

Appeals Court of Massachusetts.  
Alvin N. KIBBE, Jr.,  
v.  
TOWN OF DOUGLAS.  
No. 06-P-1455.  
June 21, 2007.

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

\*1 This is an appeal from a summary judgment dismissing a complaint brought by Alvin Kibbe against the town of Douglas (town). Kibbe brought the complaint under the Land Court's jurisdictional statute, [G.L. c. 240, § 14A](#),<sup>FN1</sup> as a landowner seeking a declaration that the town's zoning bylaws did not bar Kibbe from building a single-family dwelling on a lot located in the town at 16 Cemetery Street (the locus). Kibbe asserted in the complaint that, although the locus did not conform to the minimum area and frontage requirements in the town zoning bylaws, the locus was grandfathered under the exemption for vacant lots set forth in [G.L. c. 40A, § 6, par 4](#).<sup>FN2</sup>

[FN1. General Laws c. 240, § 14A](#), as appearing in St.1975, c. 808, § 5, provides in relevant part as follows:

“The owner of a freehold estate in possession in land may bring a petition in the land court against a city or town ... for determination of the extent to which any ... by-law ... affects a proposed use, enjoyment, improvement or development of such land.”

[FN2. General Laws c. 40A, § 6, par. 4](#), inserted by St.1975, c. 808, § 3, provides in relevant part as follows:

“Any increase in area [or] frontage ... requirements of a zoning ... 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.”

A judge of the Land Court entered summary judgment against Kibbe, holding that [G.L. c. 40A, § 6, par. 4](#), *did* not apply because the locus was not vacant at the time the town's zoning bylaws were adopted, in that the locus at that time contained a trailer which had been used as a primary residence by a predecessor in title to Kibbe. We affirm.

1. *Factual background.* We take the following undisputed facts from the summary judgment record. From 1961 until 1969, George Patterson lived in a trailer situated on the locus. The trailer was connected to electricity, telephone, and municipal water services. Patterson died in 1969. The trailer remained on the locus after Patterson's death. In 1970, the town first adopted zoning bylaws. The trailer was still on the locus when the zoning bylaws were adopted. The locus, which contained 5,055 square feet of area and 65 feet of frontage, did not conform to the new zoning bylaws which required 20,000 square feet of

area and 100 feet of frontage.

In or about 1987, Richard Roy, then the owner of the locus, removed the trailer from the locus. Roy sought a zoning variance from the town's zoning board of appeals (ZBA) in 2000 to construct a single family dwelling on the locus. The ZBA denied Roy's application that year. In 2001, Roy conveyed the locus to Kibbe. R.A. 17.

2. *Procedural background regarding claim preclusion.* Kibbe filed two actions seeking a permit to build on the locus. Because the town asserts a defense of claim preclusion, we set forth the procedural history of the two actions. In February, 2003, Kibbe requested a permit from the town building commissioner to build a single-family dwelling on the locus. Kibbe's request was denied by the building commissioner on February 26, 2003, based on a finding that “the parcel in question has not always been a vacant lot.” An appeal to the ZBA for a variance was denied.

On May 23, 2003, Kibbe appealed the ZBA denial to the Superior Court (the Superior Court action). A judge of that court dismissed the appeal pursuant to [G.L. c. 40A, § 17](#), because Kibbe had not filed a notice of appeal with the town clerk within twenty days of the ZBA decision. R.A. 155-160. “Receipt of notice by a city clerk is a prerequisite ‘for an action under [G.L. c. 40A, § 17](#)....’” *Bingham v. City Council of Fitchburg*, 52 *Mass.App.Ct.* 566, 568 (2001), quoting from *Konover Mgmt. Corp. v. Planning Bd. of Auburn*, 32 *Mass.App.Ct.* 319, 322-323 (1992).

\*2 On November 29, 2005, one and one-half years after the dismissal of the Superior Court action, Kibbe filed the complaint which is the subject of this appeal with the Land Court pursuant to [G.L. c. 240, § 14A](#) (the Land Court action). As previously noted, Kibbe sought a declaration that the locus was exempt from the town's zoning bylaws, contending that it was grandfathered under [G.L. c. 40A, § 6, par 4](#). See note 2, *supra*.

The town asserts that this appeal should be resolved under the doctrine of claim preclusion because the dismissal of the Superior Court action should have prevented relitigation of Kibbe's claims in the Land Court action. “Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action.” *Blanchette v. School Comm. of Westwood*, 427 *Mass.* 176, 179 n. 3 (1998). However, we determine that claim preclusion does not apply here because the merits of the Land Court action were not adjudicated in the Superior Court action. Instead, the Superior Court action was dismissed on the basis of a jurisdictional defect under [G.L. c. 40A, § 17](#), because of Kibbe's failure to file a timely notice of appeal with the town clerk. Therefore, the dismissal of the Superior Court action for lack of jurisdiction was not a judgment that had preclusive effect.

3. *General Laws c. 40A, § 6, par. 4.* “There is nothing on the face of [[G.L. c. 40A, § 6, par. 4](#)] to suggest that it was intended to apply to anything but vacant land.” *Willard v. Board of Appeals of Orleans*, 25 *Mass.App.Ct.* 15, 18 (1987). “The immediate statutory ancestor of the fourth paragraph (G.L. c. 40A, § 5A, as in effect prior to St.1975, c. 808,

§ 3) applied to original construction on vacant lots but not to alterations of existing structures which had become nonconforming....” *Ibid.* Thus, the fourth paragraph “does not apply to ‘reconstruction’ of a single or two-family residential structure. Such reconstruction ... is explicitly governed by the second ‘except’ clause of [\[G.L. c. 40A, § 6, par. 1\]](#).” *Dial Away Co. v. Zoning Bd. of Appeals of Auburn*, 41 Mass.App.Ct. 165, 168 (1996).

Contrary to Kibbe's arguments, the locus was not vacant in 1970 when the town adopted the zoning bylaws, because the trailer-which fell within the definition of a mobile home as set forth in the town zoning bylaws-remained on the locus. Specifically, under the town zoning bylaws, a mobile home was defined as a “transportable, single family dwelling unit suitable for year-round occupancy and containing the same water supply, waste disposal, and electrical conveniences as immobile housing.” R.A. 95-96.

Kibbe suggests that the trailer should not be considered a mobile home under this definition because, when the zoning bylaws were adopted in 1970, the trailer was not being used as a residence following Patterson's death in 1969. However, nothing in the bylaws' definition of a mobile home requires that the mobile home be currently occupied. Simply put, the locus cannot be considered vacant at the time the zoning bylaws were adopted in 1970 because the trailer remained on the locus at that time.

\*3 Alternatively, Kibbe argues that the locus should be considered vacant beginning from the time he purchased it in 2001 because Roy removed the trailer in 1987. However, Kibbe's argument is inconsistent with [G.L. c. 40A, § 6](#). The statute exempts certain lots, uses, or structures that exist before zoning bylaws are changed. Therefore, the event that triggers the grandfathering protections is a change in zoning bylaws, *not* conveyance of a given property. See *Dial Away Co.*, 41 Mass.App.Ct. at 169 n. 7. Further, accepting Kibbe's argument would create a perpetual basis for grandfathering protection for nonconforming dwellings constructed on a given lot. Anyone attempting to build a new single-family dwelling on a nonconforming lot could claim grandfathering if a previous owner of the property removed any existing dwellings on the lot before conveying it to the prospective builder. For these reasons, [G.L. c. 40A, § 6, par. 4](#), does not exempt the locus from the town's zoning bylaws. <sup>FN3</sup>

[FN3](#). Existing nonconforming dwellings may be rebuilt pursuant to [G.L. c. 40A, § 6, par. 1](#), provided the reconstruction does not increase the zoning nonconformity. Construction of a house on an undersized lot where a trailer once stood will increase zoning nonconformity. Therefore, Kibbe's proposed single-family dwelling is also not grandfathered under [G.L. c. 40A, § 6, par. 1](#).

4. *Local zoning bylaws.* Kibbe also argues that section 1.03 of the current town zoning bylaws allows his proposed construction because section 1.03 exempts lots in existence at the time the town zoning bylaws were adopted in 1970. <sup>FN4</sup> Section 1.03, however, like [G.L. c. 40A, § 6, par. 4](#), applies only to vacant lots, and for the reasons previously stated, the locus was not vacant when the town zoning bylaws were adopted in 1970. <sup>FN5</sup>

[FN4](#). Section 1.03 of the town zoning bylaws provides in relevant part as follows:

“A lot or parcel of land having an area or frontage of lesser amount than is required ... may be used at any time in the future provided it was recorded on a plan or described in a deed duly recorded or registered at the time of the adoption of the [b]ylaws (1970), or is otherwise exempted under the provisions of Chapter 40A of the General Laws.”

[FN5](#). Kibbe also relies on [Rourke v. Rothman, 448 Mass. 190 \(2007\)](#). *Rourke* held that a local grandfathering bylaw once applicable to the property was sufficient to trigger the protections of [G.L. c. 40A, § 6, par. 4](#), as the grandfathering bylaw allowed the property to conform to “then existing requirements.” Here, however, unlike the lot in *Rourke*, the locus was never eligible for protection under the local grandfathering bylaws, because the locus was not vacant at the time the town zoning bylaws were adopted, as section 1.03 requires.

We note that the precursor to section 1.03, Douglas zoning bylaws section I.B., only encompassed nonconforming lots, while nonconforming uses and structures were addressed elsewhere. R.A. 94. In this respect, section 1.03 is similar to [G.L. c. 40A, § 6, par. 4](#), which likewise only includes lots, and not uses or structures. See note 2, *supra*. Hence, the analysis of [G.L. c. 40A, § 6, par. 4](#), in the *Dial Away Co.* case (discussed *supra*) also has applicability to section 1.03 of the town zoning bylaws and further establishes that there is no separate grandfathering for the locus under the local bylaws.

*Judgment affirmed.*

Mass.App.Ct.,2007.

Kibbe v. Town of Douglas

Slip Copy, 2007 WL 1791700 (Table) (Mass.App.Ct.)

Unpublished Disposition