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Municipal Client Advisory
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Bjorklund et al. v. Zoning Board of Appeals of Norwell
SJC-09931 (January 7, 2008)

The Supreme Judicial Court of the Commonwealth has just issued its decision in the Bjorklund case, effectively resolving the question: "Does the proposed reconstruction of a single-family residence, which satisfies all dimensional requirements in the town's zoning by-law except minimum lot size requirements, increase the nonconforming nature of the structure?" In this case, the Supreme Judicial Court provided an affirmative response in a majority opinion by Justice John Greaney.

In what were a relatively straightforward set of facts, the Plaintiffs owned property in the Town of Norwell, which was located in a "Residential A" zoning district. The lot size was approximately .792 acres. On the Plaintiffs' property stood a one-bedroom, one-story single-family house and a shed. The present house had 675 square feet of living area and complied with all front-yard and side-yard setback requirements. Homes in the area contained an average of less than 2,638 square feet of living area.

The Plaintiffs proposed to tear down the existing house, to demolish the shed, and to construct a house consisting of approximately 3,600 square feet of living area. The proposed house would feature a larger footprint, but would comply with all dimensional and setback requirements. Under the Plaintiffs' proposal, the lot would remain non-conforming, as it would still fail to meet the minimum one acre lot size under the Town of Norwell Zoning By-Law.

The Plaintiffs requested a finding, pursuant to M.G.L. c. 40A, §6, and under §1642 of the Town of Norwell Zoning By-Law. The Zoning Board of Appeals denied their request, and an appeal was filed in the Land Court. The Land Court remanded the case to the Zoning Board of Appeals, which subsequently concluded that, pursuant to M.G.L. c. 40A, §6 and §1642 of the Town of Norwell Zoning By-Law, the proposed reconstruction would increase the non-conforming nature of the structure and would be substantially more detrimental to the neighborhood. The Zoning Board of Appeals cited the size and placement of the house in support of its conclusion. On appeal, the Land Court affirmed, holding that the Board's decision was not based upon a legally untenable ground.

On appeal to the Supreme Judicial Court, the Plaintiffs did not challenge the

earlier finding that their proposal was "substantially more detrimental" to the neighborhood. Instead, they focused their case solely upon the legal issue of whether their proposed reconstruction would increase the nonconforming nature of the structure, in accordance with the so-called "second except clause" under M.G.L. c. 40A, §6. The operative statutory provision reads in part as follows:

> *Except as hereinafter provided, a zoning ordinance or by-law 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 by-law 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 reconstruction, 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 alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.*

M.G.L.A. c. 40A, §6 (WEST 2007).

The Supreme Judicial Court held that the second "except" clause above should be interpreted to mean that reconstruction of a pre-existing structure, which would conform to all other zoning requirements except for lot size, would *per se*, increase the non-conformity of the structure. As a general matter, this would prompt inquiry from zoning boards concerning whether such reconstruction was substantially more detrimental to the neighborhood vis à vis the existing structure. The Supreme Judicial Court notably adopted the rationale advanced in an earlier case, Bransford et al. v. Zoning Board of Appeals of Edgartown, 444 Mass. 852 (2005). Although the opinion featured a tie among the judges, and although no majority opinion was reached in the Bransford case, the reasoning advanced in Justice Greaney's opinion therein was very plain. The focus of judicial interpretation of zoning is to minimize non-conformities. Hence, M.G.L. c. 40A, §6 should be read in a manner that will further this goal.

The Supreme Judicial Court notably added several further points to its earlier dicta in Bransford. The Opinion notes that:

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> *The board does not dispute that the plaintiffs could reconstruct a house on the lot, or modernize the existing house, in keeping with the existing structure's building footprint and living area. The plaintiffs cannot be compelled to remove the existing house because of the protection granted to a preexisting structure on a preexisting nonconforming lot. Concerns over the making of small-scale alterations, extensions, or structural changes to a preexisting house are illusory. Examples of such improvements could include the addition of a dormer; the addition, or enclosure, of a porch or sunroom; the addition of a one-story garage for no more than two motor vehicles; the conversion of a one-story garage for one motor vehicle to a one- story garage for two motor vehicles; and the addition of small- scale, proportional storage structures, such as sheds used to store gardening and lawn equipment, or sheds used to house swimming pool heaters and equipment. Because of their small- scale nature, the improvements mentioned could not reasonably be found to increase the nonconforming nature of a structure,(15) and we conclude, as matter of law, that they would not constitute intensifications.(16) More substantial improvements, or reconstructions, would require approval under the second except clause and under the terms of an existing ordinance or bylaw that will usually require findings of the type specified in § 1642 of the Norwell bylaw.*

Bjorklund, supra.

While such small-scale reconstruction of otherwise conforming structures may be undertaken by owners of non-conforming lots without triggering the rule articulated in the Bjorklund case, one large trend is apparent. The potential for widespread tear-downs and reconstructions on undersized lots, or so-called “mansionization,” is likely to be minimized as municipal building officials apply Bjorklund in the future.

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