A History of Interpretation of the Second "Except" Clause in M.G.L. Chapter 40A, Section 6

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It may not be an overstatement to suggest that section 6 of chapter 40A contains more opaque and syntactically inapt diction than any other part of the General Laws. Certainly it is hard to think of another instance in which as many legal issues of broad practical and financial consequence depend upon language whose meaning is not self-evident. And the decisions of the appellate courts forced to struggle with that language are replete with complaints about the difficulty of the exercise.

This article will focus on one of the principal subjects of these complaints: the second "except" clause of the first sentence of chapter 40A, section 6. This provision grants a measure of protection to proposed work on lawfully nonconforming single-family or two-family residential structures. The first sentence it its entirety states:

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *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.*[1]

This language had no antecedent in the former Zoning Act, and first appeared without accompanying explanation in a 1974 version of what became House Document No. 5864.

The appellate courts of the Commonwealth have repeatedly complained about this language; Judge Kaplan referred to it as "difficult and infelicitous."[2] Judge Grant complained that it contains "an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter."[3] In this instance, however, the statute may be a victim of its own reputation, because the Appeals Court has overlooked the plain meaning of the language, as well

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[1] Mass. Gen. Laws ch. 40A, § 6 (emphasis added).
[2] Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55 (Mass. App. Ct. 1985).
[3] Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 20 (Mass. App. Ct. 1987).

as the evident statutory intent of protecting residential landowners, and made the application of the statutory formula needlessly cumbersome and expensive.

There is nothing in the second "except" clause that suggests that it should be applied in any manner differently from other provisions of the Zoning Enabling Act that provide so-called grandfather protection. Provisions such as "plan freezes," and the protection granted to vacant lots in separate ownership, as well as provisions that would appear to call for a far greater application of discretion, such as the exception for educational uses provided by the Dover Amendment,[4] all are applied in the first instance by the building inspector, in connection with his determination under Massachusetts General Laws chapter 40A, section 7, that an application for a building permit complies with zoning.

Nevertheless, in a succession of three cases – Fitzsimonds v. Board of Appeals of Chatham,[5] Willard v. Board of Appeals of Orleans,[6] and Goldhirsh v. McNear,[7] – the Appeals Court has fashioned a body of law that appears to require that the question of application of the second "except" clause be referred to the board of appeals in every instance. The cases together also appear to invite the boards to apply a discretion in the guise of local knowledge – the court in *Fitzsimonds* called it "an intimate understanding of the immediate circumstances, of local conditions, and of the background and purposes of the entire by-law" – in analyzing what ought to be a pure question of law.[8]

Fitzsimonds dealt with the problem in an unusual context. The court addressed the issue, among others, of whether the second "except" clause protected a ten-unit cottage colony on one lot of land, which had been condominiumized into ten units. The issue was further complicated by the fact that the town had adopted a by-law that purported to require each condominium unit to have a lot of 15,000 square feet. The court could reasonably have held that ten residential units on a single lot do not constitute single-family or two-family structures within the meaning of the statute, even if they are detached, because they are multiple family units on a single lot. The court might also have observed that the Chatham by-law governing the subject was entirely based on the legal fallacy that each condominium unit could have its own lot.[9] Rather than address these questions, however, the court punted: it referred application of the test whether the proposal "increased the nonconforming nature" of these structures back to the board of appeals. In so acting, the court specifically rejected the notion that the issue was a pure question of law:

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[4] Massachusetts General Laws chapter 40A, section 3, carrying forward language having its origin in Chapter 325 of the Act of 1950, the so-called Dover Amendment, provides protection for religious and educational uses, but subjects these uses to "reasonable regulations concerning the bulk and height of structures, and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws ch. 40A, § 3. Determining "reasonableness" requires delicate balancing of the needs of the educational or religious user with the interest of the municipality; nevertheless, the courts have held that the building inspector should make this decision in the first instance. *See* Campbell v. City Council of Lynn, 415 Mass. 772 (1993).

[5] Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53 (Mass. App. Ct. 1985).

[6] Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15 (Mass. App. Ct. 1987).

[7] Goldhirsh v. McNear, 32 Mass. App. Ct. 455 (Mass. App. Ct. 1992).

[8] Fitzsimonds, 21 Mass. App. Ct. at 57.

[9] The Condominium Act, Massachusetts General Laws chapter 183A, specifies that the ownership of a "unit" ends at its walls, and that the land outside the unit is common land. Necessarily, to be a condominium, the land must be a single lot on which all the units are located. *See* Mass. Gen. Laws ch. 183A, § 1 ("common land").

> The Plaintiffs urge as a matter of law that the "except" clause applies . . . . We think it would be unwise for the court to decide this question of the application of the "except" clause as if it presented a nice legal point upon a motion to dismiss an action for failure to state a claim. . . . . [A]t least in the first instance, the board's administrative view is valuable and is wanted.[10]

The court remanded the whole matter back to the board of appeals for findings on the subject.

Fitzsimonds did not specifically address the question of whether the board of appeals or the building inspector should make the determination as to the issue of increase of the nonconforming nature of a structure. Willard, however, took Fitzsimonds several steps further. The Appeals Court in Willard addressed an addition to a lawfully constructed single family residence in Orleans that was on an undersize lot, a corner of which was right on a street line.[11] The proposed addition would have increased the portion of the building that was in the twenty-five foot setback requirement.

The court addressed two issues. First, the court considered whether the project was entirely exempted from the by-law because of the protection given to residential lots by the fourth paragraph of chapter 40A, section 6, which, as construed by the courts, protects a lot that has been in separate ownership from any adjacent land prior to enactment of a zoning by-law that made the lot nonconforming. As to this issue, the court held that that protection applies only to vacant land, and that once a structure has been erected, any changes or additions to that structure should be subject to analysis under the second "except" clause. The court then addressed the relationship between the second "except" clause and the clause following it, which authorizes extension, alteration or reconstruction where there is a finding by the permit granting authority[12] or special permit granting authority that a structure is not "substantially more detrimental to the neighborhood." The court made a sound analysis of the substantive standard to follow in applying the second "except" clause, but stumbled on the procedural aspects of the question. As to the former issue, it held that a board of appeals should take the following approach:

> We think the quoted language should be read as requiring a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing non-conformities or result in additional ones.[13]

After this cogent formulation of the issue, however, the court went on to state:

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[10] Fitzsimonds, 21 Mass. App. Ct. at 57.
[11] Willard, 25 Mass. App. Ct. 15.
[12] "Permit granting authority" is a term defined by Massachusetts General Laws chapter 40A, section 1A, and means the board of appeals or a "zoning administrator," an optional statutory position which has rarely been created. *See* Mass. Gen. Laws ch. 40A, § 1.
[13] Willard, 25 Mass. App. Ct. at 21-22.

> If the answer to that question is in the negative, *the applicant will be entitled to the issuance of a special permit under the second "except" clause of G.L. c. 40A, § 6, and any implementing by-law.* Only if the answer to that question is in the affirmative will there be any occasion for consideration of the additional question illuminated in the *Fitzsimonds* case.[14]

One might ask, what special permit? There is no reference to a special permit, or to the "permit granting authority" or the "special permit granting authority," in the second "except" clause. The second "except" clause creates an *exception* to the application of new zoning standards; syntactically and logically, there is no occasion for a special permit granting authority to make any decision as to its pertinence; the zoning by-law is irrelevant because *it does not apply to the work.* A municipality, therefore, cannot require a landowner to get a special permit to do the work. The court in Willard confounded the role of the board of appeals in making a "finding" as to the absence of a "substantially more detrimental effect" under the second sentence of chapter 40A, section 6 – which involves the discretionary application of a broad legal standard to fact, and is expressly entrusted to the special permit granting authority – with the determination of whether alteration, reconstruction, extension or structural change increases the nonconforming nature of the structure. The latter determination makes a zoning change inapplicable as a matter of law, and, under the statutory scheme, should be determined by the zoning officer without intervention.

The inconsistencies between the statutory scheme, and the reasoning of Willard and Fitzsimonds were resolved in Goldhirsh v. McNear,[15] by discarding the statutory scheme. Goldhirsh considered a test, formulated by the Land Court in a series of cases after Willard, known as the "footprint" rule. That rule essentially provided that any modification of a single-family residence within the footprint of the existing structure could be made as of right, and that this decision could be made in the first instance by the building inspector.[16]

Goldhirsh expressly rejected this analysis. Again, the issue came before the Appeals Court on a very factually and legally complex background. The residence in question was a carriage house located three feet from a side lot line, which had not been occupied as a residence before being conveyed as a separate lot in 1952. The structure was then converted into a single-family residence. Although the point is less than clear, it appears that the carriage house did not comply with setback requirements on two sides, but that the conveyance of the carriage house lot did not create an increase in the dimensional nonconformities. However, it also appears that the sideline setback was more stringent for a principal residential use (twenty feet) than it was for an accessory building (five feet). Thus, the conversion of the structure to a residence created a new nonconformity, and the owner had applied for and received a variance authorizing the continued maintenance of the carriage house as a residential structure in connection with a sale of the property.

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[14] *Id.* at 22 (emphasis added).

[15] Goldhirsh v. McNear, 32 Mass. App. Ct. 455 (Mass. App. Ct. 1992).

[16] See MARK BOBROWSKI, HANDBOOK OF MASSACHUSETTS LAND USE AND PLANNING LAW, § 6.6 at 254 – 255, and nn. 5, 10 (1993).

Despite this history, the court concluded that (1) the issuance of a variance in the past did not affect the applicability of the second "except" clause, and that, accordingly, the case should be analyzed under the Fitzsimonds/Willard standard, and (2) that the only nonconformity presented by the application was protrusion into the setback area. Having identified this as the only nonconformity, however, the court refused to accept the landowner's argument that an increase within the footprint could not increase nonconformity. The court stated:

> In *Willard*, an addition which would protrude beyond the existing footprint was found to constitute an increase in the nonconforming nature of the structure. However, we see nothing in *Willard* which supports the proposition that there will never be an increase in the structure's nonconforming nature where the proposed alterations are confined to the existing footprint.
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> *Whether the addition of a second level to the carriage house will intensify the nonconformity is a matter which must be determined by the board in the first instance.* The fact that there will be no enlargement of the foundational footprint is but one factor to be considered in making the necessary determination or findings. See *Fitzsimmonds v. Board of Appeals of Chatham*, 21 Mass. App. Ct. at 57; *Willard v. Board of Appeals of Orleans*, 25 Mass. App. Ct. at 21-23. Cf. *Nichols v. Board of Zoning Appeal of Cambridge*, 26 Mass. App. Ct. 631, 634 (1988).[17]

If the sole nonconformity is that the structure protrudes into the side yard area, and the change proposed would not increase that protrusion, what other "factors" are there to be "considered" in making the determination that the nonconformity will not be increased? And why, on undisputed facts, was this not a pure question of law that the Appeals Court could decide on the record? Nothing in any of the cases sheds any light on what other factors there are to be considered in applying the statutory formula on these undisputed facts.

What these cases finally suggest is that the issue of whether proposed work "increases the nonconforming nature" of a residence is not a simple objective test, but some combined factual/legal determination like "reasonable care" or "substantially more detrimental to the neighborhood" that is thrown to the trier of fact. Following Willard, the board of appeals is to be that trier of fact. Assuming that the board's resolution is not wholly irrational, the cases suggest that its decision should be final.

Where are we now?

Goldhirsh remains the last, most important appellate decision on the application of the second "except" clause. Although there have been legislative attempts to limit its application, these remain unsuccessful to date.[18] What does it mean? In the absence of local provisions that

[17] Goldhirsh, 32 Mass. App. Ct. at 461 (emphasis added) (citations in original).

[18] House Bill 3521 filed in 1998, which was drafted by the Property Council of the Massachusetts Bar Association, and endorsed by its Board of Delegates, would have specified that the building inspector could make the

give more favorable treatment of nonconforming residential structures, the following conclusions seem warranted:

1. First, and most clearly, any alteration, extension, reconstruction, or structural change of a residential structure that has any nonconforming aspects requires a determination from the board of appeals as to whether the nonconforming nature of the structure has been increased. Unless the local by-law or ordinance provides to the contrary, a full hearing, following the procedures mandated by chapter 40A, section 15, including advertising, notice to persons affected, and a twenty day appeal period, is a prerequisite to structural change, even if within the existing footprint. Thus, affected landowners must plan on a process that usually takes eight to twelve weeks.

2. Under Willard, it seems clear that any expansion beyond the footprint into a required setback area is an increase in the nonconforming nature of the structure. Willard also seems to make clear that, in the context of single-family or two-family residential structures, this expansion may be authorized by a finding by the special permit granting authority that the proposed expansion is not substantially more detrimental to the neighborhood, notwithstanding Rockwood v. Snow Inn Corp.,[19] which expressly prohibits such an expansion for a non residential use without a variance.

3. What about structures on lots where the only nonconformity is area and/or frontage? In such cases where the proposed expansion or alteration observes any setback, height and lot coverage requirements, it seems particularly self-evident that the nonconformity will be precisely the same after the expansion as it was before: a permitted use on a lot that is too small. Despite the mushiness of the Goldhirsh formulation, it still seems available to argue persuasively to a board of appeals, and if necessary a reviewing court, that the finding that a proposed expansion does not increase the nonconforming nature of the structure as a matter of law, and that the work must be permitted. It is worth noting that this approach has been ratified in Sudbury where the Town has, in by-law amendments written by Professor Mark Bobrowski, supplemented the statutory language by specifying instances where the expansion does not increase the nonconformity of the structure. The by-law specifies that additions on a lot where frontage and/or area are the only nonconformity are permissible as of right.

Practitioners confronting this issue should carefully check the language of the local by-law or ordinance. Many communities with a substantial amount of housing stock on undersized lots have given relief to their citizens and boards of appeals by enacting more generous grandfather protection that permits expansion without requiring applications to boards of appeals. Besides Sudbury, noted above, in the southeast area of the state, where the author practices, Marion, Mattapoisett and Dartmouth have all adopted by-laws giving the building inspector the power to issue permits in circumstances where Goldhirsh required board of appeals action.

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determination as to whether work "increased the nonconforming nature of a residence," unless the local by-law specified to the contrary. That bill died in Committee, but has recently been refiled as House Bill 1063.

[19] Rockwood v. Snow Inn Corp., 409 Mass. 361 (1991).