

PETRINI & ASSOCIATES, P.C.

Barbara J. Saint André | bsaintandre@petrinilaw.com
The Meadows | 161 Worcester Road, Suite 304 | Framingham, MA 01701
(Tel) 508-665-4310 | (Fax) 508-665-4313

MEMORANDUM

To: Board of Selectmen
Town Manager/Administrator
Planning Board
Board of Appeals
Building Commissioner

From: Barbara J. Saint André

Date: January 8, 2008

Re: Bjorklund v. Zoning Board of Appeals of Norwell, Mass. (2008)

The Supreme Judicial Court (SJC) ruled yesterday that an application to tear down an existing single family home, and rebuild a larger single family home on the same lot which satisfies all dimensional requirements in the zoning bylaw except minimum lot size, increases the nonconforming nature of the structure within the meaning of G.L. c. 40A §6 and therefore can be allowed only if it is not substantially more detrimental to the neighborhood. The SJC went on to uphold a decision of the Land Court which upheld the board of appeals' denial of Bjorklund's request for a "Section 6 finding". The Land Court found that there was sufficient evidence to support the board's finding that the proposed reconstruction would be substantially more detrimental to the neighborhood. The Bjorklund decision therefore addresses the issue that was left unanswered in a previous SJC case, Bransford v. Board of Appeals of Edgartown, 444 Mass. 852 (2005), which had resulted in a rare tie vote of 3-3 by the SJC on this same issue.

In Bjorklund, the plaintiff proposed to tear down the existing house, which had 675 square feet of living space, and construct a new and much larger house with 3600 square feet of living space. The new house would have a larger footprint and increased height, but would comply with all setback and dimensional requirements with the exception of the one-acre minimum lot size. The board of appeals found that the proposed reconstruction would increase the nonconforming nature of the structure based upon the increased length, height, and the placement of the structure on the lot. It further found that the proposed new house would be substantially more detrimental to the neighborhood, due to the doubling of the length of the building and the increase in height, which would not be in keeping with the rural character of the neighborhood, as well as the elimination of open space and screening, increased noise and light, and increased parking of vehicles on a narrow country road.

The statute, G.L. c. 40A §6, provides in pertinent part:

Except as hereinafter provided, a zoning ordinance or bylaw shall not apply to structures or uses lawfully in existence or lawfully begun...but shall apply ...to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of ...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. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.

The plaintiffs argued that the proposed reconstruction would not increase the nonconforming nature of the structure under G.L. c. 40A §6 as a matter of law, and therefore there was no need to determine if the structure would be substantially more detrimental to the neighborhood. The SJC, relying on the concurring opinion in Bransford, found that a nonconforming lot should not be treated differently than a nonconforming structure, and therefore the board correctly applied the statute. The first step, as outlined in previous court cases, is to determine if the proposed alteration will increase the nonconforming nature of the structure. If it will, the board must then determine if the structure will be substantially more detrimental to the neighborhood than the existing structure. See, e.g. Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987). In Bjorklund, the SJC upheld the board's determination that the increased size of the structure intensified the nonconforming nature of the structure. (Bjorklund did not appeal the determination that the structure would be substantially more detrimental to the neighborhood.)

The SJC went on to comment that reconstruction or modernization of an existing house on an undersized lot, in keeping with the existing structure's building footprint and living area, could be determined not to increase the nonconforming nature of the structure. In addition, the SJC ruled that small scale improvements such as addition of a dormer or sun room, could not reasonably be found to increase the nonconforming nature of a structure. The Court recognized, however, that municipalities do not always welcome "mansionization" by reconstructing modest existing single family homes into much larger ones. The Court found that a town may exercise its zoning authority to attempt to limit the adverse effects of "mansionization", which include the elimination of more affordable "starter" homes.

As a final note, you should consult your own town's zoning bylaw provisions applicable to nonconforming structures in all of these cases.