

## William Cundiff

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**From:** Pamela Brown [pbrown@brown-brown-pc.com]  
**Sent:** Monday, September 13, 2010 5:40 PM  
**To:** wcundiff@douglasma.org; szisk@douglasma.org; areynolds@doublasma.org  
**Cc:** clizotte@vhb.com; info@americanprowind.com; neexpansion@aol.com  
**Subject:** Variance letter  
**Attachments:** Memo re exercise of variance.pdf

Dear Bill, Steve and Adele:

Attached please find my “for the record” memo regarding my opinion that the variances have been exercised, regardless of the new permit extension act. I would greatly appreciate your confirmation of your agreement, or if you believe there is reason to disagree, please let me know.

I look forward to working with each of you on this project and responding to the remaining concerns of the boards and public.

Please feel free to contact me should you have any questions or concerns.

Truly,  
Pam

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JOHN F. BROWN - (1891-1959)

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MEMORANDUM

DATE: September 1, 2010

TO: Douglas Zoning Board  
Bill Cundiff, Town Engineer  
Adelle Reynolds, Building Commissioner  
Stephen Zisk, Planning Director

FROM: Pamela J. Brown, Esq. AICP

RE: Permit Extension Act

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It is my understanding that over the past months the Douglas ZBA has reviewed the various acts that have occurred since the grant of two variances to American Pro Wind. Via separate correspondence, APW has submitted status reports noting substantial completion of 13 of a total of 18 “to do” items. Please note that each and every completed item was performed by APW strictly based on the reliance of the obtained variances. In addition, APW has expended close to \$1 Million in reliance on the variances as it moves through the site plan approval process. Based on the holdings of various Massachusetts cases, the standard for determining whether a variance has been exercised has been established by the courts to be determined by whether the holder of a variance substantially changes his or her position in reliance upon the variance. As such, I would find it impossible for a reasonable person to find that the variances had not been exercised. Despite the new Permit Extension Act that would apply to this project, we would appreciate the Board’s confirmation that APW’s good faith reliance on the variances is sufficient exercise.

For reference, we provide a summary of some of the available case law. In 2009, the Supreme Judicial Court of Massachusetts articulated a standard for what acts constitute exercising a variance within the meaning of G.L. c 40A §10. The court held in *Cornell v. Board of Appeals of Dracut* that in addition to recording the variance, a building permit needed to be obtained or a conveyance of one of the lots in reliance on the variance needed to occur to constitute exercising the variance.<sup>1</sup> However, the court made it clear that this decision “is not intended to resolve all questions concerning exercise of a variance.”<sup>2</sup> The court uses the example of a “use” variance, which may not require construction or excavation, so a building permit may not be necessary but rather evidence of “use” within one year of issuance may be sufficient.<sup>3</sup> In *Cornell*, the variance

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<sup>1</sup> *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888, 892 (2009).

<sup>2</sup> *Cornell*, 453 Mass. 888 at FN 9.

<sup>3</sup> *Id.*

was issued for construction of a house on a nonconforming lot, hence the need for a building permit.<sup>4</sup> American ProWind was issued a use and height variance, so it is necessary to examine other relevant case law since this recent court ruling is not applicable in this case.

The standard for what constitutes exercising a variance was first articulated in *Alroy v. World Realty and Development*, which established that the holder of a variance who substantially changes his or her position in reliance upon the variance will be deemed to have exercised the variance.<sup>5</sup> This standard has been used in many recent court cases dealing with whether or not a variance has been exercised. For example, in *Hayhurst v. Campel*, a proposed house construction received a variance for insufficient frontage.<sup>6</sup> The court cited *Alroy*'s standard of sufficient acts of reliance to determine if the variance had been exercised and held that by recording the variance, obtaining an easement, and seeking ANR endorsement of the Plan in reliance on the variance, the variance had been exercised since these actions were sufficient acts of reliance on the variance.<sup>7</sup>

In another case, *Cornell v. Crowley*, the court upheld this standard again by stating that a variance, provided that it has been recorded, "may be deemed exercised if the applicant takes the necessary steps to achieve the purpose for which the variance was granted, or substantially changes his or her position in reliance on the variance."<sup>8</sup> However, the court held in *Crowley* that the variance was not exercised because the variance was granted to allow the plaintiff to subdivide the property into two lots and build a new home and plaintiff had not conveyed either lot or received a building permit. Finally, in *Walters v. Voicestream Wireless-Omnipoint*, Voicestream had received a variance to construct wireless communications facility and monopole.<sup>9</sup> In determining whether the variance had been exercised in that case, the court first looked to the ruling in *Hogan v. Hayes*.<sup>10</sup> In *Hogan*, the court held that whether or not a variance had been exercised would be "determined by the acts taken by the holder in reliance on the variance."<sup>11</sup> The court held that only sufficient acts of reliance need to have timely occurred. The court also cited *Alroy*, where the court again used the standard that the holder of a variance who substantially changes his or her position in reliance upon the variance will be deemed to have exercised the variance.<sup>12</sup> In *Walters*, the court determined that the company's acts of preparing and filing a building permit application, ordering the tower's component parts and having them delivered to the site, as well as other preparatory activities, were more than sufficient acts of reliance and constituted exercising the variance.<sup>13</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Alroy v. World Realty and Development Co*, 5 LCR 245, 248 (1997).

<sup>6</sup> *Hayhurst v. Campbell*, 2007 WL 2297084 at \*2-3 (Mass. Land. Ct. 2007).

<sup>7</sup> *Id.* at FN 16.

<sup>8</sup> *Cornell v. Crowley*, 2007 WL 1430057, \*4 (Mass. Land. Ct. 2007).

<sup>9</sup> *Walters v. Voicestream Wireless-Omnipoint Holdings*, 2008 WL 1851839, \*1 (Mass. Land Ct. 2008).

<sup>10</sup> *Id.* at \*4.

<sup>11</sup> *Hogan v. Hayes*, 19 Mass. App. Ct. 399, 404 (1985).

<sup>12</sup> *Alroy*, 5 LCR at 248.

<sup>13</sup> *Walters*, 2008 WL 1851839 at \*4.