



**MINUTES OF THE HEARING ON THE PETITION FOR  
191 NAGOG HILL ROAD, MARK & CLAIRE McCARTHY**

**HEARING #11-05**

A continued public hearing of the Acton Board of Appeals was held in the Town Hall on Monday, May 16, 2011 on the petition of Mark and Claire McCarthy for a public hearing pursuant to Paragraph No. 2 of Decision of Zoning Enforcement Officer that the proposed dwelling may be constructed pursuant to G.L. c. 40A § 6 first paragraph, as reconstruction does not increase any non-conformity located at 191 Nagog Hill Road. Map D-4/Parcel 37.

Present at the hearing was Ken Kozik, Chairman; Richard Fallon, Alternate Member; Marilyn Peterson, Member; Cheryl Frazier, Board of Appeals Secretary; Scott Mutch, Zoning Enforcement Officer and Assistant Town Planner. Also present was the applicants Attorney Louis Levine and petitioners Mr. & Mrs. McCarthy. Also present were a few abutters and interested parties.

Ken Kozik began by re-opening hearing #11-05. He summarized by saying that when the hearing was opened two weeks ago the petitioner submitted a memorandum regarding MA General Law Chapter 40A § 6 first paragraph and how it should be applied. The Board in a prior hearing, #11-04 had concluded that the Zoning Enforcement Officer did make the right decision with respect to this property applying to bylaw 8.3.6., and at this point they are just taking up whether the Zoning Act preempts that section of the bylaw. Lou Levine, Attorney for the petitioner submitted a memorandum of law with respect to how this should be decided. The board asked a number of questions and they felt in effect willfully unprepared. They continued with the agreement of the petitioner. Ken wrote to Stephen Anderson, Town Counsel for guidance under 40A Section 6 and how it should be conducted. Steve Anderson wrote a brief summary for the Board. The petitioners Attorney requested a copy and did in fact get one. Before Ken continues he'd like to update the petitioners and abutters of Town Counsel's analysis. He read Counsel's analysis. Ken summarized by stating that under 40A Section 6, they have to answer one or possibly two questions, the first being whether increasing the footprint would increase the non-conforming nature of the structure on the non-conforming hammerhead lot and if they answer that in the affirmative then they would have to ask whether or not that would be a detriment to the neighborhood, if they find it is a detriment it would not be granted relief.

Ken asked for comments from the Board. Richard Fallon began by saying he believes it is complicated but in his view they have to reach an answer for the second question. He thinks the first paragraph is very clear if you increase it doesn't comply. It's in the bylaw. Marilyn does not believe it increases the non-conformity because the non-conformity has to do with the 50' foot frontage and it is certainly not detrimental to the neighborhood. Ken then asked Marilyn from a non-legal prospective how she got to detrimental or not detrimental. She said the lot size is not detrimental; the response of the neighbors and the visual line from the other structures is not detrimental, so therefore she does not see how it can be more detrimental.

Lou Levine, said he thinks he and Steve Anderson, agree that 40A Section 6 is in a series of provisions, but it is not more substantially detrimental. He believes the issue for the Board is whether or not the petitioner is increasing the non-conformity if they look at the neck of the lot which they are. You can build as a matter of right if you meet the sideline setbacks. There is no floor area ratio in most residential zones in Acton. The Zoning Enforcement Officer issued his denial, once D'Agostine and Levine got involved, there was a disagreement, so the Zoning Enforcement Officer amended his letter to the Section 6 finding. Lou said Town Counsel and he agree with the Section 6 finding. The issue circulates around Section 8.3.6 and the floor area ratio. Steve agrees that it's up to the Board. Lou would ask that the Board make the finding that the FAR is not applicable, and it was not intended to be looked at. Secondly, the issue would be the increase in the non-conformity and if it's detrimental to the neighborhood. Lou added that except for the existing non-conformity and the FAR they are entitled to this.

Mark McCarthy they have talked to all their neighbors and if they thought it was a problem they would have never done this. They did all the right things and they hope the Board makes the right decision.

Lou Levine, Attorney for the petitioner said the only thing he and the Board are disagreeing about is what was non- conforming about the lot. The issue of the Board is to determine whether or not the petitioner is increasing the non-conformity. What's come into this is the Provision of 8.3.6 where it says you can build as a matter of right if you meet the existing side line setbacks and don't increase the FAR. There is no FAR in most residential zones in Acton including this zone. He continued by saying the Section 6 finding is there and he and Steve Anderson, agree there is a two part question. Are you increasing the non-conformity and is there a substantial detriment to the neighborhood. He doesn't believe the FAR is appropriate here, there is no increase in the non-conformity and is not in any way detrimental to the neighborhood. He said they are talking about a very large lot that is way over the minimum requirement and they comply with all the other requirements of the bylaw except for the existing non-conformity and the FAR and except for those two issues they are entitled to Section 6.

Mark McCarthy, owner of the property said they have talked with all the neighbors and asked them what they thought and if their neighbors had any problem or issue with what they were proposing they wouldn't be doing this. They have lived here for 13 years and will probably live here for the rest of their lives. They hope that the Board makes the right decision.

Ken asked Marilyn if she had any questions of the petitioners Attorney. She did not. Ken then asked Rick if he had any questions. Rick asked Scott if the proposed building complies with all the minimum setbacks front, side, and rear as is current now. Scott Mutch and Lou Levine agreed it complies with all the requirements. Kim Comeau, of 57 Harvard Road in Stow and she actually represented the McCarthy's in purchasing the property and she too thinks it's a situation of equity and fairness here. She wanted to mention a couple of things, one that the neighbors that spoke last week said the house will be of less impact to them because the house sits back further than the present house. She also added that the listing agent and herself met with Roland and Scott and were told on two occasions that the house could be torn down and rebuilt again. But she realizes that's not what's being addressed tonight. John Frye, abutter from 5 Able Jones just wanted to comment on the term used in counsel's memo regarding mansionization. Mr. Frye said the house is the size it is because it will have an in-law apartment not because it will have an inside swimming pool or basketball court but rather because it will have an in-law apartment. Claire McCarthy, Petitioner wanted to address that they spoke with the neighbors at the last meeting and many of them were present at the last hearing and even though they couldn't be present tonight they still stand to their position and they don't have any issues with what's

being proposed. Ken asked Lou if he had any more questions. Lou said after this hearing no matter what happens the Town should take a look and the bylaw should be looked at closely.

Ken Kozik made a motion to close Hearing #11-05 Marilyn so moved and Rick Fallon seconded the motion. The hearing was closed.

Ken asked for a motion from the Board to entitle the petitioner to a building permit under Chapter 40A § 6 paragraph 1. Marilyn so moved, Rick Fallon seconded the motion. The Board voted 2-1 that the structure was not more non-conforming and voted 3-0 to approve the Building Permit for 191 Nagog Hill Road.

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**HEARING #11-06**

Ken Kozik re-opened Hearing # 11-06.

This application was withdrawn by the applicant.

**To approve and sign decisions for Hearing #11-02 and #11-03 149 Great Road**

The board approved and signed decisions for #11-02 & 11-03

**To sign Regulatory and Use Agreement for Town School Limited Partnership, 3 Charter Road**

The board signed the Regulatory and Use Agreement for Town School Limited Partnership