CASE FOCUS

Bellalta: A Flowchart for the Owner of a Nonconforming Home

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Case Focus

In *Bellalta v. Zoning Board of Appeals of Brookline,* 481 Mass. 372 (2019), the Supreme Judicial Court reaffirmed the process by which a preexisting, non-conforming single- or two-family structure can be altered or expanded, clarifying the framework established by courts wrestling with the "difficult and infelicitous" language of G.L. c. 40A, Section 6 for nearly four decades. *Bellalta* confirmed that changes to such structures can be made by special permit *without* the additional need for a variance.

The Section 6 Quicksand

Section 6 regulates the application of local zoning to preexisting, nonconforming structures and uses. Its language reflects a tension between competing philosophies governing the use and development of Massachusetts land. On the one hand zoning is interested in the elimination of nonconformities. But zoning also reflects the notion that "rights once acquired by existing use or construction of buildings in general ought not to be interfered with." *Opinion of the Justices*, 234 Mass. 597, 606 (1920). Thus, under Section 6, a zoning ordinance or by-law *shall not apply to structures or uses lawfully in existence or lawfully begun* … but shall apply to any change or substantial extension of such use … to any reconstruction, extension or structural change of such structure … 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 … that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood.

(Emphasis added). In two sentences, the statute (i) protects previously compliant structures and uses from the effect of subsequently enacted zoning bylaws, (ii) preserves the need to comply with zoning if one wants to change or alter a nonconforming structure or use, and (iii) creates a separate exemption for certain changes or alterations to single- and two-family structures. In *Bellalta,* the SJC examined the extent of the protections afforded by the "second except clause" to owners of single- and two-family preexisting, nonconforming structures.

Underlying Facts and Procedural Posture

Defendant homeowners owned a unit in a two-unit Brookline condominium. They proposed adding a dormer to add 677 square feet of living space. The building did not comply with the floor area ratio ("FAR") – the ratio of building gross floor area to lot area – for the zoning district in which it was located. The FAR for the zoning district was 1.0. The FAR for the defendants' building was 1.14, which would increase to 1.38 with the new dormer.

After being denied a building permit, the defendants applied for, and were granted, a "Section 6 finding" by the Brookline Zoning Board of Appeal. The Board found that the proposed addition and resulting increase in FAR would not be substantially more detrimental to the neighborhood than the nonconforming structure was prior to renovation. Plaintiff abutters appealed, arguing that because Brookline's bylaw expressly prohibited FAR increases of more than 25%, defendants also needed to apply for a variance – a more difficult and narrowly-available type of zoning relief.

The "Interpretative Framework"

Beginning with *Fitzsimmonds v. Board of Appeals of Chatham,* 21 Mass. App. Ct. 53 (1985), and culminating with *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008), the

courts have established a three-step framework to analyze a homeowner's request to alter, reconstruct, extend, or change a preexisting, nonconforming, single- or two-family home. First, how does the structure violate current zoning? Second, does the proposed change intensify that non-conformity? If the answer to question two is "no", the proposed change is allowed by right, without the need for relief. Only if the answer to question two is "yes" must a homeowner apply for a finding by the local board that the proposed change will "not be substantially more detrimental than the existing nonconforming use to the neighborhood." *Bellalta,* 481 Mass. at 380-81.[1]

In *Bellalta*, the defendants argued that the new dormer would make the building more consistent with the architecture and dimensions of other buildings on the street. Moreover, the proposed addition was modest – it only increased the habitable space by 675 square feet.[2] Thus, they argued that the new dormer would not be substantially more detrimental to the neighborhood than the existing, nonconforming building. The Board agreed, issued the Section 6 finding, and allowed the project to proceed without a variance. *Bellalta,* 481 Mass. at 383; *see also Gale v. Zoning Board of Appeals of Gloucester,* 80 Mass. App. Ct. 331 (2011).

In upholding the Board's decision *not* to require a variance, the *Bellalta* court explained that since the "second except" clause was adopted in 1975, the Legislature has amended Section 6 on multiple occasions, and never clarified the language – thereby ratifying the courts' interpretative framework. *Bellalta*, 481 Mass. at 383. To require the defendants to *also* apply for a variance would allow the Brookline bylaw to eliminate the special protections otherwise afforded preexisting, non-conforming single- or two-family structures by Section 6. *Id.* at 386 – 87.

***Bellalta's* Significance Amidst a Growing Housing Crisis**

Underlying the language of Section 6, the resulting interpretative framework, and the *Bellalta* decision is a value judgment that *extra* effort should be taken to protect a particular segment of housing stock: single- and two-family homes. The protections afforded preexisting, nonconforming single- and two-family homes would be illusory if owners were obligated to undertake the burden of applying for a Section 6 finding *and* a variance. *Bellalta,* 481 Mass. at 383. The time and costs associated with such a process might mean that homeowners would forego the renovation and maintenance of older, "starter" homes leaving them to be torn down and replaced with new, more expensive housing. *Id.* at 384. *Bellalta's* re-affirmation of the "special protections" afforded to single- and two-family homes is particularly important amid today's housing crisis. Section 6 provides a valuable counterbalance to municipalities seeking to stifle housing production by increasing minimum lot sizes or other dimensional requirements. *Bellalta,* 481 Mass. at 384 – 85. The Section 6 process allows homeowners to make changes to accommodate evolving housing needs, without adding additional demand to an undersupplied housing market. By affirming the streamlined process by which homeowners of preexisting, nonconforming single- and two-family homes can make changes to their homes, the SJC in *Bellalta*, reaffirmed the Legislature's decision to protect single- and two-family homes. Section

6's protections will continue to play an important part in helping to address Massachusetts' growing need for more habitable living space within an increasingly expensive and diminishing pool of available land.

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[1] If the proposed change will create *new* nonconformities, a variance will be required.

[2] In *Bjorklund,* the SJC sanctioned certain types of improvements, without the need for a Section 6 finding, because the small-scale nature of such improvements "could not reasonably be found to increase the nonconforming nature of the structure." 450 Mass. at 362 – 63. Although the *Bellalta* court implied that the defendants' proposed dormer was the type of small-scale improvement, that would not require a Section 6 finding, the defendants had conceded that the proposed increase in FAR from 1.4 to 1.38 would increase the structure's nonconforming nature. *Bellalta,* 481 Mass. at 381 – 82.

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