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## DECISION 10-01

### DECISION ON THE PETITION BY DANIEL & MARY JANE SILVA

A public hearing of the Acton Board of Appeals was held in the Town Hall on Monday, March 8, 2010, at 7:30 P.M., on the petition by Daniel & Mary Jane Silva for a VARIANCE from the requirements of Section 8.3.6 of the Acton Zoning Bylaw to allow a 1,008 square foot single family dwelling to be demolished and a new 2,800 square foot single family dwelling to be constructed. The lot is located at 28 Esterbrook Road, Map F5/Parcel 22.

Board members present at the hearing were Kenneth F. Kozik, Chairman; Jonathan Wagner, Member; and Adam Hoffman, Alternate Member. Also present were Scott Mutch, Assistant Town Planner and Zoning Enforcement Officer; Cheryl Frazier, Board of Appeals Secretary; Dan & Mary Jane Silva, Petitioners; and abutters to the lot.

Ken Kozik opened the hearing and read the contents of the file. Included in the file were memos from the Planning Department, the Building Department, the Health Department and Acton Medical Associates.

Mr. Silva presented the petition. The Silva's have lived in Acton for 26 years and their home has consistently suffered from water issues, particularly in the basement. In 2003, the Silvas looked into building an addition off of the back or the side of their house but concluded that such an addition would not address their persistent water problems. According to the Silvas, their home was not built correctly so they get water in their basement about seven (7) months out of the year. To address the water issues, in 2008 the Silva's looked into multiple options and concluded that the only way to address their water issues was to demolish the existing 1,008 square foot house and erect a new 2,800 square foot house with a proper foundation. The new proposed structure would also help alleviate persistent health problems of their child due to moisture.

Ken Kozik asked the Zoning Enforcement Office to comment. Mr. Mutch stated he had met with Mr. Silva several times over the course of a year and that the Silva property is in a R-8 zoning district. The property that is subject to this petition is nonconforming with respect to minimum lot area required in the R-8 zoning district; the minimum lot area for the R-8 zoning district is 80,000 square feet while the property subject to this petition is only 46,080 square feet. Mr. Scott testified that because the lot is nonconforming, Section 8.3.6 of the Zoning bylaw is applicable. Section 8.3.6 states:

*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 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 to two-family residential USE, or rebuilt for two-family 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.*

Mr. Mutch also stated that the Petitioner, like the abutters to the property subject to this petition, is constricted due to surrounding wetlands.

Ken Kozik noted to the Petitioner that Section 10.5.5 of the Zoning Bylaw states that before granting any variance from the requirements of the Bylaw, the Board must specifically find:

*10.5.5.1 That owing to circumstances relating to the soil conditions, shape, or topography of the LOT or STRUCTURES in questions and especially affecting such LOT or STRUCTURES but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this Bylaw would involve substantial hardship, financial or otherwise, to the Petitioner.*

Mr. Silva could articulate no such circumstances owing to the soil conditions, shape, or topography that did not also affect generally the zoning district in which the lot or structures are located, and more specifically, no such circumstances owing to the soil conditions, shape, or topography that did not also affect generally the lots and structures located on Esterbrook Road, other than his lot is located near the bottom of the hill on Esterbrook Road.

Abbuters testifying at this hearing confirmed that homes on and about Esterbrook Road all suffer from the same water problems articulated by the Petitioner.

Mr. Kozik also brought to the attention of the Petitioner that their proposal would almost triple the square footage of their house; the Petitioner currently has a 1,000 square foot structure on a lot that is nonconforming and the Petitioner is proposing a 2,800 square foot structure on the same nonconforming lot. This proposal it itself would violate Section 8.3.6.1 of the Zoning Bylaw, reproduced above.

Mr. Wagner asked Mr. Mutch, the Zoning Enforcement Office, if changes made to the Zoning Bylaws over the last few years that were designed to discourage developers from demolishing older, small structures, and putting up larger structures, have caused this Petitioner to seek this variance. Mr. Mutch agreed that recent changes have caused this Petitioner to request this variance and that he, the Zoning Enforcement Office, did not consider the Petitioner to be such a developer.

Mr. Kozik noted that Petitioner could replace the current structure with a structure complying with Section 8.3.6.1 and subsequently make improvements permitted under Section 8.3.6.4 in two (2) years, therefore avoiding any hardship.


The Board of Appeals, after considering the materials submitted with petition, together with the information developed at the hearing finds that:

1. The Petitioner seeks a VARIANCE from the requirements of Section 8.3.6 of the Acton Zoning Bylaw.
2. The existing dwelling is located on a nonconforming lot and the Petitioner seeks to demolish a 1,008 square foot single family dwelling and replace it with a 2,800 square foot single family dwelling.
3. Board members Ken Kozik and Jon Wagner concluded that a literal enforcement of Section 8 of the Zoning Bylaw would not involve substantial hardship to the Petitioner as a result of any circumstances relating to the soil conditions, shape or topography of the Lot or Structures.
4. Alternate Board member Adam Hoffman agreed that the Petitioner could not articulate any circumstances owing to the soil conditions, shape, or topography that did not also affect generally the zoning zoning district in which the lot or structures are located, but that the Board should ignore the requirements of Section 10.5.5.1 and grant the variance under public policy considerations.

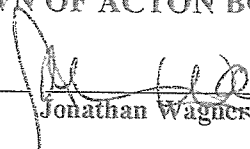
Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, voted 2-1 to DENY the VARIANCE from the requirements of Section 8.3.6 of the Acton Zoning Bylaw. In the vote to grant the variance, Alternate Board Member Adam Hoffman voted to grant the variance while Board Members Ken Kozik and Jon Wagner voted against granting the variance.

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.

TOWN OF ACTON BOARD OF APPEALS



Kenneth F. Kozik, Chairman



Jonathan Wagner, Member



Adam Hoffman, Alt. Member

Effective Date of Variance: No variance or any modification, extension or renewal thereof shall take effect until a copy of this decision has been recorded in the Middlesex County South District Registry of Deeds. Such decision shall bear the certification of the Town Clerk that 20 days have elapsed after the decision has been filed in the Office of the Town Clerk, and that no appeal has been filed, or that if such an appeal has been filed it has been dismissed or denied.

Expiration of Date of Variance: In accordance with Massachusetts General Laws Chapter 40A Section 10, if the rights granted by this variance are not exercised within one year from its date, the variance will lapse. A six-month extension of the rights under this variance may be applied for by filing a written application for an extension before the expiration of this one-year period.