

## NJ Appellate Court Sets Land Use Law Precedent in *Motley v. Borough of Seaside Park*

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In the aftermath of Superstorm Sandy, a widespread and recurrent issue is the future status of grandfathered non-conforming uses and structures that suffered extensive damage as a result of the storm. It is ironic, then, that a recent New Jersey Appellate Division decision addressed these very issues in *Motley v. Borough of Seaside Park* (No. A-3214-11), a case which is based upon a voluntary partial demolition of a residence in Seaside Park prior to Sandy.

The March 4, 2013 opinion focuses on the meaning of the non-conforming uses and structures section of the Municipal Land Use Law, N.J.S.A. 40:55A-68, which state that "...any such structure may be restored or repaired in the event of partial destruction thereof..." Structure refers to a non-conforming structure, a structure which encompasses a non-conforming use, or both. A grandfathered non-conforming structure is one with origin prior to adoption of existing zoning ordinances, such as not meeting bulk requirements including set backs or heights. Structure also could refer to a structure located on a non-conforming lot; as an example, a structure on a lot that has insufficient area, width or depth.

The *Motley* case deals with a grandfathered structure that was both a non-conforming use (a second residence on a lot that only permitted one residence) as well as a non-conforming structure (one that did not meet bulk requirements). In the course of repairs, pursuant to issued zoning and building permits, it became apparent to the property owner that the structure, for the most part, was so badly damaged internally that it could not be repaired, but rather had to be replaced. The structure was removed to the foundation, including portions of the flooring and a foundation plate. *Motley's* architect estimated that only 15% percent of the existing structure remained intact after the removal.

The Borough of Seaside Heights' code enforcement officer determined that the removal and demolition exceeded the "partial destruction" threshold of the statute and issued a Stop Work Order. The Order was ultimately upheld by the Court, which stated that "In essence, the test of whether a non-conforming use or structure may be restored or repaired is whether there has been some quantity of destruction that surpasses mere partial destruction."

As a result of this precedential opinion, the determination of what may be "restored or repaired" after a casualty will become more restrictive, and it can be anticipated that some of the more "inventive" schemes to invoke grandfathering protection, such as leaving one wall or a chimney of a structure standing, will no longer withstand scrutiny. This will have broad implications along the NJ shore, where

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numerous structures were built on non-conforming lots created years ago before the advent of zoning ordinances.

For additional information on the impact of this decision or land use law in New Jersey, please contact the author of this Alert, **John H. Hague**.