MCLE Program – Zoning Demystified

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Non-Conforming Uses and Structures and Zoning Freezes

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Mass. Gen. Laws Chapter 40A, Section 6. Applies throughout Massachusetts, except Boston. Not well drafted; convoluted sentences

Overall concepts and comments

- See Articles 9 and 13 of the Boston Zoning Code (ZBA jurisdiction; findings). See Paula Devereux's separate presentation regarding Boston zoning.
- Defines non-conforming uses and structures.
- Use and dimensional violations from current zoning.
- Protects against subsequently enacted zoning bylaws and ordinances.
- Sets standards for changes such as reconstructions, extensions or alterations.
- Addresses undersized residential lots.
- Empowers regulation if use of structure is abandoned or not used for more than 2 years.
- Provides for permit and plan freezes.
- Must be a legally pre-existing, non-conforming use or structure.
    - one that lawfully began or lawfully existed before a zoning change with which the use or structure does not now comply, e.g., a use first established by variance is not a lawful, pre-existing non-conforming use. Cannot expand with just a Finding (see below)
    - See Chapter 184 of the Acts of 2016. More protection for a non-complying structure. Discussed further below.
- These types of freeze uses are also "lawful":

- Was a building or special permit issued before the first publication of notice of a public hearing which leads to the zoning change? If so, to be grandfathered, the owner must commence construction or use within 12 months and diligently prosecute to completion. Building permit, special permit and plan freezes will be discussed more below.

- A non-conforming use or structure does not have to comply with subsequently enacted zoning. Protections run with the land. Not personal to a particular owner. Can continue it "as is".

- Cannot create a valid building lot by dividing it from another parcel thereby rendered nonconforming by such division. "Infectious invalidity." 81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline, 461 Mass. 692, 694 n.6 (2012).

- Municipal control

  - 40A/6 provides the minimum landowner protections. A municipality cannot be stricter; for example, providing a period of 1 year for abandonment vs. 2 years.

  - A municipality can treat non-conforming uses and structures more liberally or better than the minimum protections under 40A/6. *See, e.g.*, Chilson v. ZBA of Attleboro, 344 Mass. 406, 411 (1962); Bellata v. Geller, No. 16 MISC 000698 (KCL), 2017 WL 4533661, at *5 (Mass. Land Ct. Oct. 10, 2017); Roma v. Battistelli, No. 15 MISC 000085 (RBF), 2016 WL 6673441, at *8 (Mass. Land Ct. Nov. 14, 2016). For example, some municipalities allow the creation of a new non-conformity by special permit rather than by variance.

  - Styller v. Aylward, 16 MISC 000757 (KCL), 2018 WL 4502015 (Mass. Land Ct. Sep. 19, 2018) – AirBnb is not a "use" that can be grandfathered and is not an accessory use under local zoning bylaw.

- A proposed change or substantial extension – must either comply with current zoning or be authorized by a Section 6 Finding.

  - Threshold question: When is there a proposed change or substantial extension which, absent of Finding, requires compliance with present zoning? See 3-pronged Powers test. Powers v. Building Inspector of Barnstable, 363 Mass. 648, 662-63 (1973).

    - Does the current use reflect the nature and purpose of the non-conforming use prevailing when the new zoning law took effect? OR

    - Is there a difference in quality or character, as well as degree, of use? OR

    - Is the current use different in kind in its effect on the neighborhood?

  - NOTE: One is entitled to a building permit if one stays below these tests or triggers. Many building inspectors do not understand this legal test. Any proposed changes and they send you to the Special Permit Granting Authority (SPGA). *See, e.g.*, Derby

Refining Co. v. City of Chelsea, 407 Mass. 703, 712-13 (1990); Welch-Philippino v. ZBA of Newburyport, 86 Mass. App. Ct. 258, 263 (2014); Almeida v. Aruda, 89 Mass. App. Ct. 241, 243 (2016); Kanj v. D'Agostino, No. 15 MISC 000446 (AHS), 2017 WL 2406190, at *10-12 (Mass. Land. Ct. May 31, 2017); *see also* Ruble v. McGee, No. 15 MISC 000229 (RBF), 2018 WL 2246206, at *6-8 (Mass. Land Ct. May 16, 2018) (upheld repair shop) – good review of the three (3) Powers tests.

- For example, at a service station, a canopy; new pumps; modernization – no Finding should be required if dimensional requirements are not violated.

- Certain minor changes for single family residential are allowed by right. *See* Bjorklund v. ZBA of Norwell, 450 Mass. 357, 362 (2008) (list of small scale changes that are not intensification as a matter of law); *see also* Cox v. Davis, No. 08 MISC 383738 (KCL), 2017 WL 178365, at *5-6 (Mass. Land Ct. Jan. 17, 2017).

- Very "Fact Sensitive" – cases go both ways.

  - increased volume of business alone is generally allowed by right
    modern equipment
    upgrade or improvements "ordinarily and reasonably adapted to the original use"
    e.g., a new assembly line

  - similar to first test – generally, mere increase in business not a change in use.
    Key Cases – Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990); Board of Selectmen of Blackstone v. Tellestone, 4 Mass. App. Ct. 311 (1976).

    - M.R. Pollock & Sons, Inc. v. Murphy, No. 02 MISC 284911 (CWT), 2011 WL 1837593 (Mass. Land Ct. May 9, 2011), *aff'd* 84 Mass. App. Ct. 1107 (2013) – cease and desist order and ZBA decision upheld; change from sawmill to storage and sale of school buses, trailers and containers triggered all 3 Powers tests. Not allowed by right.

    - Fink v. LeDuc, No. 16 MISC 000377 (KCL), 2018 WL 3340766 (Mass. Land Ct. Jul. 6, 2018) – Expanded kennel different in scale and scope. A new use. Not just vacation dog boarding; became the large scale sale of puppies from off-site breeders.

  - Different effect on neighborhood – Derby Refining Co. v. City of Chelsea, 407 Mass. 703 (1990).

  - There is a separate body of case law on changes from seasonal to year-round use (often Cape Cod cases)

    - Change from a non-conforming summer cottage to larger, year-round residence was not substantially more detrimental. Gale v. Gloucester ZBA, 80 Mass. App. Ct. 331 (2011).

- **Reconstruction**

  - Read local bylaw provisions very carefully. They can vary widely. For example, involuntary fire or casualty replacement cost test – when can one rebuild by right? A certain percentage of destruction? For example, are reconstruction, alteration or extension defined and treated differently? See, also, the Roma case cited above.

  - This area of practice is very fact intensive and local bylaw sensitive.

- **Cases**:

  - Eastern Point LLC v. ZBA of Gloucester, 74 Mass. App. Ct. 481 (2009) – Local bylaw allowed rebuilding by right.

  - Shuffain v. Mulvehill, No. 308061, 2006 WL 1495106 (Mass. Land Ct. Jun. 1, 2006) – Local bylaw did not allow "reconstruction" via a Finding for a commercial use; allowed only extension and alteration.

  - Schiffenhaus v Kline, 79 Mass. App. Ct. 600 (2011) – Town cannot define "alteration" to include demolition and reconstruction of a larger house elsewhere on the same lot.

- **Alteration**

  - Absent a Finding, current zoning applies if the alteration will be for a substantially difference purpose, the same purpose in a substantially different manner or to a substantially greater extent.

  - If only minimal changes – arguably entitled to a building permit (see above).

- **Residential**

  - Single and two-family structures – there are somewhat different rules; generally, more liberal.

    - *See* Deadrick v. ZBA of Chatham, 85 Mass. App. Ct. 539 (2014). Good review of residential cases. A new non-conformity requires a variance. Making an existing non-conformity worse can be allowed by a Finding. Gale v. ZBA of Gloucester, 80 Mass. App. Ct. 331, 337-38 (2011); Graf v. Board of Appeals of Mattapoisett, No. 16 MISC 000203 (MDV), 2018 WL 6738179, at *5 (Mass. Land Ct. Dec. 20, 2018); Bellata v. Geller, No. 16 MISC 000698 (KCL), 2017 WL 4533661, at *3-4 (Mass. Land Ct. Oct. 10, 2017).

    - Goldhirsh v. McNear, 32 Mass. App. Ct. 455 (1992) – Vertical expansion that did not enlarge non-conforming foundation footprint.

    - *Compare* Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (1987) and Fitzsimonds v Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (1985)

with Bjorklund v. ZBA of Norwell, 450 Mass. 357, 362 (2008) – As a matter of law, listed small scale improvements do not require a Finding. But rebuilding a larger house on an undersized lot did require a Finding, even if the new house met setback and height. "Densification." Bigger structure didn't increase the non-conformity (*e.g.*, the undersized lot), but a Finding was still required.

- There are separate rules for older, undersized residential lots.

- See Paragraph 4 of Chapter 40A, Section 6 and local bylaw provisions. Were lots not held in common ownership when zoning changed? Beware merger doctrine, who controls the lots – doctrine of "infectious invalidity". *See* Mauri v. ZBA of Newton, 83 Mass. App. Ct. 336 (2014); Savery v. Duane, No. 12 MISC 474707 GHP, 2014 WL 3437772 (Mass. Land. Ct. Jul. 7, 2014) (husband and wife really controlled). Be careful about all key dates. Study local bylaw provisions, which may be more favorable to the property owner. *See generally* Rourke v. Rothman, 448 Mass. 190 (2007).

- Some representative recent cases:

  - O'Connor v. ZBA of Dennis, 92 Mass. App. Ct. 1112 (2017) – Provisions of M.G.L. c. 40A, §6 allowing dwelling to be built on dimensionally nonconforming lot does not apply to a lot held in common ownership with adjacent parcel when town adopted zoning code amendment creating nonconformity.

  - RCA Development, Inc. v. Galligan, No. 16 MISC 000744 (RBF), 2017 WL 5078913 (Mass. Land Ct. Nov. 2, 2017) – Pursuant to provisions of local zoning code offering more grandfather protection than M.G.L. c. 40A, §6 for certain nonconforming lots, house may be constructed on undersized lot with insufficient frontage held in common ownership with adjoining parcel.

  - Hurley v. Keohane, No. 16 MISC 000146 (RBF), 2018 WL 7771387 (Mass. Land Ct. Feb. 8, 2018) – Presence of tennis court on January 1, 1981 precluded application of local zoning code exemption in favor of lots which were "vacant" as of such date.

  - Cronin v. Town of Lunenburg, 92 Mass. App. Ct. 1130 (2018) – Undersized lot lost protection as nonconforming use when a portion of the land was conveyed; reconveyance could not revive the lot's preexisting nonconforming status under doctrine of "infectious invalidity".

  - Kneer v. ZBA of Norfolk, 93 Mass. App. Ct. 548 (2018) – Trial judge must determine whether, pursuant to merger doctrine, house may be constructed on dimensionally nonconforming lot controlled by fiduciary who also owns adjoining parcel individually but must discharge fiduciary duties to her mother as the trust's beneficiary.

- Planning Board of Norwell v. Serena, 27 Mass. App. Ct. 689 (1989) – Adjoining lots did not qualify for grandfather protection against zoning by-law amendment.

- Other issues:

  - Impact of a town taking on a lot if the remainder is made non-conforming?

  - Always check for tailored or quirky local provisions that grandfather undersized lots. McGrath v. ZBA of Chatham, 76 Mass. App. Ct. 1120 (2010) – An example of a more liberal local provision.

- **Finding** – Can extend or alter a non-conforming use or structure upon a Finding by the PGA or SPGA that the proposed change, extension or alteration is not substantially more detrimental to the neighborhood than is the existing non-conforming use or structure.

  - A municipality can decide whether to afford this form of relief or not – a municipality can have this mechanism, but some do not. Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32 (1991).

  - Finding – public hearing; like a special permit. A municipality can treat it that way, e.g., required quantum of vote. Shrewsbury Edgemere Associates LP v. Board of Appeals of Shrewsbury, 409 Mass. 317 (1991).

  - Safer to follow Chapter 40A, Section 11 notice procedures.

  - Courts will both uphold and reverse local Finding decisions. Some examples are:

    - Gale v. Gloucester ZBA, 80 Mass. App. Ct. 331 (2011) – Change from seasonal cottage to year-round house.

    - Fletcher v. Gardner, 85 Mass. App. Ct. 1108 (2014) – Denial of Finding upheld.

    - Shirley Wayside LP v. ZBA of Shirley, 461 Mass. 469 (2012) – SJC reversed Appeals Court and upheld Land Court that the local denial of special permit was not justified; expansion was not substantially more detrimental.

    - Silva v. ZBA of Plymouth, 77 Mass. App. Ct. 1119 (2010) – Denial of a Finding was arbitrary and capricious; reversed; adding a deck would not be substantially more detrimental. Permit issued by the Court.

    - Hayr LLC v. Nigosian, No. 15 MISC 000242, 2017 WL 3426681 (HPS) (Mass. Land Ct. Aug. 9, 2017) – Annulling a local decision finding under Powers that the change would be different in kind in its effect on the neighborhood.

- What does the local bylaw or ordinance provide? Building Inspector of Waltham v. Mazzone, 76 Mass. App. Ct. 1102 (2010) – Waltham Zoning Ordinance had a provision authorizing a change from one non-conforming use to another non-conforming use subject to ZBA approval. "A similar use of a not less restricted character" – 2-family to a 3-family.

- Pettinella v. Salisbury ZBA, No. 08 MISC 365784 (GHP), 2011 WL 2853661 (Mass. Land Ct. Jul. 18, 2011) – Finding reversed. The Finding had allowed replacement of a 1-family and 2-family house with a 3-family house. New development would block ocean views. A variance was required under Rockwood (see below).

- Wojcik v. Lovett, 91 Mass. App. Ct. 1132 (2017) – Upheld a Finding allowing the conversion of a non-conforming summer cottage to a year round residence. Not substantially more detrimental. No new zoning violations created.

- **Key Case for commercial uses and structures** – Rockwood v. Snow Inn, 409 Mass. 361 (1991)
  - Extension or changes to non-conforming commercial structures.
  - In order to increase an existing dimensional non-conformity or to create new non-conformities, one needs both a variance and a Finding.
- **Practice Tip – Advocacy. When seeking a Finding:**
  - Show no significant impacts; traffic studies; mitigation measures.
  - Argue that granting relief will be better than not allowing the proposed changes (i.e. continued eyesore; blighted condition).
  - Study the Table of Uses. There possibly are other worse uses allowed by right.
- **Abandonment**.
  - Two (2) alternative tests:

    - An intent to abandon. Chiaraluce v. ZBA Wareham, 89 Mass. App. Ct. 290 (2016) – need two factors: (1) the intent to abandon, and (2) voluntary conduct, whether affirmative or negative, which carries the implication of abandonment.

      OR

    - Non-use for more than two (2) years, regardless of intent. Plainville Asphalt Corp. v. Town of Plainville, 83 Mass. App. Ct. 710 (2013) (more than six (6) years of non-use. Protection lost).

- Practice Tip: Watch carefully the commencement of the two (2) years and restart the grandfathered use before its expiration; for example, reopen a closed service station and start to pump gasoline within the two (2) years.

- Related Law – Statutes of limitations – Chapter 40A, Section 7 – actions to remove non-conforming uses and structures

  - Six (6) years if built in accordance with an apparently validly issued building permit – protection for both use and structure against enforced removal.

  - Ten (10) years, whether or not a building permit can be found – protection against enforced removal, but for structure only, not a use violation.

  - See Chapter 184 of the Acts of 2016, amending Section 7 to provide that non-complying structures more than ten (10) years old will be treated as non-conforming and therefore eligible to be changed by a Finding.

- *See* Gund v. Planning Board of Cambridge, 91 Mass. App. Ct. 813 (2017). A structure originally exempt from local zoning due to sovereign immunity will be treated as a legal, pre-existing non–conforming structure when sold to a private owner for a different use.

- **Freezes**.

  - Uses or structures in existence and which conformed when started or built = classic non-conforming uses and structures.

  - Related topic – "Zoning Freeze" or "vesting"– Uses and structures, not yet fully commenced or completed or not yet initiated, but contemplated, may also obtain the status of protected non-conforming uses and structures in certain circumstances. Protection against new zoning for certain periods of time.

  - Vesting rights to existing zoning → project in development; in the permitting stage; construction about to start.

  - Freeze = a temporary exemption from or deferral of the applicability of certain zoning amendments. Each type of freeze is subject to time limitations; some apply only to certain types of zoning amendments, e.g., use vs. dimensional.

  - Controversial every year – bills in Legislature; some would eliminate ANR plan freezes; reduce the period of protection of subdivision plan freezes; protect only the initially contemplated project, but not the "land shown on the plan".

  - Categories of freezes – permit freezes and plan freezes:

    - Permit freeze - created by commencement of construction or a use upon issuance of a building or special permit (non-plan freeze) → protection during permitting and construction phase.

    - Freezes created by plans submitted under the Subdivision Control Law (plan freeze) → protection during planning stage.

    - Special residential lot freezes.

    - Freezes of Board of Health (M.G.L. c. 111 §127P) and Planning Board (M.G.L. c. 41 §81Q) rules and regulations.

      ***Will focus on the first two categories.**

- **Permit Freeze**.
    - Non-plan.
    - Commencement of construction or use following issuance of a building permit or a special permit.
    - Must be issued or must be unconditionally entitled to the building permit. Albahari v. ZBA of Brewster, 76 Mass. App. Ct. 245 (2010) – Corrected foundation plans not filed, so not entitled to a building permit.
    - Must be issued before the first notice of the Planning Board public hearing on the proposed ordinance or bylaw change; work must commence within twelve (12) months and be prosecuted in good faith to completion. See Chapter 219 of the Acts of 2016, extending the time period to commence work from six (6) months to twelve (12) months.
    - Not enough that an application is pending, even if the applicant is in the middle of a public hearing process.
    - Structures or uses "lawfully begun."
    - Case law: for "construction" to commence, conservatively, one must have started foundation work; demolition and site work usually not enough (although some municipalities will allow site work to be considered sufficient commencement).
    - Other issues – special permit for multi-phase project – is it enough to start the first phase? What about force majeure? Phasing under a special permit? One should address this topic in the permit conditions.
- **Plan Freeze**.
    - 40A/6, 5th and 6th paragraphs. *See* Krafchuck v. Planning Board of Ipwhich, 453 Mass. 517 (2009) – Developer's land entitled to protection of process zoning freeze pursuant to M.G.L. c. 40A, §6, fifth paragraph.
    - NOTE: Only available if a municipality has adopted the Subdivision Control Law (SCL). For example, SCL not adopted in Boston, Cambridge or Somerville, so one cannot get a plan freeze in those cities.
        - Ridgeley v. Planning Board of Gosnold, 82 Mass. App. Ct. 793 (2012) – No freeze available since Planning Board had not adopted Rules and Regulations under SCL.
    - Protects only against zoning changes; not non-zoning changes (with some narrow exceptions).

- Full Subdivision Plan Freeze

    - Plan creates frontage for a least one (1) new lot

    - Grants a complete zoning freeze for eight (8) years – both use and dimensional

        - Key Case – Massachusetts Broken Stone Company v. Town of Weston, 430 Mass. 637 (2000) – "Land shown on the plan" is protected for eight (8) years from endorsement. The protection is not limited to a particular project.

        - O'Brien Homes, Inc. v. Town of Lunenburg, No. 13 MISC 447878 (KCL), 2018 WL 2340796 (Mass. Land Ct. May 23, 2018) – M.G.L. c. 40A, §6 freeze applied following subdivision plan application, timely appeal, and amended subdivision plan.

        - Bernstein v. Planning Board of Stockbridge, 82 Mass. App. Ct. 793 (2012) – Eight (8) years runs from constructive approval, too.

    - Freeze period extended by litigation or building permit/utility moratoria.

- ANR/81P Plan (Also known as perimeter plan. All lots have existing legal frontage.)

    - Protects for three (3) years, but only against use changes in the Table of Uses.

    - Protection applies to all uses, whether permitted by right or by special permit. *See* Miller v. Board of Appeals of Canton, 8 Mass. App. Ct. 923, 923 (1979); Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232, 234-235 (1992).

    - Protects against "elimination of or reduction in the kinds of uses which were permitted when the plan was submitted to the Planning Board".

    - These protections apply regardless of whether the endorsed ANR plan is ultimately recorded. Long v. Board of Appeals of Falmouth, 32 Mass. App. Ct. 232, 235 (1992). Intent is irrelevant.

    - Protection does not extend to other zoning requirements, unless those requirements, as a practical matter, would nullify the protected use. Cape Ann Land Dev. Corp. v. City of Gloucester, 371 Mass. 19 (1976); Bellows Farms v. Building Inspector of Action, 364 Mass. 253 (1973) – "Practically prohibitive of the use".

- Issue - Can the freeze extend to protection against subsequently enacted non-zoning controls?

    - Rayco Investment Corp. v. Board of Selectmen of Raynham, 368 Mass. 385 (1975) – Freeze plan protected against general bylaw which was zoning-like (prohibited trailer parks).

    - Generally, no freeze protection against the requirements of separate municipal bylaws (for example, wetlands; earth removal; public way access permit).

        - Attorney General ruling upholding Brookline's open space bylaw (non-zoning). *See* Attorney General Municipal Law Unit Decision No. 6195, dated May 30, 2012. Freeze plan did not grandfather owner's land against such a separate municipal bylaw.

- Procedures:

    - Must follow timing and filing procedures precisely.

        - Krafchuk v. Planning Board of Ipswich, 453 Mass. 517 (2009) –Didn't claim constructive grant quickly enough; Planning Board rescinded constructive grant.

        - Kitras v. Zoning Administrator of Aquinnah, 453 Mass. 245 (2009) – Owner didn't follow all steps to get a constructive approval.

    - Town Clerk/Board of Health notices.

    - Watch out for rules and regulations of local Planning Board with particular requirements – *e.g.*, must file the plan at a meeting, etc.

    - **IMPORTANT**: Can get the plan freeze if one files the plan before the actual legislative vote – i.e., can file the morning of Town Meeting or City Council vote. Compare this provision with the requirement that, in order to effect a permit freeze, one must obtain issuance of a special permit or a building permit before the earlier first notice of the Planning Board hearing that ultimately leads to the later legislative vote.

    - Time extended for litigation, but not for financial difficulties.

    - Building utility connection moratoria extend freeze, too.

    - 40A/§6; ¶9 – If subsequent zoning is better than the old zoning, an owner can waive the freeze by a duly recorded instrument; but cannot waive in part and keep benefits of the freeze in part.

- Board of Health freezes:
    - Chapter 111, Section 127P.
    - Subdivision plan.
    - Freezes Board of Health regulations at time of submission.

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