

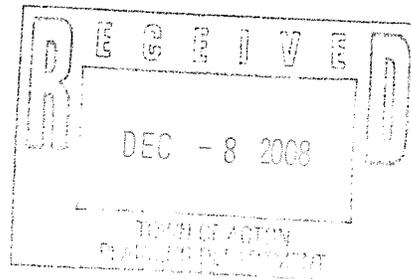


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December 4, 2008



CERTIFIED MAIL: 7005 0390 0001 8479 8230

Roland Bartl
Town of Acton
Town Hall
472 Main Street
Acton, MA 01720

RE: *Michael J. Connolly and Maureen T. Connolly, Plaintiffs vs. Cara Voutselas, Marilyn Peterson, Ken Kozik, Jonathan Wagner, Richard Fallon and Francis Mastroianni, As They Are the Members of and Constitute the Board of Appeals of Acton, Middlesex County, Massachusetts, and Roland Bartl and Scott Mutch, As They Are or Were the Zoning Enforcement Officer of the Town of Acton, and Andrew Shlesinger and Mary Dinino, Individually, Defendants*
Land Court Department of the Trial Court, Middlesex Division, Misc. Action No. 388475

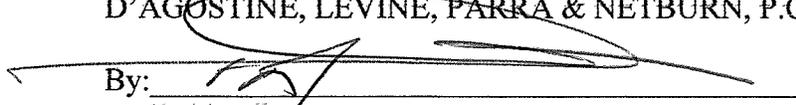
Dear Mr. Bartl:

Pursuant to Massachusetts General Laws, Chapter 40A, Section 17, notice is hereby given that on December 4, 2008, the Plaintiffs, Michael J. Connolly and Maureen T. Connolly, appealed the decision of the Zoning Board of Appeals of the Town of Acton entitled "Hearing #08-06, **HEARING ON THE APPEAL BY ANDREW SHLESINGER, 36 NEWTOWN RD., TO OVERTURN A DECISION OF THE ZONING ENFORCEMENT OFFICER**", which decision was filed with the Town Clerk of Acton on November 19, 2008, ("Decision"), to the Land Court Department of the Trial Court, Middlesex County. Notice of filing of the Complaint was given to the Town Clerk of Acton on December 4, 2008. The property which is the subject of this appeal and the Decision is located at 40 Newtown Road, Acton, Massachusetts.

A copy of the above-referenced Complaint filed in the Land Court Department of the Trial Court, Middlesex County, to which is attached an attested copy of the Decision, is attached hereto, incorporated herein and made a part hereof.

Very truly yours,
MICHAEL J. CONNOLLY and
MAUREEN T. CONNOLLY
The Plaintiffs,
By their Attorneys,
D'AGOSTINE, LEVINE, PARRA & NETBURN, P.C.

FAP/jmh
Enclosure
cc: Clients (w/out enc.)
letter\40a cm letters connolly

By: 
F. Alex Parra
e-mail: alex@dlpn.com

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

LAND COURT DEPARTMENT
OF THE TRIAL COURT
MISC. ACTION NO. 08 MISC 388475

MICHAEL J. CONNOLLY and MAUREEN T.)
CONNOLLY,)
Plaintiffs)

vs.)

COMPLAINT

CARA VOUTSELAS, MARILYN)
PETERSON, KEN KOZIK, JONATHAN)
WAGNER, RICHARD FALLON and)
FRANCIS MASTROIANNI, As They Are the)
Members of and Constitute the Board of)
Appeals of Acton, Middlesex County,)
Massachusetts, and ROLAND BARTL and)
SCOTT MUTCH, As They Are or Were the)
Zoning Enforcement Officer of the Town of)
Acton, and ANDREW SHLESINGER and)
MARY DININO, Individually,)
Defendants)

The Plaintiffs, Michael J. Connolly and Maureen T. Connolly, being aggrieved by a decision of the Board of Appeals of the Town of Acton ("Board"), purportedly acting pursuant to its authority under G. L. c. 40A and the Town of Acton Zoning By-Law ("Bylaw"), hereby invoke the provisions of G. L. c. 40A, §17 and appeal said decision of the Board.

1. The Plaintiffs, Michael J. Connolly and Maureen T. Connolly ("Plaintiffs") have resided at and owned the single family dwelling and land situated at 40 Newtown Road, Acton, Massachusetts ("Connolly Property") since 1969. The persons residing and intending to reside at the Connolly Property, namely the Plaintiffs, their daughter, disabled granddaughter and son-in-law, constitute a single "Family" as defined in Section 1.3.6 of the Bylaw.

2. The Defendants, Cara Voutselas of 4 Ladyslipper Lane, Acton, Middlesex County, Massachusetts; Marilyn Peterson of 25 Old Village Road, Acton, Middlesex County, Massachusetts; Ken Kozik of 43 Mohawk Drive, Acton, Middlesex County, Massachusetts, Jonathan Wagner of 1

Larch Road, Acton, Middlesex County, Massachusetts; Richard Fallon of 27 Faulkner Hill Road, Acton, Middlesex County, Massachusetts; and Francis Mastroianni of 8 Duston Lane, Acton, Middlesex County, Massachusetts, at all times material and relevant hereto were and are all the members of the Board, sitting and acting pursuant to the authority granted to them under G. L. c. 40A and the Bylaw.

3. The Defendants, Roland Bartl and Scott Mutch of Town Hall, 472 Main Street, Acton, Middlesex County, Massachusetts, at all times material and relevant hereto were or now are the Zoning Enforcement Officer of the Town of Acton (“ZEO”) and pursuant to Section 11.1 of the Bylaw, is “the officer charged with the enforcement of this Bylaw.”

4. The Defendants, Arthur Shlesinger (“Shlesinger”) and Mary Dinino (“Dinino”), on information and belief, are husband and wife, reside at and own the property situated at 36 Newtown Road, Acton, Middlesex County, Massachusetts (“Shlesinger Property”).

5. The Shlesinger Property directly abuts the Connolly Property and Shlesinger and Dinino have an unobstructed view of the Connolly Property.

6. On or about June 2, 2008, the Board of Health of the Town of Acton issued a permit to Plaintiffs to construct and install a new subsurface sewage disposal system at the Connolly Property (“Septic System”). The purpose of the new Septic System was to accommodate an addition to the existing house at the Connolly Property.

7. Plaintiffs proceeded with construction of the Septic System immediately after issuance of the aforesaid septic permit.

8. On June 11, 2008, the Board of Health inspected the excavation for the Septic System and found same complete.

9. On June 19, 2008, the Building Commissioner for the Town of Acton issued a building permit (“Building Permit”) to Plaintiffs for the construction of the addition to the existing house at the Connolly Property (“Addition”). The existing house at the Connolly Property was

constructed well prior to 1990 and Plaintiffs use and intend to use the existing house and Addition as a single family dwelling in accordance with the provisions of the Bylaw.

10. From June 20, 2008 and thereafter until issuance of the occupancy certificate for the Addition was issued by the Building Commissioner, the Building Permit was conspicuously posted at the Connolly Property so as to be visible from the public way.

11. On June 24, 2008, the Board of Health of the Town of Acton inspected the Septic System prior to backfill and found same to be complete.

12. On or before July 1, 2008, construction of the Addition pursuant to the Building Permit commenced with the excavation for a foundation 8' high, 68' feet long and 28' wide.

13. On July 2, 2008, the Town of Acton Building Department inspected the excavation for the foundation of the Addition and found same to be complete.

14. Almost immediately thereafter, neighbors contacted the Acton Town Hall concerning the construction at the Connolly Property.

15. On or about July 10, 2008, the foundation for the Addition was completed and inspected by the Town of Acton Building Department.

16. On July 30, 2008, Shlesinger e-mailed requests for enforcement of the Bylaw to the ZEO regarding the Building Permit and the Addition, alleging that same were not in compliance with the Bylaw.

17. On July 30, 2008 and again on July 31, 2008, Shlesinger's aforesaid requests for enforcement were denied by the ZEO and the decision to issue the Building Permit for the Addition and compliance with the Bylaw were affirmed.

18. On or about September 17, 2008, ninety (90) days after issuance of the Building Permit and forty-nine (49) days after Shlesinger's requests for enforcement by the ZEO were denied, Shlesinger filed a petition ("Shlesinger Petition") for review of the Building Permit with the Board, asserting that the Addition violated section 3.3, 3.3.2, 3.3.2.1 and 3.3.2.2 of the Bylaw.

19. Although the Shlesinger Petition states, in part, “[t]he Interim Building Commissioner and Town Planner were notified in writing on July 31, 2008 of this complaint and declined to act,” no request for or denial of enforcement action was attached to the Shlesinger Petition as required by the rules of the Board. On July 31, 2008, the Town Planner was also the ZEO.

20. On November 19, 2008, the Board filed a document entitled, "Hearing #08-06, **HEARING ON THE APPEAL BY ANDREW SHLESINGER, 36 NEWTOWN RD., TO OVERTURN A DECISION OF THE ZONING ENFORCEMENT OFFICER**", with the Town Clerk of the Town of Acton, purporting to be the decision (“Decision”) of the Board on the Shlesinger Petition. A copy of the Decision hereby appealed from, bearing the date of filing thereof, attested by the Town Clerk with whom the Decision was filed, is attached hereto, incorporated herein, made a part hereof and marked "Exhibit A."

21. Although the Shlesinger Petition was only signed by Shlesinger and purports to be filed only on behalf of Shlesinger, the Decision treats Dinino as a petitioner.

22. During the course of the hearings before the Board on the Shlesinger Petition, Shlesinger and Dinino stated that they were aware that construction of the Addition was taking place at the Connolly Property when the foundation was poured. However, contrary to the Town’s own records that the foundation was poured and completed on or before July 10, 2008, well within the time for appealing the Building Permit, the Board accepted Shlesinger’s and Dinino’s assertion that they only became aware of the construction in late July, 2008.

23. In the Decision, the Board ignored the Town’s own records and the admissions of Shlesinger and Dinino that they requested and were denied enforcement action by the ZEO no later than July 31, 2008, or forty-eight (48) days prior to filing the Shlesinger Petition.

24. Notwithstanding the aforesaid facts and admissions of Shlesinger, which clearly demonstrate that the Shlesinger Petition was not timely filed and that the Board was without

jurisdiction, the Board stated in the Decision that it “declined to find that it lacked jurisdiction and proceeded to hear the merits of the Petition.”

25. In the Decision, the Board found contrary to the Shlesinger Petition that the pre-existing house, together with the Addition, constitute “one building for zoning purposes,” in compliance with Section 3.3 of the Bylaw.

26. In the Decision, the Board further found that “[t]he pre-existing home was ‘altered’ in the sense that it was made larger. The Board agrees with the ZEO and his interpretation of the Bylaw. In addition, the Board notes that this interpretation has been allowed by the Town on numerous occasions without challenge.”

27. In the Decision, the Board further found that “the evidence was uncontroverted that the new space would be used by a single family unit, i.e., the Owners, the daughter and her family.”

28. In the Decision, the Board further found “that the [Plaintiffs] acted in good faith throughout the construction process and relied on the interpretation of the Zoning Enforcement Officer.”

29. The foregoing findings notwithstanding, the Decision states “. . . [t]his Petition to appeal the decision of the Zoning Enforcement Officer to refuse to enforce Sections 3.3, et al of the Zoning Bylaw against the owners of 40 Newtown Rd., is GRANTED.”

30. The Decision exceeds the authority of the Board.

31. The Decision is arbitrary, capricious, whimsical and based on legally untenable grounds, invalid, illegal, unenforceable and null and void, without force or effect and exceeds the authority of the Board.

32. The Decision is arbitrary, capricious, whimsical and based on legally untenable grounds, invalid, illegal, unenforceable and null and void, without force or effect and exceeds the authority of the Board for the following reasons, *inter alia*:

a. The Board was without jurisdiction to hear the Shlesinger Petition.

b. The Board was without jurisdiction to hear the Shlesinger Petition as same was not filed within thirty (30) days of the issuance of the Building Permit.

c. The Board was without jurisdiction to hear the Shlesinger Petition as it was not filed within thirty (30) days of when Shlesinger and Dinino knew or should have known of the issuance of the Building Permit.

d. The Board was without jurisdiction to hear the Shlesinger Petition as it was not filed within thirty (30) days of the decision of the ZEO to deny zoning enforcement action.

e. The Board was without jurisdiction to hear the Shlesinger Petition as said petition failed to comply with the provisions of G.L. c.40A and the rules of the Board.

f. The Board was without jurisdiction to hear the Shlesinger Petition as no request for or denial of enforcement action was attached to the Shlesinger Petition as required by the rules of the Board.

g. The Board having found that the existing house and Addition at the Connolly Property constitute one building used as a single family dwelling, the Connolly Property by definition complies with the Bylaw, which permits same to be used as a "Single FAMILY Dwelling."

h. The Connolly Property complies with all of the applicable provisions of the Bylaw as a permitted "Single FAMILY Dwelling."

i. The Connolly Property complies with all of the applicable provisions of the Bylaw as a permitted "Single FAMILY Dwelling with One Apartment."

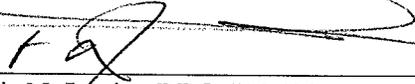
j. The Decision is contrary to the provisions of G. L. c. 40A, §3, which provides, in relevant part that "[n]o zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building"

33. The Plaintiffs are aggrieved by the Decision and, pursuant to G. L. c. 40A, §17, appeal the Decision to this Honorable Court.

WHEREFORE, the Plaintiffs, invoking the provisions of G. L. c. 40A, §17, respectfully demand this Honorable Court:

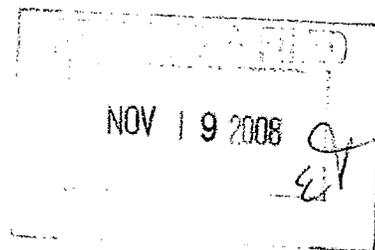
1. Hear all the evidence pertinent to the authority of the Board and determine the facts;
2. Determine, adjudge and declare that Plaintiffs are aggrieved by the Decision;
3. Determine, adjudge and declare that the Board was without jurisdiction to hear the Shlesinger Petition.
4. Determine, adjudge and declare that the Decision exceeds the authority of the Board;
5. Determine, adjudge and declare that the Decision is a nullity and null and void as a matter of law and without force or effect;
6. Annul the Decision;
7. Award the Plaintiffs their costs incurred in connection with this action.
8. Grant the Plaintiffs such other relief as justice, equity and the circumstances may require.

Respectfully submitted,
MICHAEL J. CONNOLLY and
MAUREEN T. CONNOLLY.
The Plaintiffs,
By their Attorneys,
D'AGOSTINE, LEVINE, PARRA & NETBURN, P.C.

By: 

Louis N. Levine BBO #296880
F. Alex Parra BBO #390315
268 Main Street
P.O. Box 2223
Acton, Massachusetts 01720-6223
(978) 263-7777
December 4, 2008

Civil\Connolly\Complaint



A True Copy. Attest:

Eon K. Taylor

TOWN CLERK ACTON, MASS.

Hearing #08-06

**HEARING ON THE APPEAL BY ANDREW SHLESINGER, 36 NEWTOWN RD.,
TO OVERTURN A DECISION OF THE ZONING ENFORCEMENT OFFICER**

A public hearing of the Acton Board of Appeals (the "Board") was held on Monday, October 27, 2008 at 7:30 PM at the Town Hall on the petition by Andrew Shlesinger and Mary Di Nino (the "Petitioners") under Section 11.1.1 of the Zoning Bylaw. The Petitioners appeal the decision of the Zoning Enforcement Officer (the "ZEO") to refuse to enforce Sections 3.3, et al of the Zoning Bylaw against Michael and Maureen Connolly, the property owners of 40 Newtown Rd. (the "Owners"). The property in question is located at 40 Newtown Rd., Map E3/Parcel 105.

Present at the hearing were Cara Voutselas, Chairperson; Marilyn Peterson, Member; Ken Kozik, Member; Roland Bartl, Town Planner and Acting Zoning Enforcement Officer; Scott Mutch, Assistant Town Planner and Cheryl Frazier, Board of Appeals Secretary. Also present were Kevin Sullivan, attorney for the Petitioners; the Petitioners themselves; Michael and Maureen Connolly, owners of the property located at 40 Newtown Rd.; as well as numerous abutters.

Cara Voutselas opened the hearing and read the contents of the file into the record. The hearing commenced at 7:30 PM. Because there was another hearing on the agenda and hearing #08-06 was expected to be lengthy, the Board decided to call a recess of hearing #08-06 at 8:00 PM, hold the next scheduled hearing, and reconvene at 8:30 PM. The hearing was closed and the Board came to a decision in support of the Petitioners that evening.

On October 31, 2008, Lou Levine, Esq., attorney for the Owners, submitted to the Board a Request to Reopen Proceedings on the basis that the Board of Appeals lacked jurisdiction to hear the original Petition. Mr. Levine was not present at the October 27

hearing. On November 3, 2008, the Board met for a previously scheduled and duly noticed meeting and took up the Request to Reopen Proceedings. The Board, after hearing from both parties, denied the Request.

I. THE OCTOBER 27, 2008 HEARING

Upon request by Ms. Voutselas, Roland Bartl, Acting Zoning Enforcement Officer, presented the sequence of events leading to the hearing and the rationale for his decision not to enforce provision of the Zoning Bylaw against the owners of 40 Newtown Rd. According to Mr. Bartl, on May 28, 2008, the Owners applied for a building permit to add a 28'x 68' pre-manufactured home to an existing structure at 40 Newtown Rd. It was Mr. Bartl's understanding that the intention of the Owners was to expand their home to provide additional living space so that their daughter and her family could move in. The proposed addition conformed to all dimensional requirements of the Zoning Bylaw. The building permit was signed on June 19, 2008, and construction began shortly thereafter. Sometime in late July or early August, Mr. Bartl received an anonymous email inquiring about the construction at 40 Newtown Rd. The author of the email asserted that there appeared to be a structure, wholly separate from the main house or detached garage, being erected on the property. A number of emails went back and forth with Mr. Bartl explaining that the planned construction complied with the Zoning Bylaw and the anonymous writer disagreeing. On August 13, 2008, Mr. Bartl received a written request from Petitioner Mary Di Nino to enforce Sections 3.3, 3.3.2, 3.3.2.1 and 3.3.2.2 of the Zoning Bylaw. Additionally, on August 27, 2008, a number of abutters and interested parties submitted a letter to the Board of Appeals to the same effect. On September 10, 2008, Mr. Bartl replied via email to one of the interested parties, Mr. Carl Flumerfelt, stating that he had concluded that the proposed addition did not violate the Zoning Bylaw. On September 17, 2008, the Petitioners filed an appeal with the Board of Appeals under Section 11.1.1 of the Zoning Bylaw. Construction was completed in late October and an Occupancy Permit issued on October 24, 2008.

Mr. Bartl offered his interpretation of the relevant sections of the Bylaw. He explained that the pre-manufactured portion of the addition was connected to the existing house by an enclosed breezeway. In addition, certain design changes were made to the pre-fabricated portion of the addition that could allow him to conclude that it contained an accessory apartment. He did not feel that he had to rely on finding an accessory apartment, however, in order to find that the addition complied with zoning. He stated that, in his view, the existing house and addition would be used by a single family unit. He did not feel he should dictate the design of the interior space. He pointed out that many homes have unusual configurations and second kitchens are not uncommon. For these reasons, he concluded that the addition did not violate the Zoning Bylaw.

Mr. Kevin Sullivan, attorney for the Petitioners, agreed with Mr. Bartl's presentation as far as the sequence of events and relevant dates. He also conceded that the proposed addition conforms to the dimensional requirements of the Bylaw. Additionally, he did not dispute that the space would be used by a single family unit (the Owners, their

daughter and her family). The basis of his argument was that the pre-fabricated addition is a separate dwelling unit. To support his argument, he pointed to the fact that the floor plan provided by the manufacturer shows an 1800 square foot space with three-bedrooms, a kitchen, living and dining areas and utility room with space for washer and dryer. He further pointed out that the new structure is located 28 feet from the existing house and, in the original plans, connected by a simple breezeway. He further pointed out that design changes during construction to create an accessory apartment did not in fact create such accessory apartment because the redesigned portion did not include a kitchen.

Following the presentations by the Acting Zoning Enforcement Officer and the Petitioners, the Board heard comments from the numerous residents present at the hearing. The Owners and their daughter and son-in-law were present and provided additional information about the project and how the space would be used. A number of residents and abutters spoke as well. Some offered support for the Owners and some for the Petitioners. A number of speakers expressed regret that the situation had come to the point where a hearing before the Board of Appeals was required. The Board deliberated and voted 3-0 to GRANT the Petition.

II. THE NOVEMBER 3, 2008 MEETING

At the November 3 meeting, Mr. Levine argued that the Board lacked jurisdiction to hear the original Petition. His position was that the Board should have voted on October 27 as to whether or not it had jurisdiction. Because the Board declined to make that finding, he argued that the hearing should be reopened for the Board to reconsider and vote on the issue of jurisdiction. Mr. Sullivan, attorney for the Petitioners, strongly disagreed stating that all issues had been adequately discussed on October 27. Ms. Voutselas pressed Mr. Levine to explain what circumstances had changed to warrant reopening the hearing. Mr. Levine presented to the Board a number of documents, most of which had been contained in the file prior to the October 27 hearing. The Board voted 2-1 to DENY the Request to Reopen Proceedings.

III. DISCUSSION

A. Notice and Jurisdiction

MGL c.40A, § 15 provides that, "Any appeal under section eight to a permit granting authority shall be taken within thirty days from the date of the order or decision which is being appealed." The parties agree on the sequence of events developed at the October 27, 2008 hearing. The building permit application was filed on May 28, 2008. The building permit was issued on June 19, 2008. Construction commenced shortly thereafter and the Petitioners stated that they were aware of the construction activity immediately. The Petitioners stated that at first they thought perhaps the Owners were putting in a new septic system. As construction progressed, however, it became clear that something else was going on and when the foundation was poured in late July they

became concerned.¹ The Petitioners contacted the Building Department in late July or early August to research the building permit. There is no record of their visit because inquiries at the Building Department are not recorded, but this time frame is corroborated by the Zoning Enforcement Officer. On August 13, 2008, Petitioner Mary Di Nino sent a letter to the ZEO requesting that he enforce Sections 3.3, 3.3.2, 3.3.2.1 and 3.3.2.2 of the Zoning Bylaw. The Petitioners circulated a letter to neighbors dated August 13, 2008 and submitted that letter to the Building Department and the Board of Appeals requesting zoning enforcement on August 27, 2008. The ZEO took no action on that letter, but did respond to a separate inquiry on September 10, 2008 and stated there was no zoning violation.² The Petitioners filed their appeal under section 11.1.1 of the Acton Zoning Bylaw on September 17, 2008.

The Board of Appeals recognizes that the issue of adequate notice and jurisdiction under MGL c.40A § 15 is the subject of recent case law. It was the decision of the Board to establish for the record the relevant events relating to when the Petitioners became aware of construction at 40 Newtown Rd. Based on information developed at the October 27 hearing, it is clear that the Petitioners learned that new construction was occurring at 40 Newtown Rd. by at least late July or early August. The Petitioners directly abut the property at 40 Newtown Rd. and stated at the hearing that they were aware that some kind of work was happening as soon as it commenced in June. Furthermore, a string of emails between the Zoning Enforcement Officer and an unnamed neighbor starting on July 30 strongly implies that the neighbors, including the Petitioners, were aware of the nature of the construction. Finally, the Petitioners inquired about the construction at the Building Department sometime late July or early August.

Section 11.1.1 of the Zoning Bylaw states “In the case where the Zoning Enforcement Officer is requested in writing to enforce this Bylaw against any person allegedly in violation of same and the Zoning Enforcement Officer declines to act, the Zoning Enforcement Officer shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefore, within 14 days of receipt of such request.” On August 13, 2008, Petitioner Mary DiNino requested in writing that the Zoning Enforcement Officer enforce applicable provisions of the Bylaw against the Owners. In addition, on August 27, the Building Department received a letter addressed to the Board of Appeals from numerous abutters and interested parties requesting zoning enforcement. On September 10, 2008, the ZEO respond to an email from one of the signers of the August 27, 2008 letter stating that in his opinion there was no zoning violation.

¹ Later in the hearing a neighbor disputed that the Petitioners could have thought that the Owners were working on their septic system since they had improved their septic system in the spring. This neighbor thought the substantial hole for the foundation made it obvious that the project involved new construction.

² The Zoning Enforcement Officer was on vacation during some part of the time between August 27 and September 10, 2008.

Given the somewhat inconsistent provisions of MGL c.40A § 15 and Acton Bylaw § 11.1.1 the Board declined to find that it lacked jurisdiction and proceeded to hear the merits of the Petition.

B. Bylaw § 3.3

Zoning Bylaw § 3.3 states, “Not more than one BUILDING for dwelling purposes shall be located upon a LOT.” The Petitioners contend that the pre-fabricated addition is a separate building located 28 feet from the existing house. They contend that there are no blueprints for the breezeway connecting the addition to the house. The ZEO concedes that the prefabricated portion of the addition could be a stand-alone dwelling unit under different circumstances. In this case, however, there is an enclosed breezeway connecting the addition to the house. The Board finds that the fully enclosed breezeway connection between the pre-existing house and the prefabricated addition is sufficient to render the entire complex one building for zoning purposes.

C. Bylaw §§ 3.3.1, 3.3.2 and 3.3.3

The Table of Principal Uses allows in the R-2 District Single Family Dwellings (§ 3.3.1) and a Single FAMILY Dwelling with One Apartment, subject to certain conditions (§ 3.3.2). The Table of Principal Uses prohibits Two-Family Dwellings (§ 3.3.3).

1. Bylaw § 3.3.2

3.3.2 Single FAMILY Dwelling with One Apartment - A single FAMILY Dwelling, the BUILDING of which was in existence on or before January 1, 1990, to be altered and used for not more than two DWELLING UNITS, the Principal Unit plus one Apartment, provided that:

3.3.2.1 The GROSS FLOOR AREA of the Apartment shall not exceed the lesser of fifty percent of the GROSS FLOOR AREA of the Principal Unit or 800 square feet.

3.3.2.2 There shall be no more than two bedrooms in the Apartment

The Petitioners argue that the addition violates § 3.3.2 because it is not an alteration of the existing home, rather it is a wholly separate dwelling connected to an existing home. The Petitioners assert that to comply with the Bylaw and the meaning of the word “altered”, the accessory apartment must be contained within the footprint of the original building. The ZEO, on the other hand, interprets the Bylaw to allow an accessory apartment within a new addition to a pre-existing home. He points to a number of other additions to pre-existing homes allowed by the Town to accommodate accessory apartments. Rather than a separate dwelling connected by a breezeway, he considered the breezeway and modular unit one entire addition encompassing an allowable accessory apartment. The pre-existing home was “altered” in the sense that it was made larger. The Board agrees with the ZEO and his interpretation of the Bylaw. In addition, the Board

notes that this interpretation has been allowed by the Town on numerous occasions without challenge.

2. Principal Dwelling Unit

The Petitioners argue that the addition violates section 3.3.2 because the new construction does not meet the criteria for a Single Dwelling unit with One Apartment. The crux of their argument is that the modular unit is a wholly separate dwelling unit: 1800 square feet of living space with two bathrooms, kitchen, laundry and bedrooms connected by a breezeway. The ZEO, on the other hand, considered the entire addition (modular unit plus breezeway) additional living space including an accessory apartment. He focused on the *use* of the new space and concluded it was a single dwelling because it was to be used by a single family unit.

In evaluating the arguments of the Petitioners and the position of the ZEO, the Board considered both the design of the physical space and its use. The evidence was uncontroverted that the new space would be used by a single family unit, i.e., the Owners, the daughter and her family. Indeed, the Petitioners did not dispute this. However, the Board agrees with the Petitioners that the design of the new living space cannot be characterized as a single family dwelling with one apartment as per Section 3.3.2. The prefabricated portion of the addition includes a kitchen, laundry and two bathrooms. In addition, it has rooms that may or may not qualify as bedrooms under Board of Health regulations but clearly can be used as such. The 1800 square foot modular unit duplicates the existing single family home on the property. The pre-existing home, which was not modified at all during the project, already functions as a single family dwelling. The Board acknowledges that there were some design changes that attempted to create a complying apartment within the modular unit. However, it finds that those design changes did not fundamentally change the fact that the modular unit was designed as a single family residence and could still be used as one even with those changes.

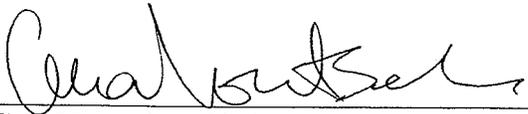
The Board recognizes that the Owners acted in good faith throughout the construction process and relied on the interpretation of the Zoning Enforcement Officer. In considering this Petition, however, the Board is compelled to interpret and apply the Zoning Bylaw in regards to the decision of the ZEO. The Board lacks authority to order remediation.

IV. CONCLUSION

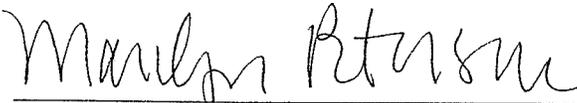
For the reasons stated herein, this Petition to appeal the decision of the Zoning Enforcement Officer to refuse to enforce Sections 3.3, et al of the Zoning Bylaw against the owners of 40 Newtown Rd. is GRANTED.

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

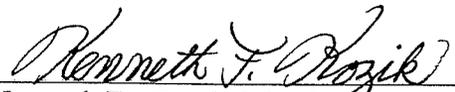
THE ACTON ZONING BOARD OF APPEALS



Cara Voutselas, Chairperson



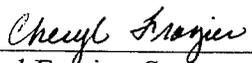
Marilyn Peterson, Member



Kenneth F. Kozik, Member

DATED:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on _____, 2008.



Cheryl Frazier, Secretary
Board of Appeals