



ZONING BOARD OF APPEALS

City Hall, Room 303
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 New Bedford, MA 02740
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 www.newbedford-ma.gov

CITY OF NEW BEDFORD
 JONATHAN F. MITCHELL, MAYOR

NOTICE OF DECISION

Case Number: #4182				
Request Type: Repetitive Petition & Variance				
Address: 220-222 Shaw Street				
Zoning: Residential C Zoned District				
Recorded Owner: Natalia F. Araujo, Trustee of Shaw Realty Trust				
Applicant: Natalia F. Araujo, Trustee of Shaw Realty Trust				
Applicant Address: 123 Nye's Lane Acushnet, MA 02743				
Application Submittal Date	Public Hearing Date	Decision Date		
April 24 th , 2015	May 28 th , 2015 & July 30 th , 2015	July 30 th , 2015		
Assessor's Plot Number	Lot Number(s)	Book Number	Page Number	Certificate Number
110	471	10383	176	

Registry of Deeds Use Only:

CITY CLERK
 2015 AUG 13 A 9:44
 CITY CLERKS OFFICE
 NEW BEDFORD, MA

Application:

Variance under provisions of Chapter 9, Comprehensive Zoning Sections 2330 (Accessory Structures) and 2333 (Height); relative to property located at 220-222 Shaw Street, Assessor's Map Plot 110 Lot 471 in a Residential-C Zoned District. To allow the petitioner's construct an addition to the existing garage with a building height of 19 feet 2 inches-the maximum allowed Building Height for an accessory structure in Residential-C District is 18 feet.

Action: GRANTED, WITH CONDITIONS, for the reasons set forth in the attached Decision with the Conditions as described in the attached Decision.
 (See Attachment)

A copy of this Decision was filed with the City Clerk of the City of New Bedford on August 13th, 2015. Any person aggrieved by this decision has twenty (20) days to appeal the decision in accordance with the procedures set forth in Section 17 of Chapter 40A of the General Laws of Massachusetts.

August 13, 2015
 Date


 Clerk, Zoning Board of Appeals

1.) APPLICATION SUMMARY

The petitioner has constructed an addition to the existing garage with a building height of 19 feet 2 inches and the maximum allowed Building Height for an accessory structure in Residential-C District is 18 feet, therefore this will require a Variance under Chapter 9, Comprehensive Zoning Sections 2330 (Accessory Structures) and 2333 (Height); relative to property located at 220-222 Shaw Street, Assessor's Map Plot 110 Lot 471 in a Residential-C Zoned District.

MATERIALS REVIEWED BY THE BOARD

Plans Considered to be Part of the Application

- As Built Plan 220-222 Shaw Street, drawn by Thompson Farland, Dated October 24th, 2014

Other Documents & Supporting Material

- Completed Petition for a Variance Form, Stamped Received by City Clerk's Office April 24th, 2015.
- Letter to ZBA from the Commissioner of Buildings & Inspectional Services, Danny D. Romanowicz, dated May 8th, 2015.
- Letter to ZBA from City Planner, Jill Maclean, dated May 21st, 2015.
- Elevation Rendering A and Elevation Rendering B, received by ZBA May 28th, 2015.
- Pictures of Elevation at front and back of building, received by ZBA May 28th, 2015.
- Notice of Finding Case #15-15 Repetitive Petition from the New Bedford Planning Board, dated Stamped Received by City Clerk's Office July 17th, 2015.
- Additional communication from the Commissioner of Building and Inspectional Services containing measurements and photos, received by ZBA July 30th, 2015.

2.) DISCUSSION

May 28th, 2015:

Board Members I. Comerford, A. Decker, L. Schick, J. Mathes, and R. Schilling were present on the evening of the public hearing for the Repetitive Petition Finding,

City of New Bedford Staff Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), Kreg Espinola (Assistant City Solicitor), and Jennifer Gonet (Assistant Project Manager) were present during proceedings for the subject case review.

Mr. Comerford noted this case was scheduled for public hearing. He stated the matter had come before the board a year ago. The owner was seeking to construct a garage with a twenty foot roof and the matter was denied by the board. The applicant went to the office of Mr. Romanowicz and changed the plans and stuck with the building code of 18'. The building was then built at 19'2" bringing the matter before the board again this evening. Mr. Comerford stated the building is already built but not to code. This evening's issue is only whether or not the plans are substantially different, which would allow another public meeting to look at the plans and vote on a variance.

Mr. Decker clarified that this is a hearing on substantial difference. He stated if the board finds a substantial difference, that's the only piece of business this evening. The application would then go to the Planning Board.

Dave Silveira of Southcoast Architecture stated he understood and had brought information on the differences.

Mr. Comerford inquired of Mr. Romanowicz and Att. Espinola that if the board found there was not a substantial difference, what the outcome of that is. Would the garage have to be ripped down?

Mr. Romanowicz stated that it's not the building code, it's that the city ordinance states it cannot be over eighteen feet. It's stated on the building permit. So, if the board says there is not a substantial difference, they can have it taken down. That's within the board's discretion.

Att. Espinola stated that the zoning enforcement officer would enforce that, which could ultimately end up in court proceedings.

Mr. Schilling clarified that if the board is considering whether there is a substantial difference between what was originally proposed and denied and what has actually been built. He confirmed that if a substantial difference is found, it will come back for a zoning variance which the board will vote on. He stated the notion of tearing a garage down over a foot and a half seems like insanity.

Mr. Silveira stated the overage is only 8" in some places.

Mr. Comerford explained to Att. Espinola that the board had not faced a situation where the structure has already been built. He asked if the board was looking at the plans of what was built. Att. Espinola stated it was. He explained that the only issue for public comment from the audience is on the issue of whether or not there is a substantial difference, anything beyond that is beyond the scope.

Dave Silveira of Southcoast Architecture, 34 Slocum Farm Drive, Dartmouth, MA addressed the board. He offered documents showing what was originally denied a variance, which was a 26'11" proposed structure.

A motion was made (AD) and seconded (JM) to accept the rendering handed up by the petitioner. Motion passed unopposed.

Mr. Mathes clarified that this is a rendering of the original proposal.

Mr. Silveira stated this original proposal was not granted a variance based on building height, which per ordinance is 18' maximum. He stated the plans were revised and approved by the Building Department for this version with a flat roof with a maximum height of 18'.

A motion was made (AD) and seconded (RS) to accept the Rendering B submitted this date by the petitioner on the present finding discussion. Motion passed unopposed.

Mr. Silveira stated they switched over to a flat roof design and just basically redesigned the structure to meet the maximum possible height. He stated that unfortunately there were two errors in construction, the first being an additional course of block added by the mason, which wasn't noticed until later on by the building inspector. He stated the roofing contractor then added an additional 3" - 4" of built up roof on top. He stated the combination of those two items and oversight, when the building inspector came out and measured he stated it was over 18'. Mr. Silveira stated he had taken measurements as well of both the front and the back, and offered those pictures to the board. He stated there are some places it is a couple of inches higher, but definitely under 19'.

A motion was made (AD) and seconded (LS) to accept the pictures as submitted by the petitioner. Motion passed unopposed.

Mr. Comerford confirmed with the petitioner that he believed it was closer to 18'. Mr. Silveira stated that in general on average the structure is over 18', but he did not believe it was over 19'. He stated that though it is over, they are not talking about feet, but inches.

Mr. Silveira stated the building commissioner had asked them to get a letter from a surveyor. He stated they could not get that because technically it is over by inches. He stated it is a technicality. He stated it's clear that the design and the construction is different than what was originally proposed. He stated the owner did not disregard the zoning board's recommendation and go out and build what he originally wanted to. He tried to conform and through an error in construction, this happened.

Mr. Mathes noted that what had come to the board from the planning office stated that at its highest point it is 19'2".

Mr. Silveira stated that was their opinion, but his measurements were with a tape measure to the roof. He stated it is over and the petitioner is not arguing that it is not.

In response to Mr. Comerford's invitation to speak to the change from the plans submitted, Ms. Vieira stated she lives next door, having built their home some forty-seven years ago. She stated if a younger person she would sell her house and move elsewhere. She stated she looks at this ridiculous building with a new garage practically against her fence and she faces discomfort and horror. She stated it is a green monster. She stated at this point she questions that they had a meeting similar to this in 2014. She stated they received a letter from the city stating it was denied, and that the gentleman had the option of another appeal. She stated they were never invited to that appeal, which was approved. She stated the only way they found out it had happened was because they saw the digging going on. She questioned why she was invited to the first one and invited to this one, but the one in the middle which made the most difference no one was invited.

Mr. Comerford reminded the speaker that this evening people are speaking to the change in the plan submitted. He stated there was another hearing once the petitioner changed their plans and met all the building code requirements. The building department signed off on it. He stated people only come before this board when they want to build something that doesn't meet building code requirements. If someone wanted to build something that was legally too close to your fence, they would have to come here and you would be notified. If they are building something that legally isn't too close to your fence, the building commissioner signs off on it and they can build. That's what happened and that's why you weren't notified. He stated that if the matter goes forward, she will be notified.

Ms. Vieira stated there was no courtesy notice to people.

Mr. Comerford stated the building department probably issues some 5,000 building permits per year. He stated courtesy phone calls cannot be given on all of those. It met city ordinances.

Ms. Vieira stated the invitation for this stated an additional was put to an existing garage. She stated there were eight garages when he purchased that building and he built a ninth one and on top of that what looks like an office space. She stated it was not built on an existing garage.

Mr. Comerford assured her the building commission would look into and make sure things were not built without permit per code.

Mr. Vieira stated you have to have a reason. He has eight garages to begin with and he will use the one he's building now for storage. How many garages do you need?

Ms. Vieira stated the petitioner does not reside in that area or that house. She stated the petitioner has a home outside the city of New Bedford and has a business not in the City of New Bedford. She stated she did not see the purpose of buying that home. She stated that no one in the house rents a garage. The garages are strictly for storage. How much storage does one person need?

Mr. Comerford stated it does seem like a lot of storage, but we will get into that if we have another hearing and you will be notified.

Mr. Schilling again clarified that the condition for that going forward is whether or not these two drawings are substantially different, and it appears to me that they are.

In response to Mr. Comerford's invitation to speak in opposition to the matter before the board, the change in the two drawings that were given, James Warren, an abutter, stated his question is the code is 18' and he's over that obviously at 19'2" so what is does in a case like this. Do you end up knocking it down or paying a fine?

Mr. Comerford stated the board can end up knocking it down.

Mr. Warren stated 18' is 18' and there is a code you stand by, and does the board allow them to go over that without doing anything about it. Does it stay that height out there or do you end up knocking it down.

Mr. Comerford stated a person can build over 18' if you obtain a variance. The board in this case said no to the original 26' building. The petitioner went forward and changed the plans and built an 18' building. With oversights in construction, the building ended up being 19'. The petitioner is coming back in front of us. If we do vote for a variance, then it would go to zoning enforcement. Usually the home owner would take that into some court as a suit.

There was no response to Mr. Comerford's further invitation to speak in opposition to the matter before the board.

Mr. Comerford offered the petitioner an opportunity for rebuttal, and stated he did believe there was a substantial change in the plans.

Mr. Silveira offered a rendering that shows the whole garage with storage above, which is not office space, but a two-story bump out addition with no plumbing. He stated they had obviously changed the design of the building to meet the ordinance. He mentioned again that there were two oversights in constructions. He stated he felt it would be detrimental to tear that building down because of a matter of a foot or even inches in some places. He stated the petitioner just wants to move forward and get the neighborhood looking normal again.

A motion was made (AD) and seconded (JM) to accept drawing A2 date 5/28/15 as submitted by the petitioner. Motion passed unopposed.

Mr. Comerford stated he believed it to be pretty clear that there are substantial changes to the plan submitted and he would have no problem signing off and having the petitioner back before the board so the board can look further into the plans.

In response to a question by Mr. Mathes, Mr. Romanowicz stated he had a building inspector put the tape on it and it was over 18'.

Mr. Mathes confirmed that the city had no specific measurement. Mr. Romanowicz confirmed that, stating they only know it's over 18'.

Mr. Mathes stated it would be critical to know the city's official measurement if this matter makes it back to before the board.

Mr. Silveira stated the client had hired Thompson Farland to do the land survey. He stated their survey determined various building heights depending on the grade. So, they're the ones that prepared the application and may have taken an average or the highest point. They measured from the inside of the garage, but we measured from the grade on the outside. He stated he did not know which would be more of a benchmark.

Mr. Mathes stated he wanted the city's opinion on what the height is.

A motion was made (AD) and seconded (JM) to make a finding concerning case #4182, a motion to make a finding under the provisions of the city code of New Bedford to Natalia F. Araujo of Shaw Realty Trust located at 123 Nye's Lane, Acushnet, MA 02743, relative to property located at 220-222 Shaw Street, Assessor's Map Plot 110, Lot 471 in a Residential-C Zoned District. The board finds that there are specific and material changes in the conditions upon which the previous unfavorable action was based. These changes are that the prior height of the building which was denied was 26'11". The proposed height of the building is now 18'. This is a substantial change from the prior proposal.

Roll Call Vote was as follows:

I. Comerford - Yes	R. Schilling - Yes
A. Decker - Yes	L. Schick - Yes
J. Mathes - Yes	

July 8th, 2015:

After the Zoning Board found there are specific and material changes in the conditions upon which the previous unfavorable action was based, the Repetitive Petition (Case #15-15) was also heard and granted by the Planning Board at the July 8, 2015 meeting.

July 30th, 2015:

Board Members I. Comerford, A. Decker, H. Tavares, J. Mathes, and R. Schilling were present on the evening of the public hearing for the Variance.

City of New Bedford Staff Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), Kreg Espinola (Assistant City Solicitor), and Jennifer Gonet (Assistant Project Manager) were present during proceedings for the subject case review.

A. Decker motioned to receive and place on file the communications from Commissioner and Inspector of Buildings, Danny D. Romanowicz, dated May 8th, 2015; the Communication from the Office of City Planner dated May 21st, 2015; the appeal packet; the plan as submitted; and, that the owners of the lots as indicated are the ones deemed by the Board to be affected; and that the action of the Clerk in giving notice of the hearing as stated be and is hereby ratified. Motion seconded by J. Mathes. With all in favor, the motion carried.

Chairperson Comerford then declared the hearing open.

A. Decker motioned to receive and place on file additional communication from the Commissioner of Building and Inspectional Services, received July 30th, 2015. Motion seconded by R. Schilling. With all in favor, the motion carried.

Representative of the Petitioner: Mr. David Silveira of South Coast Architecture (34 Slocum Farm Drive Dartmouth, MA) stated the building is limited to 18' by the zoning code. He explained due to two errors in construction the final dimension of the height was measured at 19'1".

Chairman Comerford stated there has been a mistake in construction and the building was built a foot to high.

Following the petitioner's testimony, Chairperson I. Comerford invited to the podium anyone wishing to speak in favor of the application. No one in attendance spoke in support of the petition or wished to be recorded in favor of the petition.

Chairperson I. Comerford invited to the podium anyone wishing to speak in opposition of the application. No one in attendance spoke in opposition of the petition or wished to be recorded in opposition of the petition.

Chairperson I. Comerford opened the floor for discussion between Board Members. J. Mathes thanked Commissioner Romanowicz and the Building Inspectors for providing specific measurements as requested by the Board. J. Mathes stated the measurements from the Building Department show it is a foot and four inches over the height allowed under code, which is still substantially less and different than what the applicant had proposed previously. He indicated he had no problem with what was presented. Chairperson I. Comerford asked if the rest of the Board agreed that it was a mistake in construction and comfortable voting in favor of the petition. A. Decker indicated yes and asked the Board Members' opinions on the criteria to grant the appeal. The Board discussed the criteria necessary to grant. The Board discussed the topography of the land around the building resulting in various measurements depending upon which part of the building was being measured. J. Mathes indicated the measurements provided by the Building Department show one location as less than 18' and the other measurements over the 18', so he could understand why there may have been a mistake during construction.

With no further stated questions or concerns, Chairperson Comerford declared the hearing closed.

4.) FINDINGS

Criteria for Approval of Dimensional Variation (Ch. 9, Sect. 2730)

The Board of Appeals may vary otherwise applicable dimensional requirements pertaining to frontage, lot area, building height and sidelines upon finding the following:

- a.) *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;*

The Board found the challenges of the lot's topography resulted in challenging and difficult measurements of height. The Board found the hardship is that because of a construction defect resulting in height of the garage roof exceeding the allowed maximum, to vote otherwise would require removal of the garage.

- b.) *That desirable relief may be granted without substantial detriment to the public good;*

The Board found that sufficient information and testimony had been given to determine that granting the required relief would not result in substantial negative impact to the public good.

- c.) *And, that desirable relief may be granted without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.*

The Board found that the impact of the dimensional relief would be minimal, and would not substantially derogate from the intent of the zoning ordinance.

5.) RELIEF

With respect to the relief requested by the Applicant, the Board has been presented with sufficient information at the hearing to justify the relief described below, subject to the conditions set forth below in Section 6.

Variance under provisions of Chapter 9, Comprehensive Zoning Sections 2330 (Accessory Structures) and 2333 (Height); relative to property located at 220-222 Shaw Street, Assessor's Map Plot 110 Lot 471 in a Residential-C Zoned District. To allow the petitioner to construct an addition to the existing garage with a building height of 19 feet 2 inches-the maximum allowed Building Height for an accessory structure in Residential-C District is 18 feet, as plans filed.

6.) THE FOLLOWING CONDITIONS AND RESTRICTIONS SHALL APPLY

- a. The project shall be set forth according to plans submitted with the application;
- b. That the applicant shall ensure that a copy of this decision, bearing the certification of the City of New Bedford Clerk's Office, is recorded in the Registry of Deeds;
- c. And that the rights authorized by the granted Variances must be exercised, by issuance of a Building Permit by the Department of Inspectional Services and acted upon within one year from the date they were granted or they will lapse.

7.) **DECISION**

Based on a review of the application documents, testimony given at the public hearing and the findings described above, the Zoning Board of Appeals hereby **GRANTS, WITH CONDITIONS,** the requested Variance.

On a motion by A. Decker, seconded by J. Mathes to grant the requested Variance, the vote carried 5-0 with members R. Schilling, I. Comerford, H. Tavares, A. Decker, and J. Mathes voting in the affirmative, no member voting in the negative. (Tally 5-0)

Filed with the City Clerk on:

August 13, 2015
Date

Allen Decker
Allen Decker, Clerk of the Zoning Board of Appeals