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TOWN CLERK, ACTON

## BOARD OF APPEALS

Hearing # 11-04

### DECISION ON PETITION FOR REVIEW OF THE ZONING ENFORCEMENT OFFICER'S REFUSAL TO GRANT A BUILDING PERMIT AT 191 NAGOG HILL ROAD

The Acton Board of Appeals (the "Board") held a duly noticed public hearing on May 2, 2011, at 7:30 PM at the Acton Town Hall. The hearing was attended by Board Chairman Kenneth F. Kozik, Member Marilyn Peterson and Alternate Member Richard Fallon, Assistant Town Planner and Zoning Enforcement Officer (ZEO) Scott Mutch, and Acting Board Secretary Kim Gorman. Attending for the Petitioner was owners Mark and Clare McCarthy, along with their legal representative Attorney Louis N. Levine of D'Agostine, Levine, Parra & Netburn, P.C. Also present were numerous abutters.

#### The Zoning Bylaw and the Proposed Structure

The Town of Acton Zoning Bylaw (the "Bylaw") permits replacement of nonconforming structures with limitations listed in section 8.3, while section 3.8 provides accessory use regulation. More specifically:

3.8.1 ACCESSORY USES Permitted in the Residential Districts and dwellings in the Non-Residential Districts:

3.8.1.1 Private garage or carport for not more than four motor vehicles, solar system, greenhouse, tool shed or barn; swimming pool or tennis court provided that such recreational facilities are used only by the residents and their guests.

8.1 Nonconforming LOTS - Any LOT which complied with the minimum area, FRONTAGE, LOT width, yard and depth requirements, if any, in effect at the time the boundaries of the LOT were defined by recorded deed or plan, may be built upon or used for single FAMILY, or where

permitted two-FAMILY, residential USE, notwithstanding the adoption of new or increased LOT area, FRONTAGE, LOT width, yard or depth requirements, provided that:

8.1.1 At the time of the adoption of such new or increased requirements such LOT was held, and has continued to be held, in ownership separate from that of adjoining land; and

8.1.2 The LOT had at least 5,000 square feet of area and 50 feet of FRONTAGE at the time the boundaries of the LOT were defined; and

8.1.3 Any proposed STRUCTURE is situated on an unimproved LOT so as to conform with the minimum yard requirements, if any, in effect at the time the boundaries of such LOT were defined. In the case where no minimum yard requirements were in effect at the time the boundaries of such LOT were defined, the minimum front yard shall be 20 feet and the minimum side and rear yards shall be 10 feet.

8.3.2 Changing a Nonconforming STRUCTURE - A nonconforming STRUCTURE may be altered, reconstructed, extended or structurally changed provided that such alteration, reconstruction, extension or structural change conforms to all the dimensional requirements of this Bylaw. A vertical extension of a nonconforming BUILDING, which does not expand the BUILDING horizontally so as to violate any applicable yard requirement, shall be deemed not to increase the nonconforming nature of the BUILDING and shall not require a special permit under Section 8.3.3.

8.3.6 Replacement of Single- and Two-Family Dwellings – A STRUCTURE in single family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for single family residential USE, or rebuilt for single family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; and a STRUCTURE in two-family residential USE on a nonconforming LOT, that cannot otherwise be built on under the requirements of Section 8.1, may be razed and rebuilt for two-family residential USE, or rebuilt for two-family residential USE after damage from fire or natural disaster except flood, regardless of the degree of damage; in both cases subject to the following conditions and limitations:

8.3.6.1 The replacement STRUCTURE shall not exceed the FLOOR AREA RATIO on the LOT of the STRUCTURE that existed on the LOT before it was razed or damaged.

8.3.6.2 The replacement STRUCTURE shall meet all minimum yard and maximum height requirements of this Bylaw.

8.3.6.3 In the absence of architectural and plot plans for the existing structure to be razed, the FLOOR AREA RATIO shall be determined by using the information on record at the Town of Acton Assessor's office.

8.3.6.4 Additions to the replacement STRUCTURE may be made after two years following the date of initial occupancy of the replacement STRUCTURE, if otherwise permissible and subject to any permits and special permits that may be required.

The structure proposed will be located at 191 Nagog Hill Road. The petitioners seek a building permit to demolish and replace an approximately 4,500 square foot structure located on a nonconforming hammerhead lot with an approximately 7,000 square foot structure. The hammerhead lot is nonconforming because its access trunk is 20 feet wide where the Bylaw requires a minimum of 50 feet wide. The proposed 7,000 square foot structure will conform to all setbacks required by the Bylaws. The proposed 7,000 square will include an in-law suite and

two garages housing four cars affixed to the main structure, i.e., a three car garage attached to the main structure and a one car garage attached to the in-law suite of the main structure.

### **Petitioner's Appeal**

Petitioner submitted a request for a building permit and the ZEO rejected the building for the following reasons:

- Failure to comply with 8.3.6 in that the proposed structure will exceed the Floor Area Ratio (F.A.R.) of the original structure as forbidden by 8.3.6.1.
- Failure to comply with 3.8.1.1 in that the proposed structure includes two (2) separate and independent garages. The plans identify a three (3) car garage on the South side of the dwelling and a one (1) car garage on the North side of the house.

Petitioner filed this timely appeal and asks the Board to overturn the decision of the ZEO. In summary, Petitioner makes the following arguments through their attorney Louis Levine.

#### **Regarding 8.3.6:**

Mr. Levine presented case law to convince the Board to decide that the ZEO erred in using 8.3.6 in this instance. Mr. Levine argued that construction is permitted under 8.3.2, which states:

A nonconforming STRUCTURE may be altered, reconstructed, extended or structurally changed provided that such alteration, reconstruction, extension or structural change conforms to all the dimensional requirements of this Bylaw. A vertical extension of a nonconforming BUILDING, which does not expand the BUILDING horizontally so as to violate any applicable yard requirement, shall be deemed not to increase the nonconforming nature of the BUILDING and shall not require a special permit under Section 8.3.3.

More specifically, Mr. Levine argued that the structural change conforms to all the dimensional requirements of this Bylaw. Further, Mr. Levine stated that 8.3.6 does not apply because its intent when adopted at Acton Town Meeting was to prevent small structures on small lots to be torn down and replaced with large structures on the same small lot. Here, Mr. Levine stressed that the lot is more than ample.

Several abutters agreed that they had no issues with the proposed structure.

#### **Regarding 3.8.1.1:**

Mr. Levine argued that a plain reading of 3.8.1.1 of the Bylaw is that it only refers to separate structures, not internal components of the principal structure. More specifically, Mr. Levine argued that section 3.8.1.1 is not applicable to garage spaces incorporated into and a part of a single family residence as Petitioners propose.

**Findings**

The Board found that section 3.8.1.1 of the Bylaw refers to separate structures, not internal components of the principal structure.

The Board also found that the facts of this case are the specific circumstances under which section 8.3.6 of the Bylaw and its subsections were enacted.

**Conclusion**

For the reasons stated above, the Board voted 2-1 to OVERTURN the ZEO's denial of a building permit under Section 3.8.1.1 of the Bylaw. Marilyn Peterson dissented.

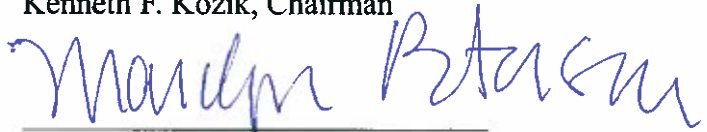
For the reason stated above, the Board voted 3-0 to UPHOLD the ZEO's denial of a building permit under Section 8.3.6 of the Bylaw.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

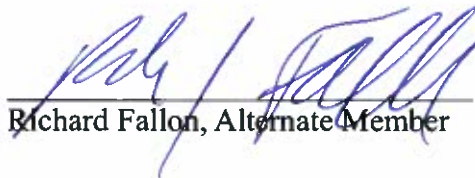
**ACTON BOARD OF APPEALS**



\_\_\_\_\_  
Kenneth F. Kozik, Chairman




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Marilyn Peterson, Member



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Richard Fallon, Alternate Member

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on May 27, 2011.

  
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Cheryl Frazier, Administrative Assistant  
Board of Appeals