

DECISION 07-04

DECISION ON THE PETITION BY GEORGIANNA GAGNON

A public hearing of the Acton Board of Appeals was held in the Town Hall on Monday, July 16, 2007, at 7:30 P.M., on the petition by Georgianna Gagnon for a VARIANCE from the requirements of Section 5.3.1 (Table of Standard Dimensional Regulations) of the Zoning Bylaw to allow the installation of photovoltaic solar panels twenty feet (20') from Pope Road where forty-five feet (45') is required. The lot is located at 126 Strawberry Hill Road, Map E-5/Parcel 52.

Board members present at the hearing were Kenneth F. Kozik, member and acting chairman, Jonathan Wagner, alternate member; and Richard Fallon, alternate member. Also present were Garry Rhodes, Building Commissioner; Cheryl Frazier, Board of Appeals Secretary; Georgianna Gagnon, petitioner, and Janet Adachi, abutter.

Ken Kozik opened the hearing and read the contents of the file. Included in the file was a memo from the Building Commissioner, Garry Rhodes, stating his determination that photovoltaic solar panels should be considered a structure under the zoning bylaw definition. Accordingly, in the Commissioner's opinion, a variance was required.

Ms. Gagnon was asked to begin. Ms. Gagnon testified that her intent was to install an array of photovoltaic solar panels ("panels") to supplement her home supply of electricity. Upon finding that the panels could not be positioned on her roof because of an incorrect exposure to the sun, she determined that a suitable alternate position would be in the yard in proximity to her house. Three suitable locations were considered in view of the property having a pond. A first location, which would not require a variance, was dismissed because the panels would sit on top of the house's septic system. A second location, which also would not require a variance, was dismissed because of its proximity to an underground irrigation system. The third location is a position within the 45' setback and is the subject of this hearing.

Board member Ken Kozik explained to the Ms. Gagnon that the Board has to make certain mandatory findings to grant a Variance under section 10.5.5 and asked Ms. Gagnon what circumstances relating to the soil conditions, shape or topography of the Lot or Structures differed from those in the surrounding area which would cause a substantial hardship if the Bylaw was enforced in this instance. In response, Ms. Gagnon offered no evidence.

Janet Adachi of 2 Simon Hapgood Lane, an abutter, asked Ms. Gagnon some questions regarding the size of the proposed panels and about their orientation. Subsequently, Ms. Adachi had no concerns and was not against the installation of the panels.

Board member Ken Kozik asked Ms. Gagnon whether she wanted to add anything with respect to considering the panels as a structure or not under the bylaws. Ms. Gagnon provided no testimony, stating only that she would prefer we ruled that the panels not be determined a structure as defined in the bylaws.

Under Acton's bylaws, section 1.3.17 defines STRUCTURE as follows:

A combination of materials assembled to give support or shelter, such as BUILDINGS, towers, masts, sheds, roofed storage areas, mechanical equipment, swimming pools, tennis courts, signs, fences; but not including driveways, walkways and other paved areas, underground storage tanks, septic tanks and septic systems, and accessory facilities associated with the provision of utilities such as drains, wells, transformers and telephone poles.

Ken Kozik asked Mr. Rhodes to explain his interpretation. Mr. Rhodes testified that the definition is vague when it comes to the panels that are subject of this hearing. As a generator of electricity, the panels may be considered a utility. Mr. Rhodes testified that, in his opinion, the panels were not an accessory but more like a primary. In the end, Mr. Rhodes considered the panels to be mechanical equipment, and as such, subject to the zoning bylaws.

Members of the Board debated the issue and were split 2 to 1 in favor of the panels being considered a structure as defined in Section 1.3.17; Mr. Kozik and Mr. Wagner agreed with the Commissioner; Mr. Fallon dissented. More specifically, Mr. Fallon took the position that the photovoltaic array for residential purposes was an accessory facility associated with the provision of utilities as described in Section 1.3.17, excluded from the definition of a "Structure," and thus not requiring a setback.

The Board proceeded under the interpretation that the panels were a structure.

The Board of Appeals, after considering the materials submitted with petition, together with the information developed at the hearing finds that:

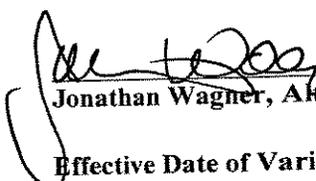
1. The Petitioner seeks a VARIANCE from the requirements of Section 5.3.1 (Table of Standard Dimensional Regulations) of the Zoning Bylaw to allow the installation of photovoltaic solar panels twenty feet (20') from Pope Road where forty-five feet (45') is required.
2. The panels are a structure as defined under Section 1.3.17.

3. A literal enforcement of Section 5 of the Zoning Bylaw would not involve substantial hardship to the Petitioner as a result of any circumstances relating to the soil conditions, shape or topography of the Lot or Structures.

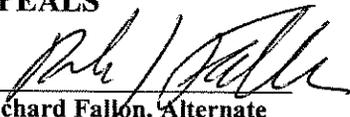
Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, Mr. Kozik and Mr. Wagner voted to deny the variance, while Mr. Fallon voted to abstain. Accordingly, the **VARIANCE is DENIED**.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

TOWN OF ACTON BOARD OF APPEALS


Jonathan Wagner, Alternate


Kenneth F. Kozik, Member


Richard Fallon, Alternate

Effective Date of Variance: No variance or any modification, extension or renewal thereof shall take effect until a copy of this decision has been recorded in the Middlesex County South District Registry of Deeds. Such decision shall bear the certification of the Town Clerk that 20 days have elapsed after the decision has been filed in the Office of the Town Clerk, and that no appeal has been filed, or that if such an appeal has been filed it has been dismissed or denied.

Expiration of Date of Variance: In accordance with Massachusetts General Laws Chapter 40A Section 10, if the rights granted by this variance are not exercised within one year from its date, the variance will lapse. A six-month extension of the rights under this variance may be applied for by filing a written application for an extension before the expiration of this one-year period.