



The Commonwealth of Massachusetts
Town of Southborough
Board of Appeals

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SOUTHBOROUGH, MA *JH*

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NOTICE OF DECISION

APPLICATION FOR SECTION 6 FINDING

**Richard Gordon
11A Cherry Street
(38-56)**

At the continued Public Hearing of the Southborough Board of Appeals on September 28, 2011, in the Hearing Room of the Southborough Town House, the Board considered the application of **Richard Gordon** seeking a Special Permit under MGL, Chapter 40A, Section 6 Finding to demolish a pre-existing, non-conforming structure and rebuild on a non-conforming lot in a Residential B zone.

Sitting as a Board: Matthew C. Hurley, Chairman
 Tara Bayko
 Edward D. Estella
 Thomas Bhisitkul
 Leo F. Bartolini, Jr.

For Petitioner: Joseph M. Antonellis, Esq.
 288 Main Street
 Milford, MA 01757

The Chairman read the emergency exit procedure as required by the Board of Selectmen.

Board Member Bartolini disclosed that the law office representing the petitioner rents a self-storage facility from him. Attorney Antonellis stated that he has been a member of the firm, Mayer, Antonellis, Jachowicz & Haranas, LLP, for three years and is aware that the firm maintains off-site storage.

Evidence

1. On May 23, 2011, petitioner submitted applications to the Southborough Board of Appeals for a special permit, a variance and a Section 6 Finding concerning property located at 11A Cherry Street, located in a Residential B zone. The original project sought to demolish a pre-existing, non-conforming structure and rebuild on a non-conforming lot and to convert an existing garage into an Accessory Apartment on the same lot as the primary dwelling in a Residential B zone, said accessory apartment exceeding 25 percent of the square footage of the primary dwelling in a Residential B zone.
2. At the Public Hearing before the Southborough Board of Appeals held on July 27, 2011, Petitioner requested, and was granted, permission to withdraw without prejudice the applications for a Special Permit and a Variance, leaving open only the Section 6 Finding regarding the demolition and rebuilding of the existing residential structure on the lot.
3. Petitioner proposes to demolish the existing residential structure on the lot and to construct a larger house in a different location on the lot. The proposed 1855 s.f. structure will be built in a location on the lot where it will meet all of the present set back requirements. Petitioner intends to construct a new septic system on the lot, in compliance with existing Title V requirements, and will be able to do so without the need for a variance or other special relief.
4. The area of Petitioner's lot conforms to the present zoning requirements, but the lot lacks any frontage whatsoever (and is nonconforming with respect to frontage). The lot gains access to Cherry Street via a 10' access easement (the "Existing Easement") over the adjacent parcel to the north of the Petitioner's lot, which has an address of 11 Cherry Street (**Southborough Assessor's Map 38, Lot 55**) (the "North Adjacent Property"). The Petitioner has represented that he owns the North Adjacent Property through a separate trust or other entity in which he owns a controlling interest, and that, accordingly, he has the ability to expand the Existing Easement to improve the access to the lot at issue on this application.
5. Petitioner submitted that the Board of Appeals may make a finding that the newly constructed house will not be substantially more detrimental than the existing nonconforming use to the neighborhood. The new structure will properly sit within the zoning district's building envelope, the use will be single family and, thus, there should be no concern that a family, living in a new house, would somehow be a greater impact to the zoning district. Petitioner submitted that the reconstruction of the house will result in a positive impact on the neighborhood as it would be constructed under today's much more restrictive Building Code, with a new septic system meeting Title V requirements and improved access.
6. Petitioner submitted that Town of Southborough Bylaw Section 174-19 gives further evidence that the Chapter 40A Section 6 Finding can be made. By way of amendment, the Town supports the reconstruction of nonconforming single-

family residential structures. As is set forth in the second paragraph of 174-19; Single-family residential structures: “In the following circumstances, alteration, reconstruction, extension or structural change to a single-family residential structure shall not be considered an increase in the nonconforming nature of the structure and shall be permitted **as of right**: (2) Alteration of a structure which complies with all current setbacks, lot coverage and building height but is located on a lot with insufficient frontage, where alteration will also comply with all of said current requirements.

7. Petitioner submitted that the scaled back proposal before the Board of Appeals represents a situation that is in total sync with Section 174-19(2) of the Town of Southborough Zoning Bylaw and creates a vehicle where under the very rare and well defined circumstances set forth in Section 174-19, no Section 6 Finding is necessary (see therefore “as of right” above).
8. Petitioner submitted that the Board of Appeals, assuming that a Chapter 40A Section 6 Finding is necessary and when guided by the language of the Southborough Bylaw, can make a finding that an alteration, reconstruction, extension or structural change when allowed “as of right” is not substantially more detrimental to the neighborhood than the existing structure.
9. By letter dated August 15, 2011, Petitioner addressed the issue of whether or not the single family residential building located at 11A Cherry Street had been abandoned as raised by Attorney Susan Craighead, a direct abutter to the property. Petitioner noted that the Town of Southborough has, through the adoption of its most recent Zoning Bylaw, distinguished between the abandonment of nonconforming uses and signs (see Section 174-21) and the abandonment of nonconforming structures. While Section 174-21 prohibits the reestablishment of nonconforming uses and signs, there is no provision in the bylaw prohibiting the reestablishment of a conforming use in a nonconforming structure. In fact, nonconforming residential structures are afforded special relief and are not subject to the issues and analysis related to abandonment. Petitioner further submitted that there is no reference in the bylaw to the issue of abandonment when, as is the case here, the use is conforming.
10. By letter dated August 24, 2011, Town of Southborough Building Inspector, David G. Gusmini, advised the Board of Appeals that he reviewed the Petitioner’s letter addressing the abandonment issue as requested. The Building Inspector opined that the Petitioner is correct in his determination, and he concurs that the Section 6 Finding is required and the issue of abandonment does not apply.
11. On July 27, 2011, the Board of Appeals received a petition in opposition to the proposal to demolish and reconstruct the house and to construct an accessory apartment in the existing garage located at 11A Cherry Street. The petition cited concerns regarding water and drainage problems and the impact that the development would have on their homes and properties. The petition cited concerns that the only access to the lot is a small easement driveway which is

- frequently even smaller due to car and trucks parking on it.
12. During the public hearing process, Attorney Craighead addressed the Board in opposition to the proposal, further indicating that the only access to the property is a ten foot wide easement which is over 160 feet long and frequently at least partially blocked by parked cars and trucks. Attorney Craighead submitted Memorandums to the Board of Appeals in support of her positions dated July 21, 2011 and September 21, 2011.
 13. Brian Swartz and Ruth Beck of 3A Pleasant Street submitted documentation to the Board of Appeals, received August 17, 2011 setting forth their concerns regarding the proposal. They also addressed the Board during the public hearing process. Mr. Swartz is extremely concerned about existing drainage problems and the potential negative impact to his property as a result of new construction at 11A Cherry Street. Ms. Beck expressed concern about the access to the property for emergency vehicles.
 14. Todd Robecki, 64 Central Street, addressed the Board, stating that his family owns the property that houses the Montessori Children's House. He stated that the proposed new residential structure is situated in a place that is in close proximity to the parking area for three nearby businesses including his own. He stated that the parking lot is very active and will continue to be so. The construction of a house on the lot so close to the parking lot has the potential to cause problems that he would like to avoid, e.g. complaints of headlights shining into the new residential structure. He also stated that the site is very wet and suggested that lot elevations be reviewed. By letter dated July 26, 2011, Mr. Robecki submitted written opposition to the proposal.
 15. Victor Baldelli of 7 Pleasant Street expressed concerns regarding drainage and the pitch of the land toward his property asking for assurance that he will not be negatively impacted by the proposed development.
 16. Responding to abutter concerns, the petitioner stated that the existing garage will be rehabilitated in its present location, and its use as a garage will be maintained. Chairman Hurley stated that plans to rehabilitate the garage in its present location places this structure beyond the Board's jurisdiction unlike the proposal to construct a larger house in a different location.
 17. Elias Aoude, owner of property in Southborough located at 67 Turnpike Road, expressed concern regarding existing drainage issues and the potential for additional water on his land resulting from this development. His son echoed his concerns.
 18. Petitioner submitted that the drainage problems would be addressed. Board Member Estella asked that the drainage plan be referenced in the Board's decision. Petitioner agreed to a condition that would address the concerns of the abutters.

19. In response to the concerns of the neighborhood regarding access to the site via a 10' wide Existing Easement over the North Adjacent Property, and the use of this easement for parking purposes by the properties on Cherry Street, Petitioner proposed that the Section 6 Finding be subject to an expansion of the Existing Easement to 18 feet through the recording of an easement instrument in the title records, in form and substance acceptable to the Town Counsel, that would also prohibit parking of vehicles in the easement area. Petitioner further submitted that he had the ability to control parking for the North Adjacent Property such that vehicles could park without interfering with the proposed 18' wide easement, as such new/expanded easement area is shown on the site plan entitled "Plot Plan, 11A Cherry Street, Southborough, MA 01772", prepared by Guerard Survey Co. & Associates, Inc., 11 Summer Street, Westborough, MA 01581, dated February 17, 2011 (the "Petitioner's Plan"). The proposed easement instrument would also provide for ongoing maintenance of (including sufficient and timely snow removal from) the easement area, and keeping it clear of parked vehicles at all times.

20. The Public Hearing was closed on September 28, 2011 at 8:31 PM.

Decision

After the continued Public Hearing duly held on September 28, 2011 in the Hearing Room of the Southborough Town House, the Zoning Board of Appeals makes the required Section 6 Finding that the proposal to demolish the existing residential structure at 11A Cherry Street, Southborough, Massachusetts and build a new residential structure as shown on the a Petitioner's Plan will not be substantially more detrimental to the neighborhood than the existing non-conforming structure. Moreover, the proposed single-family residential structure decreases the non-conforming nature of the existing structure by its placement on the lot within all existing setbacks. The Applicant's request for a Section 6 finding is hereby approved with the following conditions:

- 1) The Petitioner employing best management practices for the discharge and collection of stormwater. Petitioner shall submit the drainage plan to be attached and made a part of the Section 6 Finding.
- 2) The Petitioner causing to be created, prior to the request or issuance of a building permit for the new structure, an 18' wide permanent access easement over the North Adjacent Property and for the benefit of the subject lot, through an easement instrument (the "Easement Instrument") in form and substance acceptable to Town Counsel, and recorded with the Worcester County Registry of Deeds (and/or, if either property is Registered land, filed with the Worcester Registry District of the Land Court). The Easement Instrument shall further include provisions (i) prohibiting parking of vehicles in the 18' easement area; (ii) imposing affirmative obligations on the owner of the North Adjacent Property for the maintenance and repair of the access easement area (including, without limitation, removal of snow and ice therefrom), as necessary to maintain free, safe and unobstructed access to, and egress from, the subject (benefitted) lot; and (iii) establishing a cost-sharing arrangement requiring the owner of the petitioner's lot to

contribute its equitable pro rata share of the costs incurred for such maintenance. In order to assist Town Counsel in review of the efficacy of the Easement Instrument, the Petitioner shall supply Town Counsel with a current title commitment or equivalent certified title report (and a current survey or site plan) that establishes the title ownership of both the subject lot and the North Adjacent Property.


Matthew C. Hurley, Chairman