



Appeals Court Decision Clarifies Variance Requirements for Altering or Expanding Nonconforming Single- and Two-Family Dwellings

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In 2011, the Massachusetts Appeals Court's decision in Gale v. Zoning Board of Appeals of Gloucester, et al., 80 Mass. App. Ct. 331 (2011), concerning alteration or reconstruction of nonconforming structures, raised questions for many municipal officials, board members and attorneys active in land use matters. On June 25, 2014, the Appeals Court answered these questions in Deadrick v. Zoning Board of Appeals of Chatham, 85 Mass. App. Ct. 539 (2014). In Gale, the Appeals Court held that a project that proposed replacement of a small, nonconforming seasonal cottage with a year-round home nearly triple the size could be allowed with a special permit and without a variance. Many observers wondered if the ruling in Gale was intended to apply to so-called "new nonconformities." In Deadrick, the Appeals Court made clear that new nonconformities will indeed require a variance. The Supreme Judicial Court ("SJC") declined to review the Appeals Court's decision. Therefore, Deadrick stands as the "last word" on the subject of whether variances are required to permit new nonconformities.

The so-called "second-exception clause" in the first paragraph of G.L. c.40A, §6 states that no zoning ordinance or bylaw can apply to a pre-existing nonconforming single- or two-family dwelling if the "alteration, reconstruction, extension or structural change . . . does not increase the nonconforming nature of said structure." The statute further provides that "pre-existing non-conforming 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 or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." In Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21 (1987), the SJC clarified that the reference to "nonconforming use" must also include nonconforming structures.

In Gale, the Appeals Court reaffirmed the two-part inquiry required under G.L. c.40A, §6. The building inspector or special permit granting authority (depending on the local bylaw or ordinance) must: (1) identify the particular respect(s) in which the existing structure does not conform to local zoning; and (2) determine whether the proposed alteration or addition would intensify the existing nonconformities or result in new ones. See Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852, 858 (2005), *citing Willard*, 25 Mass. App. Ct. at 21. If it is determined that the project would not intensify the existing nonconformities and would not result in new nonconformities, then the applicant is entitled to the issuance of a building permit (or special permit as local zoning may require) without any additional zoning relief. However, if the answer to the second inquiry is in the affirmative, the permit granting authority must proceed to make a finding as to whether the proposed change, extension or alteration would be substantially more detrimental to the neighborhood than the existing nonconforming structure.

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The Gale decision clearly rules that once there is a finding under G.L. c.40A, §6 that the proposed change, extension or alteration would not be substantially more detrimental to the neighborhood, an applicant cannot be required to take the additional step of obtaining a variance to make the proposed changes. The Appeals Court in Gale, at 337-338, stated:

The two-part framework does not include application of a local by-law or ordinance as an additional step when proceeding to the substantial detriment finding under the second sentence. That finding stands alone as sufficient to proceed with the proposed project, if the permit granting authority deems that no substantial detriment will result from the extension or alteration. This conclusion is in keeping with the special treatment explicitly afforded to single or two-family residential structures under the statute. Thus, we hold that the board's finding in this case was all that was required: no variance under the ordinance was needed to proceed with the proposed reconstruction.

The Deadrick decision clarifies Gale by addressing the question of whether a land owner requires a variance to alter a pre-existing nonconforming single- or two-family residential structure in a manner that will result in a new, additional nonconformity. In Deadrick, the new structure was proposed to maintain the nonconformities of the pre-existing one, but the new home would exceed the Town's height limit, while the original was conforming as to height. The Appeals Court ruled that the logical interpretation of the first and second sentences of G.L. c.40A, §6 requires the statute to be construed "to allow the extension of existing nonconformities upon a showing of no substantial detriment, but to require a variance for the creation of any new nonconformity." Deadrick, at 553.

In reaching this conclusion, the Appeals Court noted the inequity and logical inconsistency that would result from interpreting G.L. c.40A, §6 to allow a landowner with a nonconforming structure to create a new nonconformity with only a "finding" or special permit under G.L. c.40A, §6, but would require a neighboring landowner with a conforming structure to obtain a variance to create an identical nonconformity. Deadrick, at 553. Requiring a variance for the creation of new nonconformities is consistent with the long-standing policy, most recently stated in Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852, 859 (2005), that "the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases."

The result of the Deadrick decision is that no distinction should be drawn between nonconforming single- and two-family dwellings (to which the second-exception clause applies) and other residential and non-residential structures with respect to the creation of new nonconformities. All nonconforming structures, regardless of residential classification, will require a variance when a proposed alteration, reconstruction, extension or structural change will result in the creation of a new nonconformity.

If you have further questions concerning the implications of the Deadrick decision, please contact Attorney Joel Bard or Attorney Katherine Laughman at jbard@k-plaw.com or klaughman@k-plaw.com, respectively, or at 617-556-0007.

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