



# COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

## Appeals Court Clarifies Protection for Grandfathered Structures and Uses

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**Jared Otte** – Local zoning regulations across the Commonwealth are frequently amended. These amendments often take place at a spring or fall town meeting or by vote of a city council (with the exception of Boston which is a discussion for another post). Because of this constant state of change, Massachusetts law provides “grandfathered” or “preexisting nonconforming” status to both structures that are constructed and uses that are commenced prior to a zoning amendment, provided they originally complied with the zoning regulations. Unfortunately, the statute that provides this protection, the first sentence of M.G.L. c. 40A, § 6, has confused readers since its enactment and is the topic of frequent litigation. Recently, the Appeals Court of Massachusetts answered one question raised by Section 6 when it was presented with the proposed replacement of a 100-bed nursing home facility built in Newburyport in 1968.

In [Welch-Philippino v. Zoning Board of Appeals of Newburyport](#), the Appeals Court confirmed that when a structure dimensionally conforms to current zoning regulations while its use no longer conforms, but is grandfathered, that structure can be reconstructed without needing a special permit for the grandfathered use from the local permitting board. As the Appeals Court explained, M.G.L. c. 40A § 6 provides that nonconforming uses lose their grandfathered status when there is “any change or substantial extension of such use.” On the other hand, nonconforming structures lose their grandfathered status when there is “any reconstruction, extension or structural change of such structure,” or modification that amounts to “alteration of a structure...for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.”

The Appeals Court, affirming the Land Court’s decision, ruled that the Port Associates Limited Partnership, the property owner, and Whittier Health Network, Inc., the healthcare organization operating the nursing home, could replace the 45 year old nursing home even though the use of the property was no longer permitted in the applicable zoning district. Because the existing facility and its proposed replacement were both dimensionally conforming structures, the Appeals Court confirmed that the appropriate inquiry is whether the project proposed a “change or substantial extension” of the nonconforming use. Employing the three-pronged test set forth in the seminal 1973 zoning case [Powers v. Building Inspector of Barnstable](#), the Appeals Court confirmed that the project did not constitute a “change or substantial

extension” of the grandfathered use because (1) the property would continue to operate as a nursing home, (2) operation of the nursing home with 121 beds rather than 100 would not alter the quality, character, or degree of that use, and (3) the project would not have any adverse effect on the neighborhood different in kind from the exiting use, but would have a mitigating impact on its surroundings.

This decision provides clarity on the application of zoning regulations for property owners and developers looking to upgrade or rebuild outdated buildings.