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EXEMPT FROM PUBLIC RECORDS ACT DISCLOSURE
PER M.G.L. CH. 4, § 7, CL. TWENTY-SIXTH, PARA. (D).
THIS LETTER IS NOT INTENDED FOR PUBLIC DISSEMINATION.

*WAIVED
FRONT*

By Facsimile and U.S. Mail

Michael J. Fadden
Chairman, Concord Board of Appeals
Michael J. Fadden, P.C.
2020 Lakeview Avenue
Dracut, MA 01826

Re: Zoning Impacts - Voluntary Demolition and Reconstruction of Single-Family Homes

Dear Michael:

You have asked a number of questions related to the voluntary demolition and reconstruction of nonconforming single-family homes in Concord. The answers to your questions are set forth below.

To begin, I would like to clarify the terminology that I use in this letter. I often refer to undersized lots and nonconforming structures. For the purposes of this letter, an *undersized lot* is a lot that does not comply with the dimensional requirements, such as lot area and frontage requirements, that are applicable in the zoning district in which the lot is located. A *nonconforming structure* is, as such term is defined in Section 1.3.25 of the Concord Zoning Bylaw (the "Bylaw"), a lawfully created structure that does not comply with the current dimensional requirements, such as yard, height, lot area and frontage requirements, that are applicable in the zoning district in which the structure is located.

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*May an applicant voluntarily demolish and reconstruct a nonconforming single-family home when the new home that is to be built on the property will be a redesign, expansion and relocation of the original home on the premises by requesting and obtaining a special permit from the Board of Appeals (the "Board")?*¹

According to Massachusetts General Laws Chapter 40A, Section 6, Paragraph 1, and Section 7.1 of the Concord Zoning Bylaw, a nonconforming single-family home may be voluntarily demolished and reconstructed under a special permit from the Board so long as the applicant demonstrates, to the Board's satisfaction, that the reconstructed home will not intensify the nonconforming nature of the structure or result in additional nonconformities. If the Board determines that the reconstruction will intensify the nonconforming nature of the structure or result in additional nonconformities, voluntary demolition and reconstruction will not be permitted unless the applicant demonstrates, to the Board's satisfaction, that the reconstructed home will not be substantially more detrimental than the existing nonconforming structure to the neighborhood and the Board issues a special permit authorizing the reconstruction mentioned above.

As you know, one of the basic purposes of zoning in Massachusetts is to eliminate nonconformities and to foster the creation of lots, uses and structures that comply with zoning. *See Murphy v. Kotlik*, 34 Mass. App. Ct. 410 (1993). Nevertheless, there are many lots, uses and structures in Massachusetts that were lawfully created and that are now nonconforming because they predate zoning altogether or they predate changes in zoning that make them nonconforming. It would be onerous and impractical for property owners to be required to take affirmative steps to eliminate or change such lawful lots, uses or structures every time there is a zoning change that creates a nonconformity. Therefore, as you know, Massachusetts General Laws Chapter 40A, Section 6, establishes a number of situations where such lots, uses and structures are protected from increases in zoning requirements.

Concord has established protections that are similar to the protections set forth in M.G.L. Chapter 40A, Section 6, in Section 7.1 of the Concord Zoning Bylaw. According to Section 7.1, any structure or use that is lawfully in existence at the time of the adoption of the Concord Zoning Bylaw or any amendment thereto may be continued, even if that structure does not comply with the current requirements of the Bylaw. Furthermore, the Concord Bylaw establishes a number of situations where such a nonconforming structure may be changed. For instance, according to Section 7.1.4 of the Concord Bylaw, a single- or two-family residential dwelling may be altered, reconstructed, extended or structurally changed if the proposed alteration, reconstruction, extension or structural change will not increase the nonconforming nature of the structure. And, according to Section 7.1.2 of the Concord Bylaw and the holding in *Goldhirsh v. McNear*, 32 Mass. App. Ct. 455 (1992), even

¹ You have asked about the voluntary demolition and reconstruction of structures on undersized lots and structures on full-sized lots that do not comply, for instance, with yard requirements. A structure may be nonconforming because it violates a structurally-related dimensional requirement, such as building height and yard requirements, or the structure may be nonconforming because it is located on an undersized lot. Either way, the structure will be considered nonconforming under Section 1.3.25 of the Bylaw, and the same rules regarding the alteration, reconstruction, extension or structural change of a nonconforming structure will apply.

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if the proposed alteration, reconstruction, extension or structural change will increase the nonconforming nature of the structure, the alteration, reconstruction, extension or structural change may be permitted if the applicant demonstrates that the alteration, reconstruction, extension or structural change will not be substantially more detrimental or injurious to the neighborhood than the existing nonconforming structure or use.

As a result of the foregoing, a nonconforming single-family home may be reconstructed if an applicant demonstrates, to the Board's satisfaction, that the reconstructed home will not increase an existing nonconformity or create any additional nonconformities with respect to the property on which the home is located.² If this is the case, the reconstruction should be permitted through a special permit from the Board of Appeals. However, if the Board concludes that the proposed alteration, reconstruction, extension or structural change will increase an existing nonconformity or create a new nonconformity, the applicant will have to demonstrate, to the Board's satisfaction, that the reconstructed home will not be substantially more detrimental to the neighborhood than the existing home that is to be demolished. If the applicant is successful in demonstrating this, the Board may issue a special permit for such reconstruction.

I understand that in some of the cases that have recently been brought before the Board, a homeowner will request permission under Sections 7.1.4 and 7.1.2 of the Bylaw to voluntarily demolish the entire home that currently exists on his or her property and to build a new home thereon. You have explained that, often times, the new home is located in a different footprint on the lot and the new home is much larger than the home that it is intended to replace. The question then arises as to whether such voluntary demolition and reconstruction constitutes "reconstruction" under the Bylaw? Unfortunately, this question has not been squarely addressed by the Appeals Court or the Supreme Judicial Court here in Massachusetts. Nevertheless, the Massachusetts Land Court addresses this issue in both *Bjorklund v. Zoning Board of Appeals of the Town of Norwell*, Misc. Case No. 264729 (Land Court September 4, 2003) (Sands, A.), and *Dugas v. Barnstable Zoning Board of Appeals*, Misc. Case No. 246863 (Land Court March 1, 2001) (Green, M.). In these cases, the Land Court indicates that the voluntary demolition of an existing home on a property and the construction of an entirely new and larger home does indeed constitute a "reconstruction" and "extension" of the existing home in light of the commonly understood definitions of

² The determination of what constitutes an increase in the nonconforming nature of a structure can present difficult issues. It seems clear that an existing nonconformity will be increased if a structure is nonconforming with respect to a side yard setback and the reconstructed structure will violate the side yard setback even more than the original home on the lot. However, where an existing structure is nonconforming only because the lot on which the structure is situated does not have the required frontage or area for the zoning district in which the lot is located, it is unclear whether the reconstruction of the existing home on the lot in a manner that would increase the size of the home without violating any of the applicable dimensional requirements (other than the lack of frontage mentioned above) would constitute an increase in the nonconforming nature of the structure because of the undersized lot. Even though the Massachusetts Land Court mentions the issue in *Bjorklund v. Zoning Board of Appeals of the Town of Norwell*, Misc. Case No. 264729 (Land Court September 4, 2003) (Sands, A.), and *Dugas v. Barnstable Zoning Board of Appeals*, Misc. Case No. 246863 (Land Court March 1, 2001) (Green, M.), and even though the Massachusetts Land Court suggests such a reconstruction would appear to increase the nonconformity of the undersized lot in *Bjorklund*, Massachusetts courts have failed to directly address this issue.

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reconstruction and extension and in light of the purpose and intent of Massachusetts General Laws Chapter 40A, Section 6, Paragraph 1. In fact, the court in *Bjorklund* holds that any combination of reconstruction, extension, alteration or structural change to a single-family home will be permitted as provided in Massachusetts General Laws Chapter 40A, Section 6, Paragraph 1.

May an applicant create two nonconforming lots out of one pre-existing nonconforming lot in keeping with Massachusetts General Laws Chapter 41, Sections 81L and 81P? If so, can the applicant voluntarily demolish the nonconforming building on each resulting lot and reconstruct those buildings by requesting and obtaining a special permit from the Board of Appeals?

According to Massachusetts General Laws Chapter 41, Section 81L, certain divisions of property do not constitute subdivisions that are subject to definitive subdivision review. As you know, these divisions of land are often called "Approval Not Required" divisions. According to Massachusetts General Laws Chapter 41, Section 81L: "The division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing shall not constitute a subdivision." Section 3 of the Subdivision Rules and Regulations of the Town of Concord references this exception in the Massachusetts Subdivision Control Law. As a result, when an applicant proposes to divide his or her land as described above, the plan for that division must be endorsed by the Concord Planning Board in keeping with the expedited "Approval Not Required" process described in Section 3 of the Subdivision Rules and Regulations of the Town of Concord and Massachusetts General Laws Chapter 41, Section 81P, without definitive subdivision review.

Please note that Massachusetts courts have literally applied the aforementioned language of Massachusetts General Laws Chapter 41, Section 81L, so long as the plan that is submitted to a planning board shows a division of land on which two or more buildings were standing when the subdivision control law went into effect in the municipality in which the land lies into two or more separate lots on each of which one of such buildings remains standing. See *Citgo Petroleum Corporation v. Planning Board of Braintree*, 24 Mass. App. Ct. 425 (1987). In fact, Massachusetts courts have held that the language of Chapter 41, Section 81L, should be literally enforced and interpreted even when the lots that result from the division will be nonconforming. See *Malcolm v. Inhabitants of Town of Reading*, Misc. Case No. 223434 (Land Court January 30, 1997) (Kilborn, P.); *Huff v. Planning Board of the Town of Duxbury*, Misc. Case No. 127604 (Land Court May 7, 1991) (Sullivan, M.). Thus, as long as the requirements of Massachusetts General Laws Chapter 41, Sections 81L and 81P, are satisfied, the Planning Board of the Town of Concord must allow such a division of land.

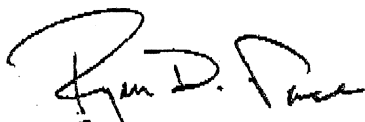
Despite the foregoing, applicants should understand that an endorsement of a plan for the division of land under Massachusetts General Laws Chapter 41, Sections 81L and 81P, does not mean that the resulting lots are buildable under the Bylaw. See *Citgo*, 24 Mass. App. Ct. at 427; *Taylor v. Pembroke Planning Board*, Misc. Case No. 126703 (Land Court February 7, 1990). In order for the resulting lots to be buildable, they must be entitled to one of the grandfathering protections set forth

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in the Bylaw.³ For instance, if the resulting lots contain lawfully existing single-family dwellings, those dwellings will be protected under Section 7.1.1 of the Bylaw. In such a case, the property owner will be entitled to alter, reconstruct, extend or change such dwellings in accordance with the provisions concerning the alteration of nonconforming structures that are set forth above.

I hope that this letter is helpful to you and to the Board of Appeals as you address voluntary demolition issues in Concord. As always, please feel free to call should you have any questions or if you would like any further explanation of the concepts discussed above.

Sincerely,



Ryan D. Pace

cc: Christopher Whelan (by U.S. Mail)
William L. Lahey, Esq.
Thomas G. Schnorr, Esq.

³ As we have discussed, there is some question about whether adjoining undersized lots on which existing structures are voluntarily demolished will be entitled to the grandfathering protections mentioned above or whether, once the existing structures are demolished, the remaining vacant lots will have to be merged; in particular, I have not been able to identify a case in Massachusetts where a court directly addresses this issue in relation to a special permit for the alteration, reconstruction, extension or structural change of a nonconforming structure.