

MINUTES

On Wednesday evening, **March 26, 2008** at 7:00 p.m. in the Council Chambers of the Administration Building, the Zoning Board of Appeals held a public hearing. In attendance: **Harry J. Vlachos**, *Chairman*; **Stuart J. Bailey**, *Member*; **Deborah Elliott**, *Member*; **Carlos Fernandez**, *Member*; **Richard M. Moynihan**, *Alternate Member (Acting Clerk)*; **Nancy Scott**, *Zoning Enforcement Officer*; **Louise Civetti**, *Clerk*; **Joseph Merkel**, *Senior Planner*. **Absent: Melissa M. Santucci**, *Clerk*

Tape 1 of 2, Side A

Chair Vlachos opened the meeting at 7:00 PM, introduced the board and staff and swore in the audience.

Voting to approve the minutes of the January 30, 2008 meeting has been continued for absent members to vote on at a later time.

Mr. Moynihan read the legal notice of the first case:

Kevin Morrissey, 104 Acton Street, Watertown, MA, herein requests the Board of Appeals grant a **Special Permit Finding** in accordance with §4.06(a), Alts/Additions to Non-Conforming Structures, Side Yard Setback and a **Variance** in accordance with §5.04, Table of Dimensional Regulations, Building Coverage, so as to raze rear sunroom 7'x 13' and deck, 12'x 17' and construct one-story rear addition, 16'x 18' with attached deck, 16'x 12', maintaining non-conforming easterly side yard setback of 7'-6', where 10' is required and increasing building coverage from 22.3% to 25.5%, where maximum 25% is allowed at **104 Acton Street**, located in the S-6 (Single Family) Zoning District.

At the Planning Board hearing on February 13, 2008, the Petitioner presented the original request for a variance and special permit finding to construct a rear addition 16'x18' (288 s.f.) Planning Board concurred with staff's recommendation to deny the variance request and to have the Petitioner modify his plans so as to not warrant the Variance. The Board requested an Elevation drawing depicting the new addition.

At the continued Planning Board hearing on March 12, 2008, the Petitioner presented a new proposal for an addition 15'x17' (255 s.f.) and 12'x15' uncovered deck, which conforms to the 25% maximum allowed building coverage at 24.9% and no longer requires a Variance; however, the proposed modified structure maintains the non-conforming easterly side yard setback thereby still requiring approval for a Special Permit Finding. A hand-drawn elevation plan was submitted by the petitioner and dated 2/21/08. The Planning Board voted unanimously to recommend to the Zoning Board to grant the Special Permit Finding.

Mr. Kevin Morrissey, Petitioner appeared before the Zoning Board with the revised drawings and plot plan, which was updated to reflect the 15'x17' addition, but still dated 1-22-08. Member Fernandez noted that the calculations on the Plot Plan – marked by the Zoning Office "*Revised March 12, 2008*", did not appear to be accurate. The Board determined that although the calculations were indeed inaccurate, the proposed addition did not increase the building coverage beyond the maximum allowed of 25%. The Board conditioned their approval on receiving an accurately calculated revised Plot Plan. This Board finds that the proposed addition and deck which will maintain the nonconforming 7.6' easterly side lot line would not impact the property or abutting properties.

Mr. Morrissey then requested the Board to vote to withdraw his petition for Variance.

Mr. Moynihan motioned to accept the request for withdrawal on the petition for Variance. Ms. Elliott seconded. Voted 5-0 Withdrawal Granted.

Mr. Moynihan motioned to grant the revised request for Special Permit Finding as it meets the criteria set out in the ordinance. Ms. Elliott seconded. Voted 5-0. Granted.

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Deborah Elliott, Member

Carlos Fernandez, Member

Richard M. Moynihan, Alternate

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Member (Acting Clerk); Nancy Scott, Zoning Enforcement Officer; Louise Civetti, Clerk; Joseph Merkel, Senior Planner. Absent: Melissa M. Santucci, Clerk

Tape 1 of 2, Side A, Continued.

Chair Vlachos noted the next case has requested a continuance: **Palfrey Street Lot 333 3A 5B (a/k/a 212A & 213)**

Mr. Moynihan motioned to accept the request for continuation. Ms. Elliott seconded. Voted 5-0. Continued.

Mr. Moynihan read the legal notice for the next case:

Brian McDonald, Trustee, Continuous Improvement Realty Trust, 462 Main Street, Watertown, MA, herein requests the Board of Appeals to **Amend Variance, Special Permit and Special Permit Finding**, #04-61, granted January 27, 2005, permitting additions/alterations for a mixed use: 5 apartments/3 commercial units. Petitioner is requesting changes to approved plans - three-story balcony 6'x20' variance allowed 7.5' from Lexington Street, as-built 5.9'x 23', located 6.6' from Lexington Street; reduction in side yard setback to 3.1' for thicker plywood sheathing, where 3.5' was approved and where 20' is required; enlarge third floor rear dormer to 12'7"; new third floor rear balcony 3'x17' located 4' from side lot line; 3'x 26' planter erected adjacent along driveway; 1' including berm setback along driveway rear yard, where 2' was required at **34 Lexington Street** and **460-464 Main Street**, located in the LB (Limited Business) Zoning District.

Steve Winnick, Attorney for the Petitioner, gave a history of the project and then stated that there were minor deviations between the plans that were approved by the board; the plans submitted to the building department; and the as-built drawings. They are here to have the changes approved by the board. The project architect and the design builder had lapses of communication. The Planning Staff focused on the as-built design regarding the roof-peak and the dormer. The Planning Board agreed with the staff that the changes should be approved without further changes to the roof-peak or the dormer. If these changes had been before the planning board prior to construction, they would have been approved. If changes are made to the roof or the dormer now, it will not lead to a better outcome to the project as-built. The recommendation is from the Planning Board to approve the requested revisions as revisions to the control plans and not to require changes to the design. He added that the Chairman of the Planning Board stated that the change to the roof-peak was

done due to the 30' height required, if they had excavated deeper, it would have been too steep to enter the garages. They flattened the roof to conform to the ordinance. Attorney Winnick spoke of the hiatus between when the board approves the project and when the project actually starts. He said there is a further hiatus while the project is being constructed – month or years with a variety of contractors and subcontractors and his role has been finished. The next time he may hear of it is when they come back with notice from Nancy Scott that what was built doesn't conform to what was approved. He believes that the petitioners did not understand the gravity of the changes.

Chair Vlachos asked if the architects understand the gravity of the change. He said they are not operating in a vacuum as there are plans in front of them that are stamped and dated with dimensions and if they are new on the project they ask who was working on this before and look at all the past plans. He said the petitioner isn't out there with a shovel deciding where to put the foundation. There are people with licenses and engineering degrees and architectural degrees. He asked Attorney Winnick, since he has presented a number of these cases where people have grossly changed their plans, what he would recommend the board, knowing it may set precedence for other people where people may have a malignant intentions and where they don't want to come back to the board knowing they may receive an adverse ruling. They go ahead and do it without seeking approval.

Attorney Winnick said John Hawes had the right idea as the changes were compelled by field changes and not with an intent to circumvent the basic design and do something willy-nilly.

Member Fernandez said he wasn't sure about that as there are three sets of double sliders and then a dimension in between which is driving the deck which is not a field condition, it is the intention of the architect to build it in a certain way. The character of this is different than the original drawings that were drafted and prepared. He said if you read the drawing, what Mr. Winnick said is not accurate. He said that is why the deck was lengthened so that they can cover the dimensions of the three openings – it is not a lack of clarification.

Attorney Winnick said there is a requirement of a certain amount of space between the openings and it couldn't be built the way it was intended. Mr. Fernandez said then the action would have been to reduce the openings. These drawings are done free-hand without dimensions. Mr. Winnick said if the board wants to enforce this, then after this case there should be oral instructions to the petitioners, that if there are changes to the control plans and they are not approved in advance, which the ordinance requires, we are going to strictly enforce the ordinance. Ignorance of the law is not a defense. Mr. Fernandez said that it is written in the decision. Atty. Winnick said that the degree of technicality that the petitioner is held to is not understood. Mr. Fernandez said the board has had three cases where the desire was to execute something other than what was approved. The board has been consistent with what has been approved should be executed. Mistakes happen. You are saying that it is the lack of the procedure by the board that leads to confusion and the petitioner doesn't execute what was approved by the board. Atty. Winnick again said that

the gravity of minor adjustments is not understood. One exception is the roof peak, and that was compelled by there wasn't any way a peaked roof could be put on without a height variance and this board has never granted a height variance. It was not an option to come back to the board for a height variance.

Member Bailey asked about the elevations on the road and the garage floor to be sure one could enter. He finds it hard to believe that once building has started that they then discover that the garage is too steep. That should have been determined beforehand – when the plans were approved by the board. He feels that one can not decide to change options to make things work and then come back to get it re-approved. This board has made petitioners change their plans – the board made a person take the footings out because they were done wrongly. This can not be passed off.

Brian MacDonald, Owner, said he has been in Watertown for 40 years and was a prior member of the Planning Board and he was on the Charter Commission. He has been active in this town for a number of decades. He is not a developer and he thought this was an opportunity to improve this area. He hired the architect and when they received approval from the board, he thought it was due to the setbacks and height. He didn't understand that the control documents were the governing documents throughout the life of it. He blames himself as a novice developer. He would have appreciated his architect and builder telling him the changes needed to be brought to the town. If there were something to sign when the changes were brought in, it would have triggered something for him. He said when he was on the Planning Board they did not have this level of involvement. Chair Vlachos asked how we got to this point. Mr. MacDonald said it was when the as-built documents were brought to Nancy Scott, Zoning Enforcement Officer. No one said to him that there were implications at the time.

Paul Kruger, 38 Russell Avenue, Architect

Tape 3 of 3, Side B

Mr. Kruger said the design that went before the Planning Board was a preliminary drawing and was not meant to be a final working drawing with all the structures and building heights worked out. He wasn't commissioned to do the working drawing at that point. After the preliminary drawings were approved, the drawings that the building inspector received were done by another architect and I instructed that architect to find out if there were any reason why they wouldn't be approved. The Building Inspector approved them – end of story. The Building Inspector should have compared them to the preliminary drawings and saw that the roof had been flattened. This is not a case of trying to circumvent regulations of the town and the Chairman of the Planning Board said had the building inspector flagged it and it was taken back to the planning board, it would have been approved. He then added that

he has been the Chairman of the Planning Board in Watertown and he is on other building committees, as well. When he was chairman, there was some degree of flexibility instead of saying these are the rules and come back when this adheres to the rules. He thinks it should be looked at in reverse as the Chairman of the Planning Board did and he came up with a fair decision, although sharply divided (among the Planning Board members).

No one further spoke from the audience and Chair Vlachos declared a business mode:

Member Fernandez asked if the 2005 application narrative describe the requirements for an applicant. Chair Vlachos said he is sure they do. Mr. Fernandez said there was an error here and to qualify the error as not understanding the process is not right. There are two documents that architects produce – one for the Planning Board highlighting the dimensions and setbacks, these are not construction documents. Construction documents are issued to the building inspector who issues the building permit and does not review zoning guidelines in Watertown or anywhere else in Massachusetts. The idea that the building inspector is a safety valve to pick up any discrepancies or errors is not the typical practice. The applicant should just present this as an error and describe it in this way.

Chair Vlachos asked the Senior Planner, Mr. Merkel to explain the staff report's statement that they concurred to grant the relief as it is still within the bounds of the original special permit but they didn't agree with the design changes – the roof and the dormer. Mr. Merkel said the planning staff recommends that they come back with a different design alternative for the flat roof and the complex dormer that they built. Chair Vlachos asked what that would be for the applicant in terms of construction, costs, time, etc. Mr. Merkel said it would be a burden for the applicant. They would not have approved those plans before it was built, they would have preferred that the roof and dormer be redesigned. Chair Vlachos asked if the Planning Board gave their reason on what was just said or was that not discussed. Mr. Merkel, although not at the meeting, feels that the board had reviewed that and felt the roof, having been built that was would be too much of a burden to change but did consider changing the dormer. The applicant had gone towards changing the dormer but the Planning Board was not in agreement.

Member Bailey asked if the items listed as changes were originally approved by the Zoning Board, specifically the balcony size and the window size. Ms. Scott said the number of windows was included but not the size of the windows and definitely the size of the dormer. There wasn't a balcony in the back and the dormer is much larger than what was approved. Mr. Fernandez asked how the size was determined if the plans do not have dimensions. Ms. Scott said that the plan he is referring to is not the control document. She said the original plot plan showed the balcony as 6'x20' without a balcony in the back. The features are totally different. Mr. Fernandez said the documents are legal documents and they are sometimes drawn with dimensions, sometimes not, sometimes hand drawn. Ms. Scott said the driveway needed to be 2' off of the lot line and that is not what happened.

Chair Vlachos asked Atty. Winnick if the board decided, what would his client consider besides granting complete relief. Atty. Winnick said the earlier question with a redesign of the roof without relief would be very difficult to achieve. They built the structure within a capped height of 30' by flattening and to now try to rip out the entire roof is infeasible. The dormer would come with tremendous difficulty and expense. He told his client there may be three outcomes – the end result is not much different than what was approved; an aspect of re-design and reconstruction; or tear out and build what was approved. He added that that would be harsh and unfair (Chair Vlachos said fair but harsh). The board could request that we redo the dormer, which would come at a great expense and inconvenience. The building was commercial attached to industrial turned into residential – eclectic. Again, he reiterated what John Hawes said at the Planning Board –which said changes now would not be different than what was originally approved.

Ms. Elliott asked that when they were designing the underground garage, they didn't want to come back to the board because getting a height request would be difficult. Atty. Winnick said the thought process was that he designed the flat roof because the structure had to stay within 30'. Ms. Elliott emphasized that the reason they were staying within the 30' was because it would be difficult to come back to the board to get it approved, yet if they made any of the other changes, they wouldn't have to (come back to the board). Atty. Winnick said he has been doing this for 30 years and this town does not grant height variances and the other things would be considered de minimus. Chair Vlachos clarified that they are admitting to the violation of the height but are not admitting to the violations for anything else. Atty. Winnick said that is correct but...Ms. Elliott said changing the control plans was acceptable. Atty. Winnick said it was a mistake and he will stop there.

Ms. Elliott asked who delivered the as-built drawings to Ms. Scott and how did they know they had to go there without reviewing all of the control documents and the approval. Atty. Winnick said he believes that now the board is focusing on how do we make this operate properly mechanically. When you get to the as-built stage, you can not get a certificate of occupancy unless you pass the Zoning Enforcement Officer. She has to review it. That is not the level at the building department – the inspector. He is not expected to review what was approved to the construction drawings. Things may fall through the cracks at that stage. Mr. Fernandez said that Attorney Winnick should stop trying to fix the process because that is not the issue. From a legal point of view, the building inspector ought only review an approved building construction – he should not be charged with zoning guidelines, that is with Nancy Scott. It has worked, what was built does not conform to what was planned. Attorney Winnick said you could involve the ZEO at two stages, when a building permit is going to be approved and when the as-built is brought in. (As a note, this is the procedure today). Mr. Fernandez said if the Petitioner knows there is a discrepancy between the approved documents and the construction documents, you come back to the board. Mr. Winnick agreed. This was a mistake and it should have come back to the board. Mr. Fernandez said the system works. Mr. Winnick said you can have the applicant rip out the dormer but it is an exercise in futility. It is constructed, it looks eclectic, and changing this could be a punishment.

Chair Vlachos asked Mr. Merkel if the dormer were put back into conformance. Mr. Merkel said the planning staff would agree that it would improve the overall appearance of the site but weighed against the cost, would be a burden to the applicant. The design would better the appearance but not significantly.

Ms. Scott said she would like to see compliance with the driveway and landscaping with grass vs. mulch and plantings.

Chair Vlachos said he is not inclined to have them tear anything down. It is not particularly attractive but the changes would not make it more attractive. He doesn't know how to make the statement to the petitioners and contractors.

Ms. Elliott asked what the board is setting themselves up for as there are three people that served on the planning board in Watertown and are all claiming ignorance. What will stop the regular neighbor without a degree in this field from coming back and saying that the board accepted this major change with three prior board members and why won't they accept my ignorance...she has strong issues with approving this.

Mr. Bailey asked where the limit should be set. Should it be based on cost? Minor costs are made to be changed and major costs are not? This was done willingly – they chose to change the plans.

Ms. Scott said the Chairman of the Planning Board said if this changed design came back to the board, they would have approved the changes. Chair Vlachos said their vote was divided and the zoning board takes a different stand and does not rubber-stamp the planning board decisions.

Mr. Bailey said they have made people take things out in the past and it is a cost. He again asked if it was a cost factor to accept the changes.

Mr. Moynihan said that it is a weighing of the harms and it can not be a hard and fast rule by the board. It has to be a one-by-one case review. The notion that the Planning Board would have approved this does have some weight. Look at the scope from which this was deviated from the original. This was not an aesthetically pleasing building to begin with and not in an aesthetically pleasing area. The changes would not have been attractive either. Mistakes happen and there will be a weighing of cost to rectify the roofline and the dormer. He is not inclined to request that. The changes are minor from the original plans.

Mr. Fernandez said one issue is the aesthetic improvement and the other is the zoning requirements for the site plan. The site plan has to be changed to follow the approved control plan. The zoning guidelines are not about aesthetics necessarily. He does not take kindly that the process was confusing and that after 40 years of building with Mr. Kruger that the process is unclear. He is making a statement that the process has worked. Aesthetics are not considered here as he would never have approved this plan and you do something to improve the neighborhood. The guidelines do not describe exactly what that means but it does describe dimensions. The flat roof is unfortunate and will leak. The balcony being 3' longer is tough as it goes against the setback and now is less.

Chair Vlachos said he would let it go with the changes to the landscaping – sheet a-1 shows a small retainer planter which further reduced the parking area. The car in front of the garage extends to the sidewalk. There is not enough room to fit a car between the door and the sidewalk, although the plans show a car can fit. Mr. Fernandez said that the tenants have to park inside or elsewhere.

Ms. Elliott and Mr. Bailey are leaning towards a 'no' vote and Chair Vlachos asked for recommendations. Ms. Elliott said she agrees with the Staff recommendations on page 4 that the roof be modified to reduce the flattened ridge and the dormer be modified to comply with the original approved plans. Mr. Bailey agrees.

Ms. Scott asked if the board is willing to give a variance on height to improve the aesthetics. Ms. Elliott stated again that her proposal is to follow the staff recommendations.

Chair Vlachos said the petitioner can either comply or come back for a height variance.

Attorney Winnick requested a continuance to explore the requirements of the recommendation. He said they would need two months.

Mr. Moynihan motioned to accept the request for continuance for two months. Ms. Elliott seconded. Voted 5-0 Continued.

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Tape x of 2, Side x

Continued Case:

R. Timothy McBride, 108 Marshall Street, Watertown, MA, herein requests the Board of Appeals to grant a **Special Permit Finding** in accordance with §4.06(a), Alts/Additions to Non-Conforming Structures, Side Yard Setback, Zoning Ordinance, to permit the construction of a single story, rear addition, 11.3'x6.7' maintaining non-conforming westerly side yard at 6.6', where 10' is required and reducing rear deck from 26.4'x 9.2' to 25'x 9.2', creating a less non-conforming westerly side yard setback from 5.3' to 6.7', where 10' is required at **108 Marshall Street**, located in the S-6 (Single Family) Zoning District.

Member Carlos Fernandez recused himself from this case. Member Moynihan will be voting.

At the Planning Board meeting on December 12, 2007, Tim McBride, Petitioner, stated that he proposes to construct a single story, rear addition, measuring 11.3'x 6.7' maintaining non-conforming westerly side yard at 6.6', where 10' is required and reducing the size of the rear deck from 26.4'x 9.2' to 25'x 9.2', creating a less non-conforming westerly side yard setback from 5.3' to 6.7', where 10' is required.

The Planning Board and Planning Staff indicated that they recommend granting the Special Permit Finding with conditions. They found that the addition would not be more detrimental to the existing structure nor to the neighboring properties as it would not be visible from a public way.

In addition, the Petitioner is eliminating the structure's nonconforming use as a three-family dwelling and restoring it to its original conforming use as a single-family dwelling.

At the Zoning Board meeting on January 7, 2008, Tim McBride explained his request for a Special Permit Finding for the westerly side yard setback. The house was built in 1919 and 6'6" to the westerly property line. He wants to maintain that setback as opposed to 10'. He bought the house in 1986 and built a deck across the back of the house, matching the side of the house, but because his property comes in at an angle, it cut the 6'6" setback to 5'7", shortening the westerly side. He said he will rip off 1'-3' of the back deck to bring it into the non-conforming 6'6". He wants to build a single-story rear addition 11'x6' (or 7') which will match an addition on the back of the house that was built in 1921. He said he is renovating a three family dwelling and removed all of the tenants from the building (at a cost of \$18,000 a year in rent) and converting it to a single family, which will be in conformance with the S-6 zoning district. He is taking a non-conforming three family house and through sufficient cost to him, converting it back to a single family so it conforms. It will greatly enhance the neighborhood. He has put \$250,000 into the home so far. He talked to Nancy Scott about the back deck and that is why he is taking a portion of the deck off.

Ms. Santucci asked if the house had 3 kitchens initially and why does he need the addition if there already was a kitchen. Mr. McBride said for re-sale value, he wants a larger kitchen. The original owners put a 13'x13' addition off the back and created a jog and he wants to fill in the jog and make the interior space squared off. Ms. Santucci asked about the 13'x13' as she can only see 6'. Mr. McBride explained the proposed plan and he will gain 7'x10' of interior space for his kitchen.

In order for the request to be approved, the Board of Appeals with four members present would require unanimity. Ms. Santucci indicated that she would not be voting in favor of the petition. The board noted discrepancies in the plot plan calculations and requested that the petitioner have his surveyor recalculate the building coverage. The Petitioner requested a continuance so that his petition could be heard by the full 5-member Board. The board voted to allow Mr. McBride a continuance to March 2008.

On March 26, 2008, the zoning board met with 4 members present. Member Stuart Bailey was in attendance; together with Chairman Harry Vlachos, Member Elliott and Alternate Member/Acting Clerk Richard Moynihan. Mr. Fernandez again recused himself from the proceedings. Member Santucci was absent.

Attorney Ken Leitner, representing the petitioner, agreed to have this case heard by the sitting 4-member Board. At the request of the board, in consideration of the current absence of member Santucci and previous absence of member Elliott, Attorney Leitner then presented the petition in its entirety to the Board. This presentation was consistent with facts from the earlier hearing.

Chris Lowry of 114 Marshall Street added a statement that as an abutter she felt the addition to the house would be fine.

Mr. McBride stated that there is a kitchen on the third floor and he plans to keep it there as a separate space for a nanny's apartment. The board concurred that Mr. McBride has stated in previous appearances before the board that he is converting the three-family into a single-family, which would indicate a maximum of one kitchen in the house. Mr. McBride is currently using the 3rd floor kitchen for his personal use since the first floor kitchen was demolished and has not been rebuilt. The board will condition the petition to state that an occupancy permit must be retained and signed off by all departments to ascertain the removal of the kitchen on the third floor.

The construction of a single story, rear addition, 11.3'x6.7' with a third floor balcony, 6.0'x6.8' and reducing the rear deck from 26.4'x 9.2' to 25'x 9.2', would **not** be more detrimental to the neighborhood than the existing non-conforming structure.

Mr. Moynihan motioned to grant the request for Special Permit Finding with conditions based on the finding that it meets the requirements set out in the ordinance. Ms. Elliott seconded. Voted 4-0 Granted.

(Voting members: Vlachos, Bailey, Elliott, Moynihan)

Mr. Bailey motioned to adjourn. Ms. Elliott seconded. Voted 4-0. Adjourned at 8:55 p.m.