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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.<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>1</sup> 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.

<sup>2</sup> 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.

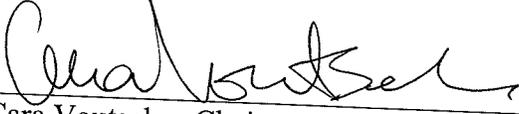
The Board recognizes that the Owners acted in good faith throughout the construction process and relied on the interpretation of the Zoning Enforcement Officer. In considering this Petition, however, the Board is compelled to interpret and apply the Zoning Bylaw in regards to the decision of the ZEO.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

## **IV. CONCLUSION**

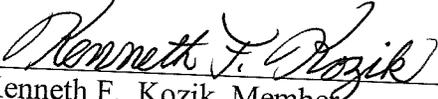
For the reasons stated herein, this Petition to appeal the decision of the Zoning Enforcement Officer to refuse to enforce Sections 3.3, et al of the Zoning Bylaw against the owners of 40 Newtown Rd. is GRANTED.

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**

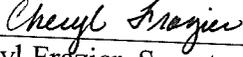
  
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Cara Voutselas, Chairperson

  
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Marilyn Peterson, Member

  
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Kenneth F. Kozik, Member

DATED:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on November 19, 2008.

  
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Cheryl Frazier, Secretary  
Board of Appeals