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*March 2, 2005*

*Erin K. Bauer*  
TOWN CLERK, ACTON



MASSACHUSETTS

BOARD OF APPEALS

**Decision #05-02**

**Decision on the Petition of Mark Lionetta, 5 Mallard Road**

A public hearing of the Acton Board of Appeals was held on Monday, January 10, 2005 at 7:30 p.m. in the Town Hall on the Petition of Mark Lionetta for a **VARIANCE** from Section 5, Table of Standard Dimensional Regulations of the Zoning Bylaw to allow a covered entry to be built 21.8 feet from the front property line where a 30 foot front setback is required, the property being located at 5 Mallard Road.

Present at the hearing were Jonathan Wagner, Chairperson; David Black, Member; Richard Fallon, Alternate Member; Garry Rhodes, Building Commissioner; and Cheryl Frazier, Board of Appeals Secretary. Also present at the hearing were the Petitioner, Mark Lionetta, the owners of the property, Lawrence and Michele Behan, and the architects.

Jonathan Wagner opened the hearing, read the contents of the file, and asked the Petitioner to begin. Mark Lionetta of Nagog Construction asked relief for mistakes that were made with regard to the front setback with regard to the addition to the existing house which has already been built. When the architects drew up the plans for the addition they noted the setbacks from the side and rear property lines. Mr. Lionetta and the architects were not aware of the front setback. Upon the frame inspection of the Building Department the encroachment on the front setback was noted, work was stopped, and a variance was requested from the Zoning Board.

The back of the property has a four foot high mounded septic system. Thus, the mudroom addition put on the front could not be put on the rear.

No basis for a variance, other than the mistake, was presented. At the time of the hearing, the addition in question had already been built, with the mudroom, the deck and the overhang above the deck, but the finished siding had not been added. While the addition as now built extends 3 or 4 feet into the setback, plus the deck, the foundation for the addition only extends approximately a bit more than one foot into the setback.

Jonathan Wagner moved to close the hearing. David Black moved to reopen the hearing to accept additional evidence. The hearing was continued until Monday, January 24, 2005 at 7:30 p.m. for new plans to be submitted.

On **January 24, 2005 at 7:30 p.m.**, Jonathan Wagner reopened the hearing. The architects presented a new plan, with a removal of the porch roof, but the plans basically otherwise unchanged. Mr. Wagner noted that the reason the hearing was continued was to allow the Petitioner to provide a plan that might allow the Board to consider the possibility of the violation being de minimis, and asked the architects if this really was the plan that they felt would result in such a finding. The architects then presented a second plan which significantly further reduced the violation, with the front of the addition moved back to the poured foundation. The hearing was then closed.

The Board of Appeals, in consideration of the facts presented and reviewing the materials and information provided, finds that:

A. The Zoning Bylaw requires a 30 foot front setback in this residential zoning district, while the Variance request was for approximately an eight foot intrusion into the setback.

B. The addition was essentially built except for siding before the setback intrusion was discovered by the Building Department frame inspection; the architects and the builders of the addition had focused on the side setbacks because there was a side addition involved in the work, but were not aware of the front setback issue. Also, the owners and residents of the house were not involved in any way in the construction.

C. The foundation for the front addition extends only about a foot to eighteen inches into the setback.

D. The circumstance specifically relating to this structure and not affecting generally the zoning district is that this addition was inadvertently built within the setback, with the foundation intrusion being a de minimis amount in this context. There is no question of a variance being justified here without the construction existing prior to the discovery of the setback intrusion, or without the de minimis element of the foundation intrusion.

E. It would be a substantial hardship here for the homeowners to have to not only redo the addition but to repour the foundation based on this minimal intrusion of the foundation. It is a bedrock rule for determining substantial hardship, though, that a petitioner cannot create the hardship, for example, as here, build a structure in violation of the bylaws and then base a claim for variance on the hardship of tearing down the offending structure. Here, however, the de minimis aspect of the intrusion comes into play. In the context of land encroachment, the Massachusetts Appeals Court in Capodilupo v. Vozzella, 46 Mass. App. Ct. 224 (1999) found the Land Court had erred in ordering removal of encroaching walls, in the "exceptional" case where the encroachment was trivial or de minimis, the encroachment was not intentional, and the cost of removing the encroachment was disproportionate to the benefit.

F. This Board finds that the situation here by analogy fits in that same category of an exceptional case where the intrusion of the foundation is de minimis, the encroachment was not intentional, and the cost of eliminating the foundation as well as the structure above would be disproportionate to the benefit, *i.e.*, the upholding of the literal language of the Zoning Bylaws.

G. The Board emphasizes that this is the exceptional case. Such exception would only apply where the intrusion has already been innocently built, and is trivial or de minimis. It also would not be applied if the homeowner had been involved in the construction. Furthermore, if there had not been a side addition involved such that the focus on the side setback explained the oversight, this would be a different situation: construction which involved only one setback which ignored that setback would be a dubious candidate for this exception.

H. Therefore, the Board finds that literal enforcement of the Bylaw would involve substantial hardship to the homeowner, that desirable relief with regard to the de minimis foundation intrusion may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of the Bylaw, and that granting a limited variance here, less than requested, is consistent with the Master Plan.

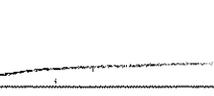
Therefore, based upon the above findings, the Board of Appeals votes unanimously, 3-0, to **GRANT** the **VARIANCE**, subject to the following **CONDITIONS**:

1. The addition must comply with the revised plan dated 1/19/2005 as modified.
2. The addition, other than landing and stairs, shall not project beyond the newly poured foundation with the exception of finishing materials.
3. The width of the landing shall not exceed the width of the existing stairs which are approximately 72 inches wide, and the depth of the landing shall not exceed 42 inches.
4. The roof overhang of the addition shall not exceed 8 inches.
5. The existing structure which is in violation of the 30 foot setback shall be abated within 9 months of the date of this decision to the extent necessary either to comply with this decision or with the setback of 30 feet.

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

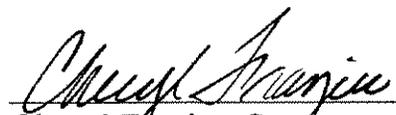
**TOWN OF ACTON BOARD OF APPEALS**

  
Jonathan Wagner,  
Chairperson

  
David Black,  
Member

  
Richard Fallon,  
Alternate

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on March 2, 2005.

  
Cheryl Frazier, Secretary  
Board of Appeals

**EFFECTIVE DATE OF VARIANCE:** No variance or any modification, extension or renewal thereof shall take effect until a copy of the decision has been recorded in the Middlesex County South Registry of Deeds. Such decision shall bear the certification of the Town Clerk that 20 days has elapsed after the decision has been filed in the Office of the Town Clerk and no appeal has been filed, or that if such an appeal has been filed, it has been dismissed or denied.

**TIME LIMITATION ON VARIANCE:** Any rights authorized by this Variance which are not exercised within nine months from the date of the decision shall lapse and may be reestablished only after notice and a new hearing pursuant to the Zoning Bylaw.