

**BOARD OF APPEALS**

**OF THE**

**CITY OF WALTHAM**

**Case No. 2020-34  
December 1, 2020**

**BRIEF**

**OF**

**SILVESTRE BUSCEMI, JR.**

This appeal pertains to the property at 63 Bacon Street, Waltham, Massachusetts. The property at 63 Bacon Street, the “Locus”, is situated in a Residence C Zoning District according to the Zoning District Map for the City of Waltham.

The Petitioner is the owner of the Locus property Silvestre Buscemi, Jr. (“Buscemi”). Buscemi resides at 68 Beal Road, Waltham, Massachusetts.

By letter dated September 18, 2020, William L. Forte, Inspector of Buildings of the City of Waltham, served a “Stop Work Order” (the “Order”) upon the Petitioner. The Order alleged that a building permit was issued in erroneously on the basis of incorrect, inaccurate or incomplete information, or in violation of any ordinance, regulation or any provision of 780CMR. This appeal to the Zoning Board of Appeals is an appeal of the stop work order. Alternatively the Petitioner is seeking a variance to cure the alleged zoning violation.

The Appeal Application includes the following requests for zoning relief:

1. Appeal. On June 19, 2020 the Inspector of Buildings issued a building permit to the Petitioner to allow the construction and use of a two family dwelling with a two car garage under and a detached garage for two cars. The Inspector required a side yard setback of 5 feet as provided under § 4.221 as he deemed it an accessory building. § 4.226 provides that garages for single and two family dwellings shall have a minimum 3 foot side yard setback. The building permit allowed for a principal building with two dwelling units and two parking spaces or garages within the principal building. The permit also allowed the construction and use of a detached garage for the storage of two

motor vehicles. The Inspector of Buildings issued a stop work order/cease and desist all construction order to the Petitioner on September 18, 2020. He alleges that the permit was issued in error or on the basis of incorrect, inaccurate or incomplete information or in violation of any Ordinance. The Inspector has determined that the storage of more than three motor vehicles at the property in two separate garages is a violation of § 4.226. The Petitioner appeals this stop work order/cease and desist order as the proposed dwelling and detached garage conforms to the Zoning Ordinance and further conforms to other two family dwellings developed in the City of Waltham under the current Zoning Ordinance.

2. Variance. §4. 226, entitled “Parking garages for single- and two-family dwellings”, provides that one private garage with storage space for not more than three motor vehicles, either detached or forming a part of the principal building, is permitted on each lot on which the dwelling is located. Here, the Petitioner proposed to construct, use and maintain one detached garage for two motor vehicles and one principal building with garages for two motor vehicles therein for a total four motor vehicles. The proposed enclosed parking spaces for four motor vehicles shall conform to the requirements of § 5.2 which requires two parking spaces for each dwelling unit.

### **JURISDICTION**

Massachusetts General Laws, c. 40A §8 and 15 state that an appeal to the permit granting authority may be taken by any person aggrieved by reason of his inability to

obtain a permit or because he is aggrieved by an order or decision of the Inspector of Buildings.

Massachusetts General Laws, c.40A §10 and §14 authorize the Board of Appeals to grant variances as long as they are not for a use prohibited by the Ordinance. In this instance the requested variance pertains to the number of vehicles in a garage or garages for a two family dwelling. A two family dwelling and detached garages are permitted uses in the Residence C Zoning District. Thus the use is a permitted use in the Zoning District and the variance requested is dimensional.

§ 7.31 of the Zoning Ordinance of the City of Waltham provides that any person aggrieved by the refusal or decision of the Inspector of Buildings may appeal to the Board of Appeals as provided herein and in the General Laws.

§ 7.2 of the Ordinance authorizes the Board of Appeals to utilize all of the powers granted to it by the General Laws and the Ordinance.

Therefore, in that the Board of Appeals has both the power and authority to grant relief from a decision of the Inspector of Buildings, the Petitioner respectfully requests that the Stop Work Order which alleges that a zoning ordinance violation at the property be vacated.

### **THE LOCUS**

The locus consists of one lot of land at 63 Bacon Street. Lots in the Residence C Zoning District are required to have a minimum lot area of 6,000 square feet. The locus lot area is 7,449 square feet; required frontage of 50 feet (existing 118.52 feet); required

front yard setback of 10' ( 11.6 feet), side yard setbacks of 10 feet ( 10.3 feet), rear yard setback of 20 feet ( 64 feet); and a maximum lot coverage 30 % ( 29.9 %). The dimensional requirements for a detached garage on the locus are different than the above. Pursuant to § 4.226 the side yard setback required for a detached garage is 3 feet and the rear yard setback required is 3 feet. Notwithstanding the requirements of § 4.226 the Inspector of Buildings required the Petitioner to comply with § 4.221 of the Ordinance. § 4.221 of the Ordinance states that “accessory buildings” shall have a five (5) foot side yard setback and rear yard setback. It also limits the size of the accessory building permitted in the rear yard setback. The Petitioner complied with the request of the Inspector of Buildings and situated the detached garage with a rear yard setback of 8.6 feet and a side yard setback of 13.5 feet. Less than 25% of the building is situated in this rear yard setback area.

A single family dwelling was formerly situated on the Locus. The Petitioner applied for and received a building permit to demolish the old and deteriorating single family. The Petitioner then applied for and received a building permit to construct, use and maintain a new two family dwelling on the locus lot. According to § 4.11 and the Table of Dimensional Requirements the lot area and the proposed setbacks of all the proposed structures complied with the requirements of the Ordinance. In the plans filed with the Building Department the Petitioner showed one principal building containing two dwelling units and garage spaces for two motor vehicles and one detached garage for two motor vehicles.

On June 19, 2020 the Building Inspector issued a building permit, No. P202041617, to the Petitioner to construct the two family dwelling and the detached

garage thereon, see Exhibit A attached hereto. The Petitioner proceeded to demolish the existing structure and to construct the new two family dwelling and the detached garage.

## **I. NOTICE OF STOP WORK ORDER**

Prior to the Petitioner's receipt of the Stop Work Order he did receive a call from the Building Inspector advising him that the permit was issued in error and that he would have to revise his plans. The Inspector stated that because he had garage spaces for four vehicles on the locus he was in violation of the Zoning Ordinance § 4.226. § 4.226 provides that for private garages for single and two dwellings, “. . . one private garage with storage space for not more than three motor vehicles, either detached or forming part of the principal building, is permitted on each lot on which a dwelling is located.”

Soon after the telephone call, by letter dated September 18, 2020 the Building Inspector issued a STOP WORK ORDER to Buscemi. It stated therein that , “ The building permit was issued erroneously.” See copy attached at Exhibit B. It did not cited § 4.226 of the Ordinance but The Inspector did confirm that an alleged violation of § 4.226 was the reason.

Notwithstanding the Stop Word Order, after some negotiations between Buscemi and Inspector Forte, Buscemi was allowed to proceed with the work provided that he agreed to pursue zoning relief with the Zoning Board of Appeals.

## THE VIOLATION

Although the letter does not specifically cite a violation of § 4.226 we do know from discussion with Inspector Forte that this provision of the Zoning Ordinance is the basis of the “violation of any ordinance” as alleged in the Stop Work Order.

§ 4.226 states, in pertinent part, as follows:

Private garages for single- and two-family dwellings. Except as otherwise provided herein, one private garage with storage space for not more than three motor vehicles, either detached or forming part of the principal building, is permitted on each lot on which a **dwelling** is located. In the case of a garage forming part of the principal dwelling, the minimum setback, side yard and rear yard requirements of the district shall be provided. In the case of a detached garage, the minimum setback requirement of the district shall be provided and the garage shall be at least three feet from the side and rear lot lines and at least 10 feet from the principal building.

The Petitioner is constructing one detached garage with space for two motor vehicles. The detached garage meets the required setbacks as articulated in § 4.221 of the Ordinance which is entitled “Location and area of accessory buildings”.

**4.221. Location and area of accessory buildings.** A detached accessory building may be located in the rear yard area, provided that not more than 25% of the required rear yard area shall be so occupied. An accessory building shall be at least 10 feet from the principal building and five feet from the side lot line and the rear lot line.

Notwithstanding the language in § 4.226 which allows for a 3 foot rear and side yard setback the Inspector of Building requested and required the Petitioner to comply

with § 4.221. It requires a 5 foot rear and side yard setback and also a limitation of the area to be located within the required rear yard. No more than 25% of the required rear yard may be occupied by the accessory building or the garage in this case. Please note on the Site Plan filed herewith that the garage has a rear yard setback of 8.5 feet and a side yard setback of 13.3 feet. 24.7 % of the garage is in the required rear yard setback. Again the garage meets all the dimensional requirements of the Ordinance under §4.11 and § 4.221 and § 4.226.

The Petitioner proposed a detached two car garage and a garage within the principal building for two vehicles. § 5.21 of the Ordinance entitled **Off Street Parking Requirements**, states that the required parking spaces for a *two family dwelling-2 per dwelling unit*. The Petitioner's proposal shall comply with the requirements of the Ordinance for required parking spaces.

The Inspector has determined that the Petitioner is in violation of § 4.226 because he has proposed to construct a detached garage for two vehicles and a garage within the principal structure for two motor vehicles for a total of four motor vehicles in a garage. § 4.226 states, “. . . storage space for not more than three motor vehicles. . .” We contend that the Inspector has misinterpreted the Ordinance or the Ordinance is ambiguous. The Ordinance refers to a dwelling in the singular. Under the definitions section of the Ordinance a dwelling is defined as,

*DWELLING — A building which is designed for or occupied as a place of abode by one or more persons, either permanently or transiently.*

And a dwelling unit is defined as,

*DWELLING UNIT — One or more rooms designed for or occupied as a place of abode by one person or by one family with cooking, sleeping and toilet facilities.*

We contend that the three motor vehicle per garage is a restriction on the number of vehicles that may be garaged per each dwelling unit. Each single family dwelling is entitled to a three car garage. It makes no sense that a two family dwelling should have the same limitation. Moreover, the Petitioner has not created a garage for more than three motor vehicles but two garages for two motor vehicles each. Again we contend that this is not a violation of the Ordinance as neither garage exceeds two vehicles.

This is especially troublesome when the Petitioner observes around the City of Waltham numerous instances of two family dwellings with garage for four motor vehicles in the principal buildings. See Exhibit C attached. We have identified over twelve properties in the City which have been permitted and constructed in the last several years. The majority of the properties are two family dwellings constructed in a Residence B Zoning district which permits two family dwellings.

When interpreting zoning ordinances certain Rules of statutory construction hold that . . .” we are to avoid an absurd result when the language is susceptible to sensible meaning”. **Livoli v. Zoning Board of Appeals of Southborough, 42 Mass. App.Ct. 921, 922 (1997).** A reasonable and sensible interpretation here is that each dwelling unit is entitled to a garage for up to three vehicles. Here, we proposing two garages for four vehicles total, each dwelling unit to have two garage spaces.

For all of the above reasons the Petitioner respectfully request that this Board vacate the Stop Work Order dated September 18, 2020 and find that there are no violation of the Zoning Ordinance as alleged by the Inspector of Building in his Order and further that the Petitioner may proceed to construct the detached garage for two motor vehicles and the principal structure with garage for two motor vehicles.

## **II. VARIANCE REQUEST**

### **A. STATUTORY CONDITION FOR A VARIANCE**

In order to obtain a variance one must first establish that there are “. . . circumstances relating to the soil conditions, shape or topography of such land or structures and especially affecting such land or structure but not affecting generally the zoning district in which it is located . . .” Massachusetts General Laws, c.40A, §10.

Therefore, in order to obtain a variance it must first be shown that there are circumstances relating to soil conditions, shape, topography, or the structure which especially affects the locus, but does not generally affect other properties in the Residence A-4 Zoning District. In this instance, the structure and the shape of the locus are unique circumstances which especially affect this locus but do not generally affect other properties in the zoning district.

The shape of the lot is unique. The lot is a corner lot as it is located on the corner of Bacon Street and School Street. The lot was created around the footprint of the pre-existing nonconforming single family of the locus. The perimeter lot lines for the lot are

as follows: northerly 125.23 feet, easterly 59.52 feet, southerly by School Street 98.61 feet, by a curved line at School Street and Bacon Street 39.82 feet, and westerly by Bacon Street 36.70 feet. The lot is long and narrow. It is more than twice as long from east to west than it is from north to south. The long part of the lot fronts on School Street and the narrow end of the lot has frontage on Bacon Street.

Structure. The prior residential structure on the locus was built around 1874. In 1965 a prior Owner of the locus lot received a variance to construct a six family residence on the locus. This resulted in two structures on the prior parcel, a six family dwelling and a single family dwelling. The Petitioner appeared before the Board in 2019 for certain zoning relief so that he could separate the two building on the one lot into two lots. The zoning relief required to accomplish that was approved. The prior parcel was then divided by a Approval Not Required Plan approved by the Board of Survey. The locus lot was created around the footprint of the recently demolished single family residence. The locus lot created met all the dimensional requirements of the current Ordinance; lot area, by right use, setbacks and lot coverage. The two structures on the locus conform to all the dimensional requirements of the Zoning Ordinance.

Thus, the Petitioners contend that they have met the first requirement for the granting of the proposed variances in that there are conditions which especially affect this locus, but which do not generally affect other lots in the Residence C Zoning District.

**A LITERAL ENFORCEMENT OF THE PROVISIONS OF THE ORDINANCE  
WOULD INVOLVE SUBSTANTIAL HARDSHIP TO THE PETITIONERS**

Not only does this locus have conditions which especially affect it, which do not generally affect other lots in the Residence C Zoning District, but these differences create a substantial hardship, financial or otherwise, to the Petitioner.

The Petitioner is required under the Zoning Ordinance to provide two off street parking spaces for each dwelling unit on the locus. He is proposing two indoor parking spaces for each dwelling unit. Two parking spaces are proposed within the principal building and two parking spaces are proposed within the “accessory building”. It would be a practical hardship to the Petitioner to require that he remove or enclose one indoor parking space. The space was permitted in June and now he is facing the requirement that he enclose the space and renovate it in living space. This is not practical and it is a financial burden.

Thus, the Petitioner respectfully contends that the above represents substantial hardships, financial or otherwise, to him.

The final issue is whether the granting of the variance will result in a substantial detriment to the public good or nullify or substantially derogate from the intent or purpose of the Ordinance.

The statute states that there must be a substantial detriment to the public good, or the Ordinance must be nullified or substantially derogated from.

The cases follow *Cavanagh v. DiFlumera*, 9 Mass. App. Ct. 396 (1980), wherein the Court stated “ . . . 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, some derogation from the (Ordinance’s) . . . purpose is anticipated by every variance.”

This Petition does not present a substantial detriment to the public good. The structures proposed on the locus may be constructed and will conform to the dimensional requirements of the Zoning Ordinance. The only issue is whether the Petitioner may allow four vehicles to park inside the garages or only three vehicles. The Petitioner can simply convert one garage space in the principal building and comply with the Ordinance as interpreted by the Inspector. Use of the structures to house four vehicles is a benefit to the public good. It will keep vehicles out of sight and safe within structures away from the weather. This is a benefit to the public good.

As required by any Zoning Board of Appeals case, this petition has been advertised and noticed to all abutters within 300 feet of the property, as well as posted on municipal posting boards.

Thus, the Petitioner, having met all the legal requirements for the granting of the variance requested herein, respectfully requests that his Petition be granted.

Silvestre Buscemi, Jr.  
By his Attorney,

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