

## BOARD OF APPEALS

Hearing # 11-15

**DECISION ON PETITION FOR A FINDING  
UNDER MGL c.40A, §6, FIRST PARAGRAPH,  
THAT PETITIONER IS ENTITLED TO BUILD  
UPON A NON-CONFORMING LOT AT  
50 POPE ROAD, MAP F-5, PARCEL 49**

The Acton Board of Appeals (the “Board”) held a duly noticed public hearing on December 5, 2011, at 7:30 PM at the Acton Town Hall. The hearing was attended by Board Chairman Kenneth F. Kozik, Member Marilyn Peterson, Alternate Member Adam Hoffman, Assistant Town Planner and Zoning Enforcement Officer (ZEO) Scott Mutch, and Board Secretary Cheryl Frazier. Attending for the Petitioner were owner Douglas Shaw of GS Holdings, Inc., and his legal representative, Attorney Luis Levine of D’Agostine, Levine, & Parra of Acton, MA. Also present were numerous abutters.

### Massachusetts Law

Massachusetts law, at M.G.L., c 40A, §6, first paragraph, allows for the expansion of certain structures located on non-conforming lots, at the discretion of the local Zoning Board of Appeals. More specifically:

40A Section 6. Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing 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 use to the neighborhood. This section shall not apply to establishments which display live nudity for their patrons, as defined in section nine A, adult bookstores, adult motion picture theaters, adult paraphernalia shops, or adult video stores subject to the provisions of section nine A.

### **Petitioner's Appeal**

According to Mr. Levine, petitioner is a developer who purchased the property at 50 Pope Road. The existing residential structure is a one story Cape Cod style 1,142 square foot home having a foot print of 34 feet by 24 feet. The property is located in a R-8 zoning district that requires a minimum of 80,000 square feet of lot area and 200 feet of lot frontage. The property has only 24,627 square feet of lot area and only 166.07 feet of lot frontage. Thus, the current structure is deemed non-conforming. The property is compliant with all other zoning requirements, e.g., front, rear, and side set backs.

Petitioner purchased the property and does not reside on the property or intend to reside on the property. Petitioner proposes to raze and/or alter the current structure and erect a 1,785 square foot structure, which he subsequently intends to sell. The current structure is a three bedroom residential dwelling. The proposed structure would remain a three bedroom residential dwelling.

Attorney Levine argued that the increase of square footage of the structure from 1,142 square feet to 1,785 square feet does not increase the non-conforming nature of the structure because the proposed structure compiles with all other zoning bylaw provisions in the R-8 zoning district, e.g., front, rear, and side set backs. More generally, attorney Levine argued that no increase in structure square footage on a non-conforming lot can be interpreted as an increase in non-conformity so long as a proposed structure complies with all other zoning bylaws. Accordingly, attorney Levine argued that petitioner is entitled to complete his proposed plans under Massachusetts law, at M.G.L., c 40A, §6, first paragraph, as a matter of right.

When the Board questioned the Assistant Town Planner and Zoning Enforcement Officer (ZEO) regarding the proposed modifications, Mr. Mutch stated that the Acton Planning Department is in favor of the petitioner's plans as submitted.

Several abutters made comments with respect to changes in the neighborhood in general and the effects that the proposed structure might have on the surrounding water table. The Board chairman reminded the abutters that changes over time are inevitable and that if a building permit issues with respect to this proposal, petitioner will have to comply with the requirements set out by all the appropriate town boards, including the Board of Health. Attorney Levine added that the current and proposed structure would remain a three bedroom dwelling so that no additional impact to the surrounding lots is expected.

The petitioner also stated that many of the lots in the area around 50 Pope Road consist of dwellings of 1,500-2,500 square feet.

The Board agreed that any finding under M.G.L., c 40A, §6, first paragraph, requires first a finding that proposed structure does not increase the non-conforming nature of the structure. If the Board determines that the proposed structure does increase the non-conforming nature of the structure, only then must the Board determine whether the alteration of the structure would be substantially more detrimental than the existing non-conforming use to the neighborhood. Attorney Levine agreed with the Board's interpretation of M.G.L., c 40A, §6, first paragraph.

### **Findings**

Petitioner owns a non-conforming structure of 1,142 square feet. The structure is non-conforming because it sits on a non-conforming lot in the R-8 zoning district. The R-8 zoning district requires a minimum lot size of 80,000 square feet and 200 feet of lot frontage. The petitioner's lot is 24,627 square feet with 166.07 feet of lot frontage. Thus, the 1,142 structure is non-conforming.

Applicant proposes to erect a 1,785 square foot structure, approximately 56% larger than the current structure. The proposed structure will remain a three bedroom residential dwelling.

The Board failed to conclude uniformly that the proposed 1,785 square foot structure was not an increase in the non-conforming nature of the structure. In a vote of Board members, Chairman Kozik voted that the proposed 1,785 square foot structure, a 56% increase of the current structure, was an increase in the non-conforming nature of the structure, while Member Peterson and Alternate Member Hoffman voted that the proposed 1,785 square foot structure was not an increase in the non-conforming nature of the structure.

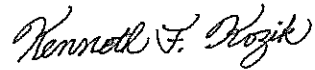
Accordingly, the Board moved on to discuss the second inquiry under M.G.L., c 40A, §6, first paragraph. In a 3-0 vote, the Board determined that the proposed 56% increase in square footage was consistent with current dwellings in the neighborhood and that the alteration of the structure would not be substantially more detrimental than the existing non-conforming use to the neighborhood.

### **Conclusion**

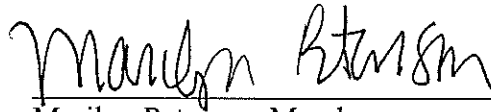
For the reasons stated above, the Board voted **3-0 to Grant** the petitioner the right to alter the structure located on the non-conforming lot under M.G.L., c 40A, §6, first paragraph, in accordance with plans submitted in conjunction with this hearing.

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.

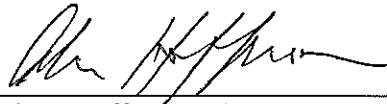
**ACTON BOARD OF APPEALS**



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Kenneth F. Kozik, Chairman



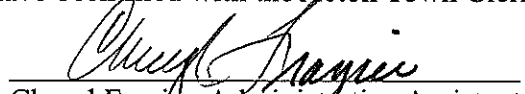
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Marilyn Peterson, Member



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Adam Hoffman, Alternate Member

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on 12/19, 2011.

  
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Cheryl Frazier, Administrative Assistant  
Board of Appeals