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Grandfathered Lot Protection in Stoughton

By Mark A. Kablack

There currently are several legislative initiatives underway which scrutinize the Zoning Enabling Act, M.G.L. c.40A (the "Zoning Act") and the Subdivision Control Law, M.G.L. c.41, Sections 81K, et seq. (the "Subdivision Control Law"), and are attempting to make substantial modifications to both laws. For example, the Zoning Reform Working Group, consisting of legislators, planners, municipal officials and environmental activists, is proposing modifications to the zoning act, which would eliminate or severely reduce the benefits of the Section 3 exemptions and Section 6 zoning freezes. The group's proposal, filed in the last legislative session as the Massachusetts Land Use Reform Act, has been brought forward as municipal concerns for growth control and the need for modernization of the Zoning Act and Subdivision Control Law. In reaction to these initiatives Gov. Mitt Romney's office has discussed the need to convene a task force similar to the task force that recently issued its report and recommendations for M.C.L. c. 40B, the state's Comprehensive Permit law for creating affordable housing. Such a task force would be charged with taking a balanced look at the perceived ills of the existing statutes, together with the need for creating affordable and moderate-income housing, and with making recommendations for legislative and regulatory change.

Amid this flurry of activity involving legislative change, many of us in the building and legal community still grapple with the ramifications of the existing laws. The Section 6 zoning freezes, and the grandfathering rights it provides to property owners and developers, continue to befuddle those who try to fully understand and promote its scope of protection. As many of you know, ambiguities in the Zoning Act and Subdivision Control Law, coupled with the Home Rule powers of zoning and planning boards throughout Massachusetts, can create a general state of confusion and a different set of regulatory criteria from one municipality to the next.

Section 6 of the Zoning Act contains several zoning freezes, sometimes referred to as grandfathering provisions. Many readers are familiar with the zoning freeze provisions afforded to new subdivisions and "approval not required" ("ANR") plans. Section 6 provides an eight-year freeze against zoning amendments for land shown on a plan approved under the Subdivision Control Law. A more limited three-year freeze is available for the use of land shown on an ANR plan. Other provisions of Section 6 affect land shown on older filed plans. Single- and two-family residential lots that are held in single and separate ownership on older filed plans, are afforded a zoning freeze against increases in area, frontage, width, yard and depth requirements of a zoning bylaw or ordinance, provided such lots have a minimum of 5,000 sq. ft. of lot area and 50 feet of frontage. Residential lots that are held in common ownership get this protection for up to three adjoining lots for a period of five years after the zoning bylaw or ordinance change, provided such lots have a minimum of 5,000 square feet of area and 75 feet of frontage.

As we approach the 30th anniversary of the adoption of the Zoning Act in its current form, case law continues to shape and mold the language of the Zoning Act, and the Section 6 zoning freeze provisions in particular. The Supreme Judicial Court's recent decision, Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255 (2003), involving the grandfathering protections of lots on an old filed plan, adds much needed guidance on the protections afforded to lots held in common ownership.

The Marinelli case involved a lot owner's request to obtain a building permit for one of six 25,000 sq. ft. lots shown on a 1991 plan, which plan was approved as an ANR plan when the minimum lot size in the R-15 zoning district in the Town of Stoughton was 25,000 sq. ft. A 1996 amendment to the Stoughton zoning bylaw increased the minimum area required in the R-15 zoning district to 40,000 sq. ft., making each of the six lots on the 1991 plan substandard as to lot area, and therefore non-conforming. The building inspector refused the requested building permit, which refusal was upheld by the Stoughton Board of Appeals, on several grounds. First the town argued that the six lots shown on the 1991 plan exceeded the three-lot scope of protection for lots held in common ownership under Section 6 of the Zoning Act. Second, the town argued that although the six lots were held in common ownership at the time of the 1996 amendment, a subsequent sale of the lot in question, to a third-party, removed the lot from common ownership, thereby destroying the grandfathering protections afforded under Section 6. The lot owner appealed the permit denial to the Massachusetts Land Court, where Judge Scheier granted summary judgment in favor of the lot owner. On appeal by the town, the Supreme Judicial Court, elected direct appellate review, and affirmed the Land Court's decision, deciding in favor of the lot owner and providing valuable interpretive language on the meaning of the Section 6 protections for older filed plans.

The Supreme Judicial Court dismissed the Town of Stoughton's argument that the combination of six lots, as shown on the 1991 plan, removed all lots from the scope of protection of the Zoning Act, Section 6. The Town of Stoughton argued that the Section 6 protection did not apply to lot owners with more than three lots in common ownership. Any lot combination in excess of three, according to the town, did not benefit from the grandfathering protection because such a lot owner would have significant opportunity, after a zoning increase, to alter lot lines, and bring any substandard condition into conformity with a zoning bylaw or ordinance amendment.

In dismissing the Town of Stoughton's argument, the Supreme Judicial Court found that such an interpretation of the Zoning Act would distort the plain language of the Section 6 text. Moreover, the Court found that such an interpretation would have "irregular and inequitable results." Id. at 259. The Court recognized that, under the town's argument, four lots at 25,000 square feet each (100,000 square feet total) would have to be reconfigured to just two buildable lots under the new bylaw for the R-15 zoning district, while three lots at 25,000 square feet each (75,000 square feet total), would have the entire benefit of the Section 6 grandfathering protection. According the court, such a bizarre result, if intended by the Legislature, would have to be clearly spelled out in the Zoning Act. Id. at 260.

The court also dismissed the town's second argument. A subsequent transfer of the lot in question out of common ownership was enough, according to the Town of Stoughton, to nullify its grandfathering protection under Section 6. The town, in effect, was arguing that the benefit of the grandfathering protection for lots in common ownership is available only if the lots continue in common ownership. The town cited to a recent Court of Appeals decision, Preston v. Board of Appeals of Hull, 51 Mass.App.Ct. 236 (2001), as support for its argument that grandfathering protections under Section 6 are dependent upon continued ownership status. The Preston case, as many of you will recall, was a decision by the Massachusetts Court of Appeals that scrutinized the legislative history of the enactment of the Zoning Act. In a case that involved the grandfathering protection of lots in single and separate ownership at the time of a zoning bylaw amendment, the court in Preston held that the common law doctrine of merger must govern. The court held that non-conforming single and separate lots lose their grandfathering protection if they subsequently come under common ownership.

The Marinelli Court was not persuaded by the town's argument. The court held that the logic of the Preston case was misplaced to the facts of the Marinelli case, which presented almost a mirror image of the circumstances (lots in common ownership becoming separately owned versus lots in separate ownership becoming commonly owned). The Supreme Judicial Court decided that there was no violation of any common law principle in the Marinelli case (such as the merger doctrine), and lots which are in common ownership at the time of a zoning amendment retain the grandfathering protection of Section 6, whether or not they remain in common ownership at the time of a subsequent building permit application.

The Preston decision of 2001 and the Marinelli decision of 2003 provide valuable guidance, though drastically different results, for lots on older filed plans. The Supreme Judicial Court has provided much-needed insight into the meaning of Section 6 zoning freezes, but lot owners and developers must continue to proceed cautiously when considering development on older lots that no longer conform to local zoning bylaws or ordinances. ◆

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