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**TO:** Robert Watchilla, Town of Ware Director of Planning & Community Development  
Lewis Iadarola, Chair, Town of Ware Zoning Board of Appeals

**FROM:** Jonathan G. Murray, Esq.

**RE:** Zoning Board of Appeals Questions Regarding Pre-Existing Non-Conforming  
Uses and Structures

**DATE:** May 31, 2022

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You have asked a series of questions regarding the application of the Town’s Zoning Bylaws to pre-existing non-conforming uses and structures (i.e., “grandfathering”).<sup>1</sup> Please be advised that the following information is intended for general educational purposes. The application of the Zoning Act to pre-existing non-conforming uses and structures often involves factual and legal analysis based on the history and specifics of a particular use or structure. With that said, I will answer each question in turn.

## 1. What is Grandfathering?

A preexisting nonconformity is a use or structure that lawfully existed prior to the enactment of a zoning restriction that otherwise would prohibit the use or structure. See generally G. L. c. 40A, § 6; Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317, 319 (1991). Preexisting nonconformities may become protected or “grandfathered” when zoning laws change, as a result of the long-standing recognition that “rights already acquired by existing use or construction of buildings in general ought not to be interfered with.” See Opinion of the Justices, 234 Mass. 597, 606 (1920).

Preexisting nonconforming lots and structures throughout the Commonwealth may be protected under the Zoning Act, G. L. c. 40A, § 6. General Laws c. 40A, § 6, provides, in relevant part:

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<sup>1</sup> Please be advised that in 2020, the Massachusetts Appeals Court made the decision to cease using the term “grandfathering” due to its racist origins. See Comstock v. Zoning Bd. of Appeals of Gloucester, 98 Mass. App. Ct. 168, 178 n. 11 (2020) (“We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase ‘grandfather clause’ originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867.”). Therefore, I will utilize the phrase “pre-existing non-conforming protections” in place of “grandfathering” whenever possible.

Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun . . . but shall apply to any change or substantial extension of such use . . . to any reconstruction, extension or structural change of such structure and . . . 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. Pre-existing nonconforming 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 [structure or] use to the neighborhood

In summary, if a use or structure lawfully exists before a zoning change becomes applicable, such use or structure:

- Automatically acquires the status of a nonconforming use or structure;
- Need not comply with the requirements of the zoning change; and
- May remain in existence as a lawful nonconforming use or structure.

A nonconforming use or structure is thus exempted from compliance with subsequently enacted zoning laws, and is “grandfathered.” The right to continue a nonconforming use or structure is not personal to the owner or occupant on the date when a zoning change first becomes applicable. Rather, the protections afforded by Section 6 of the Zoning Act relate to the nonconforming use or structure itself. Revere v. Rowe Contracting Co., 362 Mass. 884, 885 (1972).

## 2. What can be grandfathered?

A use or structure that lawfully began or lawfully existed before the zoning change with which the use or structure does not comply became applicable.

Conversely, a use or structure that violated the zoning laws at the time of its establishment and was not rendered lawful by intervening zoning changes will not receive any of the protections afforded by Section 6, and will continue to be an illegal, noncomplying use or structure. See, e.g., Bruno v. Bd. of Appeals of Wrentham, 62 Mass. App. Ct. 527 (2004); Hall v. Zoning Bd. of Appeals of Edgartown, 28 Mass. App. Ct. 249, 258-59 (1990).

## 3. How does Grandfathering effect the implementation of Wares by laws?

If a use or structure lawfully exists before a zoning change becomes applicable, such use or structure need not comply with the requirements of the zoning change, and may remain in existence as a lawful nonconforming use or structure.

Any changes, alterations, or extensions of a pre-existing non-conforming use or structure would, instead, be considered under the relevant provisions of Section 1.9 (“Nonconformities”) of the Zoning Bylaws, and G.L. c. 40A, § 6.

**4. Can home rule in each town allow defining grandfathering?**

Section 6 of the Zoning Act does not address whether a municipality may adopt zoning laws defining nonconforming uses and structures differently than the Zoning Act. With that said, case law is clear that zoning laws that define a nonconforming use or structure more narrowly than does Section 6, or afford them less protection than the Zoning Act, would be void.

However, a municipality may treat the owners of nonconforming lots and structures more favorably than under Section 6 of Chapter 40A. See, e.g., Roma, III Ltd. v. Battistelli, No. 000085, 2016 WL 6673441 (Mass. Land Ct. Nov. 14, 2016) (protection for changes and alterations to nonconforming structures that create new nonconformities); Desalvo v. Chatis, Land Court Misc. Case No. 149615 (1991) (protection for nonconforming lots); Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass. 372 (2019).

**5. Can non-conforming uses be grandfathered?**

Yes, so long as the use conformed to the zoning laws at the time the use first commenced and left unchanged, despite all subsequent zoning changes.

**6. Can preexisting dimensional nonconformities be grandfathered?**

Yes, so long as the use, structure, or lot conformed to the zoning laws at the time the use first commenced, or the structure was first constructed, and is left unchanged, despite all subsequent zoning changes.

**7. How are grandfathering appeals handled?**

It is unclear what is meant by “grandfathering appeals.” This could refer to a determination as to whether a use or structure is entitled to pre-existing non-conforming protection. It could refer to whether someone has abandoned a pre-existing non-conforming use

or structure, and is therefore no longer entitled to protection. It also could refer to a request to change or extend a pre-existing non-conforming use or structure pursuant to G.L. c. 40A, § 6 (“Section 6 Finding”). If there is a particular type of “appeal” the Board is referring to, I am happy to supplement this answer accordingly.

**8. Are ZBA boards currently limited to Size, Shape and Topography issues for appeals?**

No. “Size, shape, and topography” generally refers to the statutory criteria necessary to grant a petition for a variance. See G.L. c. 40A, § 10. However, pursuant to G.L. c. 40A, § 14:

A board of appeals shall have the following powers:--

- (1) To hear and decide appeals in accordance with section eight.
- (2) To hear and decide applications for special permits upon which the board is empowered to act under said ordinance or by-laws.
- (3) To hear and decide petitions for variances as set forth in section ten.
- (4) To hear and decide appeals from decisions of a zoning administrator, if any, in accordance with section thirteen and this section.

In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.

Therefore, the ZBA is not limited to “size, shape and topography” appeals. The ZBA is responsible for hearing the appeals of any “person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative official” under the Zoning Act. See G.L. c. 40A, § 8. The ZBA is also responsible to hear and decide applications for special permit, to the extent it is the special permit granting authority. G.L. c. 40A, § 9.

**9. In 2017 the house ways and means passed a bill allowing nonconformities to exist if not acted upon by the town's enforcement officer within a 6- or 10-year period. How is that period verified and how is it implemented by the homeowner and the town?**

The “6- or 10-year period” refers to the statute of limitations under G.L. c. 40A, § 7, which states in relevant part:

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If real property has been improved and used in accordance with the terms of the original building permit, no criminal or civil action intended to compel the abandonment, limitation or modification of the use allowed by the permit or the removal, alteration or relocation of a structure erected in reliance upon the permit by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 6 years of the commencement of the alleged violation. No criminal or civil action intended to compel the removal, alteration, or relocation of a structure by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter or the conditions of a variance or special permit shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 10 years of the commencement of the alleged violation.

If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located or, in the case of registered land, has been filed in the registry district in which the land is located within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures.

The 6- or 10-year period is determined by reviewing the Town's records (for example, building permits, zoning permits, certificate of occupancy, Title V permits). The existence or use of a structure may also be determined by outside evidence (for example, testimony, deeds, photographs, plans).

This provision need not be "implemented by the Town." Instead, this provision limits the ability of the Town to initiate zoning enforcement action against long-established uses and structures. With that said, expiration of the statute of limitations under G.L. c. 40A, § 7, does not render an unlawful structure legally nonconforming; it merely protects the structure against

enforcement action. Patenaude v. Zoning Bd. of Appeals of Dracut, 82 Mass. App. Ct. 914 (2012) (rescript); see also DeFronzo v. Zoning Bd. of Appeals of Salisbury, 99 Mass. App. Ct. 1103 (2020) (unpublished decision; text available at 2020 WL 7383134).

**10. Can Licensing boards issue licenses in zones where they are not allowed?**

Generally, yes. Licensing and permit granting authorities operate under different regulatory schemes. The grant of a license to an individual, however, does not negate their responsibility to comply with the Town’s Zoning Bylaws. For example, the grant of a liquor license to a restaurant does not permit the restaurant to operate in a zoning district that prohibits restaurants.

Notwithstanding any other permit or license granted, it is the responsibility of the Building Inspector, as Zoning Enforcement Officer under Section 7.5.1 of the Zoning Bylaws, to enforce the Town’s zoning requirements.

**11. What are the laws for allowing a subdivision on a non-conforming lot?**

Subdivisions are governed by the Subdivision Control Law, G.L. c. 41, §§ 81K – 81GG. It is important to distinguish that zoning requirements and the Subdivision Control Law govern different aspects of land use.

Endorsement of a subdivision plan does not establish zoning compliance. In fact, case law is clear that a Planning Board may not withhold approval because the lots on a plan do not conform to zoning requirements. See, e.g., Duhaime v. Planning Bd. of Medway, 12 Mass. App. Ct. 907, 908 (1981) (undersized lot); Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 604 (1980) (emphasizing that the board is prohibited from considering compliance with applicable zoning laws and adequate provision of municipal services); Gattozzi v. Director of Inspection Servs. of Melrose, 6 Mass. App. Ct. 889, 890 (1978); Fairbairn v. Planning Bd. of Barnstable, 5 Mass. App. Ct. 171 (1977).

Therefore, there may be circumstances in which the Planning Board may be required to endorse a subdivision plan containing non-conforming lots. However, such an endorsement does not establish or determine any aspect of zoning compliance.