

**ZONING BOARD OF APPEALS MEETING PLACE: HEARING ROOM 2,
MARSHFIELD TOWN HALL OCTOBER 10, 2017 7:30 p.m.
MEETING MINUTES**

Members Present:

*Lynne Fidler
Francis Hubbard
Brian Murphy
Mark Stiles
Richard Murphy*

Also Present:

MARSHFIELD TOWN CLERK
RECEIVED
2017 MAY 23 PM 3:40

Ms. Fidler called the meeting to order and advised that the meeting was being recorded by Marshfield Community Television (MCTV) and voices and images were being recorded. Ms. Fidler stated that she would be the Hearing Officer and that other members were signified by their nameplates.

Ms. Fidler began by saying that there was a change in the schedule, that the Bay Avenue hearing would be at 8:00 P.M.

#17-59: John and Linda Gomez: The Petitioners are seeking a Special Permit in accordance with §305-11.09 of the Marshfield Code to create a Residential Accessory Apartment on the property located at **23 Sherrill Road**, which is further identified on the Assessors' Map as parcel K10-01-32 and is located in an R-3 zoning district.

#17-55: John and Linda Gomez: The Petitioners are seeking a Variance in accordance with Article X, Section 10.11 for relief from Article XI, Section 11.09.3.f on the property located at **23 Sherrill Road**, which is further identified on the Assessors' Map as parcel K10-01-32 and is located in an R-3 zoning district.

Ms. Fidler read the petitions into the record and stated that #17-55 was a continued hearing and asked the applicant to explain the project. Brian Henderson stated that they would like to put a 16'x30' accessory apartment on the rear of the existing dwelling. Mr. R. Murphy said that this has been in the same family for years with no substantial improvements. Mr. Stiles asked Mr. Hubbard what he thought and Mr. Hubbard said that a Variance was not needed, just a Special Permit. Mr. Stiles said that it would still look like a single family. Mr. Henderson explained the plans. Ms. Fidler said that a Variance would probably not be granted but a Special Permit was not necessarily okay. Mr. R. Murphy asked Ms. Fidler if she were struggling with §305-11.09C(6) (which states "the dwelling must be in existence, and not substantially altered, for a period of three years prior to filing an application). Mr. R. Murphy said that he had spoken to Greg Guimond because he had also struggled with it. He stated that Mr. Guimond said that this was done for one development only, Woodlawn Hills, because they were building with three (3) car garages and space on top of the garages. The thought was that they would turn these into apartments. Mr. Guimond said that the Planning Board was willing to discuss and fix this.

Ms. Fidler said that she also spoke to Mr. Guimond and she said this was verbiage in the Bylaw and they could take out three (3) or four (4) words which would allow them to interpret this another way. But she said this was a Bylaw and it has specific verbiage and it is a Bylaw that needs further exploration. Mr. Stiles said that he is not sure the three (3) years is the issue, that it

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is drafted poorly. He said that if you go to the Definition section and looked at dwelling unit, if they meant that the dwelling unit needed to be in existence they should have said dwelling unit with no substantial changes. Ms. Fidler said that she agrees with the Board that the verbiage is funky. Mr. B. Murphy said that the words were there in front of them, that this was not the spirit of the law. Mr. R. Murphy said that if there is ambiguousness with this section, the default should not be that there cannot be an accessory apartment. Mr. Stiles said the alternative would be to put the addition on but not put in a kitchen. Mr. B. Murphy said they could put the kitchen in but could not put in a stove. Mr. Hubbard said another alternative would be that they don't get building permits, electrical permits, etc. so that there could be many illegal rental apartments. He also said that without permits, nothing will be inspected.

Ms. Fidler made a motion to close the hearing which was seconded and all were in favor. She then made a motion to grant the Special Permit which was seconded. The Special Permit was granted by a vote of 4-1 with Mr. Hubbard, Mr. B. Murphy, Mr. R. Murphy and Mr. Stiles voting in favor and Ms. Fidler opposed. A motion was made to deem #17-55 moot with no further action required by the Board. This was seconded and all were in favor. The Board took a ten (10) minute recess as Mr. Guard had not arrived for the next hearing.

#17-33 and #17-43 and #17-51: Stephen and Elizabeth Howley: The Petitioners are seeking (i) a G.L. Ch. 40A, Section 6 finding, and a Special Permit in accordance with Marshfield Zoning Bylaw Article X, Sections 10.12 and 10.10, Article IX, Section 9.02, and Article XIII, Section 13.02.3a, to raze the pre-existing, nonconforming dwelling at **225 Bay Avenue** (identified on the Assessors' Map as parcel M05-10-37) located in the Residential R-3 and Coastal Wetlands Districts, and to alter and reconstruct a new 2.5 story dwelling which will not be any closer to the side and rear yard property lines than which currently exists, (ii) a special permit under Marshfield Zoning Bylaw Article XIII, Section 13.02.3a and/or, if necessary, a variance pursuant to Marshfield Zoning Bylaw Article X, Section 10.11 from the setback requirements of Marshfield Zoning Bylaw Article XI, Section 6.10, to construct two one-foot in diameter piers or pilings at the said property within the rear yard setback as support for a temporary and removable ramp/gangway and float, (iii) a variance, if necessary, to extend the timeframe set forth in Article IX, Section 9.06 within which to complete construction of a "restored" structure at the said property, and (iv) such other further relief pursuant to the Marshfield Zoning Bylaw as necessary.

Ms. Fidler read the petition into the record and said that the applicant has been going through the process for some time. Attorney Jon Witten provided the Board with a draft decision and he reviewed the draft with the Board. Mr. Witten went through the draft and stated that based on the record before the Board, neither Variance should be granted. He said that the draft is for the Special Permit approval for the two (2) pilings and the proposed new structure. He said that it was important for the Board, if they choose to approve the Special Permit, to add conditions to mitigate impact on the neighborhood. Mr. Witten said that the importance of the draft was to agree or disagree or modify the findings that are required before the Board can allow expansion or alteration under Chapter 40A, Section 6. Mr. B. Murphy stated that the Board has been going back and forth as to whether a Variance is needed to put a dock in a backyard. Mr. Witten said

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that before Mr. O'Neill left it was his opinion that a Variance was required for a dock that didn't meet side and rear setbacks. He said that by definition a dock will violate the setback. Mr. Witten stated that pilings can be done by a Special Permit under the Coastal Overlay District and not a Variance. Mr. Witten's opinion about granting a Variance is that they are exceedingly difficult to grant because the criteria are so difficult to meet; this case does not contain sufficient evidence to support the three (3) criteria. Ms. Fidler stated that they would consider these as separate structures and asked if the Board were comfortable with pilings granted by Special Permit and they replied that they were. She said that the project is much larger than the original and asked if it intensified the setback violation. Mr. Stiles asked if they were talking about the side or rear setbacks. Mr. Witten said that there are two (2) steps. Are they adding a new nonconformity? If they are they would need a Variance. Does it intensify the nonconformity? It does. He said that the Board needs to make the most important finding which is, will the intensification be more substantially detrimental to the neighborhood; that is the Section 6 finding that really is at issue in this case.

Ms. Fidler said that she looked at other projects on the water and talked to Mr. Witten about the definition of "neighborhood" as it is not really defined in the Bylaws. She went to Webster's dictionary and it doesn't say that it is a half mile to the left or a half mile to the right from an applicant's house. She asked if they were comparing it to houses near it or on the entire street and other areas with neighborhoods of ocean and river impact. She said that it was a nice looking building and Mr. Hubbard, Mr. B. Murphy and Mr. R. Murphy agreed.

Mr. Witten said that if the Board concludes that this is not substantially more detrimental to the neighborhood then they can properly grant the Special Permit. The test is, is it substantially more detrimental. The Board needs to discuss the specific criteria of the Bylaw and determine if it has been met. The Board went through and found that it met #1-#5 and Ms. Fidler said that they want to make sure that they address #6 clearly and asked if there were any specific conditions. Mr. Hubbard said that the words "and materials" should be removed because the Board does not have the authority to tell the homeowner how to shingle his/her house. Ms. Fidler said that they do have some authority in regard to aesthetics but Mr. Hubbard said only with commercial properties. The Board believed the project met #7-#10. Ms. Fidler said that they should take their time with #9 because a lot of people spoke in opposition. She said that it needs to adhere to Conservation – waterways, state codes, etc. – and she felt they met those.

Ms. Fidler asked if it was the Board's opinion that it will not be more detrimental to the neighborhood and would the Board conclude that the evidence before it supports the finding that the applicant is entitled to a Special Permit for the reconstruction of the single family dwelling and the installation of two (2) pilings, provided that the reconstruction is in strict conformance with the site plan by Grady Consulting dated April 19, 2017 and the revised dates of May 21, 2017 and June 23, 2017. Mr. Witten said that they would need four (4) of five (5) votes and that the draft before the Board also denies the Variance which could be part of the motion or a separate motion. Mr. Hubbard said that it should be a separate motion.

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Mr. Delisi started to say that he wasn't sure if something was appropriate and Ms. Fidler said that it wasn't. She said that they had an email and asked Ms. Porreca if she had it; Ms. Porreca said that she did not include it; Ms. Fidler said the record had been closed. Mr. Witten said that Mr. Delisi had also sent him the email but the record was closed and the Board needed to go with what was on the record. He said that whatever argument Mr. Delisi was going to make for withdrawing or mooting the Variances, the applicant can always ask the Board to reopen the hearing; that would require notice and procedural requirements; a letter or email is not a way to get to the Board.

Mr. B. Murphy asked if they would deny the Variances or would they be moot. Mr. Witten said that they would be moot if the Board grants the Special Permit but advised the Board to take an affirmative vote on the Variances. He also said that they would need to have a formal request to withdraw the Variance but the Board does not have that before them. Mr. Stiles said that the Variances were for the pilings and the time restriction. Mr. B. Murphy said that the Variance was for the pilings and the Board is saying that it fits under Special Permit. He said that he has done docks in other towns and did not need Variances but in Marshfield they are saying that it is needed. He wanted to know what the answer was to that question. Mr. Witten said that he would defer to Mr. Galvin but it was Mr. O'Neill's opinion that the way the Bylaw was drafted, docks needed a Variance due to the setbacks. This would need to be changed at Town Meeting and it needs to be more clear that a dock is an exception from side and rear setbacks and maybe even front setbacks. The Bylaw doesn't say that and it could be interpreted the way that Mr. O'Neill interpreted it and Mr. B. Murphy asked if they had to interpret it the same way. Mr. Witten said that the Board could interpret the Bylaw on its own but it needed to be cleaned up because the next Building Commissioner could interpret it the same way. He said that he did not think that was Town Meeting's intent. In this case because the pilings are a requested Special Permit under the Overlay District, 13.02, that takes care of it. As for the extension of time, the Board does not have the supporting information that would allow for an extension of time. He believes that March 2018 is when it would expire. He also said that the applicant can request the extension. Mr. Hubbard said that he thought that was overcome by the last Special Permit application and Mr. Witten agreed.

Ms. Fidler asked Mr. Witten to explain moot vs. deny. Mr. Witten said that "moot" would be the Board's conclusion that it has been substituted for by the Special Permit. "Deny" would be their conclusion that the statutory criteria have not been met. He said that he would prefer that the Board deny the Variance if they don't believe the statutory criteria has been met; they would be on record with a denial otherwise they can leave it for interpretation by either party. Mr. Witten said that declaring moot in this case flies in the face of the lack of evidence; there is no evidence to support the three (3) conjunctive criteria.

Ms. Fidler said that her thought was to make a motion to deny the Variance but they would start with the Special Permit. Mr. Stiles said that there was no way the applicant would be ready by March 2018 and Mr. Hubbard said that issue is moot and our counsel had agreed to that. Mr.

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Hubbard said that the last application took care of that; they don't need the extension. Mr. Stiles asked that if they granted the Special Permit, was the timeline off the table and Mr. Hubbard said that it was, that they had two (2) years with the Special Permit. Ms. Fidler made a motion to grant the Special Permit which was seconded; all were in favor. She asked if there would be any conditions before moving on to 9.02; Mr. Hubbard said to use the three (3) that are outlined in the draft for both Special Permits. Ms. Fidler made a motion to grant the Special Permit under 9.02 and 13.02.3a to raze the preexisting nonconforming dwelling. This was seconded and all five (5) were in favor. Ms. Fidler made a motion to deny the Variance from setback requirements for the gangway; this was seconded and all five (5) were in favor of denying. Ms. Fidler made a motion to deny the Variance requesting the extension of time, if necessary; this was seconded and all five (5) were in favor of denial.

#17-58: Robert and Patricia Parsons: The Petitioners are seeking a Special Permit in accordance with §305-10.12 of the Marshfield Code and M.G.L. c. 40A, §6 and §7 to alter a legal nonconforming single family dwelling with a 14' x 5' extension of the existing covered front farmer's porch which would thereby increase the nonconformity of the dwelling; the dwelling currently has a thirty-nine foot (39') front setback and with the extension of the porch, the setback would be reduced to thirty-eight feet (38'); and to relocate two (2) sets of stairs on an existing rear deck and construct an 8' x 10' pergola on said existing rear deck; and a Variance under §305-10.11 of the Marshfield Code for relief from §305-6.01 Applicability of Dimensional and Density Regulations and §305-6.02 Table of Dimensional and Density Regulations to decrease the nonconforming front yard setback by one foot (1') in connection with "squaring off" the existing covered front porch due to the angle of the house to the front lot line and the requested relief will not create any new nonconformities on the property located at **72 Dedham Road**, which is further identified on the Assessors' Map as parcel G12-14-01 and is located in an R-1 zoning district.

Ms. Fidler read the petition into the record and Mr. Stiles recused himself from the hearing. Mr. Guard explained the Mullins Rule to the applicant and said that there would be four (4) Board members hearing the case. Mr. Guard said that when the house was constructed back in the 1970s there was a required 40' setback. It was recently discovered that the setback is only 39' setback so it is existing nonconforming. He said that in Marshfield and most towns, all legal nonconforming structures get the benefit of Section 6 if built with a permit; if built without a permit it's ten (10) years. He said that extending the porch by one foot (1') the setback will go from 39' to 38'. Mr. Guard said that if the porch weren't covered the applicant would be fine under the Bylaws. He said that the applicants did not create the hardship themselves. Mr. Guard said that in the back there are two (2) sets of stairs and a pergola in the middle of the deck; the pergola is not a structure.

Mr. R. Murphy asked Mr. Guard to go back to Chapter 40A, Sections 6 and 7. This applies to structures built with a permit and in existence for six (6) years. If it is built without a permit but has existed for ten (10) years, it is also legal nonconforming. If it is built without a permit but it is during the ten (10) years, it is not legal nonconforming. Mr. Guard said that if this had a 40'

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setback and you brought it to 39' then they would be creating a new nonconformity. Because it is already nonconforming at 39', he is asking the Board to make a finding that the one foot (1') issue does not increase the nonconformity. Mr. Guard said that if the porch wasn't covered they would be fine under the Bylaw. He said that the second way to deal with the front setback is to go through the Special Permit process. He said just like the Island Street case of his a few weeks ago, Section 7 under the new code says you can't increase a nonconformity without a Variance. The Bylaws take you through the Special Permit process and then send you back to a Variance. Mr. Guard said that this does meet the requirements of a Variance – it's oddly shaped, the soil or topography is odd, there is no detriment to the neighbors. It's a substantial hardship to the applicants because they can't extend the porch but it is not a hardship that they created themselves.

Mr. Guard said that the applicants also want to relocate the stairs on the deck to a safer spot and add another set of stairs. There is a pergola in the middle of the deck; it's not a structure, it just offers architectural detail. The deck has been there over ten (10) years; the assessors' cards have the deck on them. The color on the map identifies easements and they are working with the neighbors on the easements. Mr. Guard spoke about the "Baker Bill" – structures built without a permit and now someone wants to put an addition on for example. Mr. R. Murphy asked Mr. Guard to explain Chapter 40A, Sections 6 and 7 again. Mr. Guard said that 40A Section 7 applies to structures that were built with a building permit and stayed in existence for more than six (6) years. During that six (6) year period, the Building Inspector has the right to revoke the building permit and have the property modified to comply with the Bylaw. If someone builds without a permit and nothing is done for ten (10) years, that prevents the town from telling the person that they have to take it down. During the ten (10) year period it is an illegal structure. Once the ten (10) years have passed it becomes a legal nonconforming structure, assuming that it doesn't meet the zoning criteria. He said that the problem now is that after all the years of these structures, can you alter or extend a nonconforming structure bigger. Governor Baker signed into law last November this modification of Section 7. What it says is legal nonconforming structures that have been in existence for six (6) or ten (10) years, depending on whether they were built with or without a building permit, are offered the same treatment as Section 6 which is, is the alteration more detrimental to the neighborhood, etc. He said that they get there with this property because of the 39' setback. If it was 40' they would be creating a new nonconformity. Mr. Guard said that with Section 6 there is something called the Powers test that says you can intensify a nonconformity if the Board finds that the intensification does not increase the nonconformity of the structure. He said that was the Bjorkland case in reverse. Ms. Fidler asked if Mr. Guard was arguing that this intensification of the nonconformity does not increase the nonconforming and the shape gives the reasoning for the Variance. Mr. Guard said that there are three (3) things that he is suggesting to the Board. One is that they make a finding that the one (1) foot issue doesn't increase the nonconforming nature of the structure because it's already nonconforming; if it doesn't then they go and get their building permit. If the extension does increase the nonconformity then they need a Special Permit. If the Board decides that they are making a nonconforming structure more nonconforming they will need to look at the Variance criteria. Mr. Hubbard asked about the work and Mr. Guard said that the porch has been extended and the pergola built. He said that when Mr. O'Neill did an inspection he said that they couldn't do this and that and pulled the permits. Ms. Fidler stated that they then appealed his

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decision.

Mr. Hubbard asked about the depth of the porch and Mr. Guard replied that it was four feet (4'). Mr. Hubbard then asked why wouldn't a porch be covered by the two foot (2') overlay into the setback. Mr. Guard replied because it was covered. Mr. Hubbard doesn't think that matters but Ms. Fidler thinks that it does because it has a roof. Mr. Hubbard said that this has been done before; that since it was covered it was deemed a storm shelter. Mr. B. Murphy said that Monitor Road was an example. Ms. Fidler asked if there were any questions on the site plan or rear deck pictures and there were none. She said that she was inclined not to close the hearing because the Board may have questions. Ms. Fidler made a motion to continue this to the October 24, 2017 meeting. The motion was seconded and all were in favor.

Meeting adjourned at 9:10 P.M.

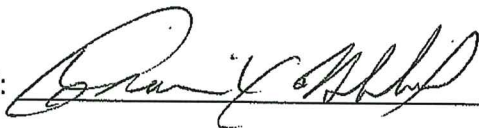
Respectfully submitted,

Nanci M. Porreca
Zoning Administrator

I attest the foregoing minutes were approved by the Zoning Board of Appeals at their

March 27, 2018 meeting by a 3-0 vote.

Signed:



Date:

3/27/2018