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legal

Grandfather Protection of Lot Status

By Mark A. Kablack

A recent ruling by the Massachusetts Supreme Judicial Court (SJC) has upheld the buildable lot status for small, stand-alone lots under the grandfather clause of Massachusetts General Law (MGL) Chapter 40A, Section 6. The case, known as *Rourke v. Rothman* (2007), reversed prior rulings of both the Land Court and the Court of Appeals, and will be of interest to anyone with ownership or development rights in smaller lots created from older filed plans. In *Rourke*, the SJC has firmly established the statutory policy of Section 6 as a minimum level of grandfathering protection. Municipalities may expand upon this minimum, but they cannot diminish the statutory policy of MGL Chapter 40A, Section 6, which is grounded in principles of fairness to landowners.

The property in *Rourke v. Rothman* would have been merged under the current statutory provisions of Chapter 40A if the Orleans zoning bylaw had not provided enhanced protection.

Chapter 40A, Section 6 contains several grandfathering provisions. In addition to the zoning freeze protections afforded upon the filing of a Definitive Subdivision plan (eight years), or a so-called Approval Not Required plan (three years), there are zoning freeze protections for pre-existing lots. The particular protection at issue in *Rourke* provides that "[a]ny increase in area, frontage, width, yard or depth requirements of a zoning ordinance or bylaw shall not apply to a lot for single- and two-family residential use, which at the time of recording or endorsement … was not held in common ownership with any adjoining land, conformed to the then existing requirements and had less than the proposed requirement, but at least [5,000 square feet] of area and [50 feet] of frontage (emphasis added)."

Cases that interpret this particular protective right are always very fact-specific, and *Rourke* is no different. The property at issue in*Rourke* consisted of a lot in the town of Orleans that was created by a 1915 plan, containing approximately 8,000 square feet and 80 feet of frontage. At the time of the 1915 plan, there were no minimum zoning criteria in Orleans. The town did not adopt a zoning bylaw until 1954. The 1954 bylaw enacted a minimum lot area of 15,000 square feet and a minimum frontage of 100 feet, but provided an exemption. Under the exemption, one building could still be erected on a lot that was either separately owned or had a minimum area of 5,000 square feet. In 1961, the zoning bylaw was amended, requiring a minimum of 20,000 square feet of lot area and 120 feet of frontage. The 1961 bylaw, however, still provided for the same exemption as before. Lots that were at least 5,000 square feet or were separately owned in 1954 continued to be exempt under the zoning bylaw.

The *Rourke* case turns on the interesting fact that both the 1954 and 1961 zoning bylaw provisions applied a local exemption to pre-existing lots (created before 1954), whether they were separately owned or owned in common with other lots. In contrast, MGL Chapter 40A, Section 6 requires separate ownership status. Orleans provided a greater protection under its zoning bylaw to existing lot owners than was otherwise provided by statute. This added benefit was crucial

to the property in the *Rourke* case, as it was held in common ownership from 1915 until March 1970. Under the current understanding of MGL Chapter 40A, Section 6, pre-existing, substandard lots that are in common ownership risk merger. The property in *Rourke* would have merged under the current statutory provisions of Chapter 40A if the Orleans zoning bylaw had not provided enhanced protection.

In May 1970, Orleans again amended its zoning bylaw. This time, however, the town eliminated the enhanced protection provided earlier. The 1970 bylaw only afforded continued protection to a lot in existence in 1954 if the lot both met a minimum area requirement of 5,000 square feet and was separately owned from any adjoining lots. While the property in *Rourke* had been transferred into separate ownership just prior to the new May 1970 bylaw, it was not a separate lot in 1954. As a result, and for the first time, the property became non-buildable, at least in the eyes of some municipal officials and abutters (as noted below). Subsequent bylaw amendments failed to offer any further relief.

When we fast-forward over the past three decades to the present, the 1970 bylaw amendment becomes the crucial matter in dispute between Rothman, the owner of the property in the case, and Rourke, a third-party abutter. Rothman sought a building permit for construction of a single-family home on the property, based upon the argument that the property was grandfathered under the local zoning exemption from 1954 through 1970 and, under the statutory exemptions of Chapter 40A, Section 6, from 1970 to present. The Rothmans argued that they could effectively string together both grandfathering provisions to maintain the property's buildable status.

Unfortunately, the Orleans building inspector did not agree with Rothman's claim. He denied the application for a building permit on the grounds that the property failed to meet the minimum requirements under zoning. Rothman appealed to the Orleans Zoning Board of Appeals, which reversed the building inspector's decision, based upon the prior enhanced protections of the zoning bylaw. The plaintiffs in the case appealed the Board of Appeals decision to the Land Court on the grounds that the enhanced protections provided by the town of Orleans were no longer in effect. The plaintiffs argued that the enhanced protections once provided by the zoning bylaw were not perpetual and survived only as long as the town deemed such enhanced protections to be warranted. When Orleans repealed the enhanced protections, Rothman could only look to the statutory protections of Chapter 40A. Rothman could no longer string together the two grandfathering provisions.

In essence, the issue in *Rourke* was whether the enhanced protections of the earlier bylaws rendered the subject property truly conforming at the time of subsequent zoning amendments. The plaintiffs argued they did not; they argued that the property in question did not conform to the requirements of zoning in 1970 (or under subsequent bylaw amendments) because it was only previously deemed buildable due to the enhanced protections made available by the town.

Fortunately for owners and developers of small, pre-existing lots, the SJC did not agree with the plaintiff's argument or with the prior rulings of the Land Court or the Court of Appeals. In a decision authored by Justice Judith Cowin, the SJC held that a repeal of a zoning exemption is no different than an increase in a zoning requirement. A lot protected under Chapter 40A from an increase in a bylaw requirement (e.g. lot area or lot width) should also be protected from elimination of bylaw exemptions. Whether a property is conforming at the time of a zoning bylaw amendment because it meets all pre-existing requirements or it is exempt from such requirements, is a "distinction without a difference."

The *Rourke* case stands for the proposition that there is "statutory policy of keeping once-buildable lots buildable." Such a policy is grounded in prior court decisions and legislative history and has been the basis of interpreting Chapter 40A, Section 6 "broadly to protect landowner's expectations of being able to build on once-valid lots." Moreover, such policy overrides a competing claim made by plaintiffs and others that a general goal of zoning should be an eventual elimination of non-conformities. *Rourke* is a welcomed affirmation of individual property rights over the zoning powers of municipalities.

Ruling Reversed

Approximately one year ago, I wrote about a Massachusetts Appeals Court case that involved the award of liquidated damages under a purchase and sale agreement. The case was *Perroncello v. Donahue* (2005). In this case, the Appeals Court awarded a provision for liquidated damages to the seller, even though the seller was ultimately successful in forcing the buyer to buy the property (through an action for specific performance). The Appeals Court strictly construed the contract's terms regarding "time of the essence" and "liquidated damages." The Appeals Court was not swayed by the buyer's argument that such an award resulted in a windfall to the seller. The court found that the liquidated damages provision could be a separate claim arising out of the buyer's breach.

On appeal to the SJC, the Appeals Court ruling was reversed. According to the SJC, in *Perroncello v. Donahue* (2007), the award of specific performance (requiring the buyer to purchase the property at the stated contract price) and liquidated damages was contrary to the fundamental principles of contract law. The SJC held that the seller was entitled to get what it bargained for, but was not eligible to get a windfall too. As a result of this recent appellate ruling, liquidated damages are still a viable remedy in a contractual breach. However, an award for liquidated damages may preclude or prohibit an award of other remedies. ◆

Mark A. Kablack is a principal of M.A. Kablack & Assoc., a real estate firm located in Framingham with specialties in land-use law and real estate development issues.