

Cheryl Frazier

From: Roland Bartl
Sent: Wednesday, May 11, 2011 12:17 PM
To: Cheryl Frazier
Cc: Scott Mutch
Subject: FW: Acton/GenZBA - 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Cheryl:

Please include this e-mail exchange in the agenda package for the ZBA meeting on May 16 pertaining to petition #11-05.

Thank you

Roland Bartl, AICP
Planning Director
472 Main Street
Acton, MA 01720
(978) 929-6631

From: Stephen D. Anderson
Sent: Wednesday, May 11, 2011 12:00 PM
To: 'llevine@dlpnlaw.com'
Cc: Nina Pickering Cook; Roland Bartl; Kenneth Kozik
Subject: RE: Acton/GenZBA - 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Hi Lou:

Thanks for your response below. I am copying a more limited audience and assume Roland will make sure this response gets included in the ZBA packet for the meeting in question.

I agree that, in making the ultimate finding under G.L. c. 40A, § 6, par. 1, the Board of Appeals needs to determine whether or not the change, extension or alteration is “**substantially** more detrimental than the existing nonconforming use to the neighborhood.” G.L. c. 40A, § 6, par. 1.

I respectfully disagree with your interpretation/application of Section 8.3.6 of the Bylaw for the reasons stated in me earlier emails. However, I do agree that it is the Board of Appeals that is charged with independently interpreting and applying 8.3.6 and making the Section 6 finding one way or the other in this case.

Steve

From: Louis N. Levine
Sent: Wednesday, May 11, 2011 10:41 AM
To: Stephen D. Anderson
Cc: Nina Pickering Cook; zba@acton-ma.gov; 'Mark McCarthy'
Subject: RE: Acton/GenZBA - 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Steve,

Thank you for forwarding your emails to the ZBA Chair and Alternate Member.

We agree with your analysis, relying on the same case law we did, that the second except clause of G. L. c. 40A, §6 is applicable to this case, and that the Board must first decide whether the reconstruction will intensify the existing nonconformity or result in additional ones. If not, then the reconstruction is permitted as a matter of right. Alternatively, if it would, then the Board must proceed to the second part of the analysis.

With respect to the first part of the analysis under G. L. c. 40A, §6, we also agree with your statement that: “In the present case, the pre-existing hammerhead lot is non-conforming as to lot width (i.e. it has less than 50 feet of width between the street and the building location). That condition exists both before and after the proposed reconstruction. It will not be changed by the reconstruction project.”

However we respectfully disagree when you go to say that the Board: “. . . may conclude that [the proposed residence] would ‘increase the nonconforming nature of said structure’ on the otherwise unchanged lot,” because of the floor area ratio provision of Section 8.3.6 of the Bylaw. Section 8.3.6 applies a floor area ratio requirement **only** to nonconforming lots containing a single family **dwelling and only when the structure is to be demolished and replaced**. Although it did not do so, the Town could have adopted a floor area ratio requirement of general applicability to the district and then could have considered that requirement when determining whether the proposed structure intensified or created a nonconformity. However, under G. L. c. 40A, §6, the Town is not authorized to hold a lawfully existing nonconforming lot to a higher standard than a conforming lot by imposing a floor area ratio requirement applicable **only** where the protections of the second except clause of G. L. c. 40A, §6 may be invoked. To the contrary, the protections of G. L. c. 40A, §6 for nonconforming single family residences are **minimum** protections and the Town may not circumvent those protections by adopting restrictions applicable only to nonconforming lots which derogate from or vitiate the protections of G. L. c. 40A, §6.

Although we understand that you were paraphrasing in your emails, we wish to point out the important distinction that the second part of the analysis requires the Board to determine not merely whether “there would be a detriment to the neighborhood” but whether the proposed reconstruction would be **substantially** more detrimental to the neighborhood than the existing structure. In this case, even if the second part of the analysis is reached, we respectfully submit that a finding of “substantial” detriment would be unreasonable and could not be supported. Besides the fact that the neighborhood supports the proposal, to date no one has identified any detriment, let alone a substantial detriment.

We appreciate that you are constrained in this matter by Town’s budget considerations. At the same time, I am sure you appreciate that this has been an expensive process, both financially and emotionally, for the Petitioners and, therefore, we would like to bring this matter to a conclusion as expeditiously as possible.

It would be appreciated if you could let us know if you disagree with any of the foregoing. If not, we would appreciate it if you could advise the Board that the floor area ratio provisions of Section 8.3.6 are not applicable to the Section 6 finding and confirm that, if the second part of the Section 6 analysis is reached, the test is one of "substantial" detriment.

Alternatively, with respect to Section 8.3.6, at the very least, we request that you let the Board know that our position in this matter is reasonable and that the Board must independently determine if Section 8.3.6 is relevant to its Section 6 finding.

It is difficult to discuss any matter by email alone. If you disagree with our analysis, I would appreciate it if you could call me to discuss this matter.

Thanks.

Louis N. Levine, Esquire
D'Agostine, Levine, Parra & Netburn, P.C.
268 Main Street
P.O. Box 2223
Acton, MA 01720
Ph: (978) 263-7777, ext. 224
Fax: (978) 264-4868
Email: llevine@dlpnlaw.com
www.dlpnlaw.com

CONFIDENTIALITY NOTICE:

This e-mail and any attachments are confidential and may be protected by attorney-client privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this e-mail or any attachment is strictly prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. E-mail is covered by the Electronic Communication Privacy Act, 18 U.S.C. §§ 2510-2521. Thank you. In accordance with Internal Revenue Service Circular 230, we hereby advise you that if this e-mail or any attachment hereto contains any tax advice, such tax advice was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer by the Internal Revenue Service.

From: Stephen D. Anderson
Sent: Monday, May 09, 2011 11:07 AM
To: Louis Levine
Cc: 'Steve Ledoux'; 'Roland Bartl'; Nina Pickering Cook
Subject: RE: Acton/GenZBA - 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Hi Lou:

You have asked for copies of my two separate emails of Friday to the ZBA Chair and Alternate Member regarding the 191 Nagog Hill Road Application. On the condition that you agree that disclosure of these emails to you does not waive the attorney-client privilege generally with respect to this matter, I have attached copies of the emails. If you are unwilling to agree to this condition, please delete the emails from your server. Thanks.

Steve

From: Louis N. Levine
Sent: Friday, May 06, 2011 3:38 PM
To: Stephen D. Anderson
Cc: zba@acton-ma.gov; 'Mark McCarthy'
Subject: RE: 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Steve,

Having not heard from you, I attempted to reach you by phone today, but without success.

Roland has advised me that you have provided the Board with memoranda. Please forward copies of the memoranda to me as soon as possible so that I can have an opportunity to review them well before the May 16, 2011 meeting. and if necessary, discuss same with you.

Thank you.

Louis N. Levine, Esquire
D'Agostine, Levine, Parra & Netburn, P.C.
268 Main Street
P.O. Box 2223
Acton, MA 01720
Ph: (978) 263-7777, ext. 224
Fax: (978) 264-4868
Email: llevine@dlpnlaw.com
www.dlpnlaw.com

CONFIDENTIALITY NOTICE:

This e-mail and any attachments are confidential and may be protected by attorney-client privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this e-mail or any attachment is strictly prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. E-mail is covered by the Electronic Communication Privacy Act, 18 U.S.C. §§ 2510-2521. Thank you. In accordance with Internal Revenue Service Circular 230, we hereby advise you that if this e-mail or any attachment hereto contains any tax advice, such tax advice was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer by the Internal Revenue Service.

From: Louis N. Levine
Sent: Tuesday, May 03, 2011 4:17 PM
To: 'Stephen D. Anderson'
Cc: 'zba@acton-ma.gov'; 'Mark McCarthy (markmccar@gmail.com)'
Subject: 191 Nagog Hill Road Application under G. L. c. 40A, §6 to reconstruct conforming single family residence on nonconforming lot

Steve,

The Acton Board of Appeals (“Board”) opened the hearing last night on our clients’ (Mark McCarthy and Claire McCarthy) application to reconstruct a conforming single family residence on a nonconforming hammerhead located at 191 Nagog Hill Road. The garage issue was resolved last night, but the Board indicated that before it rendered a decision on the construction of the single family residence under the “second except” clause G.L.c. 40A, §6, it wanted to review its legal authority with you and continued the hearing for two weeks until May 16, 2011.

It is our understanding that the Board will ask you to discuss this matter with us.

For your information, attached is a copy of our memorandum to the Board (“Memorandum”) which more fully explains this matter and our position as to the application and applicability of the “second except” clause G. L. c. 40A, §6.

The Zoning Enforcement Officer never rendered a determination as to whether the proposed residence would intensify any existing nonconformity or create any new nonconformity. Although we cannot speak for the Board, it appeared that the Board agreed that the lot was lawfully nonconforming and that the Board, as well as the many neighbors who attended the hearing, seem to agree that there is no nexus between the proposed house and the lot nonconformity (minimum lot width of the connection between the building area and Nagog Hill Road), i.e., that the proposed single family house would not intensify any nonconformity or create any new nonconformities, but would comply in all respects with the current requirements of the Acton Zoning Bylaw (“Bylaw”). As shown on the plans attached as Exhibit D to our Memorandum, the proposed residence conforms to all of the dimensional requirements of the Bylaw and is set back an additional 322.2 feet from the nearest point of lot nonconformity.

As enunciated in *Bransford v. Zoning Board of Appeals of Edgartown*, 444 Mass. 853 (2005) and confirmed in *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008), a conforming single family residence on a nonconforming lot may be replaced and reconstructed as a matter of right under the second except clause of G. L. c. 40A, §6, provided that no nonconformity is intensified or newly created. If a nonconformity is intensified or newly created, the Board may nevertheless permit it upon a finding that it will not be substantially more detrimental to the neighborhood than the existing residence. (See the discussion in our Memorandum).

At last night's hearing, the Board gave us a copy of *Blasco v. Board of Appeals of Winchendon* on the question of the Board's authority under G. L. c. 40A, §6. However, unlike the provisions of G. L. c. 40A, §6 involved in *Blasco*, which permit regulation or prohibition of changes of nonconforming uses by a local zoning bylaw, the second except clause of G. L. c. 40A, §6 prescribes “the minimum tolerance accorded to lawfully preexisting nonconforming residential structures,” *Weiss v. City of Cambridge*, 65 Mass. App. Ct. 1125 (2006) (Unpublished disposition) [finding that where a proposed addition to a residence would meet setback requirements on a lot which does not conform to lot width requirements, the “dimensionally conforming proposed addition fits within the language of the “second except” clause if any alteration of a nonconforming structure does,” and is permitted as a matter of right under G. L.c. 40A, §6, **irrespective** of the provisions of the Bylaw].

Mr. Fallon also mentioned last night that *Bransford v. Zoning Board of Appeals of Edgartown*, 444 Mass. 853 (2005) was an evenly split decision. However, the dissenting opinion in *Bransford* would have applied an even more liberal interpretation of G. L. c. 40A, §6. In any event, the reasoning of the concurring opinion in *Bransford* was affirmed and adopted in *Bjorklund v. Zoning Board of Appeals of Norwell*, 450 Mass. 357 (2008), a five-to-two decision.

We think the facts of this case compel the conclusion that the proposed conforming single family residence would not intensify any nonconformity or create any new nonconformity and that, therefore, the proposal may proceed as a matter of right under G. L. c. 40A, §6. If you disagree with our Memorandum relative to c. 40A, §6, or this email or if you have any other questions or

concerns, please let me know. In any event, I would appreciate it if you could contact me before the end of this week so that we may discuss the matter.

Thank you.

Louis N. Levine, Esquire
D'Agostine, Levine, Parra & Netburn, P.C.
268 Main Street
P.O. Box 2223
Acton, MA 01720
Ph: (978) 263-7777, ext. 224
Fax: (978) 264-4868
Email:
www.dlpnlaw.com

CONFIDENTIALITY NOTICE:

This e-mail and any attachments are confidential and may be protected by attorney-client privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of this e-mail or any attachment is strictly prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. E-mail is covered by the Electronic Communication Privacy Act, 18 U.S.C. §§ 2510-2521. Thank you.

In accordance with Internal Revenue Service Circular 230, we hereby advise you that if this e-mail or any attachment hereto contains any tax advice, such tax advice was not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on the taxpayer by the Internal Revenue Service.