

R E C E I V E D
MAY 27 2011

**BOARD OF APPEALS
MINUTES OF THE HEARING
May 2, 2011**

TOWN CLERK, ACTON

The hearing was opened on Monday, May 2, 2011 at 7:30 pm in the Room 126 of the Town Hall.

The hearing present three issues regarding a decision by the Zoning Enforcement Officer to deny the petitioners a building permit. The first issue was whether the proposed four car garage configuration violated the bylaws. The second issue was whether the proposed building violated 8.3.6. The third issued involved a proposed in-law apartment violated the by-laws.

Present at the hearing was Mr. Kenneth Kozik, Chairman, Mr. Jonathan Wagner, Member and Ms. Marilyn Patterson, Member. Mr. Scott Mutch, Assistant Planner and Zoning Enforcement Officer; Ms. Kim Gorman, Planning Department Secretary (interim for Ms. Cheryl Frazier, Board of Appeals Secretary).

Attending the hearing for the petitioner were Mr. Lou Levine (Applicant's Lawyer), and Mr. and Mrs. McCarthy (petitioners of application). Also attending the hearing were abutters and interested parties from Acton.

Mr. Kozik opened the public hearing for the review and discussion of # 11-04 for 191 Nagog Hill Road at 7:30pm. Mr. Kozik stated the applicant's lawyer had requested a Petition for Review of the Refusal of the Zoning Enforcement Officer (ZEO) to grant a building permit to construct a new single family residence with a garage.

Mr. Levine stated the Board might find §. 6 would be easier but Mr. Kozik stated he would like to discuss the petitions in order because of the Commonwealth's public meeting law.

#11-04 - 191 Nagog Hill Road - Session #1

Mr. Kozik opened the public hearing for the Hearing #11-04, 191 Nagog Hill Road petition for review; building permit to (a) reconstruct a single family residence on a lawful nonconforming lot per Bylaw Section 8.1 and 8.3.2; (b) incorporating living space for dependent elderly parents, see Bylaw Section 1.3.6; and (c) incorporating within the structure one 3-car garage and one 1-car garage to overturn a decision by the ZEO.

Mr. Kozik listed all the exhibits from the folder that were submitted for the record, as well as the legal memo received from Mr. Levine's office regarding the petitioners' memorandum hand delivered April 28, 2011.

Mr. Kozik stated the petitioners would like to rebuild a 10,000 square feet in size house on a non-conforming lot with 2 garages.

Mr. Kozik explained Mr. Mutch findings were that the building permit was applied for and demo permit but the lot width is too narrow and nonconforming due to Sections 8.

Mr. Kozik stated the in-law apartment has been worked out with Mr. Mutch and Mr. Levine's office with filing a zoning certification and covenant. Therefore, the Board will take no vote on this issue.

Mr. Lou Levine explained the proposed project to build a house that is only 7,500 square feet in size. The garages are to be a part of the house; the drawings show that 3 will be located on one side and the other garage will be on the other side of the house. There will be no additional structures; it is built all together.

The ZEO's interpretation of the garage is only in one location. From the 1974 plot plan (exhibit) Lot 3, only non-conformity at the time of creation.

No requirement of lot width was 50'. In 2007, the prior homeowners conveyed a large portion of land (exhibit) to the Town.

Mr. Levine stated that Mr. Young and Mr. McCarthy's broker met with Planning Department staff, which stated it would conform and the engineer for the project reached out to Mr. Mutch about the garages.

Mr. Mutch's memo stated the issues of concerns were to Sections 8.3.6 and the issue with the garage.

Mr. Levine spoke to Mr. Bartl regarding the Auburn Bylaw from the 1990's. Citing on the Dial Away Co. v. Zoning Board of Appeals of Auburn, MA.

Section 8.3.2, the Appeal court found they could rebuild on a nonconforming lot as long as they are conforming.

Board members reviewed and discuss Mr. Levine's exhibits of the Westlaw findings of Supreme Judicial Court v. Edgartown, MA; Appeals Court of Dial Away co., Inc. v. Auburn, MA and a few others.

Mr. Kozik stated that he has spoken with Town Counsel and he did not agree with Mr. Levine. Mr. Levine stated he called Town Counsel and stated with the Section 6 findings, Mr. Levine should use Section 6 for the lot could be built.

Mr. Levine stated the Dial Away Co. is protected by individual laws. Section 8.3.2 is exact with the Town of Auburn's Bylaw (exhibit) and if can conform to all then you can build.

Mr. Levine stated he does not agree with Mr. Mutch's interpretation of Section 8.3.6. He stated the 2008 Annual Town Meeting didn't amend or change 8.3.2. The ZEO has made an assumption that both sections are identical.

Mr. Levine stated Section 3.8.1.1 has no restrictions as number of garages. Mr. Levine stated 1949 Superior court found attached garages were not separate accessory (exhibit). What harm is it being added? Mr. Levine states it makes no sense and thinks the garage can be placed anywhere on the structure. The Bylaw cannot regulate how it is constructed.

Mr. Levine stated there were many situations where there should be a historical setting. There were 2 prior building commissioners that have interrupted differently than Mr. Mutch; it has been interrupted differently over the years. Mr. Levine has several exhibits in his petitioner's memorandum on abutting homes that had separate buildings on their land and received separate building permits for the structures.

Mr. Kozik reviewed the concerns of the public hearing; the ZEO, Mr. Mutch denied the building permit under Section 8.3.6 but Mr. Levine thinks Section 8.3.2 applies.

Members of the public had the following comments/questions:

Mr. Charles Stone, 5 Long Ridge Road, what is the size of the lot? Mr. Levine replied it is 4.6 acres. Mr. Stone stated the acre supports the size of the house. The Town should encourage multi-generation living and the garage issue is a not starter; it shouldn't be taking up our time.

Mr. David McDonald, 187 Nagog Hill Road, stated he understands that intent of the bylaw is to prevent overbuilding. He stated in the winter time, he is barely able to see 191 Nagog Hill Road house, and now with it being build further back, he would barely see it.

Ms. Kim Montella, 195 Nagog Hill Road, she agreed with previous abutter, in the winter time, she is barely able to see 191 Nagog Hill Road house, and now with it being build further back, she would barely see it. Her main concern is the upkeep with the road but she stated the McCarthy's have agreed to the upkeep.

Mr. John Frey, 5 Abel Jones Place, stated the McCarthy's are good people and fine neighbors and do not plan on flipping the house.

Board members asked and commented on:

- Section 8.3.2 was already in place and 8.3.6 was adopted after 2008 Annual Town Meeting. So what is there now is a non conforming structure? Mr. Mutch stated yes and due to the lots current width they are not allowed to reconstruction the house larger. Mr. Levine stated Dial Away dealt with the exact situation and on the Section 6 findings.
- Section 8.3.6 is restricted and it applies but specific design to this is application.
- This is not a small lot, it is large, and the sections should be connected.

Board members recommend to staff, changes to the Zoning Bylaw.

Mr. Kozik motioned to overturn the Zoning Enforcement Officers refusal to grant a building permit to 191 Nagog Hill Road Permit File #11-04 regarding construct new single family residence on a nonconforming hammerhead lot, Ms. Patterson 2nd, motion denied. The 8.6.3 issue. Vote 1/2 – Ms. Patterson yes, Mr. Kozik and Mr. Fallon nay.

Mr. Kozik stated he will write the 191 Nagog Hill Road Permit File #11-04 decision.

Board members discussed Section 3.8.1.1 regarding the two (2) separate garages. They stated the bylaw is very confusing and poorly written.

Mr. Kozik motioned to overturn the denial for 191 Nagog Hill Road Permit File #11-04 regarding the two (2) separate garages, Mr. Patterson 2nd, all in favor.
Vote 3/0 – Overturned.

Mr. Kozik opened the public hearing for the review and discussion of # 11-05 for 191 Nagog Hill Road at 9:30pm. Mr. Kozik stated the applicant's lawyer had requested a Petition for Review of the Refusal of the Zoning Enforcement Officer (ZEO) to grant a building permit to construct a new single family residence with a garage.

11-05 – 191 Nagog Hill Road – Session # 1

Mr. Kozik opened the public hearing for the review and discussion of # 11-05 for 191 Nagog Hill Road at 9:30pm. Mr. Kozik stated the applicant's lawyer had requested a Petition for Find Pursuant to G.L. c.40A § 6., Pursuant to Paragraph 2 of Decision of Zoning Enforcement Officer (ZEO) that the proposed dwelling may be constructed pursuant to G.L. c.40A §.6, first paragraph, as reconstruction does not increase any non-conformity to overturn a decision by the ZEO.

Mr. Kozik listed all the exhibits from the folder that were submitted for the record, as well as the legal memo received from Mr. Levine's office regarding the petitioners' memorandum hand delivered April 28, 2011.

Mr. Levine's explained the exhibits of the Westlaw findings. Mr. Levine stated that determination is for §. 6, if not increasing conformity then petitioners are entitled by a matter of right to build. Mr. Levine stated he had a conversation with Town Counsel and then Mr. Mutch amended his decision in his letter. Board of Appeals is entitled to a §. 6 finding. The law of non conforming structures and there is a need to make as a finding. There is the issue of width on the hammerhead lot. There are already 4 or 5 homes servicing the private way. The driveway is there but there is an agreement.

Mr. Kozik explained the purpose of the public hearing meeting. The ZEO rejects the Sec. 8.3.6 building permit for a Sec. 6 finding brought to the Board.

Mr. Levine stated the ZEO did not comply with the sections of the bylaw and the permit is entitled under general laws. After speaking with Town's counsel, then did Mr. Mutch amend his letter.

Mr. Kozik explained that the ZEO didn't feel comfortable making the decision and is asking the Board to review.

Members of the public had the following comments/questions:

Mr. David McDonald, 187 Nagog Hill Road, stated he still supports the project and thinks it's not detrimental. There are no issues with the non conformity.

Mrs. McCarthy, petitioner, stated there is no change to the conformity. The setbacks are increased but the house is positioned further back. Should be able to build for their family and parents and have spoken with the neighbors regarding the driveway.

Board members recommended they would like Town counsel's input and don't feel fully educated to make a decision with verbal statements.

Mr. McCarthy, petitioner, stated he does not understand the ruling. Mr. Levine is not lying and neighbors support the project. His mother is dying and is very confused on the bylaw. He would never have bought this property and town counsel should have been involved earlier.

Board members agreed to continue the public hearing for # 11-05 – 191 Nagog Hill Road – Session # 2 to May 16, 2011 at 7:30pm in meeting room to be posted at the Acton Town Hall. Motion was made to continue the public hearing, 2nd; all in favor.

Mr. Kozik motioned to open public hearing for 191 Nagog Hill Road Permit File #11-06 and immediately continue to May 16, 2011 at 7:45pm in meeting room to be posted at the Acton Town Hall. Motion was made to continue the public hearing, 2nd; all in favor.

Motion was made to close the meeting, 2nd; all in favor; meeting adjourned at 10:18pm.

Respectfully submitted,



Kim Gorman, Interim for
(Cheryl Frazier,
Board of Appeals Secretary)



Kenneth Kozik
Chairman of the Board of Appeals