

Variance not needed to exceed height requirement

Special permit suffices for new nonconformity

By: Eric T. Berkman August 13, 2020



The pre-existing nonconforming detached garage at the heart of 'Comstock'

Homeowners who planned to replace a pre-existing nonconforming detached garage with a new one that exceeded municipal height restrictions did not need a variance to proceed, the Appeals Court has decided.

The existing garage did not comply with setback requirements implemented after it was built and from which it was protected by G.L.c. 40A, §6, as a pre-existing nonconforming structure. The proposed new garage was to be built on the same footprint but with a 15-foot roof to accommodate a standard-sized garage door.

The Gloucester Zoning Board of Appeals approved the project, issuing a special permit to exceed the 12-foot height limit for accessory buildings.

Abutters brought a Chapter 40A appeal, and a Superior Court judge ruled that, under the Appeals Court's 2014 *Deadrick v. Zoning Bd. of Appeals of Chatham* decision, the homeowners did in fact need a variance. *Deadrick* had found that a modification to a pre-existing nonconforming one- or two-family residence resulting in a new nonconformity requires a variance.

But the Appeals Court reversed, clarifying that, under *Deadrick*, a variance is unnecessary when a specific local ordinance or bylaw provision allows for what otherwise would be a new nonconformity.

"In the case before us, §3.2.1 of the [Gloucester] zoning ordinance allows owners ... to exceed [the height requirement] if they secure approval through a separate special

permit process open to the owners of conforming structures and nonconforming structures alike,” Judge James R. Milkey wrote for the court. “Those who secure approval to exceed the twelve-foot height restriction in this manner would not be creating a new nonconformity; they would be proceeding in full compliance with the provisions governing maximum building height. ... [The homeowners] need not seek a variance from the height restriction here.”

The 18-page decision is [Comstock, et al. v. Zoning Board of Appeals of Gloucester, et al., Lawyers Weekly No. 11-111-20](#).

‘Another layer’

Liam T. O’Connell of Gloucester, who represented the plaintiff abutters, questioned the court’s finding that because the city allows properties or structures to be increased above the maximum allowable height by special permit only, that constituted an exemption within the ordinance that did not require a variance.

“Our position is that it’s not an exemption or exception,” O’Connell said, adding that his clients plan to seek further review.

More broadly, O’Connell said the ruling defeats the purpose of Chapter 40A, the state zoning act.

“The entire intent of the zoning act is to eventually get rid of all nonconformities,” he said. “Special permits are just a lot easier to get [than a variance], and this is going to allow properties to increase their nonconforming nature without having to get any variances.”

However, Mark L. Nestor of Gloucester, who represented the defendant homeowners, said allowing for projects like the one proposed by his clients under the less onerous standard for special permits is helpful to homeowners and local authorities alike.



Defense counsel for homeowners

“It gives flexibility to the ZBA, especially where the court is pointing out that you’re dealing with single- and two-family homeowners here, not multiple apartment owners,” he said. “Prior cases have asked how much more onerous regulations you can put on a single-family or two-family without having [owners] give up in frustration.”

Swampscott attorney Krisna M. Basu, who represented the Gloucester ZBA, also a defendant in the case, said the ruling is important not just because it clarifies Deadrick but because many cities and towns, like Gloucester, have limited land and older homes that need improvement.

"This allows municipalities to provide more protection through their bylaws while still being consistent with Chapter 40A," Basu said.

Along similar lines, Northampton real estate attorney Michael Pill said local dimensional requirements cast a "very broad mat" for frontage, area and setbacks, particularly in a state like Massachusetts where many lots were created before zoning existed.



"This [ruling] allows municipalities to provide more protection through their bylaws while still being consistent with Chapter 40A.

— Krisna M. Basu, Swampscott

"These blanket requirements may cause undesirable results when applied to specific cases," Pill said. "So it is essential that local boards have the flexibility to adjust those requirements on a case-by-case basis by special permit."

Comstock fosters that goal, Pill continued.

"The court made it clear they were convinced the new garage was an improvement for the neighborhood," he said. "We're looking for a way to accomplish that without imposing a variance requirement, but instead a case-by-case value judgment based on whose interests are being served and whose are contradicted."

Daniel P. Dain of Boston, who represented the homeowners in Deadrick, said he did not believe the decision broke new ground.

Instead, he said, it reflects current law that even a pre-existing nonconforming property exempted from zoning ordinances or bylaws by G.L.c. 40A, §6, needs a variance if a proposed expansion would introduce a new nonconformity.

What made Deadrick such an indefensible case, he said, was that court's holding that a variance was required even though the new nonconformity at issue was necessitated by Federal Emergency Management Administration floodplain requirements.

"There was no reason to deprive a property owner of the protections of §6 in those circumstances," Dain said.

Boston attorney Jonathan Silverstein, who represents municipalities in land use cases, agreed that Comstock did not break new ground.

"Deadrick was pretty clear," he said. "I think [the Appeals Court] intended its clarification of Deadrick to be that a variance is only required if there isn't a provision of

a local ordinance or bylaw that's more generous and would otherwise allow creation of this nonconformity."

Still, he said, the ruling will be useful to the thousands of pre-existing single- and two-family structures across the state, and local boards and applicants who are forever trying to determine the necessary type of zoning relief to alter or expand a structure. "Defending a variance is an exceedingly high bar," he said. "Applicants know that if someone appeals a variance, there's a very low probability of being able to defend it unless you can challenge the appellant's standing."

Height restriction

Defendants Robert and Pamela Irwin own a residential waterfront parcel in Gloucester with a detached one-car garage that constituted a pre-existing nonconforming structure because it did not comply with setback requirements in a zoning ordinance passed well after it was built.

[Comstock, et al. v. Zoning Board of Appeals of Gloucester, et al., Lawyers Weekly No. 11-111-20 \(18 pages\)](#)

THE ISSUE: Did homeowners who planned to tear down a detached pre-existing nonconforming garage and replace it with a new one that exceeded municipal height restrictions need a variance to proceed?

DECISION: No (Appeals Court)

LAWYERS: Liam T. O'Connell of Farrell, Smith & O'Connell, Gloucester (plaintiffs)
Mark L. Nestor of Gloucester; Krisna M. Basu of Swampscott (defense)

In 2017, the Irwins sought approval to tear down the dilapidated garage and replace it with a new one on the same footprint but with a reoriented roofline and a 15-foot height to accommodate a standard garage door.

The Irwins sought two special permits: one to modify a pre-existing nonconforming structure and another to allow it to exceed the city's 12-foot height limitation for nonconforming accessory buildings.

The project was not opposed at the public hearing. In fact, plaintiff Walter Donovan, a direct abutter, spoke in favor of it, though he apparently did express concern that the reoriented garage might create drainage issues impacting his property.

The ZBA concluded that the garage would result in a significant improvement and granted the special permit.

Tension subsequently developed over the drainage issue and a retaining wall separating the properties, and Donovan appealed the ruling under Chapter 40A.

Superior Court Judge Janice W. Howe then found that, under Deadrick, the Irwins needed a variance to exceed height restrictions.

The Irwins appealed.

Existing exemption

The Appeals Court found that the lower court misapplied Deadrick.

Specifically, the court clarified that, under Deadrick, a new nonconformity resulting from a change to a pre-existing nonconforming structure requires a variance only when the owner is not entitled to an exemption under an existing zoning ordinance or bylaw provision.

Here, Milkey said, §3.2.1 of the Gloucester zoning ordinance allows for accessory structures above the 12-foot height limit when the owners secure approval through the special permit process, as the Irwins had done.

“Properly read, Deadrick supports the Irwins, not Donovan,” Milkey said. “The judge erred in concluding that the Irwins needed a variance for their garage to exceed twelve feet in height.”

Meanwhile, the court took the opportunity to announce in a footnote that it would no longer use the term “grandfathering” to refer to Chapter 40A’s protection of structures that pre-date applicable zoning restrictions, given the term’s connection to “grandfather clause” provisions that disenfranchised Black voters following the Civil War.

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