



*Town Of Chatham*  
*Department of*  
*Community Development*



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DATE:            February, 2007

MEMO TO:        Planning Board

FROM:            Kevin S. McDonald, Director of Community Development

RE:                Zoning Bylaw Rewrite, Nonconforming Lots  
                      Memo Number 2

M.G.L. Chapter 40A and other State statutes establish a number of “zoning freezes” which allow certain structures or uses either not started or completed or even initiated to enjoy the same protected status as nonconforming uses and structures established prior to the changes in zoning that rendered them nonconforming. A zoning freeze defers the applicability of certain zoning amendments for a limited time or creates a temporary exemption. There are a number of freezes which “protect” nonconforming lots which would otherwise be rendered unbuildable by virtue of amendments to a zoning bylaw. The fourth paragraph of Section 6 of Chapter 40A establishes two of these freezes for lots for single and two-family residential use which were recorded or endorsed prior to the zoning change which made the lots nonconforming. The first of these is known variously as the Single Lot protection or exemption or the Separate Lot protection/exemption.

**SINGLE LOT EXEMPTION**

The first sentence of the above mentioned fourth paragraph of Section 6 says:

Any 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, whichever occurs sooner, 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 five thousand square feet of area and fifty feet of frontage.

At first blush it would appear that this exemption is of little usefulness since, generally, land is in common ownership at the time that a subdivision plan is endorsed even though it may be separately held at the time that a zoning amendment takes place. This seeming

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misconstruction was clarified in *Sieber v. Zoning Board of Appeals of Wellfleet*, 16 Mass.App.Ct. 985 454 N.E.2d 108 (1983) which stated that the true test should be whether or not the lot in question was held in separate ownership from the adjoining lot as evidenced by a deed or any other instrument recorded prior to the effective date of the zoning change that rendered it nonconforming, not at the time of original recording or endorsement. This same test was used in *Adamowicz v. Ipswich* 395 Mass. 757, 481 N.E.2d 1368 (1985) where it was established that the most recent instrument of recording prior to the zoning change was operative, not the first recorded instrument on which the lot is shown.

Even though it only deals with single family dwellings and does not mention two-family homes, Chatham's zoning bylaw for the most part parrots the language in the first sentence of the fourth paragraph of Section 6 of M.G.L. Chapter 40A except for the insertion of a condition not contained in the statute after the phrase "and fifty feet of frontage", to wit: "...and was not held in common ownership with any contiguous lot at the time of, or since, the effective date of the increased requirements." Obviously, the statute does not expressly state this requirement although the doctrine of the merger of substandard lots would seem to obviate the need for such a condition. I will speak more about mergers at a later date. The concern with regard to our bylaw is that there is case law extant which allows certain lots which had been held in common ownership to still qualify for the separate lot exemption. See *Carciofi v. Billerica* 22 Mass.App.Ct. 926 (1986), *Silun v. Morris*, Misc. Case No. 143836 (Land Court 1991), *Bobrowski v. Board of Appeals of Beverly*, Misc. Case No. 153543 (Land Ct. 1992). If we keep this section of our bylaw as written it could possibly fail the Attorney General's scrutiny.

There are two additional points that are of interest when dealing with separate, nonconforming, "grandfathered" lots. The first point is that a lot held in separate ownership is only exempt from the current five dimensional criteria set forth in the statute (and our bylaw) and no others. You may recall that prior to a zoning amendment presented to the 2001 Annual Town Meeting by citizen's petition this section of our bylaw also included exemption from "other area requirements" in addition to the five listed in the statute. These other exemptions were removed at the May 2001 Town Meeting so only the exemptions expressly stated in the statute are applicable. See *Tietjen v. Wells*, C.A. No.: 02-0472 in which the Town prevailed on this point. Grandfathered lots must meet these five dimensional requirements that were in effect at the time of recording or endorsement (when the lot was rendered nonconforming) and all other current requirements which are not construed as one of the five enumerated. The second point is that if the grandfathered lot predated the establishment of the zoning bylaw or ordinance then obviously there were no area, frontage, width or depth requirements in effect and they do not apply to such a lot.

## **RESIDENTIAL COMMON LOT EXEMPTION**

The second sentence of the fourth paragraph of Section 6 provides another form of grandfathered protection to residential lots for single and two-family dwellings. The second sentence provides:

Any increase in area, frontage, width, yard or depth requirement of a zoning ordinance or bylaw shall not apply for a period of five years from its effective date or for five years after January first, nineteen hundred and seventy-six, whichever is later, to a lot for single and two-family residential use, provided the plan for such lot was recorded or endorsed and such lot was held in common with the adjoining land and conformed to the existing zoning requirements as of January first, nineteen hundred and seventy-six, and had less area, frontage, width, yard or depth requirements than the newly effective zoning requirements but contained at least seven thousand five hundred square feet of area and seventy five-feet of frontage, and provided that said five year period does not commence prior to January first, nineteen hundred and seventy-six, and provided further that the provisions of this sentence shall not apply to more than three of such adjoining lots held in common ownership.

Although this statutory “grandfathering” protection for lots held in common ownership is not very elucidating the decision in *Baldiga v. Board of Appeals of Uxbridge*, 395 Mass. 829, 482 N.E.2d 809 (1985) made sense of this second sentence for us. In order to qualify for protection from increased dimensional requirements under the second sentence of the fourth paragraph of Section 6 a lot must meet the following four criteria:

The lot must be one of three (or less) adjoining lots for single or two-family use in common ownership at the time of the zoning change which rendered them nonconforming. If more than three lots are held in common ownership, only the first three for which protection is sought qualify for the grandfathering.

The lots seeking protection must be shown on a plan recorded or endorsed before the effective date of the zoning amendment.

Each of the lots seeking protection must have at least 7, 500 square feet of area and 75 feet of frontage, and

Each lot, whenever created, must conform to applicable the zoning requirements as of January 1, 1976.

When contrasting this statutory protection for adjoining or commonly owned lots with that contained in the present zoning bylaw Section V.D.2. **Two (2) or three (3) adjoining lots**, we see some divergence between the two. The common lots section of our bylaw was also amended by citizen’s petition in May of 2001 to limit the dimensional requirements which these lots are exempt from and is quite a bit different than the State statute in other ways:

Under our bylaw a lot seeking protection must also be one of two or three adjoining lots for single family use (again, no mention is made of two-family use) in common ownership at the time of the zoning change which rendered them nonconforming. Absent any language to the contrary in our bylaw, if more than three lots are held in common ownership, only the first three for which protection is sought qualify for the grandfathering.

The lots seeking protection must also be shown on a plan “duly recorded or endorsed”.

Each of the lots seeking protection must have at least 7, 500 square feet of area and 75 feet of frontage, but,

There is no requirement in our bylaw that states that the lots, whenever created must conform to the applicable zoning requirements as of January 1, 1976.

In essence, our zoning bylaw, unlike the statute, exempts up to three commonly owned adjoining lots from any increase in area, frontage, width, yard or depth requirements of the zoning bylaw for a period of five years from the effective date of the zoning amendment if they merely contain 7,500 square feet of area and 75 feet of frontage. For example, since our bylaw does not compel compliance with the dimensional requirements effective as January 1, 1976, then under this provision of our bylaw if an amendment was passed that would change the required lot area in a residential zoning district from 20,000 square feet to 30,000 square feet, a person owning three adjoining lots each containing 7,500 square feet of area and 75 feet of frontage would be exempt from these increased dimensions for a period of five years. I doubt if this liberal approach was ever intended.

### **FREEZES FOR LAND SHOWN ON DEFINITIVE SUBDIVISION PLANS AND APPROVAL NOT REQUIRED PLANS**

Land shown on definitive subdivision plans or preliminary subdivision plans followed within seven months by a definitive plan is protected from changes in zoning for a period of 8 years from the date of endorsement of approval of the plan by the Planning Board; it is governed by “the applicable provisions of the zoning ordinance or bylaw, if any, in effect at the time of the first submission”. If a definitive plan is filed prior to the effective date of a zoning change or a preliminary plan is filed before that date and then followed within seven months by a definitive plan and the definitive plan is finally approved, then that land is subject to the provisions of the zoning bylaw in effect at the time of original submittal and thence for a period of 8 years from the date of endorsement of the definitive plan. This by far the most far-reaching “freeze” available to land owners facing zoning changes.

The land shown on approval not required plans is also protected from amendments to zoning ordinances passed after the time of submission of the plan. The use of land shown on these plans

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is governed by the applicable provisions of the zoning ordinance or bylaw in effect at the time of submission and for a period of three years from the date of endorsement by the Planning Board that approval under the subdivision control law is not required.

In both of these cases, the freeze periods may be extended or “tolled” by the time taken to process applications or adjudicate appeals directly related to the approval of the plans. The freeze periods cannot be extended by personal or financial setbacks of the applicants or subsequent owners.

Also in both instances, although not referenced in the zoning bylaw, M.G.L. Chapter 111, Section 127P provides an exemption from newly enacted amendments to the State environmental code or local Board of Health regulations for a period of three years. The health regulations in effect at the time of the submission of the plan are frozen for a three year period for both subdivision plans and ANR plans

Our zoning bylaw tersely acknowledges these two freeze periods for subdivision and approval not required plans and references the requirements in M.G.L. Chapter 40A, Section 6.

## **POINTS FOR DISCUSSION ON STATUTORY ZONING FREEZES**

As you can see, the references to the statutory zoning freezes in our bylaw take a varied approach. Some, for example, evince a clear intent to defer directly to the State statute and leave the particulars to the intent of the statutory language and the published interpretations contained in case law. A strong point could be made that the intent of subsection V.D.3. **Subdivision and Approval Not Required Plans** is just this; this bylaw subsection merely acknowledges that certain grandfathering provisions exist for land shown on these plans and then sends the reader off to the statute for the particular requirements. One could also argue that this was the underlying intent of the citizen petition amendments to subsections V.D.1 and 2 in 2001; to bring our bylaw protections into strict adherence to those contained in State statute.

If it is the intent of our proposed zoning bylaw to not offer any more lenient local provisions for grandfathering of vacant lots and to strictly follow the provisions of the protections offered by State law that we are compelled to honor then we need to do nothing more than inform users of our bylaw that certain zoning freezes exist in the State statutes and direct them to the appropriate statutory references.

However, if on the other hand we wish to entertain the possibility of allowing more lenient zoning freeze protections to those vested rights granted by State law for certain vacant lots (as we have done in the existing zoning bylaw in the subsections of the Nonconforming Lots Section following those we have been discussing here) then we have to begin discussions about how to craft these “looser” protections (e.g. “and other dimensional requirements”) and debate the possible ramifications of such actions and their effects on existing neighborhoods.

It might be easy to assume that a more liberal local approach to grandfathering and zoning freeze protections might have *a priori* a negative outcome but the business of fitting new structures into neighborhoods that developed decades ago could also beg more creative thinking at the local level than adherence to strict constructionism. The issues obviously need a full airing.

## **LOCAL PROTECTIONS FOR NONCONFORMING LOTS**

Subsection V.D.4 of our existing zoning bylaw provides a more liberal local protection for nonconforming lots which met certain criteria as of January 1, 1987. This zoning freeze was first introduced in 1981 and amended in 1987. It was originally proposed as an incentive to induce the voters of Chatham to accept increased lot sizes and other dimensional criteria across Town. Prior to the promulgation of this local grandfathering provision people had been reluctant to vote for amendments to the zoning bylaw which would render multiple lot that they held in common ownership substandard and therefore either unbuildable or grandfathered for an unacceptably finite period of time. The solution was to protect no more than three adjoining lots held in common ownership from subsequent changes in dimensional criteria, mostly lot size, in two different ways. It was felt that the ceiling of three lots which could be afforded this protection would serve to protect small, personal land holdings and preclude the freezing of zoning on large tracts of land to the benefit of large developers or speculators.

Hence we have two local nonconforming lot protections in this subsection which effectively guarantee buildability for certain substandard lots in perpetuity. The first protection grandfathers lots with 10,000 square feet of area and 100 feet of frontage so long as they are provided with either public water or sewer. The public water or sewer provision was obviously an acknowledgement that it is very difficult to locate both a potable water well for drinking water and an on-site sewage disposal system on a 10,000 square foot lot since they must be a minimum of 100 feet apart. The other protection addresses this fact by grandfathering 15,000 square foot lots without the provision of public water or sewer. There are other dimensional criteria called for in this subsection which harken back to those required for quarter acre lots. And, of course, the protection is only for a maximum of three vacant lots.

Subsection V.D.5 of our current zoning bylaw creates a zoning freeze from increases in “area, frontage or other area requirements” of the zoning bylaw for lots in subdivisions which were created within a specific time frame, meet certain minimum area criteria and have frontage on roads which were constructed within the eight year period running from the Planning Board’s endorsement of their approval of the definitive subdivision plan. This subsection was added to the zoning bylaw at a Special Town Meeting in 1996 in answer to the fact that the eight year grandfathering for lots in many subdivisions whose preliminary plans were filed prior to the enactment of the 1987 zoning bylaw was running out or already had run out. Even though this subsection only deals with lots in subdivisions created between January 1, 1987 and January 1, 1994 and therefore has a built in sunset provision, it does serve to extend the zoning freeze afforded to lots in these subdivisions (subsection V.D.3 of the current bylaw) from a period of eight years to perpetuity.

## **POINTS FOR DISCUSSION ON LOCAL ZONING FREEZES**

As noted in the POINTS FOR DISCUSSION ON STATUTORY ZONING FREEZES above it would seem to make sense that the discussion on these local lot protections should center around their retention or elimination. Taking the tone from the previous discussion, State statute does not mandate this type of lenient local grandfathering so a strict constructionist might say it is therefore unnecessary in order to meet the letter of the law. Since many of the lots that qualified for this exemption have already been built upon, one might also argue that the time has come and gone for the owners of the remaining lots to avail themselves of this zoning freeze since it has been around for so long. If these grandfathered lots have not been developed in the last twenty-plus years then we should not feel guilty about eliminating this liberal giveaway at this time.

Of course, the other side of this same coin is that we have all benefited from the developmental inertia on the part of certain owners of these lots who have chosen not to rush to build. These owners who have developed their grandfathered lots incrementally over the years or who have not yet built at all have allowed us all to enjoy open spaces for a longer period of time and to benefit from a slower pace of overall development of our neighborhoods.

Therein lies the dilemma, do we penalize those who have held their buildable nonconforming lots for development at a later date and reward those who rushed to build on their grandfathered lots? Do we break the promise we made many years ago to those who held on to these substandard lots and render them unbuildable now? Does the public benefit of the elimination of the last few substandard grandfathered lots outweigh private financial disappointment?

Obviously each argument has its merits and needs to be debated thoroughly.

The perpetual grandfathering granted by subsection V.D.5 is obviously of limited application and most of these lots have been built upon already anyway so this subsection can probably stay or go with impunity. We will check to see if there are any lots remaining in this category. Future enactment of perpetual protection provisions like this should be looked at very carefully.

## **NONCONFORMITIES CREATED BY ROAD TAKINGS OR LAYING OUT OF PUBLIC WAYS**

Subsection V.E of our bylaw provides that any taking of land occasioned by the laying out of public ways or road layouts shall render any existing structure, use or lot as legally pre-existing nonconforming. In addition, any lot considered buildable because it meets the criteria for the zoning district in which it is located or because it qualifies for one of the exemptions in the preceding subsections may still be built upon even if the taking rendered it substandard. This is a local option exemption not mandated by State statute.

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## **POINTS FOR DISCUSSION ON NONCONFORMITIES CREATED BY ROAD TAKINGS OR LAYING OUT OF PUBLIC WAYS**

The premise behind this protection is fairly standard in many zoning bylaws and ordinances but the language of our existing subsection is somewhat garbled. If we intend to keep this exemption we need to clean it up a little and probably extend it to all public takings of land, for whatever purposes.

On the other hand, public takings on parcels with existing structures merely renders them nonconforming and all of the general statutory rules apply. Takings from vacant lots are a different story and allowing these newly substandard lots to maintain their buildable status may not always be good planning.

## **ANCILLARY ISSUES**

As we have discussed in the past, no matter what section of our zoning bylaw we are dealing with, part and parcel of all of our discussions on any proposed amendments to the bylaw must include work on the **Definition** section of the bylaw. Some examples that we have to deal with as part of our discussions about the Nonconforming section of the bylaw are the definitions of Lot, Parcel, Pre-existing, Accessory Use, Accessory Structure, Single Family Dwelling, Setback etc. We will prepare a draft list of suggested definitions for discussion at a future meeting.

I look forward to discussing these issues with you.

Attachments

**APPENDIX**

- A.** Town of Chatham, 1981 Protective Bylaw  
Section 4, Area Regulations, Pg. 25  
Section 4.31.1, Exempted Lots, Pg 25  
Appendix II, Footnote (8) Pg 58
- B.** Town of Chatham, 1987, Protective Bylaw  
Section V, Nonconforming Lot, Buildings and Uses, Pg 36
- C.** CASE LAW REFERENCES
- Sieber v. Zoning Board of Appeals of Wellfleet  
16 Mass.AppCt. 985 454 N.E. 2d 108 (1983)
- Adamowicz v. Ipswich  
395 Mass. 757 ,481 N.E. 2d 1368 (1985)
- Carciofi v. Billerica  
22 Mass.App.Ct 926 (1986)
- Silun v. Morris  
Misc. Case No 143836 (Land Court 1991)
- Bobrowski v. Board of Appeals of Beverly  
Misc. Case No. 153543 (Land Ct. 1992)
- Tietjen v Wells  
C.A. No.: 02-0472
- Baldiga v. Board of Appeals of Uxbridge  
395 Mass. 829, 482 N.E.2d 809 (1985)