**Case No.: 2020-16**

 **August 4, 2020**

**BOARD OF APPEALS**

**OF THE**

**CITY OF WALTHAM**

**MEMORANDUM**

 **OF**

**GEORGE M. BARNETT**

# **I. INTRODUCTION**

The Petitioner George M. Barnett (“Petitioner”), is the owner, along with his wife Martine Kalke, of a single-family home located at 91 Robbins Street, Waltham, Massachusetts (the “Locus”). The locus consists of approximately 3,675 +/- sq. ft., is entirely landlocked and is situated wholly within the Residence B Zoning District. Petitioner intends to construct, use and maintain a single-story addition in the westerly end of the structure resulting in approximately 40.5’ square feet of livable space. In order to complete the addition, petitioner seeks one variance for the proposed addition which will have no effect on the rear-yard setback. Lastly, Petitioner sought and obtained this relief (along with relief for an uncovered rear-yard deck) from this Board of Appeals on September 18, 2018. The Petitioner timely obtained a building permit for the deck and completed that work. Petitioner mistakenly believed that pulling the building permit for the deck satisfied the one-year requirement for the addition. Unfortunately, that was not the case, and Petitioner is required to obtain the relief for the addition again.

**II. JURISDICTION**

 Massachusetts General Laws, c. 40A, §§ 9 10 and 14 provide that this Board of Appeals has the power to grant variances if they are not a use prohibited by the Zoning Ordinance of the City of Waltham (the “Ordinance”). Neither variance sought is for any change in use.

 Art. VII, §7.2 of the Ordinance authorizes this Board of Appeals to utilize all the powers granted to it by the General Laws and the Ordinance. Therefore, in that this Board of Appeals has both the power and authority to grant variances, the Petitioner respectfully requests that his Petition be granted.

**III. VARIANCES**

M.G.L. c. 40A, § 10 states in pertinent part that “the permit granting authority shall have the power . . . to grant upon appeal . . . a variance from the terms of the applicable zoning ordinance or by-law where such permit granting authority specifically finds that [i] owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located, [ii] a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner . . . and that [iii] the desired relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.”

Variances Requested.

The variance sought is dimensional, specifically:

Rear Yard Setback: In accordance with Art. IV, § 4.11, the minimum rear yard setback shall be thirty feet (30’). Presently the side yard setback is 4.7’. Petitioner proposes an addition 20’ from the rear yard setback.

1. The Landlocked Lot and Existing Structures.

In this instance, there are a couple factors that affect this Locus making it unique. First, it is the fact that the lot here is a land-locked lot which is unique in this neighborhood. In addition, the single-family structure pre-exists both zoning in the City and the subdivision zoning decision in 1946 that created the lot thereby creating the non-conformities thereon. According to the City of Waltham Assessors’ office, the structure was constructed in approximately 1880 and therefore, was already in place when this Zoning Board of Appeals created the subdivision that created the short setbacks from the single-family structure. The wholly land-locked property, when combined with the existing structures thereon that pre-date the subdivision that created the lot, make this situation unique and affecting this Locus and structure. As a result of the existence and location of the structure before the subdivision was created, there is no location on the lot that any addition, even one as small as 40.5’, could be constructed and maintained even though the addition is almost wholly within the footprint of the structure.

Here, the existing single-family structure already encroaches into a side and rear-yard setback and there have been no changes to the lot since its creation. In sum, the circumstances of this land-locked lot combined with the pre-existing structure thereon, present distinctive circumstances that are generally not found in the neighborhood or district in which it is located.

2. A literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the Petitioner

In addition to the circumstances that especially affect this Locus, a literal enforcement of the provision of the ordinance in regards to the pre-existing nonconforming setbacks of the structure, would create a substantial financial hardship for the Petitioner. Without the variance, Petitioner cannot complete the 40.5 square foot addition in any area of the lot without razing a portion of the pre-existing structure. Therefore, a literal enforcement of the ordinance would involve a substantial hardship to Petitioner, both financial and otherwise in that to comply with the provision would require the demolition and removal of a portion of the existing structure.

That is the nature of the case here. The zoning dimensional provisions allow for an addition in the location where petitioner has proposed, but that a literal enforcement of the ordinance would result in the removal of a large portion of the pre-existing structure to accomplish the same. The structure is currently (and pre-existingly) located in the rear-yard setback…and therefore any addition, by its very nature, will lie within the rear-yard setback.

3. That the desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

 The final statutory requirement of G.L. c. 40A, § 10 requires that the desirable relief be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. The criteria does not require zero derogation from the intent or purpose of the ordinances, as “[s]ome derogation from the [Ordinance’s] purpose is anticipated by every variance . . .” Cavanaugh v. DiFlumera, 9 Mass.App.Ct. 396 (1982). The Court further stated that “. . . unless the [granting of the variance] significantly detracts from the zoning plan for the district, the local discretionary grant of the variance . . . must be upheld . . .”

Here, the desired relief does not nullify or substantially derogate from the intent or purpose of the by-law as Petitioner is seeking to construct, maintain and use the proposed addition that will have no effect on any setback. This project cannot reasonably be found to unduly increase the non-conforming nature of a structure. The addition meets all setbacks except for the rear-yard setback where the pre-existing structure already exists. Said addition will have no effect on the rear-yard setback and would not affect any abutter, thereby not derogating from the intent and purpose of the ordinances.

**IV. CONCLUSION**

In sum, Petitioner proposes to construct, maintain and use an addition will encroach into the required minimum rear-yard setback and require the variance to accomplish the same. The Petitioner George M. Barnett and his family thank you for your attention to this matter, welcome your suggestions and look forward to completing this project in a manner amicable to the City of Waltham.

Respectfully Submitted,

George M. Barnett,

By his attorney

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