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City of New Bedford
ZONING BOARD OF APPEALS

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NOTICE OF DECISION

Case Number:	#4232			
Request Type:	Variance			
Address:	118 Portland Street			
Zoning:	Residential A Zoned District			
Recorded Owner:	Oswaldo DeSousa & Maria D. DeSousa			
Owner's Address:	118 Portland Street New Bedford, MA 02744			
Applicant:	Oswaldo DeSousa			
Applicant's Address:	118 Portland Street New Bedford, MA 02744			
Application Submittal Date	Public Hearing Date	Decision Date		
May 17 th , 2016	June 23 rd , 2016	June 23 rd , 2016		
Assessor's Plot Number	Lot Number(s)	Book Number	Page Number	Certificate Number
4	58	3940	209	

Variance under provisions of Chapter 9 Comprehensive Zoning sections 2700 (dimensional regulations), 2710 (general), 2720 (table of dimensional requirements, appendix B-Rear yard), 2750 (yards in residential districts), 2753 (rear yards); relative to property at 118 Portland Street assessor's map 4 lot 58 in a residential-A [RA] zoned district; to allow the petitioner proposes to erect a pergola over a rear deck with a barbeque fireplace at the end of this deck as plans filed.

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 July 7th, 2016. 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.

July 7, 2016
Date

Allen Drake
Clerk, Zoning Board of Appeals

1.) APPLICATION SUMMARY

The petitioner proposes to erect a pergola over a rear deck with a barbeque fireplace at the end of this deck as plans filed, which a variance under Chapter 9 Comprehensive Zoning sections 2700 (dimensional regulations), 2710 (general), 2720 (table of dimensional requirements, appendix B-Rear yard), 2750 (yards in residential districts), 2753 (rear yards); relative to property at 118 Portland Street assessor's map 4 lot 58 in a residential-A [RA] zoned district.

2.) MATERIALS REVIEWED BY THE BOARD

Plans Considered to be Part of the Application

- Site Plan, designed by DK, dated May 9th, 2016; date stamped received by City Clerk's Office May 17th, 2016.
- Pergola side view, drawn by Ozzie, dated May 21st, 2016.
- Pergola frame, drawn by unknown, not dated

Other Documents & Supporting Material

- Completed Petition for a Variance Form, stamped received by City Clerk's Office May 17th, 2016.
- Letter to ZBA from the Commissioner of Buildings & Inspectional Services, Danny D. Romanowicz, dated June 3rd, 2016.
- Staff Comments to ZBA from Department of Planning, Housing and Community Development, dated June 15th, 2016.

3.) DISCUSSION

On the evening of the June 23rd, 2016 meeting, board members: John Walsh, Allen Decker, Robert Schilling, Sherry McTigue, and Leo Schick were present for the public hearing. City of New Bedford staff: Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services) and Jennifer Gonet (Assistant Project Manager, Department of Planning, Housing, & Community Development) were present during proceedings for the subject case review.

Mr. Decker made a motion, seconded by Mr. Schick, to receive and place on file the communications from the Commissioner of Buildings & Inspectional Services, Danny D. Romanowicz, dated June 3rd, 2016; correspondence from the Office of the City Planner, dated June 15th, 2016; communication from an anonymous New Bedford home owning family dated June 10th, 2016; 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 the lots affected; and that the action of the Clerk in giving notice of the hearing as stated be and is hereby ratified. On a 2-3 vote the motion failed. Acting Chair Walsh stated before the vote, he believed the Board cannot receive a communication from anonymous persons. Members Ms. McTigue and Mr. Schick were recorded in favor; Mr. Walsh, Mr. Decker, and Mr. Schilling were recorded in opposition.

Mr. Decker made a new motion, seconded by Mr. Schick, by amending the previous motion to be the same without the letter from the anonymous home owner. With all in favor the motion passed.

Acting Chair Walsh then declared the hearing open.

The petitioner, Mr. Osvaldo DeSousa (118 Portland Street New Bedford, MA) explained he is trying to build a pergola on an existing deck and barbeque fireplace at the end of the deck. He explained he was told he needs thirty (30) feet, whereas he has twenty-five (25) feet eight (8) inches, and therefore needs a variance.

Mr. Decker confirmed the applicant has already constructed part of the project. Mr. DeSousa confirmed saying yes, the fireplace is already up and some posts for the pergola. He further stated he is trying to increase the property value to benefit the city as he will pay taxes on it. Mr. Decker asked if the petitioner built the fireplace himself and if he knew he needed approval. Mr. DeSousa confirmed he built the fireplace himself, and did not know he needed approval. He stated he had thought about buying a pergola at Home Depot and putting it on top of the deck, but instead decided to build one himself. He explained he was then told by a city official he could not build a pergola, he challenged the official at that time "why not? Can't I go to Home Depot and pick one up and put it on top of my deck?" and he stated the official told him he could do that.

Following the petitioner's testimony, Acting Chair Walsh invited to the podium anyone wishing to speak in favor of the application. Ward 6 City Councilor Joseph Lopes (75 Dudley Street New Bedford, MA) spoke in favor of the petition. Councilor Lopes stated he has known the petitioner and his wife for some time, and they have a beautiful home. He explained the neighbors have no issue with the fireplace or this proposal. He indicated he had spoken with some of the neighbors and they have had no issues with the petitioner or the pergola. The house is well maintained and in a very nice neighborhood and adds to the value of the house and neighborhood, he explained. No one else in attendance spoke in support of the petition or wished to be recorded in favor of the petition.

Acting Chair Walsh invited to the podium anyone wishing to speak in opposition of the petition. No one in attendance spoke in opposition of the petition or wished to be recorded in opposition of the petition.

With no further questions or concerns, Acting Chair Walsh closed the hearing, and opened the floor for discussion amongst board members.

Ms. McTigue questioned the issue of being a fireplace is to do with the city not to do with zoning, as she does not see anything in the language of requiring a variance having to do with the use as a fireplace.

Mr. Decker asked Commissioner Romanowicz if the height of the pergola was reduced by one and a half (1 ½) feet, he wouldn't need the variance as he would comply with the necessary setback. Commissioner Romanowicz indicated that was not correct, explaining that the pergola proposed as attached to the house, is a structure tied into the deck and therefore does not meet the rear yard setback. The pergola and the fireplace are considered a structure connected to the house, that doesn't meet the rear yard setback. Acting Chair Walsh asked Commissioner Romanowicz, if the pergola wasn't connected to the house it wouldn't be an issue? Commissioner Romanowicz said yes. Mr. Decker clarified, if the deck wasn't connected to the house? Commissioner Romanowicz further explained if the deck was not connected to the house it can be within six feet of the rear yard. Once

you put a roof on top of it and connect it to the house it has to meet the setback, he clarified. If he didn't have a roof on it, it'd be all set, but this is the way he wants it built, said the Commissioner. Commissioner Romanowicz explained if the petitioner cut the pergola posts down and put a railing around the deck, he would not be before the board.

Mr. Decker asked the petitioner if he understood the discussion. Mr. DeSousa indicated he did not understand the discussion. Mr. Decker began to explain if the pergola height was reduced by a foot and a half (1 ½) then you wouldn't have a need for the variance. Mr. DeSousa stated he would be fine with that but had never been told that. Mr. DeSousa stated he had proposed to build eight (8) feet up but if he needs to build it at seven (7) feet that is not a problem. Mr. Decker stated it may not be a problem but was trying to make sense of the information provided. Mr. DeSousa interjected that the pergola is not attached to the house anyway. Mr. Decker said it's not the question if the pergola is connected to the house but the deck is attached to the house. Mr. DeSousa indicated understanding.

Ms. Gonet offered a point of information to the board. Acting Chair Walsh accepted. Ms. Gonet clarified that the communication from the Planning Office used the word "shorter" which was meant to convey a "shorter" distance from the rear yard and did not mean shorter in height.

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 construction of the pergola over the existing deck surface does not extend the deck surfaces impact of structures on the lot's existing setbacks. The board found the hardship is the literal enforcement would require the expense of removal.

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

The Board found that relief may be granted without substantial detriment 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 desirable relief may be granted without nullifying or substantially derogating from the intent or purpose of such ordinance or by-law.

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.

The Board grants the Applicant's request for relief from Chapter 9 Comprehensive Zoning sections 2700 (dimensional regulations), 2710 (general), 2720 (table of dimensional requirements, appendix B-Rear yard), 2750 (yards in residential districts), 2753 (rear yards); relative to property at 118 Portland Street assessor's map 4 lot 58 in a residential-A [RA] zoned district; to allow the petitioner proposes to erect a pergola over a rear deck with a barbeque fireplace at the end of this deck as plans filed.

6.) 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.

Mr. Decker made a motion, seconded by Mr. Schick, as follows, to approve the variance to allow the petitioner to erect a pergola over a rear deck with a barbeque fireplace at the end of this deck as per the plans filed, which a variance under Chapter 9 Comprehensive Zoning sections 2700 (concerning dimensional regulations), 2710 (concerning general regulations), 2720 (concerning the table of dimensional requirements, concerning appendix B-Rear yard), 2750 (concerning yards in residential districts), 2753 (concerning rear yards); relative to property located at 118 Portland Street assessor's map 4 lot 58 in a residential-A [RA] zoned district. Having reviewed this petition in light of the City of New Bedford Code of Ordinances Chapter 9 sections 2700, 2710, 2720, 2750, 2753; the board finds that in respect to these sections relief being sought is granted. And, in addition to the foregoing sections, this petition has also been found to be in accordance with Massachusetts General Law Chapter 40A section 10 relative to the granting of variances because the board found: That there are circumstances relating to the soil conditions, shape or topography which especially affect the land or structure in question, but which do not affect generally the zoning district in which the land or structure is located. The circumstances are such that construction of the pergola over the existing deck surface does not extend the deck surfaces impact of structures on the lot's existing setbacks. And, that due to those circumstances especially affecting the land or structure, literal enforcement of the provisions of the Zoning Ordinance or By Law would involve substantial hardship, financial or otherwise, to the petitioner or appellant. Such that in this case the literal enforcement would require the expense of removal. And that desirable relief may be granted without nullifying or substantially derogating from the intent or purpose of the Zoning Ordinance or Bylaw. And that desirable relief may be granted without substantial detriment to the public good. In light of its review of the specifics noted within this motion, the board's finding that the material presented is complete and in its careful consideration of the petitioner's request, the Zoning Board of Review finds that the petition satisfactorily meets the basis of the requested relief.

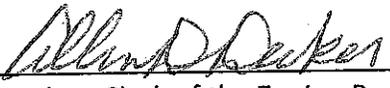
Therefore, this motion is made and includes the following conditions:

- a. That the project be set forth according to the plans submitted with the application.

- b. That the notice of decision be recorded at the Registry of Deeds and
- c. A building permit be issued by the Department of Inspectional Services and acted upon within one year from the date of the decision. On a roll call vote, the motion passed with all in favor.

On a motion by A. Decker, seconded by L. Schick to grant the requested Variance, the vote carried 5-0 with members R. Schilling, A. Decker, S. McTigue, L. Schick, and J. Walsh voting in the affirmative, no member voting in the negative. (Tally 5-0)

Filed with the City Clerk on:



Allen Decker, Clerk of the Zoning Board of Appeals

July 7, 2016
Date