
TO: G. Brian Sullivan, Chair
Town of Harwich Zoning Board of Appeals
(By Electronic Mail Only)

FROM: Amy Kwesell, Esq.

RE: 10 Kings Road, Case #2022-31

DATE: March 20, 2023

The Applicants, William S. Little and Sandra C. Holts (the “Applicants”), are seeking a variance under the Town of Harwich Zoning Bylaw (the “Bylaw”), § 325-52 from §325-14(T)(4)(g) – minimum area requirement for an Accessory Dwelling Unit (ADU) at 10 Kings Road, Harwich (the “Property”) in an RR District. The Applicants propose to use the second floor of their existing detached garage as an ADU pursuant to § 325-14(T). However, the Applicants’ lot does not have sufficient area as § 325-14(T)(4)(g), requires 20,000 square feet for an ADU and the Applicants’ lot only has 12,478 square feet. To address this deficiency, the Applicants applied for a variance, pursuant to § 325-52, from the minimum lot area requirements for an ADU.

Alternatively, on December 8, 2022 the Applicants changed their request and are seeking a special permit under § 325-54(A)(2) and a finding under G.L. c. 40A, § 6 that their proposal for an ADU is a modification of a preexisting nonconforming “condition” and that “such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.”

While I agree that the existing 5 bedroom house on the Property is a non-conforming **structure** as the lot is undersized, the Applicants are seeking an additional and new **use** at the Property. An ADU is an allowed use in the RR District only if the lot contains 20,000 square feet. Therefore in my opinion, the supporting document by Attorney Wall is conflating a nonconforming structure with a nonconforming use.

The Town of Harwich Zoning Bylaw:

The Bylaw provides for the following definitions:

- *DWELLING, SINGLE-FAMILY A single, separate dwelling unit designed for occupancy by one family only.*
- *DWELLING, SINGLE-FAMILY WITH ACCESSORY APARTMENT A single-family dwelling containing a principal dwelling unit and a separate accessory apartment, either attached or detached. The apartment shall contain a kitchen*

and bathroom which are separate from and not used in common with the principal dwelling unit.

- *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.*

§325-54 Nonconforming structures and uses.

A. Nonconforming structures.

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

(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.

(b) An addition, a preexisting nonconforming single- or two-family structure may be altered by right through the addition of a dormer or dormers if the Building Official determines that it meets the following criteria:

[1] The proposed dormer or dormers do not allow for any increase in the square footage of the single- or two-family dwelling; 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.

(2) If the Building Official determines that a proposed addition/extension to a nonconforming single- or two-family residential structure increases the nonconforming nature of the structure, the applicant may seek a new determination from the Board of Appeals. If the Board of Appeals determines that the alteration or extension will increase the nonconforming nature of the structure, no such alteration or extension may occur unless the Board of Appeals issues a special permit for alteration or extension after finding that the alteration or extension will not be substantially more detrimental to the neighborhood than the existing nonconformity. An addition/extension that increases the nonconforming nature of the structure would include:

(a) A structure built in the same footprint to an increased building height.

(b) A structure built in the same footprint that does increase the habitable floor area.

(c) A structure that continues along the same line as an existing encroachment without increasing that encroachment.

(3) through (6) N/A.

(7) Alteration or extension of other structures.

(a) A preexisting nonconforming structure other than a 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.

(b) All other nonconforming structures shall require a variance from the Board of Appeals pursuant to MGL c. 40A, § 10 for any alteration/extension or reconstruction.

B. Nonconforming uses.

(1) Except for single- and two-family dwellings provided for in Subsection A(5) of this section, a lawfully preexisting structure, whether conforming or not, used for a lawfully nonconforming use may, by special permit, be changed, altered, or razed and replaced with a new structure on the same site, provided that it is determined by the Board of Appeals that:

(a) The replacement, alteration or change of the structure will not be substantially more detrimental to the neighborhood than the existing structure;

(b) The replacement, alteration or change of the structure will not cause or contribute to any undue nuisance, hazard or congestion in the neighborhood, zoning district or Town; and

(c) The replacement, altered or changed structure will be used for the same use or for a conforming use.

(2) In no case shall a nonconforming use be changed to another nonconforming use.

(3) N/A.

Analysis:

Here, it is important to remember that the Applicants are seeking to introduce a new, additional use to the Property. The single-family dwelling is not being altered or extended. According to the submittal, the proposal is to convert the area above the garage to an ADU. The proposal calls for adding a new use, not modifying the structure. Therefore, in my opinion, a G.L. c. 40A, § 6 finding (a “Section 6 Finding”) is not applicable as to the nonconforming structure. Further, even if the proposal was contemplating an alteration to the exterior of the garage, that may be considered an alteration or extension, but the proposed use will still remain as an ADU which is a non-conforming use at the Property. Moreover, §325-54(A)(2) require a special permit from the Zoning Board of Appeals and not a Section 6 Finding.

A Section 6 Finding by the Board of Appeals is only available pursuant to §325-54(B) and, in my opinion, the Board cannot issue a Section 6 Finding as §325-54(B)(1)(c) provides that the structure must be used for the same use or for a conforming use. Here, in my opinion, the proposed use would be a nonconforming use.

In my opinion, a variance from the ADU Lot Size Requirement would be necessary to allow an ADU on the Property. §325-52 (Variances) provides that the Board has the ability to issue a use variance¹. As you know, a Variance may only be granted upon the Board finding that:

- owing to circumstances relating to the soil conditions, shape, or topography of such land or structures and especially affecting such land or structures but not affecting generally the zoning district in which it is located,
- a literal enforcement of the provisions of the ordinance or by-law would involve substantial hardship, financial or otherwise, to the petitioner or appellant, and
- that desirable relief may be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law. See, G.L. c. 40, § 10.

Further, it is important to note that pursuant to G.L. c. 40A § 10, a variance may only be granted if all elements are met. Perez v. Board of Appeals of Norwood, 54 Mass. App. Ct. 139, 142 (2002). In addition, pursuant to Massachusetts case law, variances “are not allowed as a matter of right, but, rather, should be ‘sparingly granted.’” Lussier v. Zoning Board of Appeals of Peabody, 447 Mass. 531, 534 (2006), quoting Barron Chevrolet, Inc. v. Danvers, 419 Mass. 404, 408 (1995).

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

855900/HARW/0128

¹ §325-52 (Variances) states:

The Board of Appeals shall have the power to hear and decide applications for variances from the provisions of the protective bylaws, including the power to grant a variance authorizing a use or activity not otherwise permitted in the district in which the land or structure is located, except that no variance shall be granted to allow food sales with drive-up or drive-through facilities. Variances may be granted by the Board only after a public hearing and only after the Board has made the finding required by the Zoning Act.