

3. The Commission is empowered to receive, process, and act upon applications made under G.L. c. 40C, § 6 and the By-Laws for Certificates of Non-Applicability, Certificates of Appropriateness, and Certificates of Hardship (referred to, individually, as a “Certificate”) relative to preservation and construction within the area known as the Westport Point Historic District in Westport, Massachusetts, to the extent the proposed work falls within the Commission’s authority and is not otherwise exempt from the Commission’s purview.

4. This Court has jurisdiction over the instant action pursuant to G.L. c. 40C, § 12A, which also designates this Court as the proper venue for this case.

FACTS

The Property

5. The Property is located in the Westport Point Historic District in Westport, Massachusetts. A two family home is located on the Property. The home, which was built in 1980, is not an historic home. While the home is currently being used as a one-family home, given its multiple grades and physical layout, it can easily be converted back to a two family use.

The Project

6. In early 2023, Plaintiff began pursuing the process for constructing certain improvements at the Property, specifically certain stone retaining walls and a pool and spa with associated improvements (the “Project”).

The Building Permits

7. To that end, Plaintiff, by and through his contractor, applied for two building permits from the Building Department for the Town of Westport – one for the engineered walls and a second for the pool and spa.

8. In accordance with what Plaintiff has always understood to be the governing procedure followed by the Town of Westport for construction within the Westport Point Historic District (and, further, in accordance with what the Commission has confirmed publically at Historic Commission meetings as being the applicable process – a process that Plaintiff has engaged in in the past with the Commission on other projects in the Westport Point Historic District), Plaintiff's contractor submitted building permit applications for each permit to the Westport Building Department with the understanding that the Westport Building Commissioner (the "Building Commissioner"), in advance of issuing any building permit, would confer with the Historic Commission and obtain the Commission's position on whether the Plaintiff would need to obtain a Certificate from the Commission for the proposed work before being granted a building permit.

9. Specifically, on March 28, 2023, Plaintiff filed an Application with the Town of Westport for a building permit to construct a 20' x 40' in ground swimming pool and 8' x 12' spa at the Property (the "Pool Permit Application"), which application was accompanied by a full set of engineering plans detailing all aspects of the proposed work, including dimensions and elevations.

10. The Pool Permit Application reflects, in the Building Commissioner's handwriting, that on March 28, 2023, the Building Commissioner "Spoke to William Kendall. Historic Commission has no purview over the IG [in ground] pool." See Exhibit B. William Kendall is a Member and Vice Chair of the Commission. Per the Commission's process, projects that fall outside of the Commission's review authority are cleared to proceed in this exact manner.

11. The Building Commissioner thereafter issued Building Permit # 23-221 (“Building Permit # 23-221” or the “Pool Permit”) to the Plaintiff, thereby granting the Plaintiff authorization to construct the pool and spa and associated improvements in accordance with the plans submitted.

12. Then, on May 5, 2023, Plaintiff filed an Application with the Town of Westport for a permit to construct a stone retaining wall at the Property in connection with the construction of the pool (the “Wall Permit Application”), which application was accompanied by a full set of engineering plans, dated April 25, 2023, detailing the scope of all aspects of the work, including proposed dimensions and elevations for the walls. The Pool Permit Application and the Wall Permit Application are sometimes hereinafter referred to, collectively, as the “Building Permit Applications.”

13. The Wall Permit Application reflects that, on May 16, 2023, the Building Commissioner spoke with Vice Chair William Kendall who confirmed, on behalf of the Commission, that the permit could issue without the necessity of obtaining a Certificate from the Commission, as reflected by the following handwritten notation: “OK per William Kendall.” See Exhibit C.

14. Also on May 16, 2023, the Building Commissioner stamped the plans accompanying the Wall Permit Application, “Plans Approved May 16, 2023.” See Exhibit D.

15. The Building Commissioner thereafter issued Building Permit # 23-371 (“Building Permit # 23-371” or the “Wall Permit”) to the Plaintiff, thereby authorizing the Plaintiff to “construct an engineered retaining wall per the approved plans dated 4/25/23.” The issuance of this permit without a hearing before the Commission was in accordance with

applicable laws and the Commission's own publicly pronounced practices, most recently described in detail at its November 2023 public meeting.

16. Over the ensuing several months, and in direct reliance on the issuance of Building Permit # 23-221 (Pool Permit) and Building Permit # 23-371 (Wall Permit) (collectively, the "Building Permits"), Plaintiff proceeded to commence construction on the Project at the Property, understanding that all aspects of the Project had been considered by both the Commission and the Building Commissioner and that he was moving forward with any and all required approvals in hand.

17. In that regard, and again in direct reliance on the issuance of the Building Permits, Plaintiff expended significant amounts of money and became legally committed to substantial contractual liabilities and work.

The Abutters' Actions

18. Upon information and belief, in or around November 2023, after sitting back and observing Plaintiff incur substantial sums of money in conducting work on the Project pursuant to the Building Permits, certain abutters complained to the Historic Commission, contending that the work at issue was improper and required a Certificate from the Commission, and that the work should be halted immediately. Indeed, on September 19, 2023, an abutter texted Plaintiff with complaints about noise associated with the Project and, in response to Plaintiff's text advising the abutter that he had had permits in hand since the previous spring, stated, "We know you have permits and double checked them." This text confirms that the abutter was well aware of the scope of the Project prior to September 19, 2023, yet waited to raise purported concerns to the Commission until a few months later -- after Plaintiff had engaged in significant construction activities and had incurred substantial costs in relation thereto.

19. Certain abutters also trespassed onto Plaintiff's property in November 2023, stating to workers there that a stop work order had issued (even though Plaintiff had not been served with any such order) and otherwise interfered with work that Plaintiff was proceeding with pursuant to the Building Permits. Upon information and belief, certain abutters had interfaced with Town officials in order to orchestrate the issuance of an unlawful stop work order and took it upon themselves to attempt to enforce it, before any alleged stop work order had even issued, and in violation of Plaintiff's rights. This practice of adverse actions against Plaintiff, including using the Commission to deprive Plaintiff of his due process rights and intentionally inflict emotional and financial harm on Plaintiff and his family, has continued throughout the course of the Project and the Commission meetings and hearings relating thereto.

The Commission's Notice of Violation

20. By letter dated November 16, 2023, the Commission issued what it entitled a "Notice of Violation and Order to Respond" relative to Building Permit # 23-371 (Wall Permit) to the Plaintiff. See Exhibit E. In that correspondence, the Commission stated that it "has the authority to review the construction or alteration of structures on the [Property]," and that the construction at issue (i.e., the stone retaining walls), "required a Certificate of Appropriateness, a Certificate of Non-Applicability, or a Certificate of Hardship from the Commission, pursuant to G.L. c. 40C, § 6, and Section VII.A of the Commission's Rules and Regulations." The Commission's November 16, 2023 letter also ordered Plaintiff to submit, within one week, "a plan to correct this situation" and, further, to appear at the Commission's December 4, 2023 meeting to present its plan.

21. Then, on or about November 17, 2023, and at the Commission's behest, the Building Commissioner issued a "Stop Work Order" for Building Permit # 23-371 (the Wall

Permit) based on notification that he had received from the Chair of the Commission that the Commission was taking the position that construction pursuant to Building Permit # 23-317 could not proceed without a Certificate of Appropriateness, a Certificate of Non-Applicability, or a Certificate of Hardship issued by the Commission. See Exhibit F. The Pool Permit was not affected at this point.

22. By this time, Plaintiff had incurred hundreds of thousands of dollars in work on the Project, understanding all along that he was operating pursuant to duly issued Building Permits for which the Building Commissioner had confirmed in advance of their issuance that no Certificate would be required from the Commission because the work fell outside of the Commission's jurisdiction. The actions of the Commission (and Building Commissioner) also came down at a time when a series of severe weather events affected the Project, which, at this point, consisted of an unprotected open construction site as a direct result of the Commission's actions -- a condition about which Plaintiff complained to the Town.

23. At this point, the abutters continued their practice of interfering with Plaintiff's rights. Upon information and belief, certain abutters engaged the Town's elected constable to enter the Property and threaten to unlawfully arrest workers who were working under the Pool Permit, even though the Stop Work Order applied only to the Wall Permit.

24. By letter dated November 20, 2023, Plaintiff, by and through counsel, advised the Commission, among other things, of Plaintiff's understanding that the work permitted by Building Permit # 23-371 (the Wall Permit) fell outside the scope of the Commission's jurisdiction (as had been confirmed by the Building Commissioner and the Commission's own Vice Chair in accordance with its publicly known process of review) and, as such, that Plaintiff believed work could proceed without a Certificate of Non-Applicability from the Commission.

Plaintiff set forth a plan requesting that the Commission honor what Plaintiff understood to be the Commission's initial determinations made with respect to the Project as communicated to the Building Commissioner, rescind its November 16, 2017 letter immediately and, in turn, advise the Building Commissioner to rescind his November 17, 2023 so-called Stop Work Order. See Exhibit G.

The Applicable Law

25. G.L. c. 40C, § 8 authorizes a City or Town to enact a by-law or ordinance limiting the authority of an historic commission from being able to review items such as “walls and fences”; “[t]erraces, walks, driveways, sidewalks and similar structures, or any one or more of them, provided that any such structure is substantially at grade level”; and other structures that are not subject to view from a public street, public way or public body of water.

26. Article LIX of the By-Laws sets forth the following express “[l]imitations on [the] authority” of the Commission, making it clear that the Commission “shall not have the power to review any of the following:

2. Walls and fences; . . .

7. Additions, alterations, or appurtenant structures (including but not limited to swimming pools and the like), which are not subject to view from a public street, public way, public park or public body of water.”

See By-Laws, Article LIX, § 5911, A.1, 2 & 7.

27. The By-Laws thus place express limitations on the Commission's powers: the Commission lacks the power to review walls, as well as pools and other appurtenant structures that are not visible from a public street, public way, public park or public body of water.

28. In addition, the Guidelines for the Westport Point Historic District (the “Guidelines”), promulgated by the Historical Commission in June 2017 to “clarify the purposes and procedures of the [Commission] and to provide a guide for Westport Point Historic District .

. . owners when considering changes to their properties,” also make clear that “walls and fences” as well as “appurtenant structures (including but not limited to swimming pools and the like), which are not subject to view from a public way” are exempt from review by the Commission, pursuant to G.L. c. 40C and the By-Laws. The Guidelines further provide, “A Certificate is required from the Commission before any exterior work is initiated *other than for projects specifically exempted by law and written into these Guidelines*” (emphasis added).

29. A review of the plans that accompanied both Building Permit Applications confirms that the retaining wall layout – i.e., “walls” – expressly falls beyond the Commission’s jurisdiction. Furthermore, while portions of the walls may be visible from a public way, they are nevertheless walls, and the By-Laws make it clear that “walls” fall outside of the Commission’s jurisdiction and purview -- something Plaintiff understood the Building Commissioner had confirmed with the Commission in advance of issuing the Wall Permit.

30. The proposed pool and its appurtenances also would not be subject to the Commission’s jurisdiction because they would not be “subject to view from a public street, public way, public park or public body of water.” Here, too, Plaintiff understood that the Building Commissioner had confirmed this fact with the Commission prior to issuing the Pool Permit, and both of the Building Permit Applications each specifically documented this confirmation in the Building Commissioner’s handwriting.

31. At all times relevant hereto, it has been Plaintiff’s understanding that the By-Laws and the Guidelines make clear that the Commission has no authority over the construction and activities permitted by the Building Permits because walls are expressly excluded from the Commission’s jurisdiction and the pool would not be visible from a public street, public way,

public park or public body of water. The Building Permit Applications' notations of these facts only underscored this understanding.

The December 4, 2023 Public Meeting

32. As ordered, Plaintiff appeared before the Commission at its December 4, 2023 meeting and tried to explain to the Commission why he understood and believed the Commission had no jurisdiction over the wall work and how he had proceeded, in good faith and pursuant to duly issued building permits, with work on the Project, spending hundreds of thousands of dollars in the process. The Commission appears to have taken the position that Plaintiff has flagrantly disregarded the authority of the Commission: to the contrary, Plaintiff understood that the Commission had confirmed -- twice -- with the Building Commissioner that it did not have jurisdiction over the Project, something that is also supported by a review of applicable law, including the Bylaws and the Guidelines, as well as statements of Commission members at the Commission's public hearings, and the processing of other building permit applications in the Town.

33. Certain abutters came to the December 4, 2023 meeting with an attorney, namely Attorney Robert Feingold. Attorney Feingold handed a letter into the Commission prior to the start of the meeting. When the meeting commenced, the Commission's Chair mistakenly believed that Plaintiff's counsel had submitted that letter. When Attorney Feingold promptly stood up and informed the Chair that he was representing the neighbors (and not the Plaintiff), the Chair laughed and said, "oh, the neighbors, haha, I'm sorry, Bob. I didn't recognize you . . . in a suit," to which most of the Commission members (and the public) chuckled. From that point forward, and throughout the proceedings that followed, it became abundantly clear that Attorney Feingold (and his clients) have been able to wield an unusual level of control over the

Commission and its proceedings and have dramatically colored the events at issue. In fact, the Commission has looked to Attorney Feingold (and his clients) for both direction and approval of certain of its actions, thereby essentially (and improperly) abdicating its role and decision-making authority to the abutters and their attorney. Attorney Feingold's clients are referred to herein as "abutters" for purposes of convenience as some are neighbors but not necessarily legal abutters.

34. As the December 4th meeting progressed, the Commission maintained that it has jurisdiction over the Project and, further, that Plaintiff would need to apply for a Certificate of Non-Applicability and/or Appropriateness from the Commission. At the request of the Commission Chair, the Commission then took a recess to allow a conversation to proceed among Town Counsel, the Plaintiff and his counsel in order to discuss a potential path forward on the Certificate process.

35. Town Counsel, the Plaintiff and Plaintiff's counsel, through a hallway discussion during the recess, agreed on a specific path forward (which, Plaintiff understood, Town Counsel had also run by the Commission): Plaintiff, with a full reservation of his right to contest jurisdiction, would file for a Certificate of Non-Applicability and a Certificate of Appropriateness from the Commission, in an overall effort to seek approval from the Commission for the Project.

36. The Commission Chair had asserted that the Commission would refrain from discussing the Project during this recess yet, upon information and belief, continued to engage in discussions about the Project with other Commission members and others in the room, including abutters. The Town initially had a recording of the recess period up on its publicly posted video of all Commission meetings, yet, after a few days, appears to have deleted the recess period from

the publicly available record without notice to Plaintiff or, upon information and belief, any sort of public notice at all.

37. During the recess, the parties were then summoned back into the meeting to report publicly on their discussion and agreement reached therein. Rather than hear from Plaintiff or the attorneys, and even though the meeting was a public “meeting” and not a hearing where the Commission would be obliged to hear from the public, the Commission nevertheless allowed Attorney Feingold to address the Commission, with Attorney Feingold submitting documents that still have never been provided to Plaintiff, despite repeated requests for the same. Furthermore, even though Plaintiff had stressed the good faith with which he had obtained the Building Permits, Attorney Feingold charged Plaintiff with “knowing” that he had to come to the Commission for a Certificate for the Project and purportedly intentionally defying that process, thereby portraying Plaintiff as a bad actor who was disrespecting the Commission, which only inflamed the situation. Moreover, Attorney Feingold made a defamatory statement that Plaintiff filed knowingly false and deceptive Building Permit Applications that did not provide the true dimensions of the Project in order to obtain the approval of the Commission cited on said applications. Plaintiff proceeded to provide the building plans that accompanied the Building Permit Applications on the spot, thereby refuting this defamatory accusation. Attorney Feingold and Commission members nevertheless relied upon and then acted upon Attorney Feingold’s defamatory assertion as being true when Plaintiff complained that months had passed since issuance of the Building Permits and questioned what motives might underlie this suspiciously timed interference. Indeed, the local newspaper, “*Westport Shorelines/EastBayRI*,” repeated such a defamatory statement, subjecting Plaintiff and his family to humiliation in the

community as well as professional business harm to Plaintiff's real estate development, historic preservation and other business and philanthropic endeavors.

38. Once Attorney Feingold was permitted to say everything he wanted to say following the recess, Plaintiff, of course, took issue with Attorney Feingold's maligning of his character, stressed how he had proceeded in good faith and at tremendous cost – both monetarily and otherwise, and explained how this whole situation had caused significant angst amongst his family. Plaintiff then reported on the discussion with Town Counsel, namely that, with a full reservation of rights to contest jurisdiction, Plaintiff would apply for a Certificate of Non-Applicability and a Certificate of Appropriateness for the Project and thereby work through the process that the Commission claimed was required. With Town Counsel's recommendation to proceed as Plaintiff had described, the Commission agreed to allow Plaintiff to file applications for both a Certificate of Non-Applicability and a Certificate of Appropriateness while maintaining his right to contest the Commission's jurisdiction.

The Applications for Certificates

39. As agreed, on or about December 19, 2023, Plaintiff submitted an application to the Commission for a Certificate of Non-Applicability on the basis that the work permitted by the Building Permits falls beyond the jurisdiction, or purview, of the Commission. See Exhibit H.

40. Also on or about December 19, 2023, Plaintiff submitted an application for a Certificate of Applicability for the Project. See Exhibit I. Plaintiff did so purely out of an effort to cooperate in good faith with Commission members and neighbors. Unfortunately, and as discussed further below, it only became increasingly apparent that the Commission and the

abutters were essentially one in the same as unappointed neighbors appeared to exercise complete control over the Commission and its decisions.

41. Just one week later, namely on December 26, 2023, the Commission filed a decision denying Plaintiff's application for a Certificate of Non-Applicability. Plaintiff timely appealed that decision to Superior Court, and said appeal is presently pending in the Bristol County Superior Court in the case captioned Robert Branca, Trustee of the ANC Nominee Realty Trust v. Town of Westport Historical Commission, Bristol County Superior Court, C.A. No. 2473CV00032. Plaintiff, however, refrained from serving the Complaint upon the Commission while his application for a Certificate of Appropriateness was pending before the Commission, in the hopes that this whole matter could be resolved outside of the litigation process.

42. On January 2, 2024, Plaintiff submitted additional materials to support his application for a Certificate of Appropriateness. See Exhibit J.

The January 8, 2024 Public Hearing

43. On January 8, 2024, the Commission held a public hearing on the Application for a Certificate of Appropriateness.

44. At the commencement of the January 8th hearing, counsel for Plaintiff began her presentation by noting, as the parties had agreed at the December 4th meeting, that Plaintiff was reserving his rights with respect to jurisdiction while he pursued a Certificate from the Commission. Rather than allow Plaintiff's attorney to proceed with her presentation, the Chair abruptly addressed questions to Plaintiff directly, making it clear that he did not want to hear from Plaintiff's counsel and also making it clear that, notwithstanding the agreement made at the December 4th meeting on the jurisdictional question, he was angered by Plaintiff's reservation of

rights – something that appears to have colored everything that transpired thereafter, fueled by the continued actions and defamatory comments of Attorney Feingold, as well as the multiple local news stories that were, upon information and belief, coordinated by Mr. Feingold and his clients.

45. The Commission members, and Attorney Feingold, also continued to claim that any work in the Historic District required a certificate from the Commission -- an assertion that, Plaintiff submits, is belied by, among other things, the Guidelines, which clearly and unambiguously state that “A Certificate is required from the Commission before any exterior work is initiated *other than for projects specifically exempted by law and written into these Guidelines*” (emphasis added). The Commission and Attorney Feingold intentionally ignored Plaintiff’s reference, directly and through counsel, to this clear statement of the law. This is not the only misstatement and misapplication of applicable law imposed upon Plaintiff in this process. In fact, Plaintiff frequently had to correct and/or remind the Commission about what the Bylaws, Rules & Regulations and the Guidelines actually provide.

46. James H. Collins, Jr., FAIA, LEED AP (“Mr. Collins”), an architectural expert retained by abutters of the Property (who appeared also to be quite friendly with the Commission), presented a rendering of what the abutters submitted would be an appropriate design for the Project, and certain Commission members concurred. The rendering dramatically reconfigured the Project to have various levels of walls and terracing, with both the pool and the waterside wall situated at a significantly lower elevation than on the plans for the Project (and the retaining wall that had already been poured). Proceeding with such a plan would entail, among other things, various saw cuts of the walls as well as the substantial demolition of the interior improvements to the walls that had been contracted and paid for under valid Building

Permits (e.g., underground drainage, plumbing, engineered and compacted fill, partial forms, etc.), as well as the removal of significant ledge, among other substantial and costly undertakings. Plaintiff commented on the tremendous expense that such a redesign of the Project would entail, in addition to his need to determine whether certain aspects of the redesign would even be physically feasible.

47. One of the abutters (who is represented by Attorney Feingold) then spoke, claiming that “there was no question the Project could be modified.” The abutter went so far as to inform Plaintiff that he *needed* to cut the wall down, cautioning Plaintiff, “if fixing that is not feasible, you should stop because you are not going to get a permit.” He stated further, “it’s up to you.” The abutter, of course, does not sit on the Commission but nevertheless made it quite clear that he is apparently a decision maker in the overall process.

48. During the course of the hearing, and even though Plaintiff stressed that he was trying to go through the Certificate process and achieve a plan that would be acceptable to all, Plaintiff continued to get push back from the Commission, with the Chair and other Commission members confirming that they were upset with Plaintiff for bringing a lawyer to the hearing, while supporting the abutters’ decision to retain counsel:

Mr. Branca: My intent was not to do anything to circumvent the Commission, to disrespect the Commission . . . My family respects the history of the Point and the historic district . . . we’ve actually chosen to live there.

Chair: If that is the case, then why did you do this and why are you fighting now the pushback you’re getting?

Mr. Branca: Oh, I don’t think I am fighting.

Comm’n Member: Oh, I think you are.

Chair: Bringing your lawyer and threatening litigation? That sounds like fighting to me.

Mr. Branca: I haven't threatened anyone.

Comm'n Member. You are now surrounded by a group of neighbors. Good people who have felt it necessary to hire an attorney to fight you. I don't know why you chose to live here . . . I'm appealing to your sense of community, to your conscience. Could you not see your way through to compromise? You could be a champion here. You seem to know enough about historic things you could be a champion with your money with your influences with your resources. You could help us. We are struggling. Now if you want to fight it that way with your high-price Boston attorneys, you could probably win but look at where we are, a struggling town . . . so I am asking you to help us.

49. Mr. Branca informed the Commission that he would be "happy to help" and, further, that there were modifications that could be made to what is on site to make it "more palatable." Mr. Branca also stressed that he did not want to litigate and was committed to compromise, offering that he could come to the next hearing with proposed revisions to plans for the Project for the Commission's consideration.

50. The animus shown towards Mr. Branca for bringing a lawyer to the hearing was further underscored by another angry comment from another Commission member:

Comm'n Member: Well, I look at this and think Ms. Jordan Kelly Price or no Ms. Kelley Jordan Price referring to the swimming pool and hot tub as "improvements." How the hell do you improve on that view?

51. The abutters' architect, Mr. Collins, then discussed various "possibilities" about what could be done about the "height of the wall," with possibilities including reducing the appearance of the height of the wall by berming the land around the wall and/or through terracing accomplished by a "saw cut." Mr. Collins encouraged Plaintiff to have his landscape architect draw up such a plan and see what the Commission thinks about it, noting, "that's a path to work your way through, and, if I were you, I would go down that path. . ."

52. The abutter who had spoken earlier then spoke again, offering that he felt that the process is about “compromise,” and that if Plaintiff could think about “cutting down a couple of feet” and “berming up a couple of feet and giving up a foot in depth . . . you get right where you want to be . . .”.

53. Mr. Collins further described what he, as a former member of the Commission and resident of the Historic District, believed was the process of give and take over multiple continued hearings between the Commission and applicants before it. This was a process that was specifically and later heatedly denied to Plaintiff in the next hearing and in a motion for reconsideration where Plaintiff attempted to give the Commission an opportunity to follow its own laws and those of the Commonwealth.

54. Mr. Collins also demonstrated clearly in his presentation that Attorney Feingold’s defamatory statements about Plaintiff filing intentionally deceptive Building Permit Applications to obtain Commission approval of the Building Permits were knowingly false. Mr. Collins testified that one of his first year interns was able to understand the exact dimensions of the Project from the Building Permit application materials and render an exact model of the Project. No information outside the allegedly fraudulent Building Permit Applications that completely described the Project scope was necessary for the intern, or for anyone else, including the Commission that initially signed off on them, the abutters watching and waiting while Plaintiff constructed the Project, or Attorney Feingold who maligned Plaintiff’s character, to confirm and understand the exact dimensions of the Project.

55. At the conclusion of the hearing, Plaintiff requested a continuance to the Commission’s February 5, 2024, which the Board granted. Plaintiff also noted that his statutory appeal period on the appeal from the Certificate of Non-Applicability denial was approaching

and that he would need to reserve his rights, but that he was committed to appearing before the Commission to try to obtain a Certificate of Appropriateness “regardless” because he wanted to “do something that works,” to which Commission Members responded, “thank you, and “we appreciate it.” By the end of the January 8th hearing, Plaintiff was somewhat encouraged by what appeared to be a positive conversation towards a possible amicable path forward, yet what ensued was far from the case.

56. Following that hearing, Plaintiff met with the abutter who had spoken at the January 8th hearing in an attempt to agree upon a mutually acceptable path forward with a redesign. Plaintiff had what he believed to be a productive initial conversation that would serve as the start of a collaborative effort to agree upon mutually acceptable plan revisions for the Project that would need to be worked out through further discussions. Given time constraints, Plaintiff and the abutter only had one meeting before the next Commission hearing, but Plaintiff understood that they would continue to meet in an overall attempt to reach a compromise.

The February 5, 2024 Hearing

57. Heading into the February 5th hearing, and in light of the animus shown at the January 8th hearing by Commission members about his having brought counsel to that hearing, Plaintiff decided to attend the February 5th hearing without counsel. Plaintiff also understood, based on what had transpired at the conclusion of the January 8th meeting and his ongoing discussions with the abutter, that he would receive feedback from the Commission at the February 5th hearing and continue discussions thereafter for a further Commission hearing in March. Indeed, the Commission’s Rules and Regulations contemplate continuations of hearings on certificates of appropriateness when requested by an applicant where plan modifications are being undertaken. See Rules & Regulations Art. VII, § D. Mr. Collins’ testimony as a purported

expert also stated this to be the case for applicants, except, apparently, for Plaintiff, as the progression of the hearing would confirm.

58. In the meantime, on January 26, 2024, Plaintiff again submitted additional and substantial materials to support his application for a Certificate of Appropriateness.

59. As noted, by the time of the February 5th hearing, Plaintiff had only had one substantive meeting with the abutter as well as one phone call and contemplated further meetings/conversations moving forward. Unlike the Commission's apparent demeanor at the conclusion of the January 8th hearing, the Commission's open hostility towards Plaintiff and his Project was palpable from the outset of the February 5th hearing.

60. Among the documents submitted for consideration at the February 5th hearing were plans depicting additional details of the Project as well as further depictions that were designed to reflect the comments of the abutters' architect, Mr. Collins, namely plans with a landscape berm that would reduce the appearance of the height of the wall by approximately three (3) feet. The plans also depicted how the wall was not only in scale with other walls in the Westport Point Historic District but, in fact, was on a par with walls in the area and, as viewed from the public way of the water, was substantially at grade with them, including a retaining wall of a direct abutter to the north, who is a client of Attorney Feingold. Plaintiff also submitted photographs showing what the Project would look like when completed and how the Project, overall, would be entirely appropriate and commensurate with both the look and scale of other elements in the Historic District. Indeed, the renderings showed that Plaintiff's property and the 1980's home located thereon would be *more* historically appropriate to and in character with the surroundings after the Project was completed than in its present state and would, in fact, blend in with the environment.

61. Because Plaintiff proposed reducing the height of the wall through the addition of natural soils (something the abutters' architect, Mr. Collins, had suggested at the January 8th hearing), Plaintiff also explained that while he had considered the terracing effect proposed by Mr. Collins, such a terracing would, among other things, make the pool visible from the water and give it the appearance of a Las Vegas hotel complex. Plaintiff further advised that, in any event, it might not be feasible given the significant ledge on site and that blasting is prohibited in the area of the Project. By contrast, having the stonewall in front of the pool as depicted on the plans would render the pool not visible from the water.

62. Plaintiff also stressed that he did not bring an attorney to the hearing given the way the Commission had reacted to his doing so at the last hearing (and even though the abutters had two attorneys present in addition to the Commission's own attorney). In addition, Plaintiff continued to stress that he was proceeding in good faith and did not want to litigate, but that demolishing the Project and starting completely over again was not something he deemed financially, environmentally or otherwise reasonable, but was nevertheless committed to trying to make a redesigned Project work.

63. As the Commission questioned certain elements of the Project (e.g., what kind of lighting would be proposed), Plaintiff committed to coming back before the Commission with any further details the Commission might want to see. Plaintiff's family, however, had not completely designed the Project beyond the improvements depicted in the Building Permit Applications and was intending to apply for any permits needed for any additional elements as their designs were completed (elements such as decking, a pergola, lighting, a counter area under the pergola, and a porch). These elements were intended by Plaintiff's family to be designed

after the initial phase of the walls and pool were substantially complete, so that a feel for what would be appropriate could be finalized.

64. At this point, Attorney Feingold spoke and, once again, heatedly raised the “jurisdictional issue,” even though the parties had agreed that the jurisdictional question would be tabled with Plaintiff reserving his rights while proceeding through the Certificate process. Attorney Feingold went so far as to urge the Commission to advise Plaintiff that, unless he agreed that the Commission has jurisdiction over the Project and waived the due process rights that all other applicants before the Commission possess, the application “should be denied on that ground alone.” When Plaintiff worriedly complained, “I feel like our due process rights are being violated,” a Commission member proceeded to mock Plaintiff, stating: “There he goes again.” Plaintiff was understandably upset, and continues to be, as his family has been singled out for such unlawful treatment.

65. The abutter who spoke at the January meeting then spoke again, referencing the meeting he had had with Plaintiff and a discussion that they had had about drawing lines of certain elevations on the poured concrete wall so people could visually see what was being proposed. Plaintiff made it clear that he intended to do that (“we will do that”) but that there had been insufficient time between their meeting and the hearing to do so, particularly given severe weather events and the effect on the surfaces inside and surrounding the Project, including a trench hole filled with water due to the Commission’s (unlawful) stop work order. Plaintiff also referenced the fact that he and the abutter had had a good meeting and would “continue to talk” and that the abutter “had some good ideas.” The abutter claimed he was committed to compromise, and Plaintiff made clear that he was committed to compromise as well. One

Commission member even asked if the abutter could be “engaged” by Plaintiff to advise Plaintiff on the process of redesigning his Project.

66. The abutter further claimed that a redesign would be less expensive than “you and me fighting this out in Court for the next two or three years which is what it would take.” Again, the abutter is not a Commission member and, as such, would not be a party to any appeal from a Commission decision but apparently believed he would nevertheless be, or intended to be, intricately involved in the litigation process. Additionally, no abutter or Commission member would have been aware of the exact sums expended by Plaintiff or the costs to demolish, redesign, and reconstruct the Project.

67. Even though Plaintiff continued to make it abundantly clear that he was committed to compromise, one of the Commission members stated that the Commission *and the neighbors* felt that “they have been bullied from the get go on this” and that Plaintiff was not, in fact, “willing to make any compromise.” The “compromise” that the Commission and abutters were apparently alluding to was not any type of compromise on the Project design itself but, rather, an attempt to force Plaintiff to give up appellate rights, which is improper. Plaintiff was left to conclude that only a severe destruction of the Project and redesign by abutters represented by Attorney Feingold, and exactly as they dictated, would be considered by the Commission, if at all. None of this, of course, takes into consideration the historical purview of the Commission’s considerations.

68. Once again, and notwithstanding the agreement reached at the December 4th meeting on the jurisdictional question, the Commission faulted Plaintiff for filing a complaint in Superior Court. Plaintiff, once again, tried to explain that he was merely protecting his rights but nevertheless very much wanted to go through the Certificate process with the Commission,

stressing how he had not served process in that action while he pursued the Certificate process. The jurisdictional issue, however, continued to inflame the Commission (“You need to give us some respect. We do have jurisdiction . . . you need to give us some respect . . .”).

69. It has become abundantly clear that Plaintiff is not being treated fairly by the Commission and is, in fact, being penalized, simply because he has read the plain text of the applicable law to render the Project outside the purview of the Commission, as supported by what he understood to be a review by the Commission itself when the Building Permits were issued, and exercised his legal rights by filing a lawsuit, which, notably, he had not even been actively pursuing. In other words, the Commission appears to have taken the position, through words and conduct, that Plaintiff should give up his legal rights, and, if Plaintiff refused to do so, the Commission would punish him, which the Commission, in fact, proceeded to do to the fullest extent of the power it believes that it has.

70. At the February 5th hearing, Plaintiff stated that he wanted to continue the matter to the next hearing to have further discussions with the abutter and make additional revisions to the plans. While the Commission initially appeared inclined to grant the continuance and as continuance paperwork was being prepared, Attorney Feingold stood up and addressed the Commission, “advising” the Commission that it had no obligation to agree to a continuance and that it could deny the Application. Attorney Feingold also advised the Commission that if it were to agree to a continuance, it should condition the continuance on the Applicant agreeing that the Commission has jurisdiction over the Project and “negate” Plaintiff’s (agreed upon) reservation of rights – something he claimed was a “fundamental thing.”

71. The Vice Chair (who was presiding as Chair in the Chair’s absence) then heeded Attorney Feingold’s advice, and even stated that the Commission should indeed heed his advice,

and asked Plaintiff to agree to the Commission's jurisdiction and waive his right to challenge the Commission's authority. The discussion then proceeded in part as follows:

Attorney Feingold: I think the Commission, [the abutter who spoke] and the abutters really want to compromise. We don't want to go to court with [the Plaintiff] any more than he wants to go with us.

Mr. Branca: Correct.

Attorney Feingold: But, it is really important to [the abutter who spoke] and the others that he admit he made a mistake; that he should have gone to you for a certificate of appropriateness or any one of the three before he started to build and that you have the jurisdiction to review his project. Period. And if you don't, you know I think that is a very big issue. If he does, we continue to work together. If he doesn't, I think if you refuse the continuance then we'll have a court to decide whether you have jurisdiction in the district or you don't."

72. Attorney Feingold pressed further:

I think that this is a fundamental issue and you have an opportunity to assert the Commission's authority and insure that Mr. Branca in good faith recognizes the jurisdiction of the commission . . . I think you should stand up for yourself and say, you agree that we have jurisdiction or we are denying and you are done.

73. The Commission proceeded, again, to follow Attorney Feingold's advice: Plaintiff did not waive his right to contest jurisdiction or to forfeit his due process rights; the Commission denied the request for a continuance; and the Commission denied the Application and later voted to issue an enforcement order. The actions were part and parcel of the Commission's complete abdication of its legitimacy and control of its own purview and process to the subjective and vituperative whims of neighbors.

74. As noted, the Commission voted to direct Town Counsel to bring an enforcement action against Plaintiff on the alleged pending violation. It should be noted that Plaintiff has twice expressed concern, in writing to the Town, that his family was possibly the victim of unlawful discrimination, once in a memo to the Town Select Board and once in a letter, through counsel, to the Building Commissioner. The letter to the Building Commissioner was in response to a letter to the Building Commissioner from Attorney Feingold attempting to force the Building Commissioner into unlawfully revoking the Pool Permit in addition to the Wall Permit. Despite being put on notice twice about an allegation of potential unlawful discrimination, the Town, upon information and belief, failed not only to investigate the same but also permitted unlawful retaliation to continue to take place against Plaintiff, by and through the Commission (acting at Attorney Feingold's direction), with the ultimate consequence being denial of the applications and a directive to commence enforcement proceedings. Retaliation can potentially give rise to an independent claim without the need to prove any underlying unlawful discrimination.

The Motion for Reconsideration

75. In part of his ongoing, good faith quest to resolve this matter without further Court involvement, and after conferring with Town Counsel, on February 23, 2024, Plaintiff filed a motion for reconsideration of the Commission's decision to deny his request for a continuance and to re-open the hearing. See Exhibit J.

76. In the motion for reconsideration, Plaintiff explained how he was working with his landscape designer and contractor architect to have plans prepared that would reduce the mass of the Project and that he wanted additional time to complete and review those plans with certain abutters, all in an effort to attempt to present plans agreeable to Plaintiff and the abutters to the Commission. Plaintiff requested that the Commission reconsider its decision to deny his

request for a continuance, reverse that determination, and then re-open the public hearing for further consideration of the application for a Certificate of Appropriateness, including consideration of Plaintiff's revised plans, which he stated would more closely approximate the renderings presented by Mr. Collins at the January 8th hearing (none of which, Plaintiffs submit, were more historically appropriate than Plaintiff's Project).

The March 4, 2024 Meeting

77. At the March 4, 2024 meeting, and even though the motion for reconsideration process had been discussed with Town Counsel, the Commission Chair began the meeting by proclaiming that he was "flummoxed" by the Motion for Reconsideration. In response, Plaintiff explained that he felt that, if granted, the motion for reconsideration would allow Plaintiff to present revised plans that he believed would be along the lines that the Commission was looking for and, further, that the motion would be a potential way to obviate his need to file another lawsuit and, overall, reach compromise. Plaintiff also confirmed that he was in the process of preparing preliminary revised plans that would show further berming at the bottom of the wall as well as a reduction in the height of the wall. Plaintiff explained that work had stopped for many weeks, contractors had moved on, and re-engaging them in the Project was difficult and naturally delayed.

78. Once again, Attorney Feingold was permitted to speak (even though it was a public meeting and not a public hearing) and urged the Commission to deny the motion for reconsideration, claiming it was a "backdoor way to reverse [the] denial" for "no reason" because "Mr. Branca has not agreed you have jurisdiction."

79. And, once again, the Commission heeded Attorney Feingold's advice: the Commission voted to deny Plaintiff's motion for reconsideration, claiming that Plaintiff does not

need to appeal the denial but, rather, can forgo that right and then just apply again for a Certificate of Appropriateness. This knowingly forced Plaintiff to incur substantially more expenses in addition to the damages already inflicted upon his family.

80. On March 6, 2024, the Commission filed with the Westport Town Clerk its written Decision denying Plaintiff's application for a Certificate of Appropriateness. See Exhibit A.

81. The Commission's conclusion that it has jurisdiction over the Project and that any project that takes place in the Historic District requires the issuance of a Certificate even if outside of its purview is in contradiction to the Historic Districts Act, the By-Laws and the Guidelines, most particularly, the Guideline provision stating that "[a] Certificate is required from the Commission before any exterior work is initiated *other than for projects specifically exempted by law and written into these Guidelines.*"

82. The Commission intentionally ignored the provisions of the Historic Districts Act, the By-Laws and the Guidelines, which limit its jurisdiction and renders it without authority over the Project. The Commission also repeatedly misread and misapplied applicable law and its own Guidelines openly in public hearings, often angrily when Plaintiff requested clarification between Commissioner members' apparent interpretations and the clear letter of the law.

83. Indeed, the Commission repeatedly, through the course of public hearings with Plaintiff, misstated the law as it applies to the Project and, further, misapplied the law in its determinations and orders, including mistakenly stating that projects that fall outside of its jurisdiction must be "at grade" or "substantially at grade level." This continued to occur even after Plaintiff pointed out the actual text of the governing provisions noted herein in at least two public hearings and requested that said text be read into the record. Plaintiff stated at least twice

that he was confused by the way that the Commission misread the applicable law and asked why the Commission applied the “at grade” standard in ways other than the clear text required. The Commission’s misstatement and misapplication of governing law was either due to a lack of knowledge sufficient to issue a competent determination that is not whimsical, arbitrary and capricious, or was intentionally deployed to deny Plaintiff his due process rights and cause his family substantial harm. Other obvious deviations from the purview of the Commission and demonstrations of the arbitrary and capricious underpinnings of the Commission’s actions bordered on the absurd, such as when a Commissioner mockingly objected to the use of patio furniture and pool toys at the completed Project, none of which is remotely within the purview of the Commission but demonstrates the extreme bias of its members against Plaintiff.

84. The Commission also abdicated its decision-making role to the abutters, inappropriately took and followed “advice” from the abutters’ attorney, and/or otherwise allowed the abutters to make decisions on the Application and the Project throughout the entire process, thereby improperly abdicating its role and legitimacy as a Commission and otherwise depriving Plaintiff of his right to a fair hearing process. For example, the Vice Chair, acting as the Chair, openly asked neighbors what they thought the Commission should do during the public hearing as opposed to making independent, fair and/or impartial determinations.

85. Contrary to the Commission’s conclusion, the evidence presented at the hearings confirmed that the Project will be compatible with surrounding existing structures and structures that otherwise appear throughout the Historic District and the home on the land where the Project sits.

86. Contrary to the Commission’s conclusion, and as was presented by the evidence, the plans for the Project, as submitted, do not negatively affect the historical landscape and

architectural features but, rather, are compatible with and otherwise enhance the landscape and architectural features. In addition, the size, scale and overall mass of the Project is in harmony with the residence on the property, and the proposed materials for the Project are in keeping with the architectural style for the existing building, consistent with Section 4.L of the Guidelines, as was presented by the evidence. The Guidelines cite that appropriate materials are “wood, brick, glass, iron, stone, etc.” and that “[f]or buildings or additions built after 1973, some synthetic materials may be appropriate if the [Commission] determines that their placement and appearance replicate natural materials traditionally used for such purposes. “

83 Furthermore, to the extent the Commission claims that the application was in any way incomplete or deficient, such a conclusion is erroneous and unsupported: not only were the application materials complete, but Plaintiff was also committed throughout the entire process to revising plans and providing any details requested by the Commission. At the very least, the Commission should have continued the proceedings to the next hearing date to allow Plaintiff to present revised plans – something that conforms to the practice described by Mr. Collins at the January 8th hearing (with Mr. Collins being someone for whom the Commission afforded great deference). The Commission, however, unfairly failed to afford Plaintiff the opportunity to do so. Among other things, rather than continue the hearing to obtain further plan details and revisions, the Commission improperly took Attorney Feingold’s advice, denied the Plaintiff’s request for a continuance because the Plaintiff did not succumb to the demand that he relinquish his reservations of rights with respect to the Commission’s jurisdiction, and, overall, deprived Plaintiff of his right to a fair hearing process.

COUNT I – Appeal Pursuant to G.L. c. 40C, § 12A

84 Plaintiff restates and incorporates by reference the allegations set forth in the above paragraphs as if fully set forth herein.

85 Plaintiff is aggrieved by the Decision denying it a Certificate of Appropriateness.

86 The work authorized by Building Permit # 23-221 and Building Permit # 23-371 is not subject to review by the Commission.

87 In denying Plaintiff's request for a Certificate of Appropriateness, the Commission exceeded its authority.

88 In denying Plaintiff's request for a Certificate of Appropriateness, the Commission committed errors of law by failing to properly and reasonably apply its own By-Laws, Rules and Regulations, and Guidelines and otherwise provide the Plaintiff with a fair hearing process.

89 In denying Plaintiff's request for a Certificate of Appropriateness, the Commission improperly allowed the abutters' attorney to influence and usurp its decision-making process and authority.

90 The Commission also erred in denying the Plaintiff's request for a continuance of the hearing and, thereafter, in denying the Plaintiff's Motion for Reconsideration.

91 In denying Plaintiff's request for a Certificate of Appropriateness, the Commission rendered a decision that is unsupported by the evidence.

92 In denying Plaintiff's request for a Certificate of Appropriateness, as well as the request for a continuance and the Motion for Reconsideration, the Commission acted in an arbitrary and capricious and legally untenable manner.

93 The Commission's decisions were against the weight of the evidence submitted at the hearings and unsupportable.

WHEREFORE, Plaintiff respectfully requests that this Court annul and reverse the Commission's decision denying Plaintiff's request for a Certificate of Appropriateness; issue an Order directing the Commission to issue a Certificate of Appropriateness to Plaintiff forthwith; alternatively, remand this case to the Commission for further proceedings to consider the Plaintiff's application and any revised plans to be presented in accordance with the same and with direction to issue a Certificate of Appropriateness to the Plaintiff; award costs to Plaintiff to the extent allowed by law; and grant such other and further relief as this Court deems just and appropriate.

COUNT II – Declaratory Judgment Pursuant to G.L. c. 231A

94 Plaintiff restates and incorporates by reference the allegations set forth in the above paragraphs as if fully set forth herein.

95 An actual justiciable controversy within the jurisdiction of this Court exists between the Plaintiff and the Commission concerning the matters set forth above in this Complaint and the extent of the Commission's jurisdiction.

96 This Court has authority pursuant to G.L. c. 231A, § 1 to make a binding declaration of legal relations in this case in which an actual controversy has arisen.

97 Pursuant to G.L. c. 40A, § 8(a), the By-Laws, the Commission's Rules and Regulations, and the Guidelines, the Commission does not have authority over the work permitted by Building Permit # 23-221 and Building Permit # 23-371.

98 Walls, as well as structures (including swimming pools) that are not subject to view from a public street, public way, public park or public body of water, "may be constructed or altered within the Westport Point Historic District without review by the commission." See G.L. c. 40C, § 8(a).

99 The By-Laws also provide that the Commission “shall not have the power to review” walls and, further, appurtenant structures, such as swimming pools and the like, “that are not subject to view from a public street public way, public park or public body of water.” By-Laws, Article LIX, § 5911, A.1, 2 & 7.

100 The Guidelines further state that “[a] Certificate is required from the Commission before any exterior work is initiated other than for projects specifically exempted by law and written into these Guidelines.”

101 The Plaintiff is entitled to a declaration that no Certificate is required from the Commission “for projects specifically exempted by law and written into these Guidelines,” which would include walls and appurtenant structures, such as swimming pools and the like, “that are not subject to view from a public street public way, public park or public body of water.”

102 Plaintiff is also entitled to a declaration that the Commission lacks jurisdiction over the work permitted by the Building Permits and that said work falls beyond the Commission’s jurisdiction and purview.

WHEREFORE, Plaintiff respectfully requests that this Court adjudicate and declare the rights of the parties under G.L. c. 40C, §§ 6 and 8, and under Section 5911 of the Town of Westport By-Laws, determine that the Commission does not have the jurisdiction, authority, or right to review the work permitted by Building Permit # 23-221 and Building Permit # 23-371, declare no Certificate is required from the Commission “for projects specifically exempted by law and written into these Guidelines,” which would include walls and appurtenant structures, such as swimming pools and the like, “that are not subject to view from a public street public way, public park or public body of water,” overall declare that the Commission lacks

jurisdiction over the work permitted by the Building Permits and that said work falls beyond the Commission's jurisdiction and purview, and award costs to Plaintiff to the extent allowed by law, and grant such other and further relief as this Court deems just and appropriate.

COUNT III – Injunctive Relief

103 Plaintiff restates and incorporates by reference the allegations set forth in the above paragraphs as if fully set forth herein.

104 The Commission's November 16, 2023 correspondence states that the construction of an engineered concrete retaining wall structure on the Property is in violation of the Historic Districts Act, the By-Laws, the Commission's Rules and Regulations, and the Guidelines, and threatens enforcement action against the Plaintiff.

105 The Stop Work Order issued by the Building Commissioner prohibits any further work related to Building Permit # 23-317.

106 On December 4, 2023, the Commission also took the position that a Certificate is required for the work pursuant to Building Permit # 23-221.

107 On February 5, 2024, the Commission voted to direct Town Counsel to bring an enforcement action against Plaintiff on the alleged pending violation,.

108 The Commission has no authority over the work permitted by Building Permit # 23-317 and has exceeded its jurisdiction with respect to the same.

109 The Commission similarly has no authority over the work permitted by Building Permit # 23-221.

110 Any actions of the Commission to prevent or prohibit work from proceeding under Building Permit # 23-221 and/or Building Permit # 23-371 violates the Historic Districts Act, the By-Laws, the Rules and Regulations, and the Guidelines.

111 The Commission's actions have caused and will continue to cause irreparable harm to the Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court preliminarily and then permanently enjoin and restrain the Commission from preventing or prohibiting work from proceeding under Building Permit # 23-221 and Building Permit # 23-371.

PLAINTIFF,

ROBERT BRANCA, TRUSTEE OF THE
ANC NOMINEE REALTY TRUST

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