

CITY OF WALTHAM
ZONING BOARD OF APPEALS

Case 2020-18
Andrew J. Rowlings and Brigid Rowlings
Petitioners/Owners of 18 Pleasant Street

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR 18 PLEASANT STREET

I. NATURE OF PETITION

The Petitioners are Andrew J. Rowlings and Brigid Rowlings (hereinafter jointly referred to as the "Petitioners"), of 18 Pleasant Street, Waltham (hereinafter the "Property"). Petitioners reside at the Property consisting of an approximately 7,500 square foot lot as shown on a plan entitled "Plan of Land in Waltham, MA 18 Pleasant Street Existing Conditions" dated June 25, 2020 by Everett M. Brooks Co.

The Petitioners are respectfully requesting variances and/or a special permit to construct an addition at their family home, which is a nonconforming single-family home, and to make improvements to the front porch and back deck. The Property is located in the Residence A-4 Zoning District. As the Property is located in the Residence A-4 Zoning District, the front-yard setback cannot be less than twenty-five (25) feet and the maximum lot coverage is twenty five percent (25%).

Specifically, the Petitioners are requesting a special permit for addition and improvements to the front porch and back deck as the proposed work to the front porch calls for an increase into the existing, nonconforming front setback of 16.49 feet by 3.84 feet.

Pursuant to M.G.L. c. 40A, § 6, the proposed 12.65-foot front-yard setback will not be substantially more detrimental than the existing nonconforming structure or use to the neighborhood and a special permit should be issued.

The existing front porch is in poor condition and outdated. Petitioners are seeking to make the front porch safer to use and more aesthetically pleasing for the neighborhood and themselves.

As the property is located in the Residence A-4 Zoning District, the maximum lot coverage is set at 25%. The plan "Plan of Land in Waltham, MA 18 Pleasant Street Proposed Additions" dated June 25, 2020 by Everett M. Brooks Co. shows an existing, compliant lot coverage at 24.7% and a proposed 4.9% increase to 29.6% lot coverage with the requested addition and improvements. The ground floor area and building height will not change with the addition and improvements.

The lot and Property predate zoning.

II. JURISDICTION

Massachusetts General Laws, Chapter 40A, §§ 6, 9, 10 and 14, and the Section 3.722 of the City of Waltham Zoning Code

(hereinafter "the Zoning Code"), grant the Board of Appeals full authority to hear applications for variances and special permits under Chapter 40A, §§ 6. Therefore, this Board has both the power and authority to hear and act upon this petition.

III. ZONING DISTRICT AND REQUESTED RELIEF

The property is located in the Residence A-4 Zoning District. The dimensional variances and/or special permit requested would allow the Petitioners to construct an addition at their family home and make improvements to the front porch and back deck.

IV. PROVISION OF ZONING ORDINANCE INVOLVED

Article III, Section 3.722- "Rights of nonconforming structures, uses, buildings and land."

Article III, Section 3.7225- may be "Altered, reconstructed, extended or substantially changed, provided that such structure is a single or two-family residential structure and such alteration, reconstruction, extension or structural change does not increase the nonconforming nature of said structure."

Article IV, Section 4.11-City of Waltham Table of Dimensional Regulations, RA-4, single-family, Minimum Building Setback, Front 25 feet, Maximum Lot Coverage (percent)=25%

V. SPECIFIC MANNER IN WHICH SUBJECT MATTER VARIES FROM ZONING ORDINANCE

Article IV, Section 4.11-City of Waltham Table of Dimensional Regulations, RA-4, single-family, Minimum Building Front Setback of twenty-five (25) feet and Maximum Lot Coverage to be twenty-five percent (25%).

The proposed addition and improvements would leave a 12.65-foot front-yard setback with lot coverage of 29.6%

VI. ARGUMENT

Petitioners argue that they are entitled to a Chapter 40A, § 6 special permit as the increase in the nonconforming front setback by 3.84 feet will not be "substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

The existing structure, without the proposed addition, was constructed in or around 1800 and predates the enactment of zoning regulation in the City of Waltham. The structure, without the addition, does not meet the current zoning requirements applicable to the Residence A-4 Zoning District as the front setback only measures 16.49 feet and the zoning code requires a 25-foot front yard setback. As such, the structure constitutes a legal, pre-existing non-conforming structure.

As 18 Pleasant Street is a legal, pre-existing, non-conforming structure, it is entitled to protection under M.G.L.

c. 40A, § 6. M.G.L. c. 40A, §6 provides that a zoning change will not apply to those alterations, reconstructions, extensions or structural changes to a nonconforming single- or two-family residential structure that do not increase the nonconforming nature of the structure. Changes that do not increase the nonconforming nature of the structure are permitted as a matter of right. Pursuant to *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455 (1992), "the question is whether the proposed changes to the nonconforming residential structure will increase its nonconforming nature. As explained in *Rockwood v. The Snow Inn Corp.*, 409 Mass. 361 (1991): 'If the first and second sentence [of §6] are read together, the statute permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or by-law, and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures.... [A]s to a single or two- family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension, or change that 'would intensify the existing nonconformities or result in additional ones.' *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15 (1987)'" *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455, 461 (1992).

"As set out in *Willard v. Board of Appeals of Orleans*, 25 Mass.App.Ct. 15 (1987), an application for changes to a residential structure 'requir[es] a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones.' Should the board conclude that there will be no intensification or addition, the applicant will be entitled to the issuance of a special permit. If the conclusion is otherwise, the applicant will be required to show that the change will not be 'substantially more detrimental than the existing nonconforming structure or use to the neighborhood.'". *Goldhirsh v. McNear*, 32 Mass.App.Ct. 455, 461 (1992).

The Petitioners' concede that the improvement to the front porch will intensify the non-conforming nature of the structure. The improvement of the front porch encroaches into the existing front yard set back by 3.84 feet. This minimal additional space will allow the Petitioners to construct a safer and more aesthetically pleasing front porch.

The issue in this case is whether the proposed addition is "substantially more detrimental than the existing nonconforming structure or use to the neighborhood", which it is not. The improvement still allows space between the porch and the

sidewalk on Pleasant Street. Furthermore, the Petitioners' immediate neighbors all support this improvement as evidenced by the petition which was circulated.

A summation of a chapter analyzing M.G.L. c. 40A, §6 from a land use textbook is attached herewith and marked as Exhibit A.

Based on the above, the Petitioners contend that the proposed improvement to the front porch is not "substantially more detrimental than the existing nonconforming structure or use to the neighborhood". Thus, the Petitioners having met all the legal requirements for the granting of a special permit, or in the alternative dimensional variances, respectfully request that their Petition be granted.

VII. RELIEF MAY BE GRANTED WITHOUT DETRIMENT TO THE PUBLIC GOOD

The allowance of the Petition would permit the Petitioners to construct an addition to the back of their family home and make improvements to the front porch and back deck. The Petitioners are not aware of any abutters who are opposing their request for this variance. In fact, Petitioners submit that their neighbors have come together in support of this Petition by circulating and signing their support. The proposed addition will not have a detrimental effect on the neighborhood. The proposed improvements of the front porch and back deck will make the neighborhood more aesthetically appealing. The proposed

second-floor addition (located in the back-left of the building) and improvement to the back deck will not increase the nonconforming nature of 18 Pleasant Street. The improvement to the front porch increases the nonconforming nature of the front setback by 3.84 feet and, as stated above, is not "substantially more detrimental than the existing nonconforming structure. . ."

If approved, the variances and/or special permit may significantly improve the value of the Petitioners' Property and result in increased real estate tax revenue to the City. Moreover, Petitioners are seeking approval of the variances and/or special permit so as to complete an adoption process.

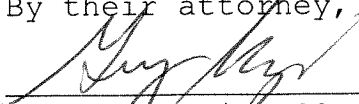
VIII. NO DEROGATION FROM INTENT OF ZONING ORDINANCE

The granting of the Petition will not derogate from the Zoning Ordinance since the proposed variances do not change the character of the neighborhood in any way.

IX. CONCLUSION

For these reasons, the Petitioners submit their request for the special permit and/ or variances described above. The Petitioners state that their request is reasonable and proper and that all conditions have been met to satisfy Massachusetts General Laws Chapter 40A, Sections 6 and 10 and the requirements of the Waltham Zoning Ordinance.

Respectfully Submitted,
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By their attorney,



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Exhibit A

MASSACHUSETTS ZONING AND LAND USE LAW

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the local ordinance or bylaw and careful attention must be paid to the precise nature of the current use whether the changes are in the usual course of business for a use of that sort, and to the composition of the particular neighborhood.

A recent application of the *Powers* decision arose in the context of commercial signs. Erected and maintained pursuant to setback variances, the signs were otherwise lawful preexisting, nonconforming uses, and the owners of the signs, so the court held, were not required to seek modification of their variance to change the sign panels.⁵⁵ The fact that the signs would not have been permitted without the variance had no bearing on the lawful, nonconforming status of other aspects of the signs. Moreover, changes to the panels of commercial signs were permitted as of right where they constituted neither (1) a change or substantial extension of a use, (2) a reconstruction, extension or structural change of the structure, nor (3) an alteration of the structures to provide for their use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent under *Powers*.

§ 6-8. Permit Issuance.

Zoning amendments apply to building or special permits issued after the first notice of the public hearing on the zoning amendment at issue. This follows from the definition of a nonconforming structure discussed above.

§ 6-9. Reconstruction of a Structure.

The first sentence of Section 6 subjects any reconstruction of a nonconforming structure to currently applicable zoning bylaws or ordinances unless the reconstruction involves a single- or a two-family structure, in which case the residence may be reconstructed if the landowner obtains a Section 6 finding.

Literally read, Section 6 requires the reconstruction of a nonconforming, nonresidential structure to comply with currently applicable zoning or obtain a variance. This reading of Section 6 is supported by the second sentence of the Section, which permits "extension or alteration" of nonconforming structures by way of a Section 6 finding, but makes no such allowance for reconstruction. Moreover, it follows, *a fortiori*, from *Rockwood* that where a land owner must obtain a variance and a Section 6 finding in order to alter or extend a nonconforming structure (other than a single or a two-family residence), a landowner must also obtain a variance to reconstruct the same structure.

⁵⁵ *Barron Chevrolet, Inc. v. Danvers*, 419 Mass. 404, 646 N.E.2d 89 (1995).

Many municipalities have zoning regulations that permit the reconstruction of nonconforming structures involuntarily destroyed by fire, flooding or other casualty. Prior to *Rockwood*, the courts generally, without focusing on the nature of the relief required, interpreted Section 6 as permitting such reconstruction, provided that the new structure's dimensions did not exceed those of the destroyed structure.⁵⁶ Likewise, a house damaged by flood could be reconstructed and some minor dimensional variations were permitted since the changes guarded against the possibility of future flooding.⁵⁷ Conversely, if the destruction was a voluntary act, the nonconforming structure could not be reconstructed, even if the new structure did not vary in dimension and did not increase the nonconforming nature of the previous structure.⁵⁸ It remains to be seen what zoning relief the courts will require for reconstruction of structures involuntarily destroyed post-*Rockwood*, but one would expect continued lenient treatment in such extraordinary cases.

§ 6-10. Extension or Structural Change of Structure.

Extensions or structural changes to structures may be authorized by a Section 6 finding (which is discussed below). In *Rockwood v. Snow Inn Corp.*,⁵⁹ which involved a commercial structure, the court held that proposed extension or structural changes must:

- (1) comply with the bylaw or ordinance *or* receive a variance from the board of appeal *and*
- (2) receive a finding that the proposed changes are not substantially more detrimental to the neighborhood than the existing structure.

In *Watros v. Greater Lynn Mental Health and Retardation Association*,⁶⁰ the court affirmed the board of appeals' grant of a special permit to a nonprofit educational corporation to renovate and use a barn, a nonconforming accessory structure, to provide shelter and education for mentally handicapped adults on a lot that also contained a two-family dwelling, a nonconforming use. Permitting the educational use of the barn did not increase the existing nonconforming use because the barn's use was protected under Chapter 40A, Section 3, and exempt from the application of the local zoning bylaw.

⁵⁶ *Berliner v. Feldman*, 363 Mass. 767, 777, 298 N.E.2d 153, 160 (1973); *Lomelis v. Board of Appeals of Marblehead*, 17 Mass. App. Ct. 962, 965, 458 N.E.2d 740, 743 (1983).

⁵⁷ *Lomelis v. Board of Appeals of Marblehead*, 17 Mass. App. Ct. 962, 458 N.E.2d 740 (1983).

⁵⁸ *Martin v. Board of Appeals of Yarmouth*, 20 Mass. App. Ct. 972, 482 N.E.2d 336 (1985); *Angus v. Miller*, 5 Mass. App. Ct. 470, 363 N.E.2d 1349 (1977).

⁵⁹ 409 Mass. 361, 566 N.E.2d 608 (1991).

⁶⁰ 421 Mass. 106, 653 N.E.2d 589 (1995).

§ 6-11. Certain Structural Alterations.

Zoning amendments also apply to an alteration of a structure, begun after the first notice of the public hearing on the zoning amendment at issue, 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. Repairs are not alterations. Repairs involve mending defects, while alterations "denote a change or substitution made in a particular part of a structure of such a substantial nature as to make the structure itself or an important part thereof materially different from what it formerly was."⁶¹

One case suggests strict construction requiring compliance with current zoning for minor changes. In *Nichols v. Board of Zoning Appeal of Cambridge*,⁶² the court held that alteration of a nonconforming structure to provide for a different use requires application of current zoning bylaw even if the new use is a permitted one. On the other hand, other cases hold that alterations are allowed within a "minimum of tolerance that must be afforded nonconforming ... structures."⁶³

§ 6-12. The Residential Exemption or Second Except Clause.

(Statutory Reference: M.G.L. ch. 40A, § 6, ¶ 1, sentence 1, part three)

See Appendix C

The last clause of the first sentence provides that zoning ordinances or bylaws shall not apply to alteration, reconstruction, extension, or structural change to a *single- or two-family residential structure* that does not increase the nonconforming nature of said structure.

In *Goldhirsh v. McNear*,⁶⁴ the court held that this meant that in the case of an application for changes to single or a two-family nonconforming residences, the board of appeals must

- (1) Identify the particular respect or respects in which the existing structure does not conform to the requirements of the present bylaw; and
- (2) Determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones;

⁶¹ *Boston & Albany R.R. v. Dept. Pub. Utilities*, 314 Mass. 634, 637, 51 N.E.2d 445, 447 (1943).

⁶² 26 Mass. App. Ct. 631, 530 N.E.2d 1257 (1988).

⁶³ *Inspector of Buildings of Burlington v. Murphy*, 320 Mass. 207, 209, 68 N.E.2d 918, 919 (1946).

⁶⁴ 32 Mass. App. Ct. 455, 460, 590 N.E.2d 709, 712 (1992).

- a. If the board concludes that there will be no intensification or addition, the applicant is entitled to the issuance of a special permit;
- b. If the conclusion is otherwise, the applicant must show that the change will not be "substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

§ 6-13. Application of *Rockwood* and *Goldhirsch*.

The following hypothetical situations show the analysis a practitioner should apply in determining the correct form of zoning relief to obtain for the client. The local bylaw or ordinance must always be consulted to determine local practices, which may include, for example, requiring a special permit in conjunction with a Section 6 finding.