18-P-589 Appeals Court

JOSEPH LEONARD[1] vs. ZONING BOARD OF APPEALS OF HANOVER & others[2] (and two companion cases[3]).

No. 18-P-589.

Plymouth. May 9, 2019. - November 13, 2019.

Present: Blake, Henry, & McDonough, JJ.

Zoning, Nonconforming use or structure, By-law, Judicial review, Appeal. Statute, Construction.

Civil actions commenced in the Superior Court Department on December 10, 2014, February 11, 2016, and June 23, 2016.

After consolidation, the cases were heard by Angel Kelley Brown, J., on motions for summary judgment.

Gregory V. Sullivan (Kerstin Peterson also present) for Joseph Leonard & others.

Lauren C. Galvin for town of Hanover & others.

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[1] Doing business as Hanover Country Florist.

[2] Town of Hanover and building commissioner of Hanover.

[3] Joseph Leonard vs. Zoning Board of Appeals of Hanover & others; and Town of Hanover vs. Joseph P. Leonard & others.

BLAKE, J. Since March 1993, Joseph and Nancy A. Leonard have operated the Hanover Country Florist (florist shop) at 803 Washington Street (locus) in the town of Hanover (town).[4] The florist shop has displayed and sold flowers, pumpkins, and other seasonal plant products from inside and outside of a building in the town's commercial zoning district.[5] The Leonards live in a second-floor apartment in the building. On December 3, 2013, the town's building commissioner notified the Leonards by letter that their outdoor display of goods required a special permit. This was the touchstone to three actions that challenged zoning enforcement orders related to the outdoor displays, as well as separate enforcement orders related to the Leonards' placement of concrete barriers along their property line to separate it from an abutting restaurant property. The three actions were consolidated in the Superior Court. On cross motions for summary judgment, the judge declared that the Leonards' outdoor displays were not lawful prior nonconforming uses and therefore required a special permit. She also found that the placement of

[4] For ease, we refer to Joseph and Nancy A. Leonard individually and collectively as "the Leonards," and the town, its zoning board of appeals, and its building commissioner, collectively as "the town."

[5] Although the Leonards opened the florist shop in March 1993, the Leonards, as trustees of the J & N Realty Trust, purchased the locus on June 13, 2000. The Leonards are the sole shareholders and directors of Hanover Country Florist, Inc., and do business on the locus as Hanover Country Florist.

concrete barriers was not an "alteration" of the property and did not require a special permit or site plan approval under the town's zoning bylaw (bylaw), and she reversed the cease and desist order relating thereto. We vacate in part and affirm in part.

Background. 1. Locus. The locus is undersized for the commercial district, but the parties agree it is a lawful nonconforming lot. The building is located roughly in the center of the locus. It is situated next to a restaurant and patrons of the restaurant routinely trespassed on the locus with their vehicles, even causing damage to the building on the locus.

2. Outdoor displays. The parties agree that the bylaw was amended in May 2011 to provide that a business may display or store "goods for sale" outdoors only upon obtaining a special permit from the planning board. When the Leonards began their business at the locus in 1993, § VI.E of the 1993 bylaw provided that "[t]he Commercial District is intended to provide consumer goods and services at retail and to provide goods and services for transients or tourists and to provide non-consumer goods and services." That provision was silent as to outdoor displays or sales. A use specifically allowed in the commercial district pursuant to § VI.E.1.c, however, was "[g]ift shops and places for display or sale of hand-crafts primarily within a structure"

(emphasis added).[6] Section VI.E.1.a provided that all uses allowed in the business district were allowed in the commercial district, and § VI.D provided that "[t]he Business District is intended to provide consumer goods and services at retail primarily within a structure" (emphasis added). Section VI.D.1.a specifically allowed a "[r]etail store . . . the principal activity of which shall be the offering of goods or services at retail within the building" (emphasis added) in the business district.

Section VI.E.2 of the 1993 bylaw delineated uses permitted in the commercial district "upon satisfactory demonstration to the Hanover Planning Board that such uses are appropriate to the specific site and that they will not create a nuisance and not cause a derogation of the intent of these bylaws by virtue of noise, odor, smoke, vibration, traffic generated or unsightliness." Within that section, allowed uses included (1) "[s]alesrooms for bicycles, boats, farm equipment and similar equipment provided the display of goods is primarily within a structure and exterior storage or display is confined to yards which are shielded from public view by fencing and vegetation"; (2) "[c]ontractors' yards and storage yards provided all materials and equipment are stored within a structure or

[6] Neither party contends that the Leonards sell hand-crafts or that their store is a gift shop.

shielded from public view by fencing and vegetation"; and (3) "[a]griculture, horticulture or floriculture." Finally, and most notably, a separate section, § VII.H of the 1993 bylaw provided that "[e]xcept as specifically permitted in this by-law, outdoor storage or display of any vehicles, boats, building materials, goods for sale and similar articles is not allowed in Business, Commercial and Limited Industrial Districts."[7]

3. Concrete barriers. In March 2014, in an effort to rectify the problems created by patrons of the neighboring restaurant, the Leonards installed along the boundary line between the two properties concrete barriers which were thirty-six inches high and twenty-four inches wide. On March 24, 2014, the fire chief conducted a site inspection of the locus. Thereafter, he issued a notice to the Leonards ordering the removal of all the concrete barriers because they impeded access and created fire-safety risks. The Leonards removed the barriers and replaced them with orange construction barrels tethered together. The town took no action against the placement of the barrels.

[7] The dissent posits that the outdoor displays are an accessory use and thus permitted by the bylaw. However, the Leonards do not make this argument. Indeed, they make one passing reference in the fact section of their brief to the definition of an accessory use and do not set forth any legal argument whatsoever in this regard.

On November 16, 2015, the Leonards replaced the barrels with smaller concrete barriers, twenty-four inches high and twenty-four inches wide. In a joint letter dated November 24, 2015, the building commissioner and the fire chief informed the Leonards that by installing the smaller concrete barriers, they had altered their preexisting nonconforming lot. The letter asserted that the Leonards had violated §§ 4.320 and 4.330 of the bylaw, presumably the 2014 bylaw then in effect, as well as G. L. c. 40A, § 6. Section 4.330 of the 2014 bylaw requires a special permit to alter or change a preexisting nonconforming lot. In addition, the letter asserted that the town's fire department requires an eighteen-foot wide travel lane for emergency access to commercial properties and that the barriers had reduced the fire lane to 15.9 feet at its narrowest point.[8] The letter ordered the Leonards to return the site to its original condition to avoid further enforcement action. On appeal, the zoning board of appeals (board) affirmed the order.

4. Procedural history. On December 10, 2014, the Leonards filed a complaint in the Superior Court (No. 2014-1316A) seeking a declaration, pursuant to G. L. c. 231A, that the outdoor displays of flowers and other plants were a lawful prior

[8] While the parties dispute whether the fire lane at its narrowest point is 15.9 feet or 16.1 feet, there is no dispute that it is less than eighteen feet and thus of no distinction for our analysis.

nonconforming use in accordance with G. L. c. 40A, § 6, and that no special permit was required for such outdoor displays on the locus. They subsequently amended the complaint to include a claim, pursuant to G. L. c. 40A, § 17, challenging the board's decision that the outdoor displays of flowers and other plants were not a lawful use eligible for "grandfathered" status.

On or about February 11, 2016, the Leonards commenced an action (No. 2016-0130A), pursuant to G. L. c. 40A, § 17, asserting that the board exceeded its authority by enforcing the order to remove the smaller concrete barriers and seeking a declaration, pursuant to G. L. c. 231A, that the barriers are not an "alteration" of a prior nonconforming lot and no special permit or site plan review was necessary before placing the concrete barriers on the lot. In June 2016, the town filed a verified complaint (No. 2016-0600A) seeking a declaration, pursuant to G. L. c. 231A and G. L. c. 212, § 4, that the concrete barriers and outdoor displays on the locus are in violation of §§ 4, 5, and 7 of the 2014 bylaw and seeking preliminary and permanent injunctions ordering the removal of the concrete barriers and outdoor displays. The motion for a preliminary injunction was denied.

After the cases were consolidated, they were decided on cross motions for summary judgment. A judgment addressing all three cases was entered on the docket for each case. As to No.

2014-1316A, the judgment declared that the outdoor display of flowers and plants was not a lawful prior nonconforming use and required a special permit, and affirmed the board's decision upholding the order to remove the displays. As to No. 2016-0130A, the judgment declared that the placement of the concrete barriers did not require a special permit or site plan approval, and reversed the board's decision upholding the cease and desist letter regarding the barriers. As to No. 2016-0600A, the judgment (1) declared that the outdoor displays violated the bylaw and permanently enjoined the Leonards from using outdoor displays without a special permit, and (2) declared that the concrete barriers did not violate the bylaw and the Leonards may maintain them as presently located. The parties appealed from the judgment.

Discussion. 1. Outdoor displays. An amendment to a zoning bylaw does not apply to a use lawfully in existence when the bylaw was amended. G. L. c. 40A, § 6, first par. See Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527, 528-529 (1990). See also Almeida v. Arruda, 89 Mass. App. Ct. 241, 243 (2016). "[A] use achieves the status of nonconformity for statutory purposes if it [lawfully] precedes the coming into being of the zoning regulation which prohibits it."[9] Mendes,

[9] Section II.Q.1 of the 1993 bylaw separately defined "[n]on-conformances other than use" as including "displays of

supra at 529-530. See Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 376 (2019). "Preexisting nonconformities become protected when zoning laws change, as a result of the long-standing recognition that 'rights already acquired by existing use or construction of buildings in general ought not to be interfered with.'" Id., quoting Opinion of the Justices, 234 Mass. 597, 606 (1920). See G. L. c. 40A, § 6. The question is whether the Leonards' outdoor displays were lawfully permitted prior to the 2011 amendment to the bylaw requiring special permits for all outdoor displays.

It is true that, read together, certain provisions in the bylaw in existence when the florist shop began operating in 1993 suggest that, provided a principal retail use is conducted inside the building, outdoor displays and sales may be permitted in the business and commercial districts as a secondary use. Indeed, that the Leonards openly displayed goods outdoors from the inception of their operation of the florist shop in March 1993 and continuing for over twenty years without complaint from the town might well suggest that all were acting under the impression that outdoor displays in conjunction with the indoor sale of flowers and plants were an allowed use in the commercial district. However, any misapprehension that outdoor displays

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good[s] . . . and the like." The 2014 bylaw does not define "[o]ther pre-existing, non-conformances."

were allowed in the commercial district does not transform a prohibited use into an allowed use. Even when the outdoor displays began in 1993, § VII.H of the 1993 bylaw provided that such displays were prohibited unless "specifically permitted" elsewhere in the bylaw.

The 1993 bylaw is not a model of clarity; however, as is well settled, we give deference to the board's interpretation of its own bylaw. See Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 381 (2009). Whatever inferences we might draw from the use of the terms "principal" and "primarily" in the 1993 bylaw in relation to whether outdoor displays are permitted, we cannot say, as the dissent says, that any provision in the bylaw applicable to the locus "specifically permitted" outdoor displays when the Leonards commenced their use of outdoor displays. To the contrary, § VII.H of the 1993 bylaw specifically prohibits the outdoor displays and therefore controls.[10] Indeed, here the

[10] The terms "principal" and "primarily," as used in § VI.D of the 1993 bylaw, modify the (principal) activity of "offering . . . goods or services at retail," or the location where goods and services are offered for retail (primarily) within a structure or building. The terms do not specifically modify outdoor displays. Even if the term "primarily" within a building or structure could be interpreted as allowing some sales of goods outside the building or structure, it does not "specifically" allow "outdoor displays" to attract customers and advertise wares. The town's enforcement efforts were directed at the Leonards' outdoor displays. The town's interpretation of the bylaw is not unreasonable.

specific prohibition trumps any generalized textual references contained in the bylaw. See St. Laurent v. Middleborough Gas & Elec. Dep't, 93 Mass. App. Ct. 901, 902-903 (2018), and cases cited. The protections from enforcement of amended bylaws in G. L. c. 40A, § 6, do not apply to uses that were not lawful when the amendment was enacted.[11] Accordingly, the judge correctly decided that the Leonards' outdoor displays were not prior nonconforming uses entitled to protection under § 6.

The Leonards also contend that the ten-year statute of limitation contained in G. L. c. 40A, § 7, third par., prevents the town from compelling the removal of the metal racks upon which the outdoor displays are placed. Section 7, third par., provides that "[i]f real property has been improved by the erection . . . of 1 or more structures and the structures . . . have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds . . . within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning

[11] The Leonards are not without a remedy. In 2011, § 5.610 of the bylaw was amended to provide that notwithstanding the prohibition against outdoor displays, a "business may display or store 'goods for sale'" upon applying for and receiving a special permit by the planning board.

purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures." Section 2.100 of the 2014 bylaw defines the term "structure" as: "[a]nything constructed or erected, except a boundary wall or fence, the use of which requires location on the ground or attachment to something on the ground. Examples of structures include, but are not limited to, buildings, swimming pools . . . , retaining walls, sheds, vending or dispensing machines of twenty (20) square feet or more, and communications towers or structures."

The Leonards insist the metal racks, apparently together with the items on display, are structures. No reading of the 2014 bylaw suggests that the items displayed, changing from season to season if not daily, can be considered structures. Moreover, it is not at all clear to us that the town imposed any orders on the moveable racks themselves; the town's actions were directed at the "outdoor displays." However, even if we assume that the racks are structures and may remain because they have existed for more than ten years under G. L. c. 40A, § 7, third par., their use for the display of goods is not protected by § 7. See Lord v. Zoning Bd. of Appeals of Somerset, 30 Mass. App. Ct. 226, 228 (1991) (rejecting argument that because structural changes authorized by building permit are protected by § 7, structure's use as two-family home in zoning district

that allows only single-family homes is also protected). See also Cumberland Farms, Inc. v. Zoning Bd. of Appeals of Walpole, 61 Mass. App. Ct. 124, 125 n.4 (2004) (distinguishing between gasoline tanks as nonconforming structures and sale of gasoline as nonconforming use). "The omission of protection for use violations not sanctioned by permit is plain on the face of the statute." Lord, supra at 227. Thus, under no provision of G. L. c. 40A are the outdoor displays authorized -- even if the moveable racks may remain, an issue which we need not and do not decide. We hold only that the outdoor display of goods is not a lawful nonconforming use and, pursuant to the 2014 bylaw, requires a special permit.[12]

2. Concrete barriers. "Our review of the meaning of statutory or regulatory language is de novo." Schiffenhaus v. Kline, 79 Mass. App. Ct. 600, 604 (2011). Here, § 4.330 of the 2014 bylaw, in pertinent part, provides that "[n]o pre-existing, non-conforming lot shall be altered or changed except in accordance with the following and only upon the grant of a Special Permit from the Planning Board . . . after a finding by

[12] The Leonards suggest that they have been singled out as the only business owners in Hanover to have been cited for their use of outdoor displays without a special permit. To be sure, such apparent selective enforcement would be troubling, but the Leonards have not pursued any claims based on disparate treatment and have not provided a record to support such a claim. We therefore decline to comment further.

the Board that the proposed alteration or change shall not be substantially more detrimental to the neighborhood than the existing, non-conforming lot and use of said lot."[13] The board concluded the concrete barriers altered[14] and intensified the nonconformance of the locus by impeding the already substandard frontage and general access to the lot. We disagree. The lot size has not changed. Although the barriers reduce the area that is "open," they do not "change" or "alter" the lot or its use. They were installed to protect the locus from patrons of the nearby restaurant. The barriers are not structures under § 2.100 of the 2014 bylaw. They serve as a boundary wall or fence, items which are specifically exempted from the requirements of a special permit or site plan approval under

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[13] Section 4.330 provides two exceptions:

> "A. A pre-existing, non-conforming lot may be combined with another lot or it may be divided and combined with more than one lot provided that all such resultant lots are themselves conforming to all dimensional regulations of this Zoning Bylaw, [and]
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> "B. Other land may be combined with a pre-existing, non-conforming lot provided that the resultant lot itself conforms to all dimensional regulations of this Zoning bylaw."

[14] The definition of "alteration" contained in § 2.100 of the 2014 bylaw is addressed to structures. It defines "alterations" as "[r]emodeling or renovation activities generally conducted within an existing structure and, except for cosmetic changes, having no effect upon the exterior of said structure." It does not assist us in determining when a nonconforming lot has been altered or changed.

§ 2.100. See, e.g., Bernard v. Brownell, 273 Mass. 262, 264 (1930) (boundary wall made of loosely placed stones of all sizes). The town argues that the concrete barriers placed along a property line cannot be considered the type of fence that the bylaw was meant to exempt. This argument is unavailing; the town fails to cite to any authority in support of this argument and simply asks us to accept a bald assertion. This we will not do. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1629 (2019).

3. Fire code compliance. The November 24, 2015, cease and desist order issued by the fire chief and the building commissioner informed the Leonards that the "Hanover Fire Department requires an eighteen foot (18') wide travel lane to provide adequate access for emergency vehicles to commercial properties" and that the installation of the concrete barriers caused the Leonards' property (and their abutter's property) to violate that requirement. The letter did not notify the Leonards that they failed to comply with the State fire code, or any specific town bylaw over which the fire chief has enforcement rights. Nor did it inform the Leonards of their appellate rights, if any, with regard to the fire chief's involvement in the cease and desist order.

In the Superior Court and in this court, the town contends that the placement of the concrete barriers violates the

Massachusetts comprehensive fire safety code (code), 527 Code Mass. Regs. §§ 1.00 (2015), by making it impossible for a proper fire access lane to exist. The Superior Court judge rejected this argument; she concluded that the cease and desist order was not justified by the alleged fire code violation. There are multiple avenues to challenge a directive from a local fire chief. See, e.g., G. L. c. 22D, § 5 (b) ("Whoever is aggrieved by any act, rule, order, directive, decision or requirement of any state or local official charged with the enforcement of the state fire code . . . may appeal to the appeals board"); G. L. c. 148A, § 2 (c), (d) (alleged violator may request, in timely manner, hearing before municipal hearing officer and then appeal from decision of officer to clerk magistrate of housing court); 527 Code Mass. Regs. § 1.10.1.1 (2015) ("Whoever is aggrieved by any act, rule, order, directive, decision or requirement of the [local official] charged with the enforcement of [the State fire code] . . . may . . . appeal to the appeals board"). It is entirely unclear under what authority the fire chief purported to act here. What is clear is that the parties cite to no section of the bylaw granting the fire chief authority to participate in a zoning enforcement matter. To the extent the fire chief's notice and order even provided proper notice to the Leonards of a violation of a regulation which the fire chief is

authorized to enforce,[15] which we do not decide, nothing in the record suggests that an appeal pursuant to G. L. c. 40A, § 17, or by way of declaratory relief was the proper avenue. The parties failed to exhaust their administrative remedies before seeking court intervention. As a result, the issue was not properly before the board or the Superior Court judge; nor is it properly before us. See Space Bldg. Corp. v. Commissioner of Revenue, 413 Mass. 445, 448 (1992).[16]

4. Procedural issue. The Leonards properly appealed from the board's decisions pursuant to G. L. c. 40A, § 17. In addition, they sought declaratory relief pursuant to G. L. c. 231A. The proper avenue for resolution of these issues is through their c. 40A appeal as that is the exclusive remedy for a person aggrieved by a decision of the board. See Lincoln v. Board of Appeals of Framingham, 346 Mass. 418, 420 (1963). We note that ancillary declaratory relief is available through

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[15] We note that notices of violations of the State fire code issued under G. L. c. 148A, § 2 (a), must give notice of the specific offense charged.

[16] The town argues four times in its brief that placement of the concrete barriers creates public safety risks to the abutting restaurant. Insofar as the town argues for the removal of the concrete barriers on the Leonards' lot because the barriers impede access to its restaurant neighbor, "[o]ur law simply does not sanction this type of private eminent domain." Goulding v. Cook, 422 Mass. 276, 278 (1996), quoting Goulding v. Cook, 38 Mass. App. Ct. 92, 99 (1995) (Armstrong, J., dissenting).

G. L. c. 40A, § 17, and thus a separate action under c. 231A is unnecessary. See Duteau v. Zoning Bd. of Appeals of Webster, 47 Mass. App. Ct. 664, 670 (1999) (disposition of enforcement case is likely to moot or govern declaratory judgment case). Here the procedural defects are of no moment as the declaratory relief afforded in the Superior Court judgment is a proper remedy for claims pursuant to G. L. c. 40A, § 17.

The town's complaint for declaratory relief does not fare as well. As discussed above, the claims regarding the fire lane are not properly before us. With regard to the zoning issues, G. L. c. 40A, § 7, authorizes the local building inspector to enforce the bylaw, including by seeking injunctive relief. Seeking declaratory relief as to the meaning of its own bylaw, as the town did here in a separate action under G. L. c. 231A, eliminates the important step of having the entity charged with enforcing the bylaw interpret it in the first instance, particularly where "deference is owed to a local zoning board's home grown knowledge about the history and purpose of its town's zoning by-law." Duteau, 47 Mass. App. Ct. at 669. See Middleborough v. Housing Appeals Comm., 449 Mass. 514, 523 (2007). Moreover, the result of the Leonards' appeals pursuant to G. L. c. 40A govern the town's declaratory judgment claims. Accordingly, the portion of the judgment that addresses the town's complaint must be vacated.

Conclusion. We affirm so much of the judgment, which, as to the Leonards' complaint in No. 2014-1316A, declares that the outdoor display of flowers and plants is not a lawful prior nonconforming use and requires a special permit, and affirms the decision of the board dated March 9, 2015, upholding the order to remove the outdoor displays.

We also affirm so much of the judgment, which, as to the Leonards' complaint in No. 2016-0130A, declares that the placement of concrete barriers does not require a special permit or site plan approval, and reverses the decision of the board dated January 26, 2016, upholding the cease and desist order pertaining to the concrete barriers.

We vacate the judgment insofar as it addresses the town's complaint in No. 2016-0600A, and order that complaint dismissed.

So ordered.

HENRY, J. (dissenting in part). The town of Hanover (town) seeks to apply its zoning bylaw (bylaw) to prevent Joseph and Nancy A. Leonard from using outdoor displays at their florist shop, Hanover Country Florist (florist shop), as they have done for over twenty years.[1] The town has overreached, and I respectfully dissent from part 1 of the court's opinion. I would reverse the judgment as to the Leonards' complaint in No. 2014-1316A. I concur in parts 2, 3, and 4 of the opinion.

All parties and the majority agree that § VI.E.1.c of the 1993 bylaw permitted, in the commercial district, "[g]ift shops and places for display or sale of hand-crafts primarily[2] within a structure."[3] The Leonards contended that the florist shop's "principal business takes place within the confines of the building." The town did not offer any evidence to the contrary,

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[1] The term "the Leonards" is used to refer to Joseph and Nancy A. Leonard individually and collectively.

[2] The bylaw does not define "primarily." In any event, Merriam-Webster's Collegiate Dictionary 1452 (Deluxe ed. 1998) defines "primarily" as "for the most part."

[3] Section VI.D.1.a similarly permits, in the business district, retail stores "the principal activity of which shall be the offering of goods and services at retail within the building." The bylaw also does not define "principal." Merriam-Webster's Collegiate Dictionary 1454 (Deluxe ed. 1998) defines "principal" as "a matter or thing of primary importance."

making the fact undisputed for purposes of summary judgment.[4] This reference to sales "primarily within a structure" necessarily permits sales of goods outside the structure, on the condition that this activity is less than the activity in the structure. If it were otherwise, the language "within a structure" in the phrase "[g]ift shops and places for display or sale of hand-crafts primarily within a structure" would be superfluous.

The majority concludes, as was found by the board and argued by the town, that § VII.H bars the Leonard's outdoor displays. However, we have to confront the fact that § VII.H starts with an exception: "[e]xcept as specifically permitted in this by-law, outdoor storage or display of any vehicles, boats, building materials, goods for sale and similar articles is not allowed in Business, Commercial and Limited Industrial

[4] In responding to the Leonards' statement of undisputed facts on this point, the town contended that whether the florist shop's "principal business" takes place within the confines of the building "states a legal conclusion which does not require a response." The town is wrong. The quantity of business indoors versus outdoors is a factual statement. See generally Conners v. Northeast Hosp. Corp., 439 Mass. 469, 479 (2003) (pursuant to G. L. c. 231, § 85K, whether questioned activity of charity is "primarily commercial" is consideration for fact finder). The town offered no contrary evidence, so the statement is deemed undisputed. See, e.g., Jenkins v. Bakst, 95 Mass. App. Ct. 654, 660 n.9 (2019) ("merely responding 'disputed' to a proposed statement of fact does not establish a genuine dispute over a material fact").

Districts" (emphasis added). This requires a look back at other provisions within the bylaw.

I believe the "primarily within a structure" language is sufficient to qualify as "[e]xcept as specifically permitted" under § VII.H. This conclusion is bolstered by the fact that the bylaw also specifically permits "accessory uses" within the commercial district.[5] Section II.A of the 1993 bylaw defines "accessory use" as "[a] use . . ., which is subordinate to the main use . . . and located on the same lot with the . . . main . . . use, the use of which is customarily incidental . . . to the use of the land." Section IV.F provides examples of "accessory uses," including "gas pumps, storage sheds, outdoor displays and similar structures or uses" (emphasis added). Thus, the 1993 bylaw "specifically permitted" the accessory use of outdoor displays where the Leonard's display and sale of goods takes place primarily within their florist shop.

To read the bylaw to exclude this type of outdoor display would render the requirement that the display or sales occur "primarily" in a structure and the specific authorization of "accessory" uses superfluous. This we should not do. When interpreting a bylaw, we must "endeavor . . . to give effect 'to

[5] Section VI.D.1.g states that accessory uses are permitted in the business district, and § VI.E.1.a states that uses permitted in the business district are also permitted in the commercial district.

all its provisions, so that no part will be inoperative or superfluous.'" Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 477 (2012), quoting Connors v. Annino, 460 Mass. 790, 796 (2011). While we accord deference to the board's reasonable interpretation of its own bylaw, an incorrect interpretation is not entitled to deference. See Doherty v. Planning Bd. of Scituate, 467 Mass. 560, 566 (2014).

The Leonards' use of outdoor displays is a lawful, prior nonconforming use and does not require a special permit. The town should cease intruding on their property rights.