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Building requirements for landlocked parcels clarified

Judge asserts need for frontage on road

By Eric T. Berkman

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A proposed single-family home on a landlocked parcel of woodland in Wenham did not comply with a 20-foot front-yard setback requirement in the local zoning laws, even though the house would have been at least 20 feet from any street, a Land Court judge has found.

The parcel was covered by a "grandfather provision" in Wenham's zoning law that exempted existing nonconforming properties from dimensional requirements. Though the provision warned that structures potentially built on such properties would need to comply with any rear-yard, side-yard and front-yard setback requirements, it did not mention frontage requirements.

The Zoning Board of Appeals upheld a building inspector's denial of a permit to construct the home, finding that because the property did not actually touch the street, it could not, by definition, satisfy a front-yard setback requirement.

The plaintiff - who had contracted to buy the lot pending issuance of a building permit - argued on appeal that the zoning board improperly inferred a frontage requirement for the lot where none existed.

But Judge Harry M. Grossman disagreed.

"[I]n its definition of *Front Yard*, [the current zoning law] alludes to the placement of a structure within twenty feet of *the* street, not twenty feet of *any* street or twenty feet of a street," Grossman wrote, affirming the zoning board's decision.

"This fact lends support to the view that the bylaw contemplates a setback from a specific street," he said. "It is the court's view that the language of that section is clear, insofar as the street contemplated by [that section] is that on which the lot possesses frontage. It follows that the front yard setback requirement would not be met if there were an intervening parcel between the subject property and the street."

The 10-page decision is *Proulx v. Westra, et al.*, Lawyers Weekly No. 14-052-10. The full text of the ruling can be purchased by clicking here.

Relief to planners?

Boston lawyer Daniel P. Dain, who represented the zoning board, said he believes Proulx is the first time

a Massachusetts court has weighed in on the definition of front-yard setback.

The ruling should bring a sense of security to municipal planners who had always assumed that, under typical zoning laws, landlocked wooded lots - vestiges of a long-past era where people often owned houses in town and separate lots in the forest for gathering firewood - were not buildable, he said.

"People have been very nervous that someone would challenge the status quo, and had [the plaintiff] prevailed, it would have had ramifications across the commonwealth," said Dain, a lawyer at Brennan, Dain, Le Ray, Wiest, Torpy & Garner. "No one knows how many landlocked wooded lots there are across the commonwealth, possibly 1,000 or more. A contrary ruling by the Land Court would mean that these wooded parcels would be buildable, assuming that the owner [as in this case] secured an easement for a driveway."

If such lots were suddenly buildable, Dain said, "it could change the character of rural and semi-rural communities."

Dain also pointed out that even without Proulx, municipalities could have avoided the uncertainty by amending their zoning codes to clarify that "front-yard setback" means setback from a street and a front-yard lot line that are coincident.

"However, revising zoning codes is difficult and often contentious, so municipalities avoid doing it too often," he said, adding that after the plaintiff filed suit in the case, the town of Wenham revised its code to clarify the meaning of front-yard setback.

Plaintiff's counsel Jason A. Manekas, of Bernkopf Goodman in Boston, questioned the broader applicability of the ruling.

"This was a specific provision in Wenham with a specific wording," he said. "In fact, most grandfather provisions I've seen specify whether you need frontage, and they'll tell you how much. For example, in Cambridge, they'll say you need frontage and you need 20 feet."

In Proulx, however, the court found that even though the grandfather clause does not stipulate that a lot have frontage, the court said it is still required.

"It doesn't matter how much," said Manekas, whose client may appeal the decision depending on the outcome of another issue remaining in the case. "But you need some. And that doesn't seem to make sense."

Donald Pinto Jr., a land-use lawyer at Rackemann, Sawyer & Brewster in Boston, who was not involved in the case, said that, generally speaking, there is a public policy against creating landlocked lots and rendering such property useless.

"But that tends to yield to the intent of the parties in the deed that created the landlocked situation as well as to the clear provisions of the local zoning bylaw, and that's what we have here."

At the same time, while acknowledging the common presumption that a landlocked parcel can never be built upon, Pinto said there are ways to access land that seems to be landlocked.

"It sometimes means going back 100 years and looking at the transaction that created the landlocked parcel," Pinto said, speaking as a matter of general principle, not with respect to any particular case. "Different doctrines of implied easement sometimes come into play and can often result in a landlocked parcel that was long thought unbuildable to be found buildable where the reason it was unbuildable was lack of access."

Denial of permit

Plaintiff Peter Proulx entered a purchase and sale agreement to buy a five-acre wooded lot in Wenham from Thomas O'Brien, trustee of Horse Hill Realty Trust, which held the deed to the land.

The sale was contingent on Proulx receiving a permit to build a single-family dwelling on the lot, which was sometimes referred to as "116 Horse Hill Lane," in reference to a road crossing the property that was neither a public way or maintained by the town, nor shown on the plan of an approved subdivision.

Though the property touched Horse Hill Lane, it did not abut any recognized street. The property also benefitted from an easement granted in 1903 giving the owner the right to construct a driveway across an intervening lot to the street.

When the plaintiff applied for a building permit, the town building inspector refused his request, stating that the plot did not comply with §X.E.4, a grandfather provision that exempted nonconforming lots like 116 Horse Hill Lane from dimensional requirements under the town zoning bylaw adopted in 1945.

Under §X.E.4, any structure built on a lot exempt from the bylaw would still have to comply with all front-yard, side-yard and rear-yard setback requirements in the zoning law. Section X.E.4 was silent, however, as to whether a lot would have to conform with frontage requirements.

The inspector determined that because the parcel in question did not touch a street, it could not satisfy the bylaw's 20-foot setback requirement, even though it complied with rear-yard and side-yard setback requirements.

The plaintiff challenged the inspector's interpretation before the town Zoning Board of Appeals, which voted in spring 2008 to uphold the inspector's denial. The board reasoned that for more than 50 years, the bylaws had required that single-family homes be built on a street, meaning they had to have some frontage on a roadway dedicated to public use.

Thus, the board stated, under the current iteration of the bylaw, a lot not abutting a street could not meet the front-yard setback requirement and therefore could not constitute a buildable lot.

The plaintiff filed a complaint in Land Court on Aug. 29, 2008, contending that the board's interpretation of the bylaw was legally untenable and in excess of its authority. Specifically, the plaintiff argued that §X.E.4 should not be interpreted as to require frontage on a street.

Nonbuildable lot

On appeal, Grossman first addressed the plaintiff's argument that §X.E.4 was intended to insulate grandfathered properties like the lot at issue from the bylaw's frontage requirements.

As the plaintiff pointed out, bylaw provisions in 1947 and 1955 added frontage requirements to "lots laid out after" the adoption of the bylaw but made no reference to frontage in their respective grandfather provisions.

Additionally, the plaintiff contended, his plan met the front-yard setback requirement of the current bylaw because his proposed house would not be within 20 feet of Horse Hill Lane if it were considered a street or within 20 feet of any other street.

Grossman was not moved.

"[The] plaintiff argues that the front yard setback does not imply the existence of any frontage on a street," he wrote. "He asserts that one could measure front yard setback from any street, so long as it were greater than [20] feet from the front of the house."

But under such a scenario, one could presumably build on a lot, landlocked or otherwise, up to the front lot line, as long as the proposed structure was more than 20 feet from any street, Grossman said.

Additionally, the zoning law prohibited the placement of a structure within 20 feet of "the" street, not "a" street, supporting the contention that the bylaw contemplated the setback from a particular street, he said.

Thus, Grossman said, it follows that the front-yard setback requirement would not be satisfied if there

were an intervening parcel between the lot and the street.

Accordingly, he concluded, "the Board did not act in excess of its authority and ... some frontage on a street was required ... in order to secure a building permit under the circumstances pertaining herein."

- Eric T. Berkman

For more information about the judge mentioned in this story, visit the Judge Center at www.judgecenter.com.

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CASE: *Proulx v. Westra, et al.,* Lawyers Weekly No. 14-052-10

COURT: Land Court

ISSUE: Was a proposed single-family home on a landlocked parcel of woodland in Wenham compliant with a 20-foot front-yard setback requirement in the local zoning laws where the house would have been at least 20 feet from any street?

DECISION: No, because in order to satisfy a front-yard setback requirement, the parcel had to have frontage on a street