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CITY OF SALEM, MASSACHUSETTS BOARD OF APPEALS

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Decision

City of Salem Board of Appeals

2020 AUG 11 PM 3:29
CITY CLERK
SALEM, MASS.

Petition of SANDY J. MARTIN for a variance per Section 3.2.4 *Accessory Buildings and Structures* to allow an accessory structure (an enclosure for trash and recycling bins) within the required front yard setback at 6 WHITE STREET (Map 41, Lot 285) (B1 Zoning District).

A public hearing on the above Petition was opened on November 20, 2019 pursuant to M.G.L Ch. 40A, § 11. No testimony was heard on this petition in the November 20 meeting. The hearing was continued to December 18, 2019; January 15, 2020 (during which no testimony was heard); February 19, 2020 (during which no testimony was heard); March 18, 2020 (during which no testimony was heard); and April 15, 2020, and closed on April 15, 2020, with the following Salem Board of Appeals members present: Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Steven Smalley, and Paul Viccica.

At the November 20, 2019 meeting, Peter A. Copelas, Mike Duffy (Chair), and Rosa Ordaz were present; Carly McClain and Steven Smalley were not yet members of the Board; Jimmy Tsitsinos and Paul Viccica were absent. At the December 18, 2019 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, and Jimmy Tsitsinos were present; Steven Smalley was not yet a member of the Board and Paul Viccica was absent. At the January 15, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica were present; Steven Smalley was not yet a member of the Board. At the February 19, 2020 meeting, Peter A. Copelas, Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica were present; Mike Duffy (Chair) and Carly McClain were absent, and Steven Smalley was not yet a member. At the March 18, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Carly McClain, Rosa Ordaz, and Steven Smalley were present; Jimmy Tsitsinos and Paul Viccica were absent. At the April 15, 2020 meeting, Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, Steven Smalley, and Paul Viccica were present, as noted above; Carly McClain and Jimmy Tsitsinos were absent.

The petitioner seeks a variance per Section 3.2.4 *Accessory Buildings and Structures* of the Salem Zoning Ordinance to allow an accessory structure (an enclosure for trash and recycling bins) within the required front yard setback.

Statements of Fact:

1. In the petition date-stamped October 16, 2019, the petitioner requested a variance per Section 3.2.4 *Accessory Buildings and Structures* of the Salem Zoning Ordinance to allow an accessory structure (an enclosure for trash and recycling bins) within the required front yard setback at 6 White Street
2. 6 White Street is a 7 Orange Street is a four-unit residential structure in the Business Neighborhood (B1) zoning district. This is an allowed use in the zoning district.
3. Petitioner Sandy J. Martin is an owner of one of the condominium units at 6 White Street.

4. At 6 White Street, an existing fence had been extended and an enclosure built to contain trash and recycling bins. This was done without a building permit. This is considered an accessory structure.
5. This structure is located near the front lot line of 6 White Street; a portion of the structure extends past the lot line, into the public way.
6. Section 3.2.4 *Accessory Buildings and Structures*, subsection 1 of the Salem Zoning Ordinance states: "No accessory building or structure shall be located within any required front yard or within any side yard of a corner lot."
7. In the B1 zoning district, the minimum depth of front yard is 15 feet.
8. The accessory structure thus does not meet the requirement of Section 3.2.4 subsection 1.
9. The accessory structure had already been built at the time of the application. One of the condominium owners at 6 White Street applied for a variance to retroactively allow this structure.
10. The requested relief, if granted, would allow the petitioner to maintain the existing accessory structure (an enclosure for trash and recycling bins) within the required front yard setback at 6 White Street.
11. The petitioner provided emails from the other condominium owners at 6 White Street granting their approval of this petition to the Board.
12. On the morning of November 20, 2019, Staff Planner Brennan Corrison informed petitioners that only four members would be in attendance at the meeting that evening (at the time, it was understood that four members would be attending), and that petitioners had the opportunity to request to continue the hearing for their petition to the next regularly scheduled meeting when five members might be in attendance. Petitioner Sandy Martin responded with a signed request to continue the hearing for 6 White Street to the December 18, 2019 meeting. This request was duly filed with the City Clerk.
13. At the November 20, 2019 meeting of the Board of Appeals, only three Board members were in attendance: Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz. Having three members in attendance out of the five-member Board constitutes a quorum (enough members to hold a meeting). However, per the Zoning Board of Appeals' Rules and Regulations, "[t]he concurring vote of at least four (4) members of the Zoning Board of Appeals shall be necessary in any action taken by the Board." As such, the Board could not vote to approve any petitions in the November 20 meeting, and all petitions were continued to the next regularly scheduled meeting. In the meeting, the Board voted three (3) in favor (Peter Copelas, Mike Duffy (Chair), and Rosa Ordaz) and none (0) opposed to approve the motion to continue to the next regularly scheduled meeting, December 18, 2019.
14. At the December 18, 2019 meeting of the Board of Appeals, petitioner Sandy Martin discussed the petition, representing the condo association at 6 White Street. Ms. Martin noted that the building used to use small, narrow bins for trash and recycling until the City mandated the use of larger ones. They located the bins at the edge of the property. People leaving the nearby marina were putting trash inside the bins, so the condo installed a three-sided enclosure to contain the bins. This seemed to solve the problem, but the condo association found out that a permit was required for the structure. No permit had been obtained.
15. At the December 18, 2019 meeting, the Board discussed the location of the fence enclosure and the barrels. Ms. Martin indicated that the barrels are on condo property and there is no other place where they can be reasonably. Ms. Martin indicated that a parking space would be blocked if the barrels were placed elsewhere. Peter Copelas asked Tom St. Pierre what makes this a structure and not just a fence; Mr. St. Pierre stated it is because of the enclosure. Mr. Copelas asked, if the protruding sections [arms] were removed, would it be considered an enclosure; Mr. St. Pierre indicated they would not, but there

- has been a question throughout the City whether the bins can be out all week long. Mr. St. Pierre added that he had questions about whether the trash structure is entirely on the 6 White Street property. Ms. Martin said the surveyor indicated the arm extensions are about six inches past the edge of the property; she stated they had no idea. Mr. St. Pierre noted that the Board cannot grant relief in the public way.
16. At the December 18, 2019 meeting, Peter Copelas expressed that given the question about whether the receptacles are on City property, and given that there might be an option to move the fence and one of the perpendicular sections so it is not an enclosure, there seem to be things the petitioner could work on and get some clarity on. Chair Duffy added that the petitioner might be able to obviate the need for a variance.
 17. At the December 18, 2019 public hearing, one (1) member of the public spoke in opposition to the proposal and no (0) members of the public spoke in favor of the proposal. The member of the public who spoke in opposition noted that public health regulations require trash barrels not be on the street except on collection days; he added that the structure makes it difficult to park near the structure, and that trash stored on the sidewalk is an eyesore.
 18. At the December 18, 2019 meeting, Chair Duffy indicated that the Board cannot grant relief if there is a question about whether the structure is on public property. Tom St. Pierre indicated that the only way to grant the request is with a provision to pull the structure back to the property line, but he expressed doubt about the feasibility of pulling the structure back. Peter Copelas also noted that it is worth looking at, if the fence were moved to the property line, placing the barrels behind the fence. Rosa Ordaz stated that if the fence was turned the other way (facing into the property), that would remove the doubt. She noted that it looks like there would be enough room to do this. Mr. Copelas suggested that Ms. Martin ask for a continuance to give her the opportunity to talk with the condo association and perhaps a surveyor to possibly modify the plan.
 19. At the December 18, 2019 meeting, Ms. Martin asked how they could make it so this does not need a variance. Mr. St. Pierre stated that it appears that there is a fence three or four feet from the property line. Mr. St. Pierre suggested that Ms. Martin confirm the property line with her surveyor and then move the fence forward to the property line and put the barrels behind it [i.e., on the property side, not the street side]. Then, no relief would be required. If they did that, Mr. St. Pierre would inspect and the surveyor would provide an updated drawing. Mr. St. Pierre added that they can also come back next month with a different plan. Chair Duffy added that a variance, if granted, would still be subject to appeal. Something allowable by right is not subject to appeal. Mr. St. Pierre suggested that they continue to keep the petition alive, knowing this could always be withdrawn; he suggested that Ms. Martin talk with her surveyor to come up with a plan, and if they come up with something in writing they commit to, Mr. St. Pierre could hold off on enforcement until the weather was conducive to construction. Ms. Martin requested a continuance to January 15, 2020. The Board voted five (5) in favor (Rosa Ordaz, Mike Duffy (Chair), Jimmy Tsitsinos, Carly McClain, and Peter A. Copelas) and none (0) opposed to approve the motion to continue.
 20. Prior to the January 15, 2020 meeting, following discussion between the petitioner, Building Commissioner Tom St. Pierre, and Planner Brennan Corrison, the petitioner decided that the fence would be moved. It was understood that the fence would be moved in a way that no longer required zoning relief. The petitioner submitted a request to withdraw without prejudice via email to Mr. Corrison dated January 7, 2020. The publicly posted agenda for the January 15, 2020 meeting indicated that there was a request to withdraw without prejudice for this petition.
 21. After the January 15 agenda was publicly posted but prior to the meeting itself, Ms. Martin submitted a new plot plan showing the revised location of the enclosure. The new location was still located

- within the required front yard setback and still constituted a structure, so the originally requested variance to allow an accessory structure within the required front yard setback was still required. As such, Ms. Martin rescinded her request to withdraw without prejudice via email to Mr. Corrison on January 14, 2020. There was not sufficient time to re-notice the hearing as a variance request (i.e, not as a request to withdraw without prejudice), so no testimony on the variance request would be permitted in the January 15 meeting.
22. Board member Paul Viccica, who was absent at the December 18, 2019 hearing on this petition, signed an affidavit of service on January 15, 2020, certifying that he examined all evidence pertaining to 6 White Street which was distributed at the single missed session on December 18, 2019, which evidence included an audio recording of the missed session. Mr. Viccica submitted this certification prior to participating in the vote on this matter in the January 15, 2020 public hearing.
 23. At the January 15, 2020 meeting, Ms. Martin briefly reviewed the history of the enclosure and of the application before the Board. Ms. Martin noted that she spoke with Tom St. Pierre about turning the structure around, but stated that this is not tenable because of the limited space and inability to access the bins if they were located on that side. Chair Duffy stated that it sounds like solutions were explored that might not require a variance and asked Mr. Corrison to comment on the situation. Mr. Corrison explained that the understanding was that there might be a solution that would not require a variance, and Ms. Martin submitted a request to withdraw without prejudice. The request to withdraw without prejudice was noticed to the public on the meeting agenda. Pursuant to discussions with Mr. St. Pierre and Ms. Martin, it became clear that even though moving the structure back would address the lot line issue, the proposal would still constitute an accessory structure within a required front yard setback and would thus still require a variance. Ms. Martin then submitted a request to rescind the previous request to withdraw without prejudice, but the rescindment request was not received early enough to take action on the petition tonight or hear discussion on the merits. This meeting was just a chance to discuss the reason for this change and continue the hearing until the next month.
 24. At the January 15, 2020 meeting, Chair Duffy explained that in order to have a properly, legally noticed meeting, notice of what is on the agenda needs to go out a certain amount of time before the meeting. In this case, notice went out indicated that the petition would be withdrawn; that position changed, the request for withdrawal was rescinded; the next agenda that went out did not go out with enough time. He stated that we cannot take any substantive action on the application tonight, but we can continue it to the next hearing, in which case there will be sufficient legal notice for any abutters or any parties concerned to be informed. Mr. Corrison added that in the meantime there could be continued discussions with Mr. St. Pierre to find if there is a solution that does not require a variance. Mr. St. Pierre stated that neighbors should be re-notified because of the confusion. Ms. Martin asked if it would be helpful to bring neighbors to the meeting; Mr. St. Pierre stated she is welcome to bring a petition or letters. Mr. Copelas noted that the concerns presented (by a member of the public) at the prior meeting were based on a city ordinance, which would not be negated by a petition or by the support of neighbors. After some discussion regarding procedure with the request to withdraw without prejudice, it was decided that no action should be taken on the request to withdraw without prejudice as it was rescinded. New notice would be mailed to abutters and the petition would be on the agenda next month as a continuation.
 25. At the January 15, 2020 meeting, the Board voted five (5) in favor (Peter Copelas, Mike Duffy (Chair), Rosa Ordaz, Jimmy Tsitsinos, and Paul Viccica) and none (0) opposed to continue the petition to the next scheduled meeting of the Board of Appeals on February 19, 2020.
 26. Prior to the February 19, 2020 meeting, a new notice was mailed to abutters informing them that the prior request to withdraw the petition without prejudice had been withdrawn, and that the variance

request would be moving forward in the February 19, 2020 meeting. The petition was noticed as a variance request on the posted agenda for the February 19, 2020 meeting.

27. In advance of the February 19, 2020 meeting, petitioners were informed that there would only be four members in attendance. With four members in attendance, the positive vote of all members is required to grant a special permit or variance. In these situations, petitioners are afforded the opportunity to request to continue to a future meeting in which five members might be in attendance. Petitioner Sandy J. Martin submitted a written request to continue from February 19, 2020 to March 18, 2020. This request was duly filed with the City Clerk on February 19, 2020.
28. Board member Steven Smalley, who was not yet a member during the December 18, 2019 hearing on this petition, signed an affidavit of service on March 18, 2020, certifying that he examined all evidence pertaining to 6 White Street which was distributed at the single missed session on December 18, 2019, which evidence included an audio recording of the missed session. Mr. Smalley submitted this certification prior to participating in the vote on this matter in the March 18, 2020 public hearing.
29. Due to the ongoing COVID-19 pandemic and related precautions and Governor Baker's March 12, 2020 Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, §18, and the Governor's March 15, 2020 Order imposing strict limitations on the number of people that may gather in one place, the March 18, 2020 meeting of the Board of Appeals was slated to take place via conference call, with a public call-in option. However, it was determined that the meeting as planned would not meet the temporary requirements of the partially suspended Open Meeting Law, and as such, no testimony should be heard. As such, the meeting was held for the sole purpose of continuing all matters before the Board.
30. In the March 18, 2020 meeting of the Board of Appeals, held remotely via public conference call, Chair Duffy described each application before the Board and noted that due to the unique circumstances, he would entertain a motion to continue all matters until the next regularly scheduled meeting on April 15, 2020. The vote was four (4) in favor (Peter A. Copelas, Mike Duffy (Chair), Rosa Ordaz, and Steven Smalley) and none (0) opposed.
31. The April 15, 2020 meeting of the Board of Appeals was held remotely, via the online platform Zoom.
32. At the April 15, 2020 public hearing, petitioner Sandy Martin presented a list of signatures from neighbors indicating they have no issue with the accessory structure. The top of the document reads: "We, the undersigned neighbors and citizens of Salem, MA, have no opposition to the petition of Sandy Martin and Nathaniel's Landing Condominiums to the variance requested concerning the fence enclosure and the bins facing out towards the street as shown on the plot plan submitted to the Zoning Board." The document is signed by 15 individuals with Salem addresses.
33. At the April 15, 2020 public hearing, Ms. Martin noted that a portion of the structure extends onto public property; she stated that she is seeking a variance in order to remedy the situation and move the structure back. Peter Copelas raised the issue of the city regulation that says barrels cannot be left out on the street. He noted that even if the variance is granted, it is beyond the purview of the ZBA to allow the petitioner to keep barrels on the street. There was some discussion among Board members, Ms. Martin, and Tom St. Pierre on this question. Paul Viccica asked whether barrels would be stored elsewhere and brought out on trash day, or if they would stay next to the structure permanently. Ms. Martin stated that there was no other place to put the barrels. Mr. Viccica asked about reversing the design so that the barrels would be blocked by the fence from the street. Ms. Martin stated that the barrels' size would make it difficult to access them if they were on the other side. After some more discussion, Mr. Copelas asked how the math changes when the fence is on one

side versus the other if there is enough room (either way) to put both the structure and the barrels on the property. He stated that this would be a reasonable alternative to requesting a variance. Ms. Martin noted that cars park right next to the fence. There was further discussion between Ms. Martin and Mr. Viccica regarding whether the porches are large enough to accommodate the barrels and whether potential alternatives exist.

34. At the April 15, 2020 public hearing, one (1) member of the public, a resident of 6 White Street, expressed her opinion that the object in question is a fence, not an enclosure or an accessory structure, and asked that the Board find that it is not an accessory structure. No (0) other members of the public spoke in favor of or in opposition to the petition. There was some discussion of this resident's question. Chair Duffy confirmed that such a finding would constitute an appeal of a decision of the building inspector rather than a variance and clarified that the instant request was for a variance with respect to setback. There was some more discussion about the location of the structure and barrels on the lot.

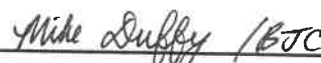
The Salem Board of Appeals, after careful consideration of the evidence presented at the public hearing, and after thorough review of the petition, including the application narrative and plans, makes the following **findings** that the proposed project **does not** meet the provisions of the City of Salem Zoning Ordinance:

Variance Findings:

1. It is not clear that special conditions and circumstances especially affect the land, building, or structure involved, generally not affecting other lands, buildings, and structures in the same district.
2. It has not been demonstrated that literal enforcement of the provisions of the Ordinance would involve substantial hardship to the applicant. Other options are available to the applicant for storing trash and recycling receptacles which would not require zoning relief.
3. Desirable relief may not be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent of the district or the purpose of the ordinance.

On the basis of the above statements of fact and findings, the Salem Board of Appeals voted none (0) in favor and five (5) opposed (Mike Duffy (Chair), Peter A. Copelas, Rosa Ordaz, Steven Smalley, and Paul Viccica) to grant the requested Variance per Section 3.2.4 *Accessory Buildings and Structures* to allow an accessory structure (an enclosure for trash and recycling bins) within the required front yard setback at **6 White Street**.

Failing to receive four votes in favor, the petition for a variance is denied.

 /BJC

Mike Duffy, Chair
Board of Appeals

A COPY OF THIS DECISION HAS BEEN FILED WITH THE PLANNING BOARD AND THE CITY CLERK.

Appeal from this decision, if any, shall be made pursuant to Section 17 of the Massachusetts General Laws Chapter 40A, and shall be filed within 20 days of filing of this decision in the office of the City Clerk. Pursuant to the Massachusetts General Laws Chapter 40A, Section 11, the Variance or Special Permit granted herein shall not take effect until a copy of the decision bearing the certificate of the City Clerk has been filed with the Essex South Registry of Deeds.