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legal

The SJC Closes the Front Door to Mansionization

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The Massachusetts Supreme Judicial Court (SJC) issued a ruling in January providing more interpretation for the grandfathering provisions of M.G.L. c.40A, Section 6. The recent case, titled *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008), addresses the issue of reconstruction of a single family residence on an undersized lot in Norwell. The majority decision, written by Justice John Greaney, confirms an earlier, concurring opinion in the*Bransford* case (*Bransford v. Zoning Board of Appeals of Edgartown*, 444 Mass. 852 [2005]), which was the subject of an article I wrote for Mass Builder Magazine in 2005 (4th Quarter).

Reconstruction of existing, single-family homes (or tear-downs, as they are sometimes referred to) is driven primarily by three concepts. First is the scarcity, particularly in eastern Massachusetts, of buildable land for new, single-family home construction. Second is the inherent value of buildable land, driven in part by scarcity, which makes demolition and reconstruction economical. Third is the desire of existing homeowners and buyers entering the housing market to modernize and expand upon the home styles of the '50s and '60s, allowing for the comfort and efficiency of a modern-day home.

Common to most tear-down projects is an older home, in an older neighborhood, where current zoning has rendered some portion of the existing residential structure or lot nonconforming. Over the decades, lot size, building setbacks, and other zoning requirements will usually increase or become more restrictive. In these circumstances, c.40A protects existing structures and uses, allowing, in almost all instances, for these structures and uses to continue (rights sometimes referred to as "grandfathered rights"), despite the change in zoning. Chapter 40A, Section 6, provides additional protection for one- and two-family dwellings by providing that such structures and uses may be altered, reconstructed, extended or structurally changed, provided there is no increase in the nonconforming nature of the structure. Tear-down projects will run into potential difficulty when new construction will increase a nonconformity. In these cases, absent additional protection that may be provided within a municipal bylaw or ordinance, a special finding is required by the local zoning board that any such increase in nonconformity is not "substantially more detrimental … to the neighborhood." This special finding is sometimes referenced as a special permit finding or a Section 6 finding, and it invokes the same discretionary review authority that a zoning board has regarding variances and other forms of special permit review.

Under Section 6, when a tear-down is proposed for a nonconforming structure or use, a zoning board must determine in the first instance whether the reconstruction increases a nonconformity, and second whether such increase is detrimental to the neighborhood. If the answer to the first question is no (and this will often be interpreted in some towns by the building inspector), the zoning board never reaches the second question. The factual threshold for the first question gets interesting where the new structure meets all current zoning requirements, but is proposed on an undersized lot. In these situations, the zoning board must determine whether new construction will increase a nonconformity when all other setback requirements and building coverage requirements are satisfied. This particular issue has been at the center of a recent battle between homeowners/builders and zoning boards, and is the subject of both the *Bransford* and *Bjorklund* cases.

Bjorklund contains a factual history that is common to tear-downs generally. In *Bjorklund*, plaintiffs proposed to tear down a small, one-story home in a residential neighborhood (675 sq. ft. in area, and 30' wide), and replace it with a new, two-story home (3,600 sq. ft. in area, and 60' wide). The existing lot and improvements predated zoning in the Town of Norwell, invoking the grandfathered rights of c.40A, Section 6, because the lot area (34,507 sq. ft.) no longer complied with the Residence District A requirements (43,560 sq. ft.). The proposed new home, together with all amenities, would meet all dimensional requirements of current zoning in Norwell, but for the minimum lot area requirements.

Plaintiffs filed a request with the Norwell Zoning Board for a Section 6 finding and were initially denied any relief. After appeal and remand to the Land Court, the Zoning Board denied the Section 6 finding because the "new house's length, height, and placement [would] intensify and exacerbate the present nonconformity of the property." *Bjorklund* at 361. Plaintiffs sought further appeal to the Land Court, where Judge Alexander H. Sands affirmed the Zoning Board's decision based upon the concurring opinion in Bransford. According to Judge Sands, there was sufficient evidence to indicate that reconstruction would be substantially more detrimental to the neighborhood. Plaintiffs filed for further appeal, and the SJC transferred the case on its own motion for direct review on the sole issue of whether the proposed reconstruction would increase the nonconforming nature of the structure.

Contrary to the split decision in *Bransford* in 2005, the SJC affirmed the Land Court ruling in Bjorklund by a clear majority decision (by a vote of 5-2). The SJC appears to have been influenced in the case by the distinct size difference between the existing and proposed

house, referring at one point to the fact that the new house will "quintuple the size" of the existing residence. *Id.* at 358. The SJC spent a considerable amount of time analyzing the comparative size of other houses in the neighborhood, and noted that all of the other homes in the vicinity of the project site, that were located on undersized lots, were of a "smaller, rural farm-house-type." *Id.* at 360. The Court was also swayed by the policy considerations regarding "mansionization." The Court made specific reference to the attempt by municipalities to reverse this trend, finding that "[m]unicipalities may permissibly exercise their police power to attempt to limit [the] potential adverse effects" of converting smaller homes into significantly larger ones. *Id.* at 363. In making this policy consideration, the Court linked previously recognized policy goals concerning the critical need for affordable housing with the autonomy given to local communities to determine land use issues. *Id.*

Justice Robert Cordy wrote a dissenting opinion in the case, as he did in the *Bransford* decision. Contrary to the majority opinion, he noted that there could be no increase in nonconformity in the reconstruction proposal unless the plaintiffs had proposed to further reduce lot area, otherwise change or modify lot area, or build more than one dwelling on the lot. He noted that Norwell, like any municipality, has the ability to regulate the size of housing structures, not by regulating lot area, but by regulating setback requirements, height restrictions and lot coverage ratios. Norwell did, in fact, have zoning regulations at the time that applied to the plaintiffs' proposal. Justice Cordy opined that the matter should be conclusively determined based on the fact that plaintiffs' proposal met all the other dimensional requirements of zoning.

The policy implications of the SJC majority opinion in *Bjorklund* are troubling. While there are legitimate municipal concerns in the regulation of house size and in the promotion of affordable housing, neither are properly advanced in this case. A municipality should be required to regulate house size in the conventional manner described in Justice Cordy's dissenting opinion. Provisions regarding setbacks, height and lot coverage are objective and predictive measures of development, and provide a clear, universal rule for all development (for both new construction and reconstruction). In the wake of *Bjorklund*, an owner/developer will not have such a bright line test for projects on undersized lots.

Secondly, the universal goals of affordable housing should not be borne on the backs of a select few. The majority ruling in *Bjorklund* potentially creates disparate treatment between two adjoining lots, one of which meets minimum lot area requirements and one of which is slightly undersized. If both lots are capable of supporting a 3,600 sq. ft. home that is compliant in all other zoning respects, why should one lot owner be able to proceed and the other prohibited? ◆

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