



KIMBERLEY DRISCOLL  
MAYOR

# CITY OF SALEM, MASSACHUSETTS BOARD OF APPEAL

98 WASHINGTON STREET ♦ SALEM, MASSACHUSETTS 01970  
TEL: 978-745-9595

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CITY CLERK  
SALEM, MASS

December 3, 2018

## Decision

### City of Salem Board of Appeals

**Petition of MATTHEW CORNELL AND OTHERS to appeal the issuance of a building permit for 84 WASHINGTON SQUARE EAST (Map 35, Lot 516) (R2 Zoning District).**

A public hearing on the above Petition was scheduled for October 17, 2018, but instead was continued to November 19, 2018. The public hearing was opened on November 19, 2018 pursuant to M.G.L Ch. 40A, § 11 and closed on that date with the following Salem Board of Appeals members present: Mike Duffy (Chair), Peter A. Copelas, Jim Hacker, Patrick Shea, and Paul Viccica.

The Petitioner is appealing the issuance of a building permit for 84 Washington Square East.

#### Statements of fact:

1. In the petition date-stamped September 17, 2018, the Petitioners requested an appeal of a decision of the building inspector. Several petitioners, represented by attorney Roy F. Gelineau, Jr., Esq., appealed the issuance of Building Permit #B-18-771 and requested that the Building Commission be order to revoke said permit.
2. Attorney Roy F. Gelineau presented the petition on behalf of the Petitioners, Matthew Cornell et al.
3. Building Permit #B-18-771 was issued on August 17, 2018. An Initial Construction Control Document, dated July 27, 2018, describes the project as "Fit-out of an existing three (3) story, approximately 10,000-SF converted home for a proposed O'Donnell Funeral Home in Salem, MA, as well as a 1,600-sf addition." The project included renovation of the existing funeral home as well as an addition.
4. Petitioners are appealing the issuance of the building permit. In the letter of appeal from Mr. Gelineau dated September 17, 2018, Petitioners claim that "the Zoning Board of Appeals must make the requisite inquiry and issue written determinations as required by the above-cited Zoning Ordinances, and only after the Owner of the Subject Property has filed applications for a variance and for a special permit."
5. The property currently operates as a funeral home; the funeral home was recently purchased by O'Donnell Funeral Service. The owners sought the initial building permit for the aforementioned "Fit-out of an existing three (3) story, approximately 10,000-SF converted home for a proposed O'Donnell Funeral Home in Salem, MA, as well as a 1,600-sf addition."
6. The requested relief, if granted, would grant the appeal of the petitioners and overturn the decision of the Building Commissioner to issue the building permit.
7. At the public meeting, Mr. Gelineau stated that there has been no process to allow the Board to consider what he deemed the expansion of a preexisting nonconforming use, and no chance for the Board to make findings that the use is not more detrimental than the current use. Mr. Gelineau

- explained that neighbors found out that a building permit had been issued when trees on the site were cut down. Mr. Gelineau asked the Board to think about whether a project of this magnitude and size is or is not more detrimental to the neighborhood than the existing nonconforming use, considering the number of lights, number of cars, and sounds that will come from the funeral home, as well as later hours. Mr. Gelineau claimed that the numbers included in the building permit applications reflect a higher volume than was there before, and that as such, the special permit process should have been used, so Mr. Gelineau asked that the Board vote to revoke the building permit.
8. Board member Paul Viccica asked why the building permit was granted. Building Commissioner Tom St. Pierre stated that, in reviewing the plans presented by the project architect, the amount of square feet of the structure changed insignificantly and that a lot of the change was based on new accessibility features. Mr. St. Pierre stated that his opinion was that this was a renovation of the main building, the removal of some less-period additions on the back and replacement with something that is less than total reconstruction of the building warranting a special permit.
  9. The Board discussed the petition as well as the proposed project for which the building permit was granted. The architect for the proposed project answered a question from the Board regarding lighting, noting that the project is to create safe lighting; there will be a six-foot-high fence around the property to block headlights from shining onto abutters' properties; that the project is about bringing the funeral home up to modern standards and codes (including an elevator going with access – not for the public – for basement and second story access); and that the footprint, including the existing handicapped ramp, is “pretty much the same” as before.
  10. Mr. Gelineau brought a document dated July 13, 1953 from the Salem Board of Appeals allowing the conversion from single-family to the funeral home at 84 Washington Square East; this was the only record available to this point regarding the property's conversion to a funeral home. It was unclear whether this was a special permit, including what (if any) limitations might have been attached. Board member Peter Copelas stated that the Board would be hard-pressed to act on a modification of a special permit (if it is indeed a special permit) from 1953 without more information.
  11. Mr. Copelas stated that although the footprint is not substantially increased, both the use and the structure appear to be extended or increased – considering that the building permit discusses renovation and addition – and that it would not seem unreasonable to require a special permit.
  12. Attorney Bill Quinn, representing the property owners, addressed the Board. Mr. Quinn said that projects do not come to this Board only because of complaints from neighbors. Mr. Quinn claimed that, because the building will not be nonconforming to dimensional requirements, there is no reason for the question to come before the Board, and that the building permit was sufficient. Mr. Quinn noted that the relevant threshold is the substantial extension of a (nonconforming) use. Mr. Quinn noted that the funeral home, under previous ownership, had four chapels available, so that they could operate up to four services at the same time. Mr. Quinn stated that the plans submitted to the city do not allow that, and that the chapels have been consolidated into two chapels. Mr. Quinn stated that the use of the building is to conduct funerals, and that the building will be conducting fewer funerals per day than before. Mr. Quinn claimed that, because the amount of people who will attend a funeral is not dependent upon the amount of parking spots available, the addition of more parking is not a use question. Mr. Quinn claimed that fewer people will be able to attend two funerals than could attend four funerals, so there is no substantial extension of use.
  13. Board members asked questions to Mr. Quinn regarding parking and traffic impacts, as the amount of parking spaces on the site is increasing per the plans submitted to the Building Department. Paul Viccica asked, “What is the changing of what is going on inside the funeral home that is requiring or desirable to increase the parking?” Mr. Viccica stated that he thinks that that is a substantial change to

- the site. Discussion of this question ensued. Mr. Quinn stated that the parking is to accommodate the maximum amount of people in attendance at two services and to get them off the street.
14. The Building Commissioner noted that an increase in parking spaces does not necessarily mean an increase in the use. He noted that the project architect told him that the additional parking spaces are to allow people to park on-site instead of next to the Salem Common; the existing funeral home currently puts out cones on the street to allow on-street parking.
  15. Discussion continued among the Board, both attorneys, and the project architect.
  16. At the public meeting, seven (7) members of the public, including several petitioners, spoke in support of the petition (i.e., in opposition to the issued building permit). Co-owners of the funeral home, Thomas O'Donnell and Anthony O'Donnell, spoke in opposition to the petition (in support of the issued building permit), and addressed some questions and concerns about the property that members of the public had presented and further explained some of their reasoning behind the approach to the project. Thomas O'Donnell explained that they will only be "hard-topping" the same amount of parking spaces as existed previously and are graveling the additional spaces because they do not know how many people will attend funerals.
  17. Building Commissioner Tom St. Pierre noted that for this project, the architect had previously submitted two renditions, both of which Mr. St. Pierre rejected as needing to come to the Zoning Board. The proposal for which the permit was issued was the third version submitted to the Building Department.
  18. The Board discussed the petition. Mr. Viccica stated that his question is regarding the definition of a substantial extension of use, and expressed concern about setting a precedent about substantial extension of use. The Board discussed the question of substantial extension of use.
  19. Article IV of the City of Salem Board of Appeals Rules and Regulations states, in relevant part, "The concurring vote of at least four (4) members of the Zoning Board of Appeals shall be necessary in any action taken by the Board."
  20. M.G.L. ch.40A §15 states, in relevant part, "The concurring vote of all members of the board of appeals consisting of three members, and a concurring vote of four members of a board consisting of five members, shall be necessary to reverse any order or decision of any administrative official under this chapter or to effect any variance in the application of any ordinance or by-law."

On the basis of the above statements of fact, the Salem Board of Appeals voted three (3) in favor (Patrick Shea, Peter Copelas, Paul Viccica) and two (2) opposed (Mike Duffy (Chair), Jim Hacker) to grant the requested appeal. **As such, the appeal was denied, and the decision of the Building Commissioner to issue Building Permit #B-18-771 stands.**

  
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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.*