, 2008.