



Ruthanne Fuller
Mayor

CITY OF NEWTON, MASSACHUSETTS

City Hall

1000 Commonwealth Avenue, Newton, MA 02459-1449

Telephone: (617) 796-1120 TDD/TTY: (617) 796-1089 Fax: (617) 796-1086
www.ci.newton.ma.us

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ZONING BOARD OF APPEALS

Adrianna Henriquez, Board Clerk

#04-21

DETAILED RECORD OF PROCEEDING AND DECISION

Petition #04-21 Bryan Gary and Pamela Stephenson of 81 Old Orchard Road, Newton, Massachusetts, pursuant to M.G.L. c. 40A, § 8, and 15, appealing the May 26, 2021 issuance of a building permit by the Commissioner of Inspectional Services for the construction of an accessory building within the rear and side setbacks at 45 Old England Road, Newton, Massachusetts. The subject property is located at 45 Old England Road and is located in a Single-Residence 1 (SR-1) District.

The Zoning Board of Appeals for the City of Newton (the "Board") held a virtual public hearing via Zoom on Monday, August 9, 2021 at 7:00 p.m.

Due notice of the public hearing was given by mail, postage prepaid, to all "parties in interest" in accordance with M.G.L. c. 40A, § 11 and by publication in the *Newton Tab*, a newspaper of general circulation in Newton, Massachusetts, on July 28th, 2021 and August 4th, 2021.

The following members of the Board were present:

Brooke Lipsitt (Chair)
William McLaughlin
Michael Rossi
Stuart Snyder
Treff LaFleche
Elizabeth Sweet (Alternate)

The following documents were submitted to the Board and/or entered into the record at the public hearing:

1. 45 Old England Road Appeal, with attachments, dated June 24, 2021

DISCUSSION

Attorney Robert Nislick, 118 Oaks Road, Framingham, spoke on behalf of the Appellants. Attorney Nislick explained that the Appellants are appealing an amendment to a previously granted building permit for construction of a single family home located at 45 Old England Road (the "Subject Property"). The amendment permitted the construction of a four post structure with a copper roof situated around an electrical transformer and within the rear and side yard setbacks of the Subject Property (the "Structure").

Attorney Nislick stated that the location of the Structure violates the Newton Zoning Ordinance because it is located within the setbacks. He acknowledged that structures that meets the Zoning Ordinance's definition of a "Building" may be located within the setback but that the Structure at issue here is not a building. He explained that the transformer also constitutes a structure that is not allowed by the original building permit and cannot be located in the setback. He argued that placing a four post structure over the transformer does not remedy the zoning violation because it still does not constitute a "Building" as defined by the Zoning Ordinance. He stated that a "Building" must be used for the storage of property and that here it is an aberration to say that property is being stored in the Structure at issue because the sole purpose of the enclosing Structure is to evade the zoning requirement that the transformer cannot be located within the setback. He also contended that the Structure is a prohibited use under the Zoning Ordinance.

Attorney Nislick also stated that the Appellants are contesting the issuance of the building permit for the Structure on the basis that it violates the maximum lot coverage allowed under the Zoning Ordinance. He explained that this is based on the stated lot coverage of 15% on the building permit plans, which is the maximum allowed, meaning that the additional lot coverage created by the Structure must put the property over the maximum.

John Lojek, Commissioner of Inspectional Services, explained his determination that the Structure meets the definition of a "Building" and therefore does not violate zoning. He stated that a structure is a building if it has a roof and is used for the storage of property and that here the Structure at issue meets those requirements. He said that the transformer constitutes property and will be contained with the approved Structure. He noted that what goes inside accessory buildings is not relevant so long as it is property and that the Structure here could have been a much larger shed or garage in the same location. He stated that by the strict definition of a "Building" in the Zoning Ordinance, the Structure constitutes an accessory building and is allowed within the setback as long as it is five feet from the lot line, which it is here. He noted that this is not an unusual practice as pool equipment and air condensers are often contained within a shed in a similar manner so that they can be located within setbacks for their protection, similarly to this case.

Commissioner Lojek next addressed the lot coverage argument. He explained that it is premature to determine the final lot coverage of the Subject Property. Construction of the project has not been completed and lot coverage will be confirmed when the final as-built plans are submitted prior to issuance of a certificate of occupancy. The final zoning calculations, including lot coverage, will be done by a land surveyor and shown on plans that are certified and stamped. The Commissioner stated that when those plans are submitted he will determine whether the property is in violation of the maximum lot coverage, will require that any violation be remedied immediately, and would not issue a certificate of occupancy if a zoning violation exists. He also noted that the proposed lot coverage shown on building permit plans often changes slightly and that the approved Structure, at about 25 square feet, is adding very little coverage which could easily be made up by reducing other paved areas. Commissioner Lojek assured the Board that, as with all projects, he will look very closely at the final project to ensure it complies with the Zoning Ordinance.

Attorney Laurance Lee, 246 Walnut Street, Newton, spoke on behalf of the property owners of the Subject Property. He explained that the Zoning Ordinance clearly defines a "Building" and that Commissioner Lojek has properly interpreted the ordinance in determining that the Structure constitutes a building. He noted that the Structure here is similar to a carport in that it is open on three sides with a roof. He also stated that the Structure is 10 feet from the side setback and 7.5 feet from

the rear setback, so that it is not right up against any lot lines. He also agreed that the final lot coverage will be confirmed after construction is complete, and stated that the lot will be in compliance and that it is standard procedure for the Commissioner not to issue a certificate of occupancy if the final plans show any zoning violations. In response to a question from the Board, Attorney Lee stated that his clients are open to adding additional screening along the property line and speaking further with the Appellants about a resolution to this dispute.

No members of the public spoke at the hearing. A motion was made by Mr. Rossi to close the public hearing, seconded by Mr. Snyder. The motion passed five in favor and none opposed.

The Board discussed and reviewed the merits of the appeal. Board members, acknowledging that the placement of the Structure over the transformer was a creative design workaround or loophole, all agreed that the Commissioner's technical interpretation of the Zoning Ordinance was correct. Board members also implored the two sets of property owners to work with each other to resolve the issue and that an agreement on additional screening and plantings may be a simple compromise.

FINDINGS & DETERMINATION

After careful study of the materials submitted and the information presented at the hearing, the Board makes the following findings and determination:

1. The enclosing Structure allowed by the building permit amendment issued by Commissioner Lojek constitutes a "Building" as defined in Section 8.3 of the Zoning Ordinance. Because the Structure is an accessory building, it is properly located within the setback in accordance with Section 3.4.3 of the Zoning Ordinance.
2. The Appellants have not met their burden of proving that the approval of the enclosing Structure creates a violation of the maximum lot coverage. The Appellants have not presented any evidence that the lot coverage is in excess of the maximum allowed. Given that construction has not been completed, the final lot coverage is not yet known, making this challenge premature. Based on the assurances of Commissioner Lojek, the Board is satisfied that the Subject Property will ultimately comply with the Zoning Ordinance's lot coverage requirements.

Accordingly, a motion was made by Mr. Rossi to uphold the decision of the Commissioner of Inspectional Services, seconded by Mr. McLaughlin. The motion passed five in favor and none opposed.

AYES: Brooke Lipsitt
 William McLaughlin
 Stuart Snyder
 Michael Rossi
 Treff LaFleche

NAYS: None


 Brooke K. Lipsitt, Chairperson

The City Clerk certified that all statutory requirements have been complied with and that 20 days have lapsed since the date of filing of this decision and no appeal, pursuant to Section 17, Chapter 40A has been filed.

City Clerk