COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-575

JAMES K. CAIN

vs.

BOARD OF APPEALS OF WILMINGTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The question before us is whether, under § 5.3.2 of the zoning by-law of the town of Wilmington (town), plaintiff James K. Cain may raze an existing detached garage on his property (locus) and construct a dwelling in its place. The building inspector of the town and the defendant board of appeals (board) said no. On Cain's appeal pursuant to G. L. c. 40A, § 17, a judge in the Land Court, on cross motions for summary judgment, affirmed the decision of the board denying the plaintiff a building permit. In summary, the motion judge ruled that § 5.3.2 of the by-law, which provides that certain preexisting lots may be buildable even though they do not conform to current dimensional requirements, applies only to vacant land. In a thorough written decision, he reasoned that the grandfathering protection afforded the locus was exhausted when, in 1984, a

detached garage was constructed on the undersized lot. We affirm.

Background. We summarize the material facts which are not in dispute. The locus is an 11,000 square foot parcel located in the town. It is referred to in the motion judge's decision as 0 Naples Road.[1] Cain acquired the locus and the adjoining parcel, 9 Kiernan Avenue, on February 28, 2013, from the trustees of the C. M. O'Brien Family Trust. Both the locus and 9 Kiernan Avenue were owned and used by the O'Brien family for several decades before Cain purchased them. In 1984, the O'Brien family applied for a permit to build a two-car garage on the locus. The permit was granted and the garage was constructed as an accessory to the primary residential structure at 9 Kiernan Avenue.

On April 18, 2013, Cain submitted to the town building inspector a request for a zoning determination that the locus qualified as a "non-conforming pre-existing grandfathered buildable lot under By-law Section 5.3.2, and that the owner is entitled to a building permit upon application." The denial of that request by the building inspector and the zoning board of

[1] The locus has no official street address according to town records. It is shown on the tax assessor's records as Parcel 135-C. We refer to it as 0 Naples Road since Cain and the motion judge use that address.

appeals, affirmed by the Land Court judge, ultimately resulted in this appeal.

In 1934, the locus was part of a general residence zone which required a minimum lot size of 10,000 square feet of area and 100 feet of frontage for residential purposes. An amendment to the zoning by-law in 1955 increased the requirements to 22,500 square feet and 125 feet of frontage. The parties agree that the locus was a buildable lot under the 1934 version of the town zoning by-law, but is deficient in lot size and frontage by today's standards.

Discussion. "On a G. L. c. 40A, § 17, appeal, review of the board's decision, while based on de novo fact finding, is nonetheless 'circumscribed. . . . [That decision] cannot be disturbed unless it is based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.'" Davis v. Zoning Bd. of Chatham, 52 Mass. App. Ct. 349, 355 (2001), quoting from Roberts v. Southwestern Bell Mobile Sys., Inc., 429 Mass. 478, 486 (1999). We accept the motion judge's findings of fact unless they are clearly erroneous, and we review the judge's determinations of law, including interpretations of zoning by-laws, de novo. Shirley Wayside Ltd. Partnership v. Board of Appeals of Shirley, 461 Mass. 469, 475 (2012).

"Grandfathering," in this context, is a land use concept that preserves the right to build on property which does not

conform to current zoning requirements. It is governed both by statute, G. L. c. 40A, § 6,[2] and local zoning by-laws. It is well settled that G. L. c. 40A, § 6, "sets the floor for 'grandfather' protection in local zoning bylaws." Rourke v. Rothman, 448 Mass. 190, 191 n.5 (2007). A municipality is free to adopt a grandfathering provision that is more liberal than c. 40A, § 6, provided it does so with clear language. Carabetta v. Board of Appeals of Truro, 73 Mass. App. Ct. 266, 269 (2008).

Section 5 of the town zoning by-law governs dimensional requirements of lots in the town. Section 5.3.2 provides a special exception for preexisting lots. Specifically, this grandfathering provision states, "In the residence districts a dwelling may be erected on a lot shown on a plan recorded prior to November 28, 1955 having less than the required lot area, frontage or width provided said lot[3] conformed with the lot size provisions applicable to the construction of a dwelling on

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[2] In relevant part, the fourth paragraph of G. L. c. 40A, § 6, as appearing in St. 1975, c. 808, § 3, states "Any increase in area, frontage, width, yard, or depth requirements of a zoning ordinance or by-law shall not apply to a lot for single and two-family residential use which at the time of recording or endorsement, whichever occurs sooner was not held in common ownership with any adjoining land, conformed to then existing requirements and had less than the proposed requirement but at least five thousand square feet of area and fifty feet of frontage."

[3] Section 1.3.9 of the zoning by-law defines "lot" as "[a]n area of land, undivided by any street, in one ownership with definitive boundaries ascertainable from a recorded deed or recorded plan meeting the applicable requirements of this Bylaw."

said lot as set forth in the Zoning Bylaws on September 14, 1934." Cain argued in the Land Court that this local, indulgent grandfathering provision, which contains no reference to adjoining lots in common ownership, expressly overrides the common law doctrine of merger codified at G. L. c. 40A, § 6. Cain argued that this is so because, unlike G. L. c. 40A, § 6, the local by-law does not require that the lot be owned independently of neighboring land to be grandfathered. The motion judge agreed, stating "[a]ccordingly, locus (0 Naples Road) was, by clear municipal legislative grace, not required to merge for zoning compliance purposes with 9 Kiernan Avenue. The separate depiction of the lots within locus on the prezoning Land Court plan grandfathered locus under § 5.3.2 even though locus had been improved with a garage accessory to the house on the commonly-owned 9 Kiernan land."

However, as the motion judge further recognized, the case is controlled by Dial Away Co. v. Zoning Bd. of Appeals of Auburn, 41 Mass. App. Ct. 165, 168 (1996), in which this court held that a local zoning by-law similar to the one at issue here, applied only to original construction and not to reconstruction. In Dial Away, the court observed that G. L. c. 40A, § 6, and the Auburn zoning by-law treated nonconforming lots and nonconforming structures differently, with different subsections applying to each. That is also true here, where

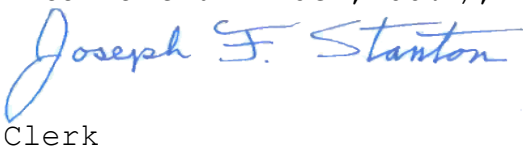
§ 5.3.2 of the zoning by-law applies to "pre-existing lots" and § 6.1 of the by-law applies to "nonconforming uses and structures." While the record does not include a copy of § 6.1, the separate sections evince an intent to treat developed lots differently than vacant lots. We see no reason to stray from our analysis in Dial Away and conclude that § 5.3.2 of the town's zoning by-law, much like the local grandfathering by-law addressed in Dial Away and the grandfathering provision in the fourth paragraph of G. L. c. 40A, § 6, applies only to vacant land and not to land on which a structure already exists. See Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 18 (1987).

Cain's argument that the holding of Dial Away should be limited to cases involving abandoned nonconforming uses or structures is not persuasive. We think the overarching principles of Dial Away, that the grandfathering protection afforded by the fourth paragraph of G. L. c. 40A, § 6 (and of cognate provisions of municipal zoning by-laws), applies only to original construction on vacant lots, and that the provisions of

the zoning by-law are meant more generally to eliminate nonconforming uses, are equally applicable here.

Judgment affirmed.

By the Court (Wolohojian, Carhart & Kinder, JJ.[4]),



Clerk

Entered: March 25, 2016.

[4] The panelists are listed in order of seniority.