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

FROM: Amy Kwesell, Esq.

RE: 14 Atlantic Street, Case #2023-03

DATE: March 15, 2023

The Applicants, John D. Barone & Karen D. Gagne (the “Applicants”) are seeking a special permit to raze and replace a pre-existing non-conforming single-family dwelling on property at 14 Atlantic Street, Harwich, MA (the “Property”). A special permit is required pursuant to the Town of Harwich Zoning Bylaw, §325-54(5) which provides:

A lawfully preexisting nonconforming single- or two-family residential structure may, by special permit, be demolished and replaced with a new structure on the same site, provided that it is determined by the Board of Appeals that:

- (a) The replacement of the structure will not be substantially more detrimental to the neighborhood than the existing structure;
- (b) The replacement of the structure will not cause or contribute to any undue nuisance, hazard or congestion in the neighborhood, zoning district or Town;
- (c) The replacement structure will not increase any of the following existing nonconformances: building coverage, site coverage, or setback encroachment;
- (d) The replacement structure will reduce at least one of the following existing nonconformances: building coverage, site coverage, or setback encroachment; and
- (e) The replacement structure may not increase the habitable square footage of the structure by more than 25% over the habitable square footage of the existing structure over a ten-year period beginning on the date of the issuance of the special permit by the Board of Appeals.

The Applicants are proposing to raze and replace the existing dwelling and will not be increasing any of the setback nonconformities. However, the existing structure encroaches on to Town land (Atlantic Street) between 0.14’ to 0.41’. The Applicants are proposing to maintain said encroachment with the proposed structure.

You have asked if the Board of Appeals (the “Board”) can issue a Special Permit to raze and replace a pre-existing non-conforming structure that encroaches on Town land with a new structure that maintains the encroachment on Town land?

In my opinion, the Board cannot issue a special permit that depicts an encroachment on Town land without express (written) permission from the Town. The existing encroachment is a trespass and constitutes an invasion of the Town’s interest in the exclusive possession of its land.

Further Atlantic Street is a public way that is subject to use by the public (and not one homeowner) and therefore, in my opinion, the existing encroachment cannot be maintained.

Finally, while the Applicants have not asserted that they have a colorable claim to the encroached upon area, in my opinion, it is unlikely that an action for adverse possession would be successful. General Laws Chapter 260, § 31 states that claims of adverse possession or prescriptive rights cannot be maintained against municipal property held “for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose.” (emphasis added). Clearly, the use of Atlantic Street is a public purpose.

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

855346/HARW/0128