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TO: Paul Halkiotis, AICP, Director of Planning and Community Development
Town of Harwich Planning Board
(***By Electronic Mail Only)***

FROM: Amy Kwesell, Esq.

RE: 86 Miles Street, Planning Board Applications #2023-4 and 2023-12

DATE: June 5, 2023

The Applicant, Oliver Homes, LLC (the "Applicant"), is seeking a special permit pursuant to the Town of Harwich Zoning Bylaw (the "Bylaw"), §325-51.N to allow the construction of a two-family dwelling at 86 Miles Street, Harwich (the "Property") in an RL District. The Property was improved with a single-family dwelling and a cottage until 2014 when those structures were razed and replaced with a 3,065 s.f. single family dwelling. The Applicant is now proposing to add a second dwelling unit connected to the existing house by covered walkways, increasing the size of the structure to 6,100 s.f.

The Property contains 47,565 s.f. of area and 127.66 feet of frontage. The RL District requires 40,000 s.f. for lot area and 150 feet of frontage. Therefore, the Property is nonconforming as to frontage.

The Applicant is arguing that only a special permit pursuant to §325-51.N is required as the existing single family dwelling is conforming, except as to frontage. The Applicant claims that in 2014, the existing single family dwelling was constructed ***by right*** pursuant to §325-54(A)(4) which states:

> *(4) A lawfully preexisting nonconforming single- or two-family residential structure may, by right, be demolished and replaced with a new structure on the same site, provided that:*
> *(a) The proposed new construction will conform to current setbacks and coverage for the zoning district in which the lot is located; and*
> *(b) The nonconformance concerns the size of the lot in question and/or the frontage of said lot*

and thus, since the existing single-family dwelling was constructed by right in 2014 pursuant to §325-54(A)(4) it cannot be a ***pre-existing*** nonconforming structure as "pre-existing" means before the zoning bylaw or effective amendment was enacted. I do not find that argument persuasive. The existing dwelling was only permitted to be constructed as of right based on protections available only to a pre-existing nonconforming structure and, in my opinion, as explained herein, it continues to carry the status of a pre-existing nonconforming structure.

It is also my opinion that a lawfully constructed structure located on a lot lacking the minimum required frontage is considered a nonconforming structure for purposes of the so-called "second except clause" of G.L. c. 40A §6 and of §325-54(A) of the Bylaw even where that structure was permitted to be constructed by right. See Schiffenhaus v. Kline, 79 Mass. App. Ct. 600 (2011) (Structure is nonconforming structure due to the lot being nonconforming as to frontage). See also, Schiffenhaus v. Kline, 18 LCR 223 (2010) (Piper, J.)[1]. Nothing about the fact that the existing single-family dwelling was permitted to be constructed without additional zoning relief makes the Property itself conforming and it is the lack of frontage that renders the existing dwelling a non-conforming structure.

The Applicant's position is wholly inconsistent with that second except clause, which provides as follows,

> "except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood."

Courts interpreting the special protections afforded to single- and two- family structures have recognized that pursuant to the aforesaid certain small-scale changes may be made as of right. Again, nothing in the law, however, suggests that once as of right changes are made, the lot or structure acquires conforming status and there is no reason to treat an entirely new structure on a nonconforming lot differently or more favorably than an altered structure on a nonconforming lot.

Therefore, in my opinion, as the existing structure is legally nonconforming[2], §325-54(A)(1)(a) & (c) apply:

A. Nonconforming structures.
(1) Alteration or extension of single- or two-family residential structure.

[1] Further, the Supreme Judicial Court declared in Bransford v. Zoning Board of Appeals of Edgartown, 444 Mass. 852 (2005) (Greaney, J., concurring), that nonconforming structures and nonconforming lots are "intertwined" and should not be considered separate concepts. Id. at 861. Consistent with the concurring opinion in Bransford, the Court held in 2008 that the reconstruction of a single-family residence on a nonconforming lot increases the nonconforming nature of the structure, despite the structure's compliance with all dimensional requirements in the town's bylaws. Bjorklund v. Zoning Board of Appeals of Norwell, 450 Mass. 357, 358 (2008). The Court did not distinguish between the conformity of the reconstructed house and the nonconformity of the undersized lot.

[2] I note that the Zoning Bylaw uses "nonconforming structure" and "preexisting nonconforming" structures interchangeably.

(a) A preexisting nonconforming single- or two-family residential structure may be altered or extended by right if the Building Official determines that it meets the following criteria:

[1] The proposed addition/extension will conform to current setbacks and coverage for the zoning district in which the existing structure and addition/extension are located; and

[2] The nonconformance concerns the size of the lot in question and/or the frontage of said lot and/or an encroachment of the existing structure.

(c) In making such determination, the Building Official, after identifying the particular respect or respects in which the structure or lot does not presently conform to the Zoning Bylaw, shall consider whether the proposed addition/extension meets the criteria stated above. If the Building Official determines that the addition/extension meets the criteria stated above, the Building Official may allow the addition/extension or rebuild by right.

Here, in my opinion, it appears that, if a special permit for the proposed ***use***, as a two-family dwelling, is approved, then §325-54(A)(1)(a) & (c) apply and the Building Commissioner must then determine if the proposed extension will conform to current setbacks and lot coverage of the RL District and if it does, a building permit may be issued. If not, Section 325-54(A)(2) would apply.

Further, I have been informed that the proposed second dwelling unit will be connected to the existing house by covered walkways. The attorney for the abutters is claiming that the configuration of connecting the two dwelling units by a walkway and covered roof does not meet the definition of "two family dwelling.

Section 325-2 of the Zoning Bylaw provides the following definitions:

DWELLING, TWO-FAMILY
A building containing two dwelling units, whether side by side, over each other or in any other combination, provided that there is a common roof or a series of roofs connecting the dwelling units.

BUILDING
A combination of any materials, whether portable or fixed, having a roof or similar covering, to form a structure for the shelter of persons, animals or property.

Section 325-51.N states:

Two-family dwelling. Special permits for two-family dwellings may be granted upon a determination by the Planning Board that the following additional criteria have been met:

(1) The lot area shall contain a minimum of 40,000 square feet of contiguous upland in all applicable zoning districts; however, in the Drinking Water Resource Protection District (WR) the minimum lot area shall be 60,000 square feet of contiguous upland.

(2) The floor area for each dwelling unit shall be a minimum of 800 square feet.
(3) A common roof or a series of roofs shall connect the dwelling units.
(4) There shall be two off-street parking spaces per each unit.

Here, in my opinion, it appears that if the Building Commissioner determines that the proposed roof covering the walkway connecting the two dwelling units is a "common roof or series of roofs", the proposed structure will qualify as a two-family dwelling.

Finally, the applicant has also applied for an Alternate Access Special Permit to access the proposed house off of Grassy Pond Rd., pursuant to the zoning Bylaw §325-18.K. However, it appears that the Applicant is not seeking alternate access, but additional access as the Applicant is a seeking a second access for the proposed second dwelling unit while keeping the existing access.

Section 325-18.K provides:
A lot with the required legal frontage must take access along the required legal frontage. No alternate access may be granted from other streets, roads, or ways, nor should access be taken from an easement across an adjacent property without the issuance of a special permit from the Planning Board. In issuing a special permit, the Planning Board shall make the following findings:
(1) The alternate access proposed is superior to the access along the frontage;
(2) The proposed alternate access is cleared to a minimum of 16 feet in width and 16 feet in height; and
(3) When access is proposed from an easement across another lot, the lot providing the easement will have the required legal frontage for the zoning district.

In my opinion, §325-18.K does not provide for additional access as sub-section (1) requires the Board to find that the proposed alternate access is superior to access across the frontage. That would only apply if the access across the frontage was being relocated to the alternate street.

If you have any further questions, please do not hesitate to contact me.

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