



HAND DELIVERED AND BY EMAIL

October 19, 2020

Zoning Board of Review  
c/o Jamestown Town Hall  
93 Narragansett Ave.  
Jamestown, RI 02835

Re: Zoning Board of Review Hearing – October 27, 2020  
Application of Laura J. and Donald R. Carlson – 20 Brook Street

Honorable Members of the Zoning Board of Review:

I represented Melvin & Barbara Whitaker for a part of this matter's 2020 travel through zoning and planning (8/1/20- 10/16/20). On Friday (10/16/20) they hand-delivered to the zoning office their response letter to the above noted Application. I write in my capacity as an abutter, a participant in the matter's travel (June, 2020- present) and as an attorney of 29 years with some land use and zoning experience. I will attempt to limit my comments to legal analysis.

This above noted Application seeks replacement of a nonconforming structure and nonconforming use in an R8 zone, more specifically in the Jamestown Village Special Development District (Art. 11). As a second dwelling on the lot, it is a nonconforming use. Because it does not meet lot area per dwelling unit regulation setbacks, it's a nonconforming structure. Both were legally permitted by 1989 variance. Applicant characterizes the existing structure as a "nonconforming structure" in Par. 11 of its Application and as an "existing nonconforming building" in Par. 15 1.

### **LEGAL ARGUMENT**

**I. The Application for Exception or Variation under the Zoning Ordinance dated 9/18/2020 is deficient for failure to include any request for relief from the ordinance regulations governing nonconforming uses and structures.**

While characterizing its current carriage house as a nonconforming structure in its Application, no sections of the ordinance regulating nonconforming uses or structures are listed. The ordinance's statutory scheme however regulates their continued use, alteration and replacement.

**Ordinance regulating nonconforming use**  
**§82-703 Restrictions on nonconforming uses** (in part)  
Nonconforming uses are only allowed to continue if:

- A. The building or structure is not enlarged, structurally altered or reconstructed, except for alteration, maintenance and repair work as is required to keep the building or structure in a safe condition*
- B. Non conforming use of a building or structure shall be changed to another nonconforming use.*

The ordinance further regulates alterations, prohibiting any expansion or alteration which increases nonconformity.

**§82-704 Alteration of a nonconforming use**

*...The board shall insure that no alteration is permitted which would increase the degree of nonconformity, except in the CD and CW zoning districts where the zoning board may allow alteration or expansion at its discretion. (in part)(emphasis added)*

Applicants list present use of the premises as:

1 family in principal building; 2 story rental dwelling outbuilding, per 1989 Regulatory Variance<sup>1</sup>

On or before 9/1/20 Building Officer Costa determined that Applicant’s proposal is for a second principal dwelling on the lot “...and not a house plus an accessory building.”<sup>2</sup> On 9/18/20 Applicants nevertheless listed their proposed use of the premises as:

“...1 family in principal building; 1 family in outbuilding.”<sup>3</sup>

The expansion of use sought by Applicant’s proposal to expand its 1-bedroom dwelling unit into a 2-bedroom principal dwelling increases its degree of nonconformity by both use and dimension. No discretion is given to the Board to permit such expansion in the R8 zone and Village Special Development District.

Some planning commissioners opined on this proposed use expansion at the 9/2/20 Planning Commission meeting.<sup>4</sup>

In addition to use, the dimensions of a proposed structure to replace the existing nonconforming structure remain a critical element of this application. Travel to and through other committees and commissions with their different powers, duties and charges, does not change that fact. The dimensions of a proposed structure that seeks to replace an existing nonconforming structure is a matter for this Zoning Board’s consideration and ultimate determination.

**Ordinance regulating nonconforming structures**

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<sup>1</sup> Application, Par 9.

<sup>2</sup> Technical Review Committee Memorandum 9/1/2020, page 1, par. 5

<sup>3</sup> Application, #9

<sup>4</sup> “...getting to a larger house size puts the Carlsons in a better position than the property owners were in 1989... (1 hr. 24 min., 50 sec.)

“...easier to give this a hearty yes I approve if I didn’t see such a difference between 800 sq. ft. and 1200 sq. ft. “ (1 hr. 25 min. 47 sec.)

“...rights are for a 1 bedroom dwelling...”  
(1 hr. 37min. 43 sec.)

**§82-705 Alteration of a nonconforming structure.**

*Any alteration of a nonconforming structure shall be in accordance with the provisions of this ordinance (chapter).*

As argued above any expansion of a nonconforming use increases its degree of nonconformity and is prohibited by the ordinance. In the same way the size of a replacement structure must be considered. The statutory scheme regulating nonconforming uses and structures contemplates that an expansion of use might require an increase in size. In addition to expanding its current use the proposed alteration seeks to more than double its current size. Such an increase in dimension is prohibited by the ordinance. And permission to depart from the requirements of the ordinance requires the Applicant to have shown

**82-103 – Definitions**

**(162) b)**

*“...by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted shall not be grounds for relief.*

*(in part).*

There is no evidence in the Application addressing this requirement for a dimensional variance.

The Planning Commission at its 9/2/20 meeting offered some opinions on the size of the proposed structure.<sup>5</sup> There size was frequently referred to as “livable space” and not in footprint square footage. While this approach may be appropriate given their charge, square footage of footprint requirements are within the zoning board’s jurisdiction and as such it is required to consider dimension in these terms.

**II. The Application fails to present evidence of hardship sufficient to support the granting of a variance under § 82-606.**

Applicant appropriately seeks “Art. 6 Sec. 82-600 thru 608 Special Use Permits and Variances.” In granting a variance **§82-606 Conditions for granting a variance** requires 4-part evidence of hardship

1. *[which is not]...due to a physical or economic disability of the applicant;...*

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<sup>5</sup> “Why not just make the house smaller?”

(33min., 41 sec.)

“Are we following the guidelines ...that say it’s a 1 bedroom space ... compress the building or move some things around to make it more viable as a handicapped accessible space” (52 min. 9 sec.)

“You’ve got something anyone new couldn’t get without zoning relief.”

(1 hr. 27min. 14 sec.)

“I’d be more comfortable if it was a smaller size...current dwelling of 776 sq. ft. vs. the 1161... “

(1hr.29 min. 47 sec.)

2. *[which] ...does not result primarily from the desire of the applicant to realize a greater financial gain;*
3. *[which]...will not alter the general character of the surrounding area or impair the intent or purpose of the ordinance [this chapter] or the comprehensive plan upon which the ordinance [this chapter] is based; and*
4. *That the relief to be granted is the least relief necessary.* (emphasis added)

These requirements are conjunctive. Applicant lists mold and the needs of an elderly resident, the latter which is a physical disability, insufficient to show the hardship required by the variance standard in #1 above. They further request setback relief supported by an assertion that compliance with the requirements of the ordinance

would place the cottage too close to the primary residential structure, crowding the lot compromising the visual integrity of the site layout from Brook Street, and destroying the historical aesthetic composition of the property  
(Application, Par 15, 3)<sup>6</sup>

These are opinions. Further, Applicant makes no representations regarding hardship showings #2 and #3. As to #3, permitting 2 primary residences on 1 lot in an R8 zone, Village Special Development District, even supported only by the few examples of Planning Commission concerns and comments stated herein, would indeed both alter the general character of the surrounding area and impair the intent or purpose of the ordinance (following).

**82-100 General intent**

*Nonconforming uses are incompatible with and detrimental to permitted uses in the zoning districts in which they are located, cause disruption of the comprehensive land use pattern of the town, inhibit present and future development of nearby properties, and confer upon their owners and use[r]s a position of unfair advantage. It is a fundamental principle of this chapter that existing nonconformities may be continued as allowed by law. It is also the intent of this ordinance [chapter] that existing nonconformities shall not be a reason for authorizing uses otherwise prohibited in the same zoning district.* (emphasis added)

Applicant further states they seek

“...the least relief necessary given the option of subdividing.”  
(Application, Par 15, 4, in part)

Applicant fails to understand the meaning of *least relief necessary*. In this instance the least relief necessary for their expressed primary purpose of providing housing for an elderly family member, might be proposed alterations to the existing dwelling or a same sized replacement of the structure to facilitate accessibility needs or pursuing an accessory family dwelling unit (82-1400 et seq.), adopted by Jamestown

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<sup>6</sup> Understanding that Mel & Barbara Whitaker have conditionally agreed to Applicant’s proposed 15’ setback I make no argument about setback other than to state that Applicant’s support for its setback request are opinions only and not evidence of hardship as required by the ordinance.

in 2013 for this very purpose. If indeed establishing a dwelling for their mother to age in place is the primary intent of this proposal, there are easier and more direct ways to accomplish that goal that either do not require a variance at all or if required, seeks lesser relief than what Applicant seeks: approval for more than doubling the structure's current size. Applicant instead frames it as a preferred alternative, which completely fails to address the hardship requirement of the ordinance. Any option to subdivide has no relation whatsoever to the showing of hardship required by the ordinance.

Further requirements for a use variance are found in

***§82-607 – Variances – Additional restrictions***

*The zoning board of review shall, in addition to the above standards, require that evidence be entered into the record of the proceedings showing that:*

*1. in granting a use variance, the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the ordinance (this chapter).*

(in part)

Applying the facts to this standard, the existing carriage house (or replacement structure 1-bedroom 441 sq. ft. dwelling) would have to yield no beneficial use to Applicant. Even without a variance Applicants have multiple options for beneficial use. The Application is wholly inadequate with respect to the showing of hardship and the additional evidence required by the statute and therefore no variance can be granted.

**III. Applicant provides no statements in support of its request for a variance from § 82-303 and therefore its request must be denied.**

***§ 82-303 (Number of residential structures per lot)*** limits lots in any residential district to one principal residence. The Building Official's determination that Applicant's proposal represents a second principal dwelling on the lot requires Applicant to seek a variance from this section. Applicant presents no arguments in support of its request for variance other than to include it on list of variances sought in par. 14 of its Application. Indeed Applicant makes no statements at all on this issue. Given Applicant's failure to meet its affirmative obligations under the ordinance when seeking a variance (including evidence of hardship as defined herein), Applicant's request for a variance from § 802-303 must fail.

To grant such relief to Applicants assures that thereafter anyone in any residential district seeking a second principal dwelling on one lot will seek it, opening a "Pandora's box." This goes directly against both the plain language of the ordinance as well as the intent of the Comprehensive Plan, one goal of which is to maintain the Town's rural character.

**IV. The historical rental of the existing structure does not convey rental permission for the proposed structure as doing so would impart an unfair economic advantage to Applicant.**

A structure's permitted use ceases to exist when the structure is torn down. The 1989 variance document granting the 1 bedroom dwelling unit was silent on rental. The prior owners of 20 Brook St. (Mr. & Mrs. O'Sullivan) did in fact, rent the

carriage house. Backyard neighbors and abutters and partial objectors in this proceeding Melvin & Barbara Whitaker state that Mr. O'Sullivan promised them he would only ever rent to one person and always communicate with the Whitakers about any proposed or planned renter. The Whitakers state that he faithfully complied for 20+ years. Accordingly, Applicant in this proceeding is correct in stating that rental of the carriage house had indeed worked "without trouble or complaint" built upon and perpetuated by continuing trust between the O'Sullivans and the Whitakers. Applicant's suggestion that this cordial history should somehow support its pursuit of rental status for a new and greatly enlarged second principal dwelling on one lot does not follow.

The Planning Commission has continued to discuss the issue of rentals over many meetings this year. At its 7/1/20 meeting the solicitor stated that parking, noise and overcrowding are three major concerns about rentals. These concerns were also voiced by the Planning Commission in connection with this Application at its 9/2/20 meeting.<sup>7</sup> These concerns remain in the custody of the Commission and deserve to be concluded there pursuant to its charge, its assumed duties and the partially completed consideration of this issue there.

In conclusion, the Application for Exception or Variation under the Zoning Ordinance fails for numerous deficiencies. First, despite characterizing its structure as nonconforming, it fails to include requests for relief from or even acknowledge those sections of the ordinance governing nonconforming uses and structures. Second, stated support for variance relief is wholly inadequate across all of its requests. Ordinance standards require specific evidence which Applicant here fails to supply. It would appear that Applicant is under the impression that the subjective opinions they hold that support their desire for this proposal should satisfy the objective hardship evidence required by the ordinance. They do not.

In a larger sense this Application, considered with Applicant's meeting contributions, supporting filings and correspondence leading up to it, create an impression that Applicants may not fully understand what it means to seek relief from a zoning ordinance, specifically that they seek something to which they are not entitled as of right. And that status as an applicant requires the assumption of burdens to present evidence in support of a request which may more likely be

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<sup>7</sup> "It would be easier for me to endorse the continuation of the allowance to rent the building if you weren't gaining square footage" (1 hr. 30 min. 20 sec.)

"...longer term concern with concept of a 2 bed dwelling ...down the road if this becomes a rental on a regular basis the number of people living in that house, the noise, the congestion in that corner of the neighborhood could be more significant than what you'd get if it remained a 1 bedroom so I'm just looking at long term, 5, 10, 15 years down the road, what that larger house might mean as a rental in that area." (1 hr. 51min. 23 sec.)

"If it's a rental unit a second bedroom becomes essentially another way of making money and not a necessity...1 bedroom and you replace it? It's one thing ...2<sup>nd</sup> bed... for rental? Something I do not think I would go for"  
(1 hr. 52 min. 12 sec.)

denied than granted. This impression has persisted from the time of Applicant's initial filings through the present. I raise this impression as one, although by no means the only, possible reason for a protracted period of consideration for what Applicant seeks from the Town.

If primary objectors Melvin & Barbara Whitaker are indeed willing to accept proposed 15' setback and this board is inclined to accept that concession as its starting point, then I respectfully request that the Zoning Board engage in an appropriate review of the size/dimension issue as raised herein.

Thank you for the opportunity to address the legal issues raised by this Application.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kristen Sloan Maccini". The signature is fluid and cursive, with the first name "Kristen" being the most prominent.

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cc: Deb Foppert, Esq.  
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