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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

CHARLES **◀KIMMETT, &▶** another [FN1] vs. TOWN OF TOLLAND & others. [FN2]

10-P-1511

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 2008, the plaintiffs filed an application with the defendant zoning board of appeals (board) of the town of Tolland (town) for variances from the lot area and frontage requirements of the town zoning by-law to qualify the locus as a buildable lot. The board denied the variances, and the plaintiffs appealed to the Land Court seeking, in addition to the variance, an interpretation of the by-law, pursuant to G. L. c. 240, § 14A. After a hearing on cross motions for summary judgment, a Land Court judge upheld the decision of the board denying the plaintiffs' application for variances, and the plaintiffs timely appealed. At issue in this appeal is whether an amendment of the town's zoning by-law, subsequent to the plaintiffs purchase of the locus, rendered the lot nonbuildable. We affirm.

Background. The relevant facts are not in dispute. Prior to 1970, the locus and adjoining lots were owned separately. In 1973 and 1974, Raymond and Beverly Usher purchased two lots adjoining the locus and, in 1976, purchased the locus itself. The locus, which the plaintiffs purchased from the Ushers in 2004, has 151.64 feet of frontage and an area of approximately 19,600 square feet (.45 acres).

The town's first by-law, adopted in 1970, included no dimensional or frontage requirements. A 1978 amendment required 200 feet of frontage and 87,120 square feet (two acres) of lot size. However, section VII A.1 of the 1978 amendment governing nonconforming uses provided that '[t]he lawful use of any structure or land existing at the time of the enactment or subsequent amendment of this By-Law may be continued, although such use does not conform with the provisions of the By-Law.' Specifically, section VII A.6 provided that,

'On a lot of less than the required area which have been recorded by plan or deed or assessed as a separate [sic] parcel before the date of adoption of this By-law (December 7, 1970), the lot area and width requirements need not apply, unless, this parcel prior to the time of adoption of the By-Law adjoined other land of the same owner'

The by-law was subsequently amended in 2005. The 2005 amendment defined a nonconforming lot as '[a]ny lot, use, structure or building not meeting the requirements of this Bylaw, but in existence prior to the date of adoption of this Bylaw or amendments thereto.' (Section IV.) Section VII A.1 of the amendment revoked section VII A.6 of the 1978 amendment, but provided that, '[t]he lawful use of any structure or land existing at the time of the enactment or subsequent amendment of this Bylaw may be continued subject to Massachusetts General Law Chapter 40A, although such use does not conform to the provision of this Bylaw.'

Discussion. General Law c. 40A, § 6, grants a perpetual exemption 'from increased zoning restrictions provided certain conditions are met.' *Johnson v. Board of Appeals of Andover*, 78 Mass. App. Ct. 292, 296 (2010), quoting from *Adamowicz v. Ipswich*, 395 Mass. 757, 758 (1985). 'These conditions are that, at the time of recording or endorsement, [FN3] the lot (1) had at least 5,000 square feet and fifty feet of frontage, (2) was not held in common ownership with any adjoining land, and (3) conformed to then existing requirements.' *Johnson v. Board of Appeals of Andover, supra*. For lots that do not meet such conditions, the effect of the statute is that 'adjacent lots in common ownership will normally be treated as a single lot for zoning purposes so as to minimize nonconformities with the dimensional requirements of the zoning by-law or ordinance.' *Seltzer v. Board of Appeals of Orleans*, 24 Mass. App. Ct. 521, 522 (1987).

The Land Court judge concluded, and we agree, that the 1978 amendment was intended to afford greater protection to nonconforming lots than G. L. c. 40A, § 6, [FN4] and, because the locus was in existence at the time of the original by-law (1970) and held in separate ownership, it received protection from the merger doctrine under the 1978 amendment. Thus, the lot was buildable when the plaintiffs purchased it.

The current status of the locus thus turns on the effect of the 2005 by-law. The Land Court judge concluded that the 2005 amendment effectively revoked the 1978 amendment's protection from merger previously afforded to pre-1970 lots, and allows nonconforming lots only if they comply with the requirements of G. L. c. 40A, § 6. The plaintiffs, relying on *Rourke v. Rothman*, 400 Mass. 190, 192 (2007) (*Rourke*), and *Adamowicz v. Ipswich*, 395 Mass. at 762, argue that the locus was buildable when they purchased it and because the locus was protected immediately prior to the adoption of the 2005 amendment, it is protected in perpetuity. We are not persuaded.

In *Rourke*, the Supreme Judicial Court concluded that the locus in question was buildable under the 'grandfather' provisions of G. L. c. 40A, § 6, because, prior to the zoning change at issue in that case, the locus met all the requirements of § 6. See *Rourke*, 448 Mass. at 198 (concluding the locus 'conformed to then existing requirements' and was buildable, where there was no dispute that it met the other two conditions of § 6). Here, the locus was in common ownership with adjacent property in 1976 and therefore did not qualify for the 'grandfather' protection of § 6. Without the protection of the 1978 amendment, the locus would have merged with an adjacent lot once acquired by the Ushers in 1976. As the judge correctly concluded, the locus was entirely dependent on the 1978 amendment for protection from the frontage and area requirements and, in the absence of such protection, is a nonbuildable lot. In essence, the locus became unbuildable because of the town's increase in the lot area and frontage requirements as well as the repeal of a local exemption.

Judgment affirmed.

By the Court (Berry, Mills & Graham, JJ.),

Entered: July 26, 2011.

FN1. Suzanne Kimmett.

FN2. Zoning board of appeals of the Town of Tolland.

FN3. The time of recording or endorsement is the time of the most recent instrument of record prior to the effective date of the zoning change. *Rourke v. Rothman*, 448 Mass. 190, 192 (2007). *Adamowicz v. Ipswich, supra* at 762 ('[T]he status of the lot immediately prior to the zoning change is controlling').

FN4. See *Carabetta v. Board of Appeals of Truro*, 73 Mass. App. Ct. 266, 269 (2008) ('While a town may choose to adopt a more liberal grandfather provision, it must do so with clear language').

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