

**MEMORANDUM**

TO: Acton Board of Appeals

CC: Roland Bartl, Town Planner and Zoning Enforcement Officer  
Scott Mutch, Incoming Zoning Enforcement Officer

FROM: Stephen D. Anderson, Town Counsel

RE: Acton/40 Newtown Road: Analysis of Appeal to ZBA  
Hearing #08-06

DATE: October 24, 2008

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**BACKGROUND**

On September 17, 2008, the Town Clerk and the Board of Appeals received a Petition for Review from Andrew Schlesinger of 36 Newtown Road, Acton, appealing the Building Commissioner’s refusal to enforce certain specified provisions for the Zoning Bylaw regarding construction and use of premises at 40 Newtown Road authorized by Building Permit Number 021763 dated June 19, 2008. Attached to the Petition is a detailed letter, dated August 13, 2008, specifying the bases for an appeal of the Building Permit. The letter is signed by 13 sets of neighbors listing addresses on Newtown Road, Minuteman Road, Patriots Road, and Hemlock Lane.

The Board of Appeals has scheduled a public hearing on the Petition for October 27, 2008, and has asked for Town Counsel’s input regarding the issues raised by the Petition.

**TIMING OF APPEAL; BOARD’S JURISDICTION; STANDING**

General Laws 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.”

*Threshold Questions*

- Was the appeal timely filed?*
- Does the Board have jurisdiction to hear it?*
- Do the neighbors have standing to appeal?*

Neighbors’ Position

The appellants presumably contend that the appeal was timely filed; the Board has jurisdiction to hear it; and the neighbors have standing to appeal to the Board.

### ZEO's Position

The ZEO urges the Board to hear the petition on the merits, regardless of whether the appeal was technically timely filed. The ZEO takes no position on the neighbors' standing.

### Analysis

While I am sympathetic to the concern that neighbors' complaints on an important zoning issue should be dealt with on the merits, a jurisdictional issue in a zoning matter ordinarily cannot be waived. In *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass.App.Ct. 850 (2008) (see attached), the Appeals Court found that the Wellesley ZBA was "without jurisdiction to act on the plaintiff's appeal" which was not timely filed under the Zoning Act. This decision has severely restricted the appeal options for neighbors in cases where (a) a building permit is issued, (b) the 30 day appeal period expires, (c) the neighbors later ask the ZEO to enforce the bylaw and rescind the building permit, (d) the ZEO declines to do so, and (e) the neighbors appeal that denial to the ZBA. In such a case, "an aggrieved person with adequate notice that issuance of a building permit will violate a zoning provision must avail herself of the right to file a timely appeal from the issuance of that permit, and may not lawfully substitute for that remedy a subsequent request for zoning enforcement by the zoning enforcement officer."

In the present case, the Building Department and the ZEO have provided the following chronology:

<b>DATE</b>	<b>ACTION ITEM</b>
6/19/08	The Building Permit was issued.
7/1/08	Construction began.
7/2/08	The first building department inspection occurred.
"Almost immediately"	Neighbors began to investigate the alleged zoning violation by contacting Town Hall.
8/13/08	The letter of appeal was dated 8/13/08.
8/27/08	The letter of appeal was first stamped received by C Frazer on 8/27/08.
8/24/08 and 8/25/08	The ZEO received several communications from individuals requesting that he enforce the zoning bylaw and halt further construction activity.
9/2/08	The ZEO signed off on a change to the plans from a covered breezeway to a fully enclosed connection.
9/10/08	The ZEO responded by email to one of the enforcement requests (from Mr. Flumerfelt).
9/17/08	The Petition was formally filed with the ZBA.

From this chronology, it appears that at least some of the complaining neighbors were aware of the alleged zoning violations within 30 days after the Building Permit was issued and more than 30 days before the appeal was filed (whether the 8/27/08 or the 9/17/08 date controls). Accordingly, the *Wellesley* case suggests that the appeal *may* not be timely and that the Board *may* not have jurisdiction to hear the appeal.

### Recommendation

To evaluate whether it has jurisdiction to hear the appeal, the Board should briefly do the following at the hearing:

- For each of the neighbors who signed the appeal petition(s), the Board should inquire as to when the neighbor first knew of the issuance of the building permit, the commencement of construction, and the possibility of a zoning violation.
  - If all of the appellants knew of these matters more than 30 days before the appeal was filed, it is likely that the Board lacks jurisdiction to hear the appeal.
  - If any of the appellants did not know of these matters more than 30 days before the appeal was filed, the Board should confirm that he or she (a) is listed on the certified abutters' list and therefore presumed to have standing (most of the signatories are), or (b) is aggrieved by the alleged zoning violation and therefore likely has standing. If so, it is likely that the Board does have jurisdiction to hear the appeal as to those neighbors.
- The Board should make a record of its findings on these issues because it will ultimately be important to know whether or not the Board has jurisdiction under the *Wellesley* case.
- Regardless of the outcome, the Board should decide the merits of the appeal.

This approach will protect all parties' rights to the maximum extent possible under the circumstances; will provide an important foundation in the event of a further appeal beyond the ZBA itself by the owners or the neighbors; will help avoid the need for a remand hearing in the event of an appeal and of uncertainty as to how the Board would have decided an issue; and will ultimately save time and money for the parties and the Town.

### **APPLICABLE PROVISIONS OF ACTON'S ZONING BYLAW**

The following provisions of the Zoning Bylaw have been raised by the neighbors and should be evaluated at the hearing as to (a) the meaning and intent of the Bylaw, (b) the application of the Bylaw provision to the facts found by the Board at the hearing. The analysis below is provided to assist the Board in evaluating the issues; however, it is ultimately the Board's (not counsel's) determination of the law and the facts that are important, so the Board should exercise its own independent judgment. In addition, because of the importance of the issues to the property owners, the neighbors, and the Town as a whole, I recommend that the Board take a view of the premises before closing the hearing and deciding the case.

A. **Bylaw § 3.3**

*With certain exceptions not applicable here, “Not more than one BUILDING for dwelling purposes shall be located upon a LOT ....”*

Question Presented

*Does the Building Permit authorize and have the owners undertaken the construction of more than one BUILDING for dwelling purposes on a single LOT?*

Neighbors’ Position

The building permit authorized the construction of a “Second Dwelling” on a single LOT in the R2 Zoning District. The “Second Dwelling” was constructed 28-feet away from the existing dwelling and is as large as the original dwelling. This violates § 3.3 and no exceptions apply.

ZEO’s Position

The prefabricated portion of the addition could be a stand-alone dwelling unit under different circumstances. Here, however, it is used as an addition to an existing house with a covered breezeway connection. The end result after completion of construction as approved will be one building that has several parts to it.

Analysis

Section 1.3.3 of the Bylaw defines “BUILDING” as a “STRUCTURE enclosed within exterior walls, built or erected with any combination of materials, whether portable or fixed, having a roof, to form a STRUCTURE for the shelter of persons, animals, or property.” In turn, § 1.3.17 of the Bylaw defines a “STRUCTURE” as a “combination of materials assembled to give support or shelter, such as BUILDINGS, ...; but not including driveways, walkways and other paved areas ....”

Upon completion of construction, the lot will house a pre-existing house, a prefabricated “addition” and a covered, fully enclosed breezeway connection. Taken together, this combination meets the literal definition of the Bylaw as to what constitutes one building.

If there were no connection between the pre-existing house and the prefabricated “addition,” there would be two separate buildings on the lot, in violation of § 3.3. However, it is not uncommon in zoning or other land use contexts to distinguish between “attached” (one) and “detached” (two) buildings or structures (e.g. house, garage, outbuildings, etc.), and to have that determination rest on the nature of the connection

between them. See, e.g. *Cuming v. Jansson*, 1992 WL 12151899, 5 (Mass.Land Ct.,1992).<sup>1</sup> In the present case, 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.

According to the ZEO, the lot and the combined building conform to the applicable dimensional requirements of the Zoning Bylaw for the R-2 District as follows:<sup>2</sup>

<b>DIMENSION</b>	<b>REQUIRED</b>	<b>PROPOSED</b>	<b>EXISTING – NO CHANGE</b>
Area	20,000 sq.ft		41,482 sq.ft..
Frontage	150’		221.4’
Lot Width	50’		221.4’
Front Yard Setback	30’	62.3’ (for “addition”)	36.2’
Side Yard Setback	10’	30.4’ (for “addition”)	> 50’
Rear Yard Setback	10’	21.1’ (for “addition”)	> 50’
Height	36’ (mean ground to mean roof)	< 20’ (mean ground to top of gable for the “addition”)	< 36’ (estimate of mean to mean roof; existing house is old, two story with gabled roof, but modest in size and dimensions – no plans)

As a result, the structure itself is lawful.

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<sup>1</sup> The dispute in *Cumming* centered around the enforcement of a restrictive covenant providing that, “No building shall be erected, placed or maintained on the granted premises other than one single-family dwelling with attached garage and one guest house or cottage all designed for the use of and used by a single family only.” The Court indicated that, “There is a two-car garage ... connected to the Dwelling by a breezeway approximately 16 feet long. The sides of the breezeway are open except for supporting columns for the roof.” The party benefitting from the restrictive covenant complained that the garage was not attached to the house within the meaning of the covenant. The Court held, “I find no credible evidence to support Plaintiffs allegations that an ‘attached’ garage would have had less impact on the surrounding lots than the Garage as constructed. *In any event, were I to hold such objection valid Gould could probably resolve the matter by enlarging the breezeway into a room, thereby making the Garage ‘attached’.* ... In summary, I find that as Plaintiff unreasonably refused to approve any of the plans of the Dwelling submitted by Gould, that therefore such approval is no longer required and that under the facts of this case neither the Dwelling nor the attached garage violate the restrictive covenants in the Gould Deed.” (Emphasis added.)

<sup>2</sup> There are two adjacent parcels owned by the same owners – one is 40,095 sq.ft. and the other is a sliver of 1,387 sq.ft. Since the owners can treat them as one lot for zoning purposes, they are treated as one lot in the Table.

### Recommendation under § 3.3

Accordingly, I recommend that:

- The Board should find that the combination of the pre-existing house, the prefabricated “addition,” and the covered, fully enclosed breezeway connection constitutes one building for zoning purposes that does not violate § 3.3; and
- The Board should proceed to determine whether the combined building as designed and used conforms to or violates the use requirements of the R2 District.

In this context, regardless of whether the combined building conforms to the Bylaw’s dimensional requirements, the use of the combined building must conform to the Bylaw. The Table of Principal Uses prescribes the following requirements for the R-2 District:

1. A Single Family Dwelling is allowed (§ 3.3.1).
2. A Single FAMILY Dwelling with One Apartment is allowed subject to certain conditions discussed below (§ 3.3.2).
3. A Two-Family Dwelling is prohibited (§ 3.3. 3).

Section 1.3.6 of the Acton Zoning Bylaw defines “FAMILY” as, “A person or number of persons occupying a DWELLING UNIT and living as a single housekeeping unit, provided that a group of six or more persons shall not be deemed a FAMILY unless at least half of them are related by blood, marriage or adoption, including wards of the state.” Section 1.3.5 of the Bylaw defines “DWELLING UNIT” as, “A portion of a BUILDING designed as the residence of one FAMILY.” These definitions of “family” and “dwelling unit” are typical zoning definitions of a type regularly applied, interpreted and upheld by Courts<sup>3</sup>

<sup>3</sup> See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 1 (1974) (upholding New York village ordinance which restricted land use to one-family dwellings, defining the word “family” to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly excluding from the term lodging, boarding, fraternity, or multiple-dwelling houses.); *Moore v. East Cleveland*, 431 U.S. 494, 511 (1977) (municipalities may not unduly restrict the meaning of “family”); *City of Worcester v. Bonaventura*, 56 Mass.App.Ct. 166, 169 (2002) (finding that the City’s “lodging house” ordinance was not unconstitutionally vague where the ordinance defined a “dwelling” and “family”); *APT Asset Management, Inc. v. Board of Appeals of Melrose*, 50 Mass.App.Ct. 133, 139 (2000) (ordinance defining “dwelling unit” and “family”); *Hall v. Zoning Bd. of Appeals of Edgartown*, 28 Mass.App.Ct. 249 (1989) (term “single family use” found broad enough to include at least occupancy of a dwelling by a reasonable number of unrelated people living together as a single housekeeping unit); *Granada House, Inc. v. City of Boston*, 1997 WL 106688, 3 (Mass.Super., 1997) (Article 2A of the Boston Zoning Code defining “family”); *Lattuca v. Houck*, 1995 WL 17215786, 1 (Mass.Land Ct.,1995) (bylaw defining “dwelling unit”); *Johnson v. Board of Appeals of*

In determining whether the combined building is allowed or prohibited under § 3.3.1, 3.3.2 or 3.3.3, the Board should consider both the final design of the physical space and the use to which it is put, as these will help determine its status for zoning purposes. See *Commonwealth v. Jaffe*, 398 Mass. 50, 56-57 (1986) (upholding the conviction of the owners of an eight-bedroom house rented to eight unrelated tenants for violating a city zoning ordinance by designing, arranging, or constructing, and using, house as dwelling for more than one family where (a) the first and second floors of the house each contained a kitchen, bathroom, bedrooms, and common room, which did not constitute a one family dwelling but constituted at least a two-family dwelling under the state building code in effect at the time,<sup>4</sup> and (b) the tenants' living arrangement did not achieve permanency and cohesiveness inherent in notion of "single housekeeping unit" where there were separate kitchens on the first and second floors of the building, each tenant could be evicted by lessor without affecting tenancy of other tenants on lease, and several mailboxes adjacent to front door of building bore names of the tenants); *City of Lynn v. Olanoff*, 314 Mass. 249, 251-252 (1943) (upholding lower court's finding that "the use of the third floor of the dwelling ... is as a separate and distinct housekeeping unit, consisting of the usual kitchen with dining facilities, living room and two bedrooms and bath" and that the use of the premises "for three families is contrary to and in violation of the zone ordinance" which prohibited houses for more than two families); *Singer v. DeMartino*, 1999 WL 24547, 3 (Mass.App.Div., 1999) ("Even if we accept the Landlord's sophistry in treating each apartment separately, the apartments are not designed to house a 'single housekeeping unit.' What would have been the living room has been eliminated to create one or more bedrooms. Except for the entryway, kitchen and bathroom, the apartment consists entirely of bedrooms. Such a layout is plainly adapted for single room occupancy. The real question is whether the occupants of the apartment are a 'single housekeeping unit.'")

As the neighbors and the ZEO have focused on the Accessory Apartment Zoning Bylaw, § 3.3.2, I will focus on that next.

***B. 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:*

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*Nahant*, 1994 WL 16193905, 4 (Mass.Land Ct.,1994) (ordinance defining "dwelling unit" and "family"); *Sanidas v. Town of Rockport*, 1991 WL 11258858, 3 (Mass.Land Ct.,1991) bylaw defining "dwelling unit").

<sup>4</sup> The State Building Code, 708 CMR 5202, currently defines "DWELLING" as "Any building that contains one or two dwelling units used, intended, or designed to be built, used, rented, leased, let or hired out to be occupied, or that are occupied for living purposes." And it defines "DWELLING UNIT" as "A single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation."

*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*

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### Questions Presented

*Has a BUILDING, which was in existence on or before January 1, 1990, been "altered" within the meaning of the Bylaw, or has a separate building or addition been permitted and built which does not conform to the requirements of § 3.3.2.*

*Does the GROSS FLOOR AREA of the Apartment exceed the lesser of fifty percent of the GROSS FLOOR AREA of the Principal Unit or 800 square feet?*

*Does the Apartment have two or fewer bedrooms?*

### Neighbors' Position

The new construction violated § 3.3.2 because it is not an alteration to the existing dwelling but is a wholly separate dwelling, house, dwelling unit and home. The Second Dwelling was constructed over 28 feet away from the existing dwelling, on an entirely separate concrete foundation. The Second Dwelling is a three-bedroom house with full eat-in kitchen, laundry room, cathedral ceilings, two full bathrooms, and living room atop a full walk-in basement. No alterations have been made to the existing dwelling to construct the Second Dwelling.

The Second Dwelling violates § 3.3.2.1 because it is 1859-square-feet, well over double the maximum allowed.

The Second Dwelling violates § 3.3.2.2 because the modular home, as purchased, comes complete as a pre-fabricated three bedroom modular home. The after-the-fact relabeling of the plans do not change the character or purpose of the Second Dwelling and its rooms.

### ZEO's Position

The ZEO advised the applicants to change their proposed design so as to create a legal accessory apartment. The changes were made, and the proposed apartment unit in the addition now meets all criteria of § 3.3.2 and its various subsections. Without limitation:

- The pre-existing building is older than 1990 and therefore may be "altered and used for ..... the Principal Unit plus one Apartment, ... " (§ 3.3.2).

- The gross floor area of the accessory apartment measures approximately 600 square feet in gross floor area.<sup>5</sup>
- The accessory apartment has one bedroom in its final configuration.<sup>6</sup>

Analysis

The Town’s Accessory Apartment Zoning Bylaw, § 3.3.2, was adopted (subject to certain later amendments) as Article 4 at the 10/28/91 Town Meeting. The Summary of the Article as presented to Town Meeting provided as follows (emphasis added; copy attached):

**This article, if adopted, will eliminate for most instances the special permit requirement for accessory apartments and will establish instead a series of other parameters which are designed to control size, access, internal separation, exterior appearance and ownership.**

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<sup>5</sup> According to the ZEO, the pre-existing building (the principal unit) is 3,372 sq. ft. based on assessors' records. (Gross floor area includes all covered interior floor space - 1st and 2nd floors, basement, and finished attic). The addition now underway measures 2,488 square feet, consisting of:

1. an addition to the principal unit (rooms labeled breezeway connector, kitchen, bath, utility room, living room, den, and retreat), and
2. an accessory apartment having a bathroom, a bedroom, and one unspecified room that could be a kitchenette. The accessory apartment measures approximately 600 square feet in gross floor area.

<sup>6</sup> The ZEO also indicates that the accessory apartment as reconfigured conforms to the other requirements of § 3.3.2 as follows:

- Section 3.3.2.3 requires a separate entrance from the exterior or a common hallway. As a modification within the prefabricated addition, there will be a common hall way with separate entrances from it to the principal unit and to the accessory apartment.
- Section 3.3.2.4 requires that stairway to upper floor must be inside building. No upper floor is proposed; there may be a low attic.
- Section 3.3.2.5 specifies not more than one driveway together for the principal and accessory unit. The building permit application did not propose any additional driveway to what pre-exists on the lot.
- Section 3.3.2.6 requires one additional parking space for the accessory apartment. The principal unit requires two parking spaces. There are at least three parking spaces available on the lot.
- Section 3.3.2.7 requires that the property owner must reside on the premises. The Owners have indicated that they will live at the premises.
- Section 3.3.2.8 – requires that accessory apartments must remain in common ownership with the principal unit. Nothing in the case at hand suggests otherwise.
- Section 3.3.2.9 requires a minimum lot area for R-2 at 20,000 square feet. The lot has more than twice this area.
- Section 3.3.2.10 addresses accessory apartments in separate buildings. This is not applicable here.
- Section 3.3.2.11 states that no accessory apartment shall be created without building and occupancy permits. A building permit has been issued, the project is underway and close to finish. Final inspections for occupancy were scheduled for the week of 10/20/08. The ZEO will report at the hearing what he observed during the inspection.

**Accessory apartments will be permitted in buildings in existence as of 1/1/1990, revised from the current date of 5/7/1984.** A special permit requirement will remain only for

- a) accessory apartments on significantly undersized lots, and
- b) accessory apartments in existing detached structures such as old barns or carriage houses which precede 1950, thereby excluding from this option residential tract development which began in Acton at a large scale in the 1950s. Up to now, accessory apartments in detached structures are not permitted.

**The Master Plan Goals and Objectives ask to promote a wide range of economic diversity in housing including low and moderate income housing. Action Item #87 recommends easing regulatory controls for accessory apartments. By replacing the special permit requirement with clear standards the process of establishing accessory apartments will become more predictable and less cumbersome.** The provision to allow accessory apartments by special permit in old secondary buildings promotes their economic use and thereby responds in part to the Master Plan Objective to “provide incentives and aid to preserve and revitalize historic structures and places”.

Generally speaking, § 3.3.2 eased regulatory controls for accessory apartments and replaced a previous special permit requirement with objective standards. However, as demonstrated by this case, the application of these standards leaves room for argument and interpretation.

The Board must first consider whether an accessory apartment can only be created within the footprint of the building “which was in existence on or before January 1, 1990,” or whether the provision allowing the building “to be altered and used” means that the pre-existing building can be “enlarged” or “added onto” to make the apartment use possible. According to the ZEO, since the adoption of the Town’s Accessory Apartment Zoning Bylaw in 1991, there have been several examples of additions to pre-existing buildings being allowed by the Town to accommodate accessory apartments, including the following:

ADDRESS	BUILDING PERMIT	HOUSE	ADDITION DIMENSIONS
216 Parker	10/19/93	1949	24’ x 57’
218 Parker	6/13/02	1960	38’ x 46’
1 Brookside	6/27/02	1963	6.5’ x 10.5’
7 Pope	5/17/02	1850	45’ x 57’

In its interpretation of the Bylaw, the Board can give significance to this “consistent, long continued administrative application of an ambiguous statute [or bylaw

provision].” *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 343 (1964) (citations omitted); *Green v. Board of Appeal of Norwood*, 358 Mass. 253, 259 (1970) (“There was evidence that, prior to the present case, on ten occasions, the Norwood authorities had construed the by-law provision as we do.”). On the other hand, the building inspector's interpretation of an unambiguous bylaw provision is not controlling as to the Board. *See, e.g., Hebb v. Lamport*, 4 Mass. App. Ct. 202 (1976) (rejecting the building inspector's "longstanding construction" of a lot area requirement in the Stoughton zoning bylaw; “In reaching this conclusion we have obviously attached no weight to the building inspector's long standing construction of the formula, apparently concurred in by the planning board. We see no ambiguity in the formula when it is considered in context, or any real cause for doubt as to the proper conclusion.”).

### Recommendation under § 3.3.2

Accordingly, I recommend that the Board should answer the following questions:

1. Does the Board concur with the Building Commissioner's prior interpretations of the Bylaw to the effect that the word “altered” in § 3.3.2 allows an “addition” to a pre-existing building in connection with the creation of an apartment?
  - a. If the answer is yes, then the Board should go to items 2 and 3.
  - b. If the answer is no, then the Board should go to item 4(b).
2. Principal Dwelling Unit:
  - a. Which portions of the combined building constitute the Principal Dwelling Unit?
  - b. With the configuration changes required by the ZEO, has the Principal Dwelling Unit been designed and will it be used as the residence of one family?
  - c. Will the occupants of the Principal Dwelling Unit be living as a single housekeeping unit?
  - d. If the Principal Dwelling Unit is clearly established and will be used as the residence of one family living as a single housekeeping unit, then the first half of § 3.3.2 is satisfied (the “Single FAMILY Dwelling” half).
3. Apartment Unit
  - a. Which portions of the combined building constitute the Apartment?
  - b. Does the Apartment have less than 800 square feet?
  - c. Does the Apartment have two or fewer bedrooms?
  - d. With the configuration changes required by the ZEO, has the Apartment been designed and will it be used as the residence of one family? Can it be so configured and used with inclusion of a kitchen?
  - e. Will the occupants of the Apartment be living as a single housekeeping unit?
  - f. If the Apartment is clearly established, meets the objective requirements as to size and number of bedrooms, and will be used as the residence of one family living as a single housekeeping unit, then the second half of § 3.3.2 is satisfied

(the “plus one Apartment” half).<sup>7</sup>

4. (a) If the Board concludes that the combined building constitutes a valid “Single FAMILY Dwelling with One Apartment” under § 3.3.2 of the Bylaw, the Board should affirm the issuance of the Building Permit and deny the Petition.

(b) If the Board concludes that the combined building does not constitute a valid “Single FAMILY Dwelling with One Apartment” under § 3.3.2 of the Bylaw, then the Board should proceed to the analysis of §§ 3.3.1 versus 3.3.3 below.

- **Bylaw § 3.3.1 versus § 3.3.3**

If the Board has concluded that the combined building does not constitute a valid “Single FAMILY Dwelling with One Apartment” under § 3.3.2 (as discussed above), the Board should evaluate whether it constitutes (or can be made to constitute) an allowed “Single Family Dwelling” under § 3.3.1 or if it constitutes a prohibited “Two-Family Dwelling” under § 3.3.3. Simply put, if the combined building has two Dwelling Units, and if one of them does not qualify as an Apartment under § 3.3.2, then the building as configured violates the Zoning Bylaw. The question then becomes what remedy is appropriate.

Because the combined building conforms to the Bylaw’s dimensional requirements, the building itself does not violate the Bylaw as long as it is configured and used as a single family dwelling unit. The most objective way to ensure – and the easiest way to enforce - that the building is used as a single family dwelling unit is to restrict the number of kitchens in the building to one because the Bylaw’s definition of a “family” and a “dwelling unit” both turn on whether or not there is a single housekeeping unit.<sup>8</sup>

**Recommendation under 3.3.1 versus § 3.3.3**

Accordingly, I recommend that if the combined building currently has two Dwelling Units, does not qualify under § 3.3.2, and is a prohibited “Two-Family Dwelling” under § 3.3.3, the Board should order the removal of all kitchen facilities in excess of one kitchen and limit the use of the building to single family use.

Finally, the neighbors’ allegation that the building does not meet State Title V Regulations is not within the ZBA’s jurisdiction and is not dealt with in this memorandum.

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<sup>7</sup> Since the neighbors have not challenged compliance with §§ 3.3.2.3-3.3.2.11, I am assuming that the ZEO is correct that these sub-sections are complied with.

<sup>8</sup> I agree with the ZEO that there are a variety of legitimate reasons that a single family house may contain more than one kitchen; however, if the Board has reached the conclusion that *this* building violates the two-family prohibition, removing a kitchen is less draconian than removing the addition.