

# Newburyport Zoning Board of Appeals Application for DCOD SPECIAL PERMIT

Petitioner: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Property Address: \_\_\_\_\_

Map and Lot(s): \_\_\_\_\_ Book and Page: \_\_\_\_\_

Zoning District: \_\_\_\_\_

Owner(s) Name: \_\_\_\_\_

Mailing Address (if different): \_\_\_\_\_

A Request for Historical Report was submitted to the Historical Commission on: \_\_\_\_\_

The applicant is requesting a Special Permit under Section XXVIII – Demolition Control Overlay District for the following request:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Any advice, opinion, or information given by any board member or any other official or employee of the City of Newburyport shall not be binding on the Zoning Board of Appeals. It shall be the responsibility of the petitioner to furnish all supporting documentation with this application. The dated copy of this application received by the City Clerk or Planning Office does not absolve the petitioner from this responsibility. The petitioner shall be responsible for all expenses for the filing, publication, and legal notification. Failure to comply with the application requirements, as cited herein and in the Zoning Board Rules and Regulations may result in a dismissal by the ZBA of this application as incomplete.

By checking this box and typing my name below, I am electronically signing this application.

\_\_\_\_\_  
Petitioner

By checking this box and typing my name below, I am electronically signing this application.

\_\_\_\_\_  
Owner (if different)



CITY OF NEWBURYPORT  
OFFICE OF PLANNING AND DEVELOPMENT  
60 PLEASANT STREET • P.O. Box 550  
NEWBURYPORT, MA 01950  
(978) 465-4400  
WWW.CITYOFNEWBURYPORT.COM

## NOTICE OF VIOLATION

Under the City of Newburyport Zoning Ordinance (section X-F violations) and the decisions and permits issued thereunder:

**To:** Michael Gray  
12 Harrison Street  
Newburyport, MA 01950

**Site:** 12 Harrison Street

**Date:** August 11, 2020

**Notice:** It has come to the attention of the Office of Planning and Development that you or your agents are in violation of the Newburyport Zoning Ordinance.

### Reported Activity:

Based on site observation on August 10, 2020 and reports of prior demolition it is apparent that the scope of demolition is in violation of that represented in your zoning review request materials, ZBA Special Permit for Non-conformities (2020-037) and Historic Commission Demo Delay (04/09/20) applications as well as that allowed for under XXVIII Demolition Control Overlay District (DCOD) and associated building permits issued thereunder.

### **"XXVIII-D Definitions**

*2. Demolition of a building or structure: Demolition of greater than twenty five (25) percent of all exterior walls of a building structure, measured based upon their total surface area, regardless of the visibility of such walls from a street, way or public body of water."*

### Required Action:

**Immediately** cease demolition and secure the structure from the elements and vandalism. Then contact the Newburyport Zoning Administrator to schedule a meeting with the authorities having jurisdiction to discuss the next steps.

Failure to cease the above referenced demolition in excess of Special Permits issued under the NZO is subject to section X-G, Prosecution of Violations, and upon issuance of an Enforcement Order may incur a penalty for violations of up to \$300.00 per day for each offense.

**"XXXVIII-E 8. Additional penalties for unauthorized demolition:** *In addition to any other penalties under applicable law, without prior written approval by the SPGA, no building permit shall be issued for a period of three (3) years with respect to any premises at which an historic building or structure has been intentionally demolished without a DCOD-SP having been first*



CITY OF NEWBURYPORT  
OFFICE OF PLANNING AND DEVELOPMENT

60 PLEASANT STREET • P.O. BOX 550

NEWBURYPORT, MA 01950

(978) 465-4400

WWW.CITYOFNEWBURYPORT.COM

*obtained in compliance with the this section. Such three-year period shall commence after the date upon which such demolition has been completed or suspended, whether voluntarily or by legal compulsion. For purposes of this subsection, "premises" shall mean both (a) the lot upon which the demolished historic building, structure, or architectural feature was located, and (b) all abutting lots under common ownership or control of such lot at the time of demolition."*

Appeals arising under the enforcement of this ordinance shall be taken pursuant to M.G.L 40A within thirty (30) days from the date of the order by filing a notice of appeal, specifying the grounds thereof, with the City Clerk, who shall forthwith transmit copies thereof to such officer whose order or decision is being appealed and to the Zoning Board of Appeals.

If you do not understand the requirements of Zoning Ordinance of the City of Newburyport the Zoning Administrator and the Office of Planning and Development and its staff will make every effort to assist you in complying with the law. Additionally, you can find links to the relevant zoning regulations on the City of Newburyport website at:

<http://www.cityofnewburyport.com/Planning/>

Questions and communications regarding this Notice may be directed to:

Jennifer Blanchet  
Newburyport Zoning Administrator  
& Enforcement Officer  
978-465-4400 x 1227  
Jblanchet@cityofnewburyport.com



O'Connor  
Carnathan  
and Mack LLC

Landmark One  
1 Van De Graaff Drive  
Suite 104  
Burlington, MA 01803

Tel: 781.359.9000  
Fax: 781.359.9001

www.ocmlaw.net

David B. Mack  
Direct Line: 781.359.9005  
dmack@ocmlaw.net

October 1, 2020

**By Hand Delivery and Email**

Newburyport Zoning Board of Appeals  
Attn: Robert Ciampitti, Chairman  
60 Pleasant Street  
Newburyport, MA 01950

**Re: 12-14 Harrison Street; Letter in Support of DCOD Special Permit**

Dear Chairman Ciampitti:

I represent Michael Gray ("Petitioner"), who, together with his wife, owns the property at 12-14 Harrison Street (the "Property"). This letter is submitted in support of Petitioner's Application for a DCOD Special Permit pursuant to Section XXVIII of the Zoning Ordinance. In addition to this letter, Petitioner respectfully refers the Board to the following materials on file with the Office of Planning and Development, the Zoning Board of Appeals, and the Newburyport Historical Commission ("NHC"):

- The Special Permit for Nonconformities, submitted on or about March 10, 2020;
- The NHC Demolition Permit Application, submitted on or about March 12, 2020;
- The set of Plans for 12 Harrison Street dated May 28, 2020, with sheets A0.1, A0.2, A1.2, A.13, A1.5, S-0, S-2, S-3 and S-4; and
- The letter from David Mack to ZBA dated September 11, 2020, with Exhibits A through F.

There are no new drawings or plans to present, as the project is the same project as approved by the Board in May, with the exception of replacing the framing of the exterior walls, as described below.

Summary of Prior Proceedings

As these prior filings suggest, the Board earlier this year granted Petitioner's Application for a Special Permit for Non-Conformities pursuant to Section IX-B. The Petitioner did not seek a DCOD Special Permit at that time because he did not expect that the project would require "demolition," as that term is defined in Section XXVIII-D-1. During construction, however, Petitioner discovered that the existing framing for the Property was not structurally sound and had to be replaced in order for the project to be constructed in accordance with the framing plans submitted to and approved by the Board and the Building Department (see Plans S-0, S-2, S-3 and S-4). The Petitioner did not appreciate at the time that the removal of the structurally unsound framing, which is not a visible feature of the Property and was not the original framing in any event, required a different permit. As a result, when Petitioner removed the framing, the Zoning Administrator on August 11 issued a Notice of Violation and a stop work order, and imposed a three-year moratorium of a building permit under Section XVIII-E-8 (Additional Penalties).

Pursuant to the Notice of Violation, the Petitioner and his then counsel Mark Griffin (who is unavailable due to a scheduling conflict) conferred with the Planning Department to discuss the best course forward. Initially, it was suggested that the Petitioner seek a waiver of the Additional Penalty, which Petitioner did via a letter from this office dated September 11, 2020 (see above). Following submittal of that letter, however, the Petitioner and Planning Department staff engaged in further discussions, during which it was suggested that the Petitioner take a "belt-and-suspenders" approach and seek a DCOD Special Permit since the facts and circumstances suggest that this Property would have qualified for such a permit had the condition of the framing been known at the time Petitioner sought the Special Permit for Nonconformities.<sup>1</sup>

Despite this somewhat complex and unusual procedural history, *the project at issue is materially identical to that proposed when Petitioner sought a Special Permit for Nonconformities in May. The lone exception is the removal and replacement of the exterior wall framing, and this one change is not visible to the public.* Moreover, the replacement of the framing was required in order to construct the building in accordance with the approved structural plans. All other aspects of this proposed construction, including the restoration of many historical features that had been removed by prior owners, are identical to that presented to and approved by the Board, and recommended for approval by the Newburyport Historical Commission. These same plans likewise had been approved by the Building Inspector in issuing the Building Permit.

---

<sup>1</sup> Out of an abundance of caution to preserve his appellate rights, Petitioner also has filed a Notice of Appeal of the Notice of Violation, with respect to which appeal Petitioner will seek a continuance pending the outcome of this DCOD Special Permit Application.

Facts Supporting DCOD Special Permit

The Property is located in the Demolition Control Overlay District (DCOD) and the R-2 Zoning District. It is listed on the Newburyport District Data Sheet as contributing to the National Historic District, but it is not on the National or State Registers of Historic Properties. The home on the Property was built in or about 1750-1800. To the best of Petitioner's knowledge, it originally was constructed as a single-family home, but at some point in time the owner converted the Property into a two-unit, multi-family dwelling, which was its existing condition when the Petitioner purchased the Property in 2019.

The Petitioner and his wife purchased the Property with the intent of renovating it and moving their family there. As of the date of purchase in 2019, the existing home had been severely neglected over time, to the point where its shabby appearance detracted from the neighborhood. The neglect led to structural deficiencies, rendering the house unsafe and uninhabitable. The front entry floor and wall were reframed at some point, but were not properly framed. The entire structure was sagging and leaning into the front of the house. As noted in project photos attached to my waiver request letter (Exhibit E thereto), the post-1980 additions to the home appeared unstable. Scores of potential buyers visited the Property when it came on the market, but only the Grays and one other interested buyer made offers.

The Grays hired an architect, Barry Ganek, to draw up plans for what they expected would be an entire gutting and reconstruction of the interior of the home. Many of the planned renovations, however, involve restoring several of the historical features of the home that had been removed by prior owners. These features include reverting the home from a two-family residence back to its original use as a single family home, replacing vinyl siding with wooden clapboard siding, and replacing the shingle roof with a slate roof. The plans also called for a modest upward extension of the roof, which was considered a roofline change. Importantly, none of these features, despite being outward-facing and visible to the public, required a DCOD Special Permit because the Petitioner expected to be able to preserve the exterior walls.

The Petitioner therefore filed for a Special Permit for Nonconformities under Section IX-B, which triggered a review by the Newburyport Historical Commission ("NHC"). On May 14, the NHC recommended that the Board approve the Nonconformities Special Permit. In its Memorandum, the NHC noted, among other things:

Since the time of the historic survey (1980-81), several poorly designed and executed additions and alterations were made which have seriously degraded the historic qualities which are seen in the 1980 photograph. The commission agreed that the changes proposed by the applicant would, to some degree have the effect of reversing some of those changes in a favorable way. The aspects as seen from the Rail-Trail in particular would be improved.

On May 26, 2020, the ZBA voted to approve the Petitioner's remodeling plans and granted a Special Permit for Nonconformities. The Petitioner applied for and obtained a building

permit based on the same plans submitted to and approved by the Board following the recommendation of the NHC. The engineering plans reviewed and approved by the Building Department assumed that the existing walls would be structurally sound and sufficient to support the anticipated framing layout.

Construction commenced in early August, and it soon became clear that the structure was in even worse condition than Petitioner originally believed. Upon removing the wall board on the inside of the exterior walls, it became obvious that various sections of the original walls had been patched, and what remained was rotted and structurally deficient to support the framing layout. A decision was made in the field to remove the rotting and structurally deficient framing. Daniel Webb, the structural engineer on the project, has issued a report explaining the structural deficiencies of the existing walls and opining that “the structural deficiencies of the framing rendered the sections [of the exterior walls] that are intended to remain, unsuitable to be used as a component of the renovated structure.”

The decision to tear down the framing of the exterior walls was made in the field, based on the honest belief that it was consistent with the permits that had been approved by the NHC and the Building Department and was not altering any historic element of the Property. Most importantly, the existing walls were not structurally sufficient to support the framing design reflected in the engineering drawings.

#### DCOD Special Permit

When issuing a DCOD Special Permit, the ZBA must find that there is substantial evidence that the historic building or structure “retains no substantial remaining market value or reasonable use, taking into account the cost of rehabilitation to meet the requirements of the State Building Code as it applies to historic buildings or structures, or to other applicable laws.” Zoning Ordinance, XXVIII-E(3). Substantial evidence is such evidence “as a reasonable mind might accept as adequate to support a conclusion.” Ordinance at XXVIII-D(6).

Given that the Board has already issued a Special Permit for Nonconformities covering all aspects of this project except for removal of the framing, and the removal of the framing is what triggered this Application, we believe that “historic building or structure,” in the context of this Application, means the framing itself. Nonetheless, even if the project is viewed as a whole, inclusive of the previously approved changes, we believe that this project clearly meets the applicable standard.

As for the framing itself, the Petitioner refers the Board to the photographs submitted as Exhibit E to my letter dated September 11, 2020, which clearly depict the deteriorated condition of the framing. Additionally, the Petitioner relies on the reports of (i) the structural engineer, Daniel Webb, who has opined that “the structural deficiencies of the framing rendered the sections [of the exterior walls] that are intended to remain, unsuitable to be used as a component of the renovated structure;” and (ii) the project architect, Barry Ganek, who concurred with Mr. Webb’s assessment. Those letters appear as Exhibits C and D, respectively, to my September 11

letter. This evidence demonstrates that the framing, in the opinion of experienced professionals, “has no substantial remaining market value or reasonable use.” In fact, these professionals opined that the framing has no remaining structural value at all. We would also submit that the purpose of Section XXVIII, the DCOD Special Permit ordinance, would not be served by requiring an entirely new framing design where the (a) interior walls are not the original walls and therefore have no apparent historic significance; and (b) the framing is not even visible from the outside of the Property.

Even if the Board is inclined to view “historic building or structure” as the entire building, we believe that the existing condition of the building, as of project commencement, was in such a state of disrepair that the Property had no “substantial remaining market value” except to someone willing to purchase it for the purpose of doing a major remodeling and renovation of the building, in much the same fashion as the Petitioner did here. As noted above, and more particularly in the letter submitted by Mr. Gray (which letter appears as Exhibit F to my September 11 letter), the building was basically uninhabitable when the Petitioner purchased it, and even more problems were discovered upon commencing the construction in the interior of the building.

Moreover, in approving the Special Permit for Nonconformities, the Board found, based on the same plans before the Board now, that the project “will not be substantially more detrimental to the neighborhood than the preexisting nonconforming structure or use.” Indeed, the Board specifically found that “this structure is an important contributor to the overall impression on a visitor to Newburyport’s South End” and the project “will result in improvements to the existing condition” in that neighborhood. While the standard for a Special Permit for Nonconformities is not the same as for a DCOD Special Permit, we believe that the Board’s prior finding in the Nonconformities Special Permit implicitly supports a finding in the instant Application that the Property had no *substantial* remaining market value or reasonable use in its then existing condition (i.e. in May 2020).

The project described in this Application is, in all material respects, the same project as the one Petitioner presented in his Application for a Special Permit for Nonconformities. The only change is the framing, an interior feature. In light of the condition of the Property, Petitioner’s proposed renovation work would in fact *re-establish* a substantial market value and reasonable use for the Property, and would improve the overall character of the Demolition Control Overlay District. By replacing structurally deficient walls with ones that are structurally sound, Petitioner is better preserving the Property, in accordance with the Zoning Ordinance’s expressed intention that historic structures shall be preserved and repaired where reasonably feasible. XXVIII-E(1).



Newburyport Zoning Board of Appeals  
Attn: Robert Ciampitti, Chairman  
October 1, 2020  
Page 6

CONCLUSION

For the foregoing reasons, and those stated in the prior submissions incorporated herein, the Petitioner requests that the Board approve the Application and issue the DCOD Special Permit.

Very truly yours,

*/s/ David B. Mack*

David B. Mack, Esq.  
Counsel to the Petitioner

cc: Newburyport Historical Commission