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April 28, 2015

OF COUNSEL

JAMES W. MURPHY
WAYNE H. SCOTT

Mr. Leo Bertolami
Wayside Management Corporation
97 Great Road, Unit #5
Acton, MA 01720

Re: 429 Great Road, Acton, Massachusetts

Dear Mr. Bertolami:

You have asked whether the razing, reconstruction and horizontal extension of the structurally deficient Pegasus Building as a pre-existing, nonconforming structure at 429 Great Road in Acton, Massachusetts is allowed under the Bylaw. The building was built one hundred (100) years ago with almost zero front yard setback prior to the enactment of the Acton Zoning Bylaw and on this basis is a pre-existing, nonconforming structure per M.G.L., c. 40A, §6 and the Acton Zoning Bylaw. The Bylaw allows you to apply for a special permit to reconstruct and extend the building and seek a finding that it will not be substantially more detrimental to the neighborhood than the existing condition of the building.

The pre-existing, nonconforming building is located on a 1+ acre of land. It has frontage in excess of 300 feet and the existing structure on the property is three stories in height with approximately 5000 square feet, the net floor area ratio (FAR) is less than 20%, has a front yard setback of almost zero and a rear setback of in excess of one hundred (100) feet. The present side yard setback is less than the required thirty (30) feet. Access to the site is from Great Road. The lot is conforming with the zoning district as to acreage, height, rear yard setback and lot coverage. The existing building's tenant moved out earlier this year and the building should be razed and reconstructed according to your structural engineer due to foundation and structural deficiencies. The proposed structure will be approximately 10,500 square feet in size and will continue to meet the rear yard setback as well as height. In addition, the net floor area will continue to be less than twenty percent (20%), the building will reduce the front yard setback nonconformity and the project will be brought into compliance with the 30 foot side yard setback. The use of the building will conform with zoning.

When considering reconstructions and alterations, the legal principle cited from M.G.L., c. 40A, §6 is that while Acton's zoning bylaws do not apply to the structures and uses built or practiced prior to the zoning bylaw enactment, the current zoning laws do apply to alterations or

extensions of nonconforming structures, subject to local zoning provisions which can expand statutory allowances.

RECONSTRUCTION AND EXTENSIONS ARE AUTHORIZED BY THE BYLAW

The first question is whether the reconstruction of the building is authorized under the Acton bylaw. Glidden v. ZBA of Nantucket, 77 Mass. App. Ct. 403 (2010). Section 8.3.2 of the Acton Zoning Bylaw allows the owner to alter, reconstruct, extend or change the nonconforming structure provided that alterations, reconstruction, extension or change, complies with the dimensional requirements of the Bylaw. Section 8.3.3 further allows horizontal extensions within the dimension of the existing front yard nonconformity provided that the extension otherwise conforms to the dimensions of the Bylaw and the ZBA issues a special permit finding that the extension is not substantially more detrimental to the neighborhood than the existing nonconforming condition of the building.

While reconstruction is not defined in the Bylaw, its ordinary meaning is “the act of rebuilding, recreating or reorganizing something.” In this case, the existing building will be rebuilt and extended. Similar to Glidden, there is nothing in the meaning of the term or its use in the Bylaw that limits the reason for reconstruction or excludes reconstructing a structure anywhere on-site. Glidden at 409. However, the razing of the building should take place after issuance of the special permit to avoid an abandonment argument. Glidden at 410.

In this instance, the horizontal extension is within the existing front yard setback nonconformity and does not increase any existing nonconformities. The building design actually decreases the front yard setback consistent with the Bylaw and conforms to the 30 foot side yard setback. All other dimensional requirements are met in accordance with the Bylaw.

RECONSTRUCTION AND EXTENSIONS ARE NOT PROHIBITED BY M.G.L.A., C. 40A, §6

In addition to authorization under the Bylaw, Chapter 40A, §6 also allows the extension and change of the pre-existing nonconforming building by special permit:

“Pre-existing nonconforming structures or uses may be extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority . . . that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming structure . . .”

M.G.L., C. 40A, §6 permits extensions and changes to nonconforming structures if (1) the extensions or changes themselves comply with the ordinance or bylaw and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the pre-existing nonconforming structure or structures through the issuance of a special permit. Rockwood v. The Snow Inn Corp., 409 Mass. 361, 364 (1991).

In considering this special permit application, the issuing authority will review and compare the existing uses and density in the business neighborhood.

**THERE IS NOTHING IN THE BYLAW OR STATUTE THAT RESTRICTS
RECONSTRUCTION TO THE SAME FOOTPRINT.**

In Glidden v. ZBA of Nantucket, 77 Mass. App. Ct. 403 (2010), the Massachusetts Appeals Court affirmed the ZBA approval when the owner demolished a garage and replaced the pre-existing, nonconforming structure with a different structure at a different site on his lot.¹

The Glidden Court considered the Nantucket Bylaw regulation of two (2) pre-existing, nonconforming structures (a house and garage) on the property. Both buildings were nonconforming as to front yard and rear yard setback and ground cover ratio. Defendant's predecessor received a variance from the Nantucket Board of Appeals to bring one side yard into setback compliance with a property exchange and boundary change. After razing the garage, Defendant later received a special permit approval to replace the garage with a pool house at a different location that conformed to setbacks and had less ground cover, while still nonconforming with the ground cover requirements. Plaintiff (a neighbor) challenged the special permit based upon the Variance issuance and stated that the property no longer enjoyed the grandfather status of C.40A, §6 because of the conformity of one of the side yard setbacks through the boundary change. The Court disagreed and found that similar to Acton, the Bylaw did not contain restrictive language as to the location of the reconstructed building or the reason for reconstruction. Defendant's special permit was affirmed.

While alteration, extension and reconstruction of the pre-existing structure are all allowed, the new structure cannot create a new nonconformity by special permit. In Deadrick v. ZBA of Chatham, 85 Mass. App. Ct. 539 (2014) the Land Court reviewed a proposal to raze a 1829 building which would keep the same nonconformities with respect to frontage, setbacks, lot size and building coverage. The owners also sought to increase building height by 7 feet above the local conservancy district restriction of 20 feet. The Court overturned the special permit, finding that a Variance was required for the height increase, since it created a new nonconformity.

¹ Similar to Acton there was no requirement in the Nantucket Bylaw that reconstruction must include a portion of the old building.

Mr. Leo Bertolami
April 28, 2015
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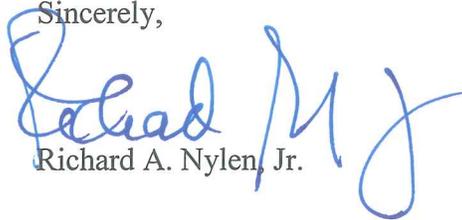
NO VARIANCE IS REQUIRED IN THIS FILING

As noted above, while intensifying existing nonconformities require a special permit, creating new nonconformities requires a variance. Rockwood v. Snow Inn Corp., 409 Mass. 361, 362, 370 (1991). In Hollock v. ZBA of Chatham, 21 LCR 95 (2013), the owner sought to raze an existing structure on a pre-existing, nonconforming lot and replace it with a larger structure. The lot was nonconforming due to acreage, front yard setback, side yard setback and tidal frontage (100 vs. 150 required). The project continued the existing nonconformities and in addition, the height (presently conforming) was increased to be nonconforming. The Court held that a variance was required for the new nonconformity. No new nonconformity is created for this reconstruction so the project is eligible for a special permit.

Please contact me if you have any further questions.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard A. Nylén, Jr.", with a stylized flourish at the end.

Richard A. Nylén, Jr.

RAN/kad
Enclosure

cc: George Dimakarakos, P.E.

KANAYO LALA, P.E.
BSCE, M.ASCE, M.SEI, M.NSPE, M.I.E.(India), M.AMWS, M.ACI, M.ICC
FOUR WEST ROAD
ACTON, MA 01720
LIC.# 33710-C(MA), 9227(NH), 84611(NY), 32768(VA), 7736(VT)
<https://sites.google.com/site/kanayolalape/>

Building Inspection and Zoning Department
472 Main Street
Acton, MA 01720

April 17, 2015

Attn: Mr. Frank Ramsbottom, Building Commissioner

Re: 429 Great Road, Acton, Massachusetts

Dear Mr. Ramsbottom:

Following is the evaluation of the existing conditions at the 429 Great Road, Barn Building used as retail store, as per the International Existing Building Code 2009 as amended by 780 CMR Chapter 34:

The two story building has been in use as a retail store, i.e. use **Group M**. It should not continue in its present condition in my opinion. The Gross area of the building - 1st Floor = 2728SF; 2nd Floor = 2356SF; Attic = 744SF; Total = 5828SF

The existing building has a stone foundation with an average five foot deep crawl space. The upper two floors are wood framed post and beam structure with a partial attic space. The structure has a roof rafter system with asphalt shingles.

The first inspection was done by me on November 9, 2013 and recently I visited a few weeks ago in February 2015.

The existing stone foundation is crumbling due to standing water in the crawl space that freezes in the winter. The freeze and thaw cycle of the past few severe winters has caused movements in the foundation making it unstable and unsafe for occupancy.

The existing building has many structural damages extending from wet rot and termite damage to its sill plates and loosened post and beam connections. No short term or long term repairs appear economical or appropriate for the existing structure. The existing siding is also deteriorated which is essential for the lateral stability of the barn and safety of its occupants.

Due to the existing condition of the structure the tenant has vacated the building. The roof is leaking and the rot and termites have won their battle with the structure. The previous tenant stated when the building is full, both floors are very spongy and did not feel safe and feels even worse on the second floor.

In my opinion, the roof structure, foundation, first and second floors must be replaced. Razing or dismantling the entire structure and installing new footings with concrete walls and a new structure that meets the current building code is necessary due to public safety concerns. Field decisions will be made to determine if any part of the building/structure can be salvaged.

The work of razing the building and replacing the structure on the new foundation will be under controlled construction and will be supervised by a professional engineer responsible to provide timely inspection reports to the Town.

Please contact me if you need additional information or if you have any questions.

Sincerely,



Kanayo Lala, PE

cc.: Mr. Brain McMullen, Assistant Assessor