Reprinted from the fourth quarter 2005 issue of

Mass BUILDER
The Official Magazine of the Home Builders Association of Massachusetts

legal

More on Nonconforming Structures

By Mark A. Kablack

Every so often a court decision tests the standards of what most in the legal community consider to be black-and-white law. When this happens it shakes and rattles the foundation that people in the legal community have come to rely upon. It is common in human nature for people to want firm standards and predictable results. This trait is magnified in the business world, particularly as it relates to lending practices. With this backdrop, it is understandable how the recent Massachusetts Appeals Court decision in *Queeno v. Colonial Co-Operative Bank* (63 Mass. Appeals Court 392, 2005) has the attention and concern of lenders, members of the conveyancing bar, and builders.

A recent Supreme Judicial Court (SJC) decision, *Bransford et al. v. Zoning Board of Appeals of Edgartown* (2005), will be of interest to infill developers and remodelers. The *Bransford* case deals with the quirky aspects of Mass. General Law Chapter 40A, section 6, as it relates to grandfathering rights of existing residential lots and structures. *Bransford* is interesting and informative, not for making a clean and decisive statement as to the meaning of section 6, but for its opposite impact. The SJC in *Bransford* was equally divided, the ruling has limited precedential value, and the stated arguments in the opinion, both for and against the landowner, are equally balanced and well reasoned.

In *Bransford*, the plaintiffs purchased an existing home in the Katama area of Edgartown on the island of Martha's Vineyard. The property contained 22,125 square feet in area and a three-bedroom, two-story, single-family home at the time of purchase. All parties in the case were in agreement that at the time the original home was built in the early 1970s, the home conformed to all zoning bylaws. At the time of purchase, however, the property was located in the R-60 residential zoning district, requiring a minimum lot area of 65,340 square feet. Because of the property's substandard size, the lot was nonconforming, or as some would argue, the home constituted a nonconforming structure within the meaning and framework of Chapter 40A, section 6.

The plaintiffs applied twice for a building permit to construct a new home on the property that would comply with all dimensional criteria of the current zoning bylaw with the exception of the minimum lot size requirement of 65,340 square feet. The new home would meet all setback requirements of zoning as did the old home. The only difference between the new home and the old home would be that the new home would be larger. The new home would be taller and would have a total living area of 2,300 square feet, whereas the old home had a living area of only 1,250 square feet.

Nonconformity

Building permit requests were made pursuant to a local zoning bylaw that afforded similar grandfathering protection as contained in Chapter 40A, section 6, for the alteration, reconstruction, extension or structural change of an existing home, provided that there is no increase in nonconformity. Where there is no increase in nonconformity, no special permit or finding of the Zoning Board of Appeals would be required. In this case, however, the building inspector denied the issuance of the building permits without a specific finding by the Zoning Board that there was no increase in nonconformity as a result of the proposed new home. At some point during the two building permit applications, the plaintiffs removed the old home, with the exception of the foundation, and transported the home to another site. The subject property was then left in a semi-improved state, with a building foundation and presumably accessory improvements such as truncated utility connections, driveway improvements and so forth.

Plaintiffs next filed a request under Chapter 40A, section 6, with the Zoning Board for a finding under the so-called "second except" clause of section 6, which provides as follows:

"Except as hereinafter provided, a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or bylaw required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruc-

tion, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where the alteration, reconstruction, extension or structural change to a single-or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the special permit granting authority … that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood" (emphasis added).

In response, the Zoning Board voted unanimously to allow reconstruction of a single-family home on the property without a special permit only if the new home did not exceed the footprint and square footage of the old home. When the plaintiff filed a second application, requesting a special permit to proceed with the new home as planned, the Zoning Board voted to deny the request, finding that the new home was substantially more detrimental to the character of the neighborhood than the old home (emphasis added).

The plaintiff appealed both rulings of the Zoning Board to the Massachusetts Land Court, where Judge Alexander H. Sands III granted summary judgment in favor of the Zoning Board. Sands held that the Zoning Board acted within reason, considering the discretionary jurisdiction of special permit approval, in denying the requests for new construction. The SJC granted direct appellate review and issued its decision in August of this year.

Unusual Outcome

In a highly unusual outcome, the SJC was equally divided on the matter. Three justices, in a concurring opinion authored by Justice John M. Greaney, upheld the Land Court ruling and the decision of the Zoning Board, and three justices, in a dissenting opinion authored by Justice Robert J. Cordy, opposed. Justice Judith A. Cowin did not participate. The impact of the neutral, split decision is one that has limited precedential value, as there is no clear majority opinion in support of or in opposition to the Land Court decision. However, the practical effect of the split decision was to uphold the Land Court decision as the SJC took no affirmative action to reverse. In addition, the SJC opinion is far from being a nullity. The concurring and dissenting opinions provide valuable insight into the interpretation of Chapter 40A, section 6, together with raising palpable uncertainty as to how a particular case under section 6 will impact a homeowner, developer or remodeler.

For example, in the concurring opinion, Greaney is quite clear in his statement that "[t]he rule to date … is simple: where an undersized lot exists, the proposed reconstruction may be allowed without special permit only if the proposed new residence does not intensify existing nonconformities." In determining whether a nonconformity is intensified, Greaney recognizes that a minimum lot area zoning requirement is a proper exercise of police power. Citing Massachusetts case law and treatises on the subject, he reaffirms the public policy purposes of minimizing congestion, providing adequate light, air and sunshine and providing adequate municipal services as the focal point of legitimate controls on density, size and mass. Noting also the special regional and state interest in preserving the unique quality of Martha's Vineyard, he states: "[t]he expansion of the residence's footprint, and the expansion of the living area, will, at the very least, tend to reduce the open space previously existing on the lot and to increase the density of the residential neighborhood." Greaney rejects the plaintiff's statistical analysis of the average home size currently being built nationwide and looks instead to the immediate neighborhood in Katama. The average home in the plaintiff's neighborhood is 1,800 square feet in area, "which is significantly smaller than the plantiff's proposed new structure." Greaney concludes that the Zoning Board's decision in this case, denying a special permit for reconstruction, was within the board's discretion.

In Cordy's dissenting opinion, the view is exactly opposite. Cordy's focus is on the initial cause of nonconforming status. In this case, it is lot area only. The plaintiff's property has no other nonconformity. The new home as proposed will meet all dimensional requirements of the zoning bylaw. While the town has a number of legitimate mechanisms to regulate the bulk of structures by regulating open space, parking, lot coverage and other configuration criteria, none of those criteria exist in the zoning bylaw applicable to this case: "It is undisputed that the reconstructed building would conform to [all existing] requirements." According to Cordy, a new home of 1,200 square feet in area on plaintiff's property has the same nonconforming status as construction of a 2,400 square- foot home, as the lot area itself is not changing.

Cordy is also swayed by his interpretation of the legislative intent of Chapter 40A, section 6, stating that the grandfathering provisions of said section are meant not to amortize nonconforming structures and uses out of existence, but to allow said uses to continue. He believes that section 6 is designed to provide reasonable and efficient standards for maintaining current housing stock, much of which is readily "affordable." In his view, the concurring opinion by Greaney, requiring special permit review for such matters as in the *Bransford* case, results in a lengthy, costly and discretionary zoning process that runs afoul of the legislative intent of section 6.

Where does the *Bransford* case leave existing homeowners and members of the home development and remodeling industries? Bransford provides no clear roadmap for discerning the "difficult and infelicitous" language of section 6. However, certain things are clear. First, the justices in the highest court in Massachusetts are conflicted right down the middle as to the meaning of certain grandfathering rights under section 6. If the SJC has no clear understanding of what the statute means, how can the landowner, developer and/or remodeler? Second, given the uncertainty, and the breadth of discretion afforded to zoning boards, the outcome of a particular construction project, where reconstruction is proposed on a nonconforming lot, will be determined on a case-by-case basis. ◆

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