



May 5, 2020

By Hand

Rob Ciampitti, Chair  
Zoning Board of Appeals  
City of Newburyport  
City Hall  
60 Pleasant Street  
Newburyport, Massachusetts 01950

Re: Request for Special Permit for Non-Conformities;  
12 54th Street, Newburyport, MA (the "Property")  
Assessor's Map: 76 Lot: 4

Dear Chair and Members of the Board:

Reference is made to the above-captioned matter. In that connection, as you are aware, this firm represents Gregory Elliott and Candace McMahon (the "Applicants"), the owners of the Property, relative to the construction of additions to a single-family residence (the "Structure"). The Applicants seek a Special Permit for Non-Conformities for the project and presented the project to the Board on April 28, 2020. Concerns were raised at the last meeting from several Board members about the proposed renovations compliance with the Plum Island Overlay District ("PIOD") Special Permit criteria for modification to a pre-existing non-conforming single family home and the owners of the closest abutting property objected to the Applicants' project, citing obstruction of view of up-river to the Basin and the City of Newburyport.

As background, the Greg and Candace have resided in the Structure for 13 years. The Applicants are in their 60s and want to retire in the Structure and age there, without having to climb stairs. The Applicants also desire that their family and grandchildren be able to visit them at the Property and stay over night from time to time. In undertaking the design of this projects, the Applicants have sought to take the most conservative route possible, resulting in the modest proposed additions to the Structure. That is, they purposefully have stayed within the footprint of the existing structure – but for the cantilevered screened porch and have added a second floor with lower ceiling heights and roof pitch.

While Greg and Candace believe that the proposal they put forward at the last meeting meets the requirements of the Ordinance and supporting caselaw as more fully elucidated below, they requested John Sava to work further to have less impact on the direct abutters view. As a result he has accomplished the following changes: the mean roof height has gone from 21 feet to 19.9 feet and the peak from 30.7 to 23.9 feet where a mean roof height of 35 feet is permitted. Further, the dormer on the north elevation has been removed. The roof is now of such a pitch that shingles are not recommended and a metal roof will be employed.

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As you are aware, the Property is located in the R3 zoning district and Plum Island Overlay District (“PIOD”) under the Newburyport Zoning Ordinance (the “Ordinance”). Neither the Ordinance overall nor the PIOD provides protection for view or visual impact. Neither Section I-C “Purpose” nor Section XXI-A of the PIOD contain any reference to protecting view of visual impacts. Opposition to a special permit based on view or visual impact, where said interests are not protected under zoning, is not a valid reason for denial of a special permit. See *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491 (1989), rev. denied 405 Mass. 1204 (1989) (plaintiffs’ opposition “essentially involving the expression of aesthetic views and speculative opinions, do not establish a plausible claim of a definite violation of a private right, property interest, or legal interest sufficient to bring any of the plaintiffs within the zoning of standing”).

In cases where a neighboring property owner challenged a special permit based on view or visual impact, Massachusetts courts have allowed the challenge only where the zoning bylaw or ordinance specifically protected that interest. The Supreme Judicial Court in *Kenner v. Zoning Bd. of Appeals of Chatham*, stated that, “[g]enerally speaking, concerns about the visual impact of a proposed structure on an abutting property are insufficient to confer standing.” 459 Mass. 115, 120 (2011). In *Kenner*, the board granted a special permit to allow the razing and reconstruction of a single-family house, to include an expansion and an increase in height resulting in a home 7 feet taller than the original. *Id.* at 115. A neighbor appealed, claiming that the taller house would obstruct the view of the ocean. *Id.* at 117. The zoning bylaw explicitly provided that the board was to consider “[i]mpact of scale, siting and mass on neighborhood visual character, including views, vistas and streetscapes.” *Id.* However, the SJC concluded that “[t]his language does not suggest that the zoning bylaw was designed simply to protect individual homeowners’ views of the ocean from their own property. Rather, § V.B.5 addresses the visual impact of a proposed structure, or of changes to an existing structure, on the visual character of the *neighborhood* as a whole (emphasis in original).” *Kenner*, 459 Mass. at 121.

Here, unlike in *Kenner*, there is no protection for visual character of the neighborhood. Additionally, even where the bylaw in *Kenner* protected the visual character of the neighborhood, that protection did not extend to an individual’s views of the ocean. Compare *Martin v. Corporation of the Presiding Bishop of Church of Jesus of Latter-Day Saints*, 434 Mass. 141, 146 (2001) (where zoning bylaw provided board was to take into consideration visual consequences of any proposed structure on properties).

Section XXI-G.4a allows the alteration, reconstruction, extension of, or change of a single-family residence in the PIOD where, in addition to dimensional requirements, the proposed change will not be substantially more detrimental than the existing nonconforming structure to the neighborhood or the PIOD. In determining whether proposed changes are substantially more detrimental, the board may consider conditions in the neighborhood generally, as compared to the subject lot upon which the changes will be made. See *Graf v. Akin*, Mass. Land Ct., 2018 WL 6738179 (2018). In *Graf*, the defendant sought a special permit to raze a one-story garage and replace it with a two-story structure; an immediate abutter objected. *Id.* at \*1. The zoning board found no substantial detriment to the neighborhood and the abutter appealed to the Land Court. *Id.* The Land Court judge determined that the zoning board correctly found that there was no substantial detriment, particularly where the board noted that the nonconformities were not unique to the defendant’s property and the objecting abutters own garage was within the side-yard setback. *Id.* Further, the proposal was compatible with garages and residences on the street and in the broader neighborhood. *Id.* It is of note that the term “substantially” means to a great or significant extent. When used in the context of the ordinance the Board would have to make a finding that the proposed renovation and expansion upward was “substantially more detrimental” to the neighborhood or the PIOD than the existing condition. There has been no showing by the neighbor or any evidence of record that such is the case here, nor can there be.

Here, the nonconforming front and side yard setback of the Applicants' residence is not any different than the nonconformities on many of the abutting properties. The structure at abutting 8 54<sup>th</sup> street, to the naked eye, clearly is nonconforming as to side yard setback and front setback. The Property is more than double the size of 8 54<sup>th</sup> Street, and triple the size of two of the abutting properties to the rear. Another property to the rear of the Applicants' Property is also half the size. Viewing the neighborhood as a whole on MIMAPS, a number of the structures on the lots are close to or within the setbacks. The small expansion in footprint to the Structure more than complies with the setback requirements of the PIOD. As to the proposed additions, the resulting Structure is similar and in keeping with the size of other residential structures in the neighborhood.

Finally, it is not proper to deny the special permit on the basis of speculative future harms. In seeking to protect Plum Island and the purpose set forth in section XXI, more stringent criteria were adopted with the enactment of the PIOD. The criteria that must be met for a special permit in the PIOD is more restrictive than that applicable to other areas of the City. For example, modifications to pre-existing non-conforming single and two family structures must meet a FAR requirement, the structures are limited to one additional and not more than 3 bedrooms, new construction must be at least 10 feet from the property line – all criteria protecting the PIOD and NOT applicable elsewhere in the City. If an applicant can meet the criteria, the Board can grant a special permit.

The proposed project meets the requisite criteria for special permit under Section XXI-G.4a. The Structure will not be more than 2 stories, will not be more than 35 feet in height, and will not be within 10 feet of the side lot line, excepting the one side yard setback that is pre-existing nonconforming at 5.01 feet. The FAR of the lot complies and the Applicants are only adding one bedroom for no more than three. Thus, the Applicants have met the special permit criteria of the PIOD.

It is not appropriate to speculate about future unknown circumstances, relative to growth and development in the PIOD. In *Fitzsimonds v. Board of Appeals of Chatham*, the plaintiffs sought a special permit to construct an addition to convert a summer cottage into more of a house. 21 Mass. App. Ct. 53, 54-55 (1985). The zoning board denied based on detriment to the neighborhood as “it would be difficult in the future to refuse the plaintiffs’ permission for year-round occupancy.” *Id.* at 57. The Appeals Court disagreed and stated “[w]e think the board erred when it took into account, as bearing upon present decision, a putative problem to be faced in the indefinite future upon now uncertain facts.” *Id.* Where said speculation is based on conservation issues that are not the province of zoning, it is likewise improper to deny a special permit. See *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 640-641 (1970) (“It appears that the board, acting under the guise of zoning, intends to grant no special permits for any physical changes or improvements on any coastal wetlands in town, and thereby to protect and preserve them in their natural state. The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power of authority delegated to municipalities under the Zoning Enabling Act. If such preservation of wetlands was the board’s sole objective, it was a legally untenable ground for its decision”). The Applicants’ project is currently under review with the Conservation Commission.

Where view is not protected the Ordinance and the proposed renovations and reconstruction are consistent with the requirements of the PIOD and the resulting nonconformity of the Property and Structure are not any different than the nonconformities existing in the broader neighborhood, it cannot be said that the proposed changes to the Structure are substantially more detrimental to the neighborhood or PIOD than the existing Structure.

Finally, you will find it interesting that the Applicants could tear down the existing structure entirely, and rebuild a 2,375 square foot home in the middle of the lot meeting all setback requirements and current construction requirements. However, to do so would likely impact more abutting properties and would necessarily include a

mean roof of 35 feet as permitted in the district in order to retain the desired and permitted living space. and, would cause the demolition of a perfectly sound home that environmentally is better being re-used. For Greg and Candace personally, such a result would require them to climb stairs which for 13 years they have been planning how to avoid. Most new buyers of this property would indeed do just that, tear it down and big a much bigger new home. However, Candace and Greg have long planned to retire in this location, but a short while ago, Mrs. Murray mentioned to Candace that the Murray's were planning on moving to another house they own on the Island so Mrs. Murray does not have to climb stairs. Nonetheless, the Applicants are willing to reduce their proposal in order to attempt to address the concerns raised to the extent they can be addressed.

The Applicants respectfully request that the Board find that the proposed changes are not substantially more detrimental to the neighborhood than the pre-existing, nonconforming Structure and grant a Special Permit for Non-Conformities.

Respectfully submitted  
Gregory Elliott and Candace McMahon  
By their Attorney

A handwritten signature in black ink, appearing to read 'Lisa L. Mead', written over a horizontal line.

Lisa L. Mead

Attachment  
cc: client