



**City of Marlborough  
Zoning Board of Appeals**

140 Main Street  
Marlborough, Massachusetts 01752  
Tel. (508) 460-3768 Facsimile (508) 460-3747

**ZBA Case # 1449-2018**  
**Location: 39 Witherbee St.**

**Date: August 20, 2018**

**(General Laws Chapter 40A, Section 16)  
Withdraw Without Prejudice**

**To:** Germano Lima c/o Atty. Christopher Flood

**Address:** 14 Winthrop Street

**City:** Marlborough, MA 01742

affecting the rights of the owner with respect to land or buildings at:

**39 Witherbee St. Map 69 Parcel 247**

And the said Board of Appeals further certifies that the decision attached hereto is a true and correct copy of its decision and of all plans referred to in the decision, have been filed with the City Clerk.

Paul Giunta - Chairman

Susan Brown - Secretary

Submitted to the City Clerks' office on August 20, 2018.



# City of Marlborough Zoning Board of Appeals

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Case # 1449-2018  
Name: 39 Witherbee St. LLC (Mr.Lima)  
Location: 39 Witherbee St.

Date: August 20, 2018

## DECISION Zoning Board of Appeal

### Withdraw Without Prejudice

The Zoning Board of Appeals, acting under the Marlborough Zoning Ordinance and Mass. General Laws, Chapter 40A, Section 16, as amended, and after a public meeting held on August 7, 2018 voted 5-0 to allow the applicant to **Withdraw Without Prejudice** the below mentioned petition.

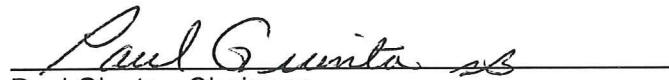
**Members present:** Paul Giunta-Chairman, Ralph Loftin, Robert Levine, Thomas Golden and Thomas Pope.

**Petition:** The applicant has expanded his existing driveway which created the following violations:

- 650-41 The "Table of Lot Area, Yards and Height of Structures" states that the maximum Lot Coverage is 30%, your new driveway exceeds the allowable limit at 49%.
- 650-49 B(2)b Distance from property line (driveway) The edge of the driveway shall be located no closer than the minimum distance governing parking areas as provided for under 650-48C(5). 650-48C(5)(b)[1] one and two family side setback -5 feet. Constructed – less than 5 feet.
- 650-49 B(2)c Distance from building. (Paving is too close to the building at the rear) No driveway OR PAVED AREA shall be located within 5 feet of a building, constructed adjacent to the building on the rear of the structure.

After much discussion, the applicant thru this attorney, requested to "Withdraw Without Prejudice" their above petition. On a motion made by Paul Giunta, seconded by Ralph Loftin, the Board voted 5-0 to allow the applicant to Withdraw Without Prejudice.

And the said Board of Appeals further certifies that the decision hereto is a true and correct copy of its decision and have been filed with the City Clerk.

  
Paul Giunta - Chairman

Submitted to the City Clerks' Office on August 20, 2018.



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ZBA Case # 1449-2018  
Applicant: 39 Witherbee St. LLC (Mr. Lima)  
Location: 39 Witherbee St.

Date: August 20, 2018

## Zoning Board of Appeals Record

The Zoning Board of Appeals, acting under the Marlborough Zoning Ordinance and General Laws, Chapter 40A, as amended, a meeting was held on August 7, 2018.

**Board Members present were:** Paul Giunta – Chairman, Ralph Loftin, Robert Levine, Thomas Golden and Thomas Pope.

### Proceedings:

1. Date of Appeal: July 9, 2018.
2. Name and Address of Applicant: 39 Witherbee St. LLC, Germano Lima, 52 Devens St. Marlborough, MA 01752 c/o Atty. Christopher Flood, 14 Winthrop St. Marlborough, MA 01752
3. Administrative body from whose decision or order of appeal was taken: Building Dept.
4. Appeal filed with: Zoning Board of Appeals and City Clerks' Office.
5. **Nature & Basis of Appeal:** The applicant has expanded his existing driveway which created the following violations:
  - 650-41 The "Table of Lot Area, Yards and Height of Structures" states that the maximum Lot Coverage is 30%, your new driveway exceeds the allowable limit at 49%
  - 650-49 B(2)b Distance from property line. The edge of the driveway shall be located no closer than the minimum distance governing parking areas as provided for under 650-48C(5). 650-48C(5)(b)[1] one and two family side setback -5 feet. Constructed – less than 5 feet.
  - 650-49 B(2)c Distance from building. No driveway shall be located within 5 feet of a building, constructed adjacent to the building on the rear of the structure
6. Section of the Zoning Ordinance involved: See above item #5.
7. Notice was sent by Certificate of Mailing to parties in interest, including the petitioner, abutters, owners of land directly opposite on any public or private street or way, owners of land within 300 feet of the property lines, including owners of land in another municipality, all as they appear on the most recent applicable tax lists.



8. Original documents are on file with the Board of Appeals and the City Clerks' Office.
9. **Record:**
  - 1R. The property is located in Zoning District Residence C (RC). Being Map 69 Parcel 247 of the Assessor's Maps.
  - 2R. The lot contains some 7,622 sq. ft. of area. Existing on the lot is a 2 family dwelling containing 3 bedrooms per unit. According to the city's zoning code 650-48A(7) Off Street Parking – provide one parking space per unit and 1 parking space per bedroom, totaling 8 off street parking spaced.
  - 3R. The lot is rectangular in shape. The lot is essentially level, with the front half sloping slightly to the street.
  - 4R. The other lots in the area are similar in shape and topography.
  - 5R. The applicant, Mr. Germano Lima, owner, was present. He was represented by Atty. Christopher Flood, 14 Winthrop Street, Marlborough, MA
  - 6R. **Proposal:** The applicant has expanded his existing driveway which created the following violations:
    - 650-41 The "Table of Lot Area, Yards and Height of Structures" states that the maximum Lot Coverage is 30%, your new driveway exceeds the allowable limit at 49%.
    - 650-49 B(2)b Distance from property line. (driveway) The edge of the driveway shall be located no closer than the minimum distance governing parking areas as provided for under 650-48C(5). 650-48C(5)(b)[1] one and two family side setback -5 feet. Constructed – less than 5 feet.
    - 650-49 B(2)c Distance from building. (Paving is too close to the building at the rear) No driveway OR PAVED AREA shall be located within 5 feet of a building, constructed adjacent to the building on the rear of the structure.
  - 7R. Atty. Flood presented a narrative with Exhibit A – Middlesex South Registry of Deeds, Quitclaim Deed; Exhibit B -plan entitled: Plan Showing Existing Conditions, prepared for Germano Lima, 39 Witherbee St. Marlborough, MA 01752 dated May 24, 2018, Scale 1 inch – 20 feet; Exhibit C – Zoning Denial letter, dated June 14, 2018; Exhibit D – Assessor's maps.
  - 8R. In reference to Atty. Flood's narrative, (in Board's file) he stated the following:
    - The 2 family structure was built in 1890, which was always a 2 family structure.
    - Mr. Lima, owner, has purchased the structure which was in need of repairs. Mr. Lima's paving contractor paved the existing extended driveway and installed a new parking lot at the rear of the house. Mr. Lima has invested a considerable amount of money renovating the structure and tried to provide some off-street parking for his tenants.
    - With the parking at the rear, the neighbors will not be affected by the cars' headlights, because there is a fence shielding the rear neighbors.

- Even with the exceeded lot coverage, there is still a considerable amount of green space on the lot.

9R. **HARDSHIP** as stated by Atty. Flood:

- Mr. Lima spent a lot of time and money into renovating the structure and area. Without the variances, he cannot get a full occupancy permit for this 2 family dwelling. He currently has an occupancy permit for one floor.
- Mr. Lima hired a paving company to pave the driveway and add a parking lot at the rear of the house, not knowing the paving company did not get the proper permits thru the city. Mr. Lima has text messages as evidence from him and the paving company stating that the proper permits were issued thru the city.
- According to the old assessor's map (copy in board's file) it appears the driveway was in existence since 1960. The applicant should check with the building inspector or the engineering department to determine if this prior nonconformity can be grandfathered.
- Mr. Lima cannot comply with the city's regulations of providing sufficient off street parking for his tenants.

10R. The Board's concerns:

- With the existing paved area at the rear of the lot, how will that affect water run off? Maybe engineering should weigh in on this. The applicant did state that the abutting lot at the rear is slightly higher, so water run off would not affect that lot. The Board also had concerns about possible water run off onto the street which may ice up during the winter months.
- The Board stated that the applicant can bring suit against the paving company for not receiving the proper permits before paving.
- It was suggested by the Board that the applicant remove some of the pave material at the rear, which may help bring lot coverage into conformity. Or replace the existing paved area with a pervious material which will not be counted as lot coverage.
- The Board stated that lot size is not a consideration for a variance.

11R. In conclusion, the Board finds:

- The variances the applicant is seeking are due to a self created hardship. The existing pavement violation does not constitute granting variances for relief to the applicant in order for him to get a full occupancy permit thru the Building Dept. to rent the second floor. The applicant already has a partial occupancy permit for one floor.
- Prior to the paving violations, the existing structure is pre-existing non-conforming. With the new pavement, it has created a more non-conforming lot.
- The Board felt the applicant had options to mention a few: of either pulling up the existing pavement which is in violation and replacing it with pervious material, or if possible just pull up enough material in order for lot coverage to conform, or take legal action against the paving company for deceiving him about getting the proper permits.

- Prior illegal improvements to the land cannot be used to establish a hardship. The fact pavement has been installed in violation of the zoning code is not "hardship" warranting a variance.
- 12R. There was no one in the audience to speak in favor or in opposition to the petition.
- 13R. The Board gave the applicant the option to continue the hearing with a vote of the Board or to Withdraw Without Prejudice.
- 14R. With the advise of his attorney, the applicant Withdrew Without Prejudice.
- 15R. On a motion by Paul Giunta and seconded by Ralph Loftin, the Board voted 5-0 to allow the applicant to "Withdraw Without Prejudice".
- 16R. With no other testimony taken or given, the public hearing was closed.



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**Location: 39 Witherbee St.**

**Applicant: 39 Witherbee St. LLC**

**VOTE OF THE BOARD**  
**Signature Sheet**

**In Favor**  
**To Withdraw Without Prejudice**

Paul Giunta

Ralph Loftin

Thomas Golden

Thomas Pope

Robert Levine

**In Opposition**  
**To Withdraw Without Prejudice**

Paul Giunta

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Ralph Loftin

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Thomas Golden

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Thomas Pope

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Robert Levine

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