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SJC Affirms Independence of Massachusetts Subdivision Law and the Zoning Act

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Robert C. Sudmyer & Gemma Ypparila – On March 3, 2015, in the case of Palitz v. Zoning Board of Appeals of Tisbury, the Massachusetts Supreme Judicial Court (the "Court") decided that lots created by the division of land under the subdivision control law's "existing structures exemption," codified in Massachusetts General Laws ("M.G.L.") c. 41, § 81L ("§ 81L") did not entitle the existing structures on newly divided lots "grandfather" protection against new zoning nonconformities created by the division and that a variance is required for such new zoning nonconformities. This case is particularly enlightening because of the Court's detailed analysis of the purposes behind and relationship between the subdivision control law and M.G.L. c. 40A (the "Zoning Act").

The lot in question, which was created in 1994 pursuant to the existing structures exemption in § 81L, was acquired by the plaintiff in 2007. § 81L allows a planning board to endorse a plan through the "approval not required" ("ANR") process when a tract of land, on which two or more buildings were standing when the subdivision control law went into effect in a city or town, is divided into separate lots on each of which one of such buildings remains standing. Here, there was a dwelling on the lot that was built before the subdivision control law and Zoning Act were enacted. The owner, at the time the lot was created, obtained an ANR endorsement pursuant to M.G.L. c. 41, § 81P, as well as variances for nonconforming minimum lot size, frontage and front and sideyard setbacks (the "Original Variance").

In 2012, the plaintiff sought a building permit to tear down the existing dwelling and construct a new dwelling within the same footprint, but ten feet taller and with a third floor, a full basement and an additional bedroom. The building inspector refused to issue the permit unless the Original Variance was amended. The plaintiff's application for a new or amended variance was denied by the zoning board of appeals, in part, because the increased height of the new dwelling as well as the nonconforming front yard setback would have eliminated the view of an abutter.

The plaintiff appealed the zoning board of appeal's decision to Land Court, arguing that the property was entitled to grandfather protection under Section 6 of the Zoning Act ("Section 6") because the dwelling predated the town's zoning bylaw and the lot was created pursuant to the existing structures exemption. Section 6 provides that

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grandfathered structures and uses may be extended or altered without obtaining a variance, so long as the extensions comply with local zoning and are not substantially more detrimental to the neighborhood. Rockwood v. Snow Inn Corp., 409 Mass. 361, 364 (1991). Acting on the plaintiff's motion for summary judgment, the Land Court, instead, granted summary judgment for the town, holding that the ANR endorsement did not establish zoning compliance and the dwelling was not protected by Section 6; therefore, the property was rendered lawful solely by the Original Variance, which had to be amended or a new variance obtained in order for the plaintiff to construct her new dwelling.

In affirming the Land Court's decision, the Court analyzed the legislative history of the subdivision control law, explaining that the subdivision control law is not intended to encroach upon the authority of the building inspector or zoning board of appeals and prevent them from enforcing a town's zoning bylaws. Instead, the law sets up a "dual approval requirement," requiring approval from the planning board to create a new lot as well as relief from the zoning board of appeals for zoning nonconformities, so that the zoning bylaws and the subdivision rules remain distinctly enforceable. Palitz, at 19. In reaching its conclusion, the Court rejected the plaintiff's argument that, because there was no physical alteration of the dwelling when the lot was created, the nonconforming status of the structure survived the ANR division in 1994; citing Marblehead v. Deery, 356 Mass. 532, 537 (1969) (setback violation created by subdivision rendered preexisting structure "an unprotected nonconforming use"). Nor did the Court agree that the Original Variance elevated the lot and structure to a protected nonconforming use; citing Mendez v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527, 531 (1990). ("It would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansions as a nonconforming use."). The Court concluded that, in the same way that the Original Variance was necessary to legitimize the nonconformities that arose when the lot was created in 1994, a new or amended variance was required because the reconstruction of the dwelling would have resulted in an expansion of the nonconformities made lawful by the Original Variance.

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