Zoning Update: Is Your Lot "Grandfathered" or Just Old?

By James M. Burgoyne, Esq.

It is no secret that during the past few years, the value of a parcel of real estate suitable for single family home development in Massachusetts has increased at a pace which is unparalleled in modern history. The demand for new residential housing has continued unabated, largely due to reasonable mortgage interest rates. Shortages in the available supply of approved or "buildable" lots, however, has led to an increased focus on the development of "grandfathered" lots by builders as well as homeowners to meet the demand.

Undoubtedly, the most common zoning question faced in the day to day practice of a land use attorney or zoning practitioner concerns the issue of whether an existing vacant lot or parcel of land which does not conform to current zoning dimensional requirements is "grandfathered" as a "buildable lot" for zoning purposes. The reasons for the inquiry vary. Builders, real estate brokers and investors are always on the hunt for property. Owners are finding that with assessed values increasing, the real estate tax burden of owning an apparently "buildable lot" adjacent to their existing home is too much to handle. Local assessors often rely on old subdivision plans or local zoning provisions to conclude that vacant land is "developable" and tax it accordingly. Some clients who may have inherited a property with surplus adjacent land, or who simply wish to sell and downsize their homes, are increasingly attempting to maximize their returns in the hot market by selling off adjacent lots for development. In some cases, property owners are seeking to create or develop a vacant lot for use by their children who are otherwise frozen out of the market by today's prices.

Predictably, the clash between the owner who attempts to retain the value of the lot he has been "paying taxes on for years" and abutters or town officials seeking to restrain new development in established neighborhoods has led to frequent litigation with unpredictable results. As discussed below, whether a vacant lot is "grandfathered" for building purposes is a complex question that involves a detailed analysis. The result can turn on many factors. The Massachusetts Zoning Act has always contained provisions exempting "once valid," established lots from the applicability of the increased zoning dimensional requirements. These protections for vacant lots are currently set forth in Massachusetts General Laws, Chapter 40A, Section 6. That statute contains two sentences which seemingly exempt certain isolated lots or groups of up to three contiguous lots from increases in zoning dimensional requirements which would either prevent them from being built upon, or would require them to be "merged" for zoning purposes with adjacent land. One section of the statute provides that "Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner, was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage." As long as the lot contained modest area and frontage, "conformed to then existing requirements," and was not held in common ownership with adjacent land, the statute seemed to protect the lot from the application of a dimensional zoning amendment that would render it unbuildable for single or two-family use.

To give further protection to established lots, while still increasing minimum requirements for new development, some communities have historically adopted local zoning provisions which afford even more liberal protections to "grandfathered lots" than the Zoning Act provides. For example, some communities maintained historical provisions which grandfathered any lots which were "lawfully laid out by plan or deed" or other similar language, without regard to minimum size or frontage established by Chapter 40A. In some cases, communities have decided to eliminate these local grandfathering provisions and defaulted to state law without regard for the effect those enactments may have on existing lots. This situation was recently encountered in the case of Rourke v. Rothman, which was decided by the Massachusetts Appeals Court on September 26, 2005.

In Rourke, the Appeals Court considered the fate of a lot that had seemingly existed as a buildable lot in the town of Orleans since 1915. The lot was laid out on a recorded plan and consisted of 8000 square feet, with 80 feet of frontage. Orleans first adopted a zoning by-law in 1954. Although the by-law required a minimum of 15,000 square feet and 100 feet of frontage, the by-law contained an exemption allowing one building to be erected on any lot that, "at the time this by-law is adopted, either is separately owned or contains five thousand [5,000] square feet." In 1961, the by-law was amended, increasing the minimum lot size to 20,000 square feet and 120 feet of frontage, but retaining the same exemption. Because the lot was held in common ownership with one or more adjoining lots from 1949 to 1970, it did not qualify for protection under Chapter 40A, but it was protected under the local by-law. In 1970, the lot was sold. For the first time since its creation, the lot was separately owned from any adjoining land. Although the lot did not

contain the minimum area required for a building lot, there was no question that it was "buildable" under the local by-law which had protected any lot which "existed" as of the first adoption of zoning regulation 1954 and had at least 5000 square feet.

In 2001, the lot was purchased by Rothman for $300,000, a significant sum of money for a house lot, even in a desirable Cape Cod town. Understandably, Rothman wanted assurance that the lot was buildable. Before he purchased the lot, the Orleans building inspector had written two letters, one to the seller's attorney and the second to Rothman himself, which concluded that the lot was "buildable." Facing challenge by abutters, the Building Inspector later reversed his decision. On appeal, both the Orleans Board of Appeals and later the Land Court found that Rothman's lot had "lost" its grandfathered status. In 1971, the town had deleted the by-law's more liberal local grandfather provision and replaced it with a provision allowing development of nonconforming lots for "single residential use" provided that the lot or parcel complied "with the specific exemptions of ...Chapter 40A of the General Laws." Although at the time of the 1971 amendment, the lot had more than 5000 feet and 50 feet of frontage and was not held in common ownership with adjacent land, the question turned on the requirement of Chapter 40A that an isolated building lot is protected only if it "conformed to then existing requirements." Although the lot did not have the minimum dimensions then required for new building lots, it was a buildable lot under the by-law in effect immediately before the amendment because it complied with the requirements for the exemption. Nevertheless, the Appeals Court interpreted "then existing requirements" to which the lot must have "conformed" to be the minimum area and frontage requirement in effect for new building lots despite the fact that the lot was then undeniably protected by the local exemption in effect. The Court stated "... we conclude that conformance with the "then existing requirements" refers to the minimum dimensional requirements contained in a zoning by-law, not to those requirements as exempted by the grandfather provision of the by-law..." In sum, c. 40A, Â§ 6, does not grandfather local by-law grandfather provisions..."

One result of this seemingly harsh decision is that in retrospect, Rothman's predecessors likely paid real estate taxes to the Town of Orleans for over 30 years for a lot that the Court decided had actually been unbuildable since the 1971 zoning amendment deleted the local exemption. But the consequence was obviously much more devastating to Rothman. Despite having obtained a written determination by the local zoning enforcement officer that the lot was "grandfathered" before investing $300,000, after four years of appeals and litigation he is now the owner of a vacant, unbuildable lot of questionable value to anyone. If nothing else, the Rourke decision again dramatically illustrates that lot owners or prospective purchasers must be very skeptical of claims or assumptions that a lot is "grandfathered." No one can rely on the opinions of assessors, brokers and even building inspectors who administer the zoning by-laws. Whether a nonconforming lot is grandfathered requires careful examination of the lot's origin, its history of ownership with adjacent land, and a careful study of the history of all zoning enactments and their interplay with the Zoning Act. This usually can only be reliably done by an attorney who is knowledgeable and experienced in this area and who can identify the many pitfalls and minefields which can be encountered with zoning issues in real estate transactions.

RESPONSIVE SOLUTIONS

Two simple words that explain our commitment to you. Being responsive is a critical element in building a strong attorney-client relationship. Whether you are a new or existing client, we'll be quick to respond to your needs with the knowledge necessary to find solutions to your legal concerns.

www.fletchertilton.com

James M. Burgoyne
P: 508.459.8019
F: 508.459.8319
E: jburgoyne@fletchertilton.com

Fletcher Tilton PC
Attorneys at law

THE GUARANTY BUILDING
370 Main Street, 12th Floor
Worcester, MA 01608
TEL 508.459.8000 FAX 508.459.8300

THE MEADOWS
161 Worcester Road, Suite 501
Framingham, MA 01701
TEL 508.532.3500 FAX 508.532.3100

CAPE COD
1579 Falmouth Road, Suite 3
Centerville, MA 02632
TEL 508.815.2500 FAX 508.459.8300