



DANEHEY & OSTERBERG, P.C.

ATTORNEYS AT LAW
5 OLD COUNTRY WAY
SCITUATE, MASSACHUSETTS 02066

**JOHN F. DANEHEY +
ANNA E. OSTERBERG**

+ ALSO ADMITTED IN VT

TELEPHONE:
(781) 545-1116

FACSIMILE:
(781) 545-1118

May 30, 2023

Robyn S. Maguire, Chair
Zoning Board of Appeals
Town of Hingham
210 Central Street
Hingham, MA 02043

RE: Appeal of Building Commissioner's Decision concerning 58 Main Street

Dear Chair Maguire:

Please be advised that I have been retained by Benedict D. Wilcox to represent him with his appeal of the Building Commissioner, Michael J. Clancy's ("Building Commissioner") decision regarding my client's request for determination stating that a single-family dwelling cannot be built at 58 Main Street under Section III-I.1.d(iii)(A) of the Town of Hingham's Zoning Bylaws (Abandonment or Discontinuance of Nonconforming Single-family and Two-Family Dwellings).

By way of background, Mr. Wilcox is a Hingham resident who owns a company known as the Wilcox Corporation that undertakes historic preservation and restoration and who has been conferred multiple awards from state and local entities for his work protecting and safeguarding historical buildings. He recently purchased 58 Main Street ("the Property") at a mortgage foreclosure sale and he is looking to build a replica of the original home located at the Property and move and live there.

In preparation for next week's hearing, I am submitting for both you and your board members' a rationale of the facts of this appeal as it is applied to Section III-I.1.d(iii)(A) for your consideration.

Relevant Facts

The Thomas Barker House was a 1757 home located in the heart of downtown Hingham at 58 Main Street. The Property is located in the Lincoln Local Historic District, and is the second house down from Old Ship Church. Regardless of the recent torched history by the former owner of the property, suffice it to say the former owner attempted a number of times since the 1980s to renovate and/or rebuild a single-family dwelling on the property. Sadly, the house fell into disrepair over recent

years necessitating the Town of Hingham to undertake an action that towns are reluctant to take, and knocked down the old home in late 2018 pursuant to G.L. 143, § 9 (Dangerous or abandoned structures removed or made safe by local inspector; costs; penalty; use of structure).

In 2020, your Board of Appeals promulgated a unique bylaw, Section III-I.1.d(iii)(A), to expand the rights granted single-family homeowners under G.L. 40A, § 6 for nonconformities. Specifically, undersized lots that previously had a single-family dwelling or a single-family dwelling that existed but failed to meet dimensional setbacks, which had been deemed abandoned or ceased use could be rebuilt. The proposed bylaw was approved by the legislature at Town Meeting on June 20, 2020. The impact of such a bylaw although limited in scope, would have a profound and positive impact on old homes in historic districts because homeowners could revitalize abandoned homes or in our case, resuscitate and breath life back into the foundation of where the Thomas Barker House once stood!

Unfortunately for the prior owner of the property, a notice of foreclosure was issued in October 2021, and ultimately the property was foreclosed at auction on December 22, 2022 and sold to my client, Mr. Wilcox. Since the demolition undertaken by the Town in 2018, the property has remained vacant with a few weathered unregistered motor vehicles and a lot of overgrowth being permitted to remain.

On March 3, 2023, my client requested a zoning determination from the Town's Building Commissioner that a single-family dwelling could be reconstructed at the property under the theory of Ch 40A, § 6 "Single Lot Protection" and under Section III-I.1.d(iii)(A) of the Zoning Bylaws. The Building Commissioner issued his determination on March 22, 2023 and March 23, 2023 stating that he determined that a single-family home may not be constructed as of right or by special permit at 58 Main Street citing commentary that was used to explain the warrant article.

Rationale as to Why Single-family Dwelling can be Built

It is recognized that the Building Commissioner works hard for the Town of Hingham and endeavors to apply the Zoning Bylaws honestly and fairly. However, in this situation he unsuccessfully applied the plain meaning of the bylaw to the proposed facts of the case, and mistakenly chooses to rely on illustrative commentary for justification for determining that a single-family dwelling cannot be constructed at 58 Main Street.

First, it should be noted that the residential use has not been abandoned or discontinued with respect to this appeal. The proposed use, single-family dwelling, is conforming because at all times the property has been zoned for residential use.

Second, the single-family dwelling that my client proposes to build conforms to all dimensional requirements in the zoning district and meets all setback dimensions and height requirements. Specifically, Mr. Wilcox is proposing to set back the house twenty-five (25') feet from Main Street, and the he also proposes to reposition the house by deleting a portion that was once part of the Thomas Barker House so the proposed new single-family dwelling will meet all of the side setback that was previously a nonconformity. Additionally, the height of the single-family dwelling would be two and one-half (2 ½) stories meeting the height dimensional conditions existing at the time the single-family dwelling was discontinued. In addition, Mr. Wilcox is proposing to replicate the Thomas Barker House by using another antique home from Lexington as a model for what he proposes to build. Once built, this new single-family dwelling will have the same character and

charm that the original Thomas Barker House displayed prior to its decline, and it will fill in a void on Main Street and the historical district that has been absent for a number of years.

The Building Commissioner inaccurately relies on commentary for justification for denying the reconstruction of the Property. I draw your attention to the unequivocal language of Section III-I.1.d(iii)(A), where it states a nonconforming structure that has been discontinued (not used or occupied) for a period of more than two (2) years may be used for *“the conforming use as a Single-Family Dwelling of a building or structure that would be a lawful nonconforming building or structure if it had not been discontinued. . . hereunder; provided . . . any . . . reconstruction . . . to such building or structure shall not extend the yard and/or height dimensional conditions that were nonconforming at the time the building or structure was . . . discontinued.”*

From review of the promulgated bylaw, it is evident the Town adopted the view of the Board of Appeals that once nonconforming conditions were abandoned or ceased to be used over a period of time, they lost their protected status absent some local exemption provided by the Town. This article passed by the Town in 2020 provided a mechanism to allow those discontinued nonconforming buildings or structures to be reestablished in the residential zone.

The uniqueness of the Bylaws is that it undoubtedly confirms that a conforming single-family dwelling use may be reestablished in a residential zone that had been a discontinued nonconforming structure for a period of more than two years! Even more importantly is the fact that Board of Appeals is conferred with the discretion to determine what the time limitation, if any, would be. When looking at the current proposal, equity dictates that you apply the bylaw directly to the facts of the case.

However, when reviewing the commentary raised by the Building Commissioner, his reliance upon it is flawed because it is not mandatory language but a suggestion. I state this because had it been compulsory it would have been directly written into framework of the bylaw when it was promulgated and bandied back and forth between your Board and the Planning Board and Advisory Committee. But it was not! In fact, even though a possible time limitation was raised before the Advisory Committee during the vetting process, it was strictly ignored and declined to be included as part of the proposed bylaw. Further, it is important to know that the commentary is not exhaustive but illustrative. In the present case before this Board, there cannot be a “continuous” event between razing and reconstruction because the Town proactively tore down the former property owner’s house 2018. In order to have a “continuous” event, you needed one party to coordinate both sides of demolition and construction. That did not happen here despite the fact that the former owner had been trying to renovate the structure. Equally as important is how often has the Town of Hingham been confronted with this exact situation of declaring a home uninhabitable and/or dangerous and forcing the Town to tear down the house to the objections of the homeowner?

Another reason why the commentary is only illustrative is because there are numerous unforeseen situations where a single-family dwelling or business structure could be destroyed by fire, nor’easters, flooding or other factors and they may not be immediately rebuilt as “continuous process” due to ongoing claims adjusting or litigation. Under said examples, if the building or structure was destroyed or demoed, they would be precluded not because of their dilatory action, but due to the actions of third-parties, something completely beyond their control and not countenanced as part of the commentary!

The approach by the Building Commissioner is one-size fits all solution, and yet, when dealing with single-family dwellings with nonconformities said approach fails to take into consideration the unique circumstances of each case. It is with that in mind that my client requests that you use your discretion in interpreting Section III-I.1.d(iii)(A) so that you can fairly apply the bylaw to the facts of this appeal. While there was no “continuous process” between the demolition and the proposed reconstruction, balancing the equities of the intent of the bylaw, i.e., to reconstruct single-family dwellings with nonconformities as well as the other positive factors¹, with the desire to the reestablishment of abandoned or discontinued residential buildings and structures.

Thank you for your consideration.

Very truly yours,

DANEHEY & OSTERBERG, P.C.

/s/ John F. Danehey

John F. Danehey, Esq.
jdanehey@doesq.com

enc.

¹ The other positives that should not be ignored are: 1) replication of the original Thomas Barker House; 2) reviving a historic structure within the historical district; 3) ridding the downtown of an ongoing eyesore; 4) compliance with all zoning setbacks in the zoning district, including height; 5) utilizing the newly adopted bylaw equitably and fairly; and 6) increase tax revenue to the Town with adjusted property taxes.