

Gail Zayac
Portland, Maine

Page 3

January 20, 1982

to Malcolm Ward dated August 18, 1981. The appeal which they filed with Mr. Ward was dated September 24, 1981. Consequently, even if Mr. Flewelling's opinion were an interpretation which could be appealed, the thirty day appeal period already had elapsed by the time that Mr. Kearney delivered the appeal to Mr. Ward.

Since the Board would be deprived of jurisdiction to decide the substantive issue, the Board should deny the appeal and cite in writing the reasons for its lack of jurisdiction which I have just discussed. The appellants' attorney then can appeal the Board's denial to Superior Court if they wish to pursue the matter further.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Rebecca I. Warren

Rebecca I. Warren

RIV:rvc

cc: Richard P. Flewelling, Esq.

Gail Zayac
Portland, Maine

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January 20, 1982

As I understand the facts surrounding the 191 Ashmont Street appeal, a "notice of appeal specifying the grounds thereto" was filed on September 24, 1981 with the Building Inspector, Malcolm Ward, by Edward Kearney and five other individuals attempting to "appeal the opinion of Richard P. Flewelling" which was issued on August 18, 1981. Apparently no written appeal challenging Mr. Ward's decision not to require a permit has been filed by this group. Under Section 602.24.B(2) of the Zoning Ordinance, it appears that the Building and Inspection Services Department has a non-discretionary duty to accept and forward to the Board of Appeals the appeal application and any documents constituting a record which the Department has in its possession. The Board of Appeals then must arrange and conduct a hearing on the appeal. However, before it can discuss and decide the merits of the substance of the appeal (ie., whether the use in question requires a permit), the Board first must determine whether the appeal was brought by the proper person, whether it was filed within the deadline specified in the ordinance, and whether it is the type of appeal which the Board has authority to hear and decide. A negative finding on any of these three factors would deprive the Board of jurisdiction to rule on the real substance of the appeal.

Whether the Kearneys and the other appellants have suffered "particularized injuries" resulting from Mr. Flewelling's interpretation of the ordinance which are sufficient to give each of them standing to appeal is a factual determination which the Board will have to make based on the evidence presented. It appears that the Board will not even need to address the question of standing, however. I am of the opinion that the Board could deny the appeal on two other grounds. First, despite the arguments outlined by David Turesky in his November 6, 1981 letter to the Board, I do not agree that Richard Flewelling's interpretation of the zoning ordinance constitutes an "order, decision, determination or interpretation made by the Building and Inspection Services Department" for the purposes of the Board's jurisdiction over an appeal under Section 602.24.A (1). Mr. Flewelling, as Assistant Corporation Counsel, has no authority to administer the Zoning Ordinance. While it is true that he does provide advice to those officials in the Building and Inspection Services Department who are charged with the administration of the ordinance, those officials are not necessarily bound by his advice and in fact may decide to disregard it. Consequently, I do not believe that Mr. Flewelling can be viewed as an official in the Building and Inspection Services Department, or even an agent of the Department, since his opinion carries no independent weight of its own. Because I do not believe that Mr. Flewelling's opinion is an "interpretation made by the Department" in and of itself, I do not believe that his opinion can provide an independent legal basis under the ordinance for an appeal by a "person affected." Therefore, the Board could deny the appeal for lack of jurisdiction because Mr. Flewelling's opinion is not an interpretation of the ordinance which can be appealed, but it is Mr. Flewelling's opinion which the appellants have cited as the basis for their appeal.

A second basis on which the Board could deny the appeal appears to be that the request was not filed in time. The appellants have specified that they are appealing Mr. Flewelling's opinion as expressed in his memo



CITY OF PORTLAND

DAVID A. LOURIE
CORPORATION COUNSEL

TO: Chairman and Members of the Board of Appeals
FROM: David A. Lourie, Corporation Counsel
DATE: November 10, 1981
RE: 191 Ashmont Street

* * *

I have received a copy of a letter from David S. Turesky, Esq., addressed to the Board of Appeals concerning 191 Ashmont Street. I have made my position with regard to the jurisdiction of the Board crystal clear at your workshop meeting of October 29, 1981, and I do not intend to reiterate my position in this letter. However, it is essential that the Board understand that the factual allegations in Mr. Turesky's letter are at best subject to some doubt, and that there are some practical legal problems with the proceeding in this matter.

Because of the potential for litigation and individual liability of members of the Board of Appeals, I would request an Executive Session with the Board of Appeals for the purpose of discussing the personal liability of the members of the Board if the Board chooses to proceed to hear the alleged appeal on the merits. I believe this is well within the Executive Session provisions of the Freedom of Access statute and is absolutely necessary prior to the Board proceeding toward any hearing on the merits of the alleged appeal.

David A. Lourie
David A. Lourie
Corporation Counsel

DAL/ljn

cc: Stephen T. Honey, City Manager
David S. Turesky, Esq.
Joseph E. Gray, Jr., Planning & Urban Development Director



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David A. Lourie
David A. Lourie
Corporation Counsel

DAL/ljn

cc: Stephen T. Honey, City Manager
David S. Turesky, Esq.
Joseph E. Gray, Jr., Planning & Urban Development Director



CITY OF PORTLAND

DAVID A. LOURIE
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David A. Lourie
David A. Lourie
Corporation Counsel

DAL/ljn

cc: Stephen T. Honey, City Manager
David S. Turesky, Esq.
Joseph E. Gray, Jr., Planning & Urban Development Director

LAW OFFICES
David S. Turesky
477 CONGRESS STREET
SUITE 716
PORTLAND, MAINE 04101

 (207) 772-7120

DAVID S. TURESKY

JOHN C. HOWARD

November 6, 1981

The Board of Appeals
c/o Office of the City Manager
Portland City Hall
389 Congress St.
Portland, Maine 04101

Dear Gentlemen and Ladies of The Board of Appeals:

As a result of our informal conference on Thursday, October 29, 1981, I wish to respond to the memorandum of Richard P. Flewelling, dated September 28, 1981, and the remarks of Portland's Corporation Counsel, David Lourie, delivered at and during the formal part of your Board's meeting. I shall now address myself to two issues raised by our discussion: 1) Does the Board have jurisdiction (or authority) to hear the Appeal of the Kearneys and other abutters? 2) Do the Kearneys have standing to petition this board for relief?

The law applicable to this situation can be found at Title 30, Section 2411 of our Maine statutes and at Section 602.24 A and B of Portland's Municipal Code. The State's broad enabling legislation grants the Board jurisdiction "to hear any Appeal...from any decision, order, rule, or failure to act of any officer, board, agency..." Within that broad ambit of jurisdiction and authority, the City of Portland has honed the following procedure: "An Appeal may be taken...by any person affected by a decision of the Building and Inspection Services Department." "The Board shall hear and decide Appeals from and review orders, decisions, determination, or interpretations or the failure to act of the Building and Inspection Services Department."

In the instant case, Mr. Richard Flewelling, acting on behalf of the City and, more specifically, on behalf of the Buildings and Inspection Services Department, rejected on August 18, 1981 the petition of my clients, who sought the City's help in enjoining a misuse of the property at 191 Ashmont Street, Portland, Maine. While Mr. Flewelling's memorandum may not be considered an order since he is not and was not acting as a judicial or quasi-judicial authority, he was clearly rendering an interpretation of both municipal and Federal law. We believe, quite

Continued Pg. 2

The Board of Appeals
Portland, Maine 04101

Page 2

November 6, 1981

simply, that the Board has jurisdiction to hear our Appeal from this interpretation.

Mr. Kearney asked Mr. Flewelling to send him a copy of his interpretation as soon as it became available. Unfortunately, Mr. Flewelling did not comply with this altogether reasonable request by a citizen of this City. As soon as Mr. Kearney did learn of Mr. Flewelling's adverse interpretation, he sought an Appeal by delivering a letter of Appeal, dated September 24, 1981, to Mr. Malcolm Ward along with a tendering of a check in the amount of \$25. Mr. Ward took the Appeal to Mr. Flewelling, and subsequently informed Mr. Kearney that he could not Appeal and that he, Mr. Ward, would not accept his check. In an effort to clear the confusion over the timeliness of our Appeal, I sent my letters of October 13, 1981 seeking a final denial by Mr. Gray, from which I would then appeal to the Board. Unfortunately, no further action has been taken by Mr. Gray on my corrective Motion.

In addition, Mr. Kearney and his neighbors sought a more favorable order, decision, determination, and/or interpretation from several City officials, including Mr. Flewelling's immediate supervisor, the City Manager, Mr. Malcolm Ward, and Mr. Joseph Gray. They refused to be of further assistance to my clients; in the words of both the State statutes and the municipal ordinance, they failed to act favorably upon my clients' petition.

It seems to be Mr. Lourie's contention that my clients cannot be heard by your Board because no permit was ever applied for and denied or approved. Mr. Lourie throughout his discussion used the term "permit" as some magical term which alone would and could set off your action. There is, however, no such word ever used either in the State statute or the municipal ordinance. There is, in fact, absolutely no support whatsoever in any of the literature for Mr. Lourie's position. So-called "affected persons" have access to your ear whenever they are aggrieved by an order, decision, determination, or interpretation of a local official, board or agency. Certainly, a decision by this Board reversing the opinion and interpretation of Mr. Flewelling would be of embarrassment to the City, and it is my clients' firm belief that this embarrassment and the resultant confusion animate such a bizarre interpretation of our laws.

With regard to the second question posed above, it would seem clear to me that the Kearneys and other neighbors of 191 Ashmont Street are "persons affected directly or indirectly" by the present zoning ordinance violations. They are for the

Continued Pg. 3

The Board of Appeals
Portland, Maine 04101

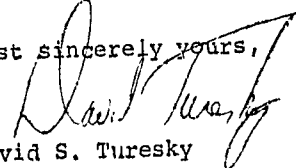
Page 3

November 6, 1981

most part abutters of the subject property; all of them live within 300 feet of the subject property; and all of them are on a daily basis affected in a patent and dramatic way by the present use.

Let me end this letter by making a brief reflection on legalese. While some words within City zoning ordinances are "terms of art," many words mean just what any normal or reasonable person would think they would mean--even if found in a complex City document. It is evident that the State of Maine and this City have given to you as a Board the authority and jurisdiction to hear our Appeal seeking a review of an order from the Buildings and Inspection Services Department and from an interpretation of the Assistant Corporation Counsel. Despite the wonderful Alice in Wonderland quality of Mr. Lourie's arguments, words even in a legal context are not impervious to our common sense and our good reason.

Most sincerely yours,



David S. Turesky

DST:mm

cc: Mr. and Mrs. Edward J. Kearney
Mr. David Lourie



APPLICATION FOR PERMIT
 DEPARTMENT OF BUILDING INSPECTIONS SERVICES
 ELECTRICAL INSTALLATIONS

Date Sept. 11, 1980, 19
 Receipt and Permit number A51689

To the **CHIEF ELECTRICAL INSPECTOR, Portland, Maine**
 The undersigned hereby applies for a permit to make electrical installations in accordance with the laws of
 Maine, the Portland Electrical Ordinance, the National Electrical Code and the following specifications:
 LOCATION OF WORK: 191 Ashmont St.
 OWNER'S NAME: Richard G. McDonough ADDRESS: _____ FEES _____

OUTLETS: Receptacles _____ Switches _____ Plugmold _____ ft. TOTAL _____

FIXTURES: (number of) Incandescent _____ Fluorescent _____ (not strip) TOTAL _____
 Strip Fluorescent _____ ft. _____

SERVICES: Overhead _____ Underground _____ Temporary _____ TOTAL amperes 100 3.00
.50

METERS: (number of) 1 _____

MOTORS: (number of) Fractional _____
 1 HP or over _____

RESIDENTIAL HEATING: Oil or Gas (number of units) _____
 Electric (number of rooms) _____

COMMERCIAL OR INDUSTRIAL HEATING: Oil or Gas (by a main boiler) _____
 Oil or Gas (by separate units) _____
 Electric Under 20 kws _____ Over 20 kws _____

APPLIANCES: (number of) Ranges _____ Water Heaters _____
 Cook Tops _____ Disposals _____
 Wall Ovens _____ Dishwashers _____
 Dryers _____ Compactors _____
 Fans _____ Others (denote) _____

MISCELLANEOUS: (number of) _____
 Transformers _____
 Air Conditioners Central Unit _____
 Separate Units (windows) _____
 Signs 20 sq. ft. and under _____
 Over 20 sq. ft. _____
 Swimming Pools Above Ground _____
 In Ground _____
 Fire/Burglar Alarms Residential _____
 Commercial _____
 Heavy Duty Outlets, 220 Volt (such as welders) 30 amps and under _____
 over 30 amps _____
 Circus, Fairs, etc. _____
 Alterations to wires _____
 Repairs after fire _____
 Emergency Lights, battery _____
 Emergency Generators _____

FOR ADDITIONAL WORK NOT ON ORIGINAL PERMIT _____
 FOR REMOVAL OF A "STOP ORDER" (304-16.b) _____

INSTALLATION FEE DUE: 3.50
 DOUBLE FEE DUE: _____
 TOTAL AMOUNT DUE: 3.50

INSPECTION: Will be ready on Fri- afternoon; or Will Call _____
 CONTRACTOR'S NAME: Roger McCarthy
 ADDRESS: 67 Caleb St.
 TEL.: 773-2716 SIGNATURE OF CONTRACTOR: Roger McCarthy
02948
 MASTER LICENSE NO.: _____
 LIMITED LICENSE NO.: _____

INSPECTOR'S COPY -- WHITE
 OFFICE COPY -- CANARY
 CONTRACTOR'S COPY -- GREEN

Full cut #920R - Half cut #920BR - Third cut #9203R - Fifth cut #9205R



191-195 KASHMONT STREET

CITY OF PORTLAND, MAINE
ZONING BOARD OF APPEALS



GAIL D. ZAYAS
Chairperson

MICHAEL E. WESTORT
Secretary

JACQUELINE COHEN
TIMOTHY E. FLAHERTY
EUGENE S. MARTIN
THOMAS J. MURPHY
MERRILL S. BELTZER

191 Ashmont St.

February 25, 1982

Mr. David Turesky, Attorney
477 Congress Street
Portland, Maine 04101

Dear Mr. Turesky:

The Board of Appeals has been advised by the Corporation Counsel that they do not have the authority to hear the interpretation appeal concerning 191 Ashmont Street.

Therefore, the Board has asked me to notify you that it will not hear the appeal which was requested. A refund of your remittance will be sent to you under separate cover. This action was so voted by the Board on Thursday, February 25, 1982.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph E. Gray, Jr.", written over the typed name.

Joseph E. Gray, Jr., Director
Planning and Urban Development

JEG/wt

cc: Chairman and Members of the Board of Appeals

CITY OF PORTLAND, MAINE
GOV. BOARD OF APPEALS



191 Ashmont St.

GAIL D. ZAYAC
Chairperson
MICHAEL E. WESTORT
Secretary

JACQUELINE COHEN
TIMOTHY E. FLAHERTY
EUGENE S. MARTIN
THOMAS J. MURPHY
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Mr. David Turesky, Attorney
477 Congress Street
Portland, Maine 04101

Dear Mr. Turesky:

February 25, 1982

The Board of Appeals has been advised by the Corporation Counsel that they do not have the authority to hear the interpretation appeal concerning 191 Ashmont Street. Therefore, the Board has asked me to notify you that it will not hear the appeal which was requested. A refund of your remittance will be sent to you under separate cover. This action was so voted by the Board on Thursday, February 24, 1982.

JEG/wt

Sincerely

Joseph E. Gray, Jr., Director
Planning and Urban Development

cc: Chairman and Members of the Board of Appeals

387 CONGRESS STREET • PORTLAND, MAINE 04101 • TELEPHONE (207) 775-5451

City of Portland, Maine - Building or Use Permit Application 389 Congress Street, 04101, Tel: (207) 874-8703, FAX: 874-8716

Location of Construction: 191 Ashmont St		Owner: Diggs, Jo		Phone:		Permit No: 961064	
Owner Address:		Leasee/Buyer's Name:		Phone:		Business Name:	
Contractor Name: G.A. Monsell & Co.		Address: 23 Glenwood Ave Ptld, ME 04103		Phone: 774-2125		Permit Issued: OCT 24 1996	
Past Use: 1-fam		Proposed Use: Same		COST OF WORK: \$ 15,000.00		PERMIT FEE: \$ 85.00	
Proposed Project Description: Rebuild/extend roof		FIRE DEPT. <input type="checkbox"/> Approved <input type="checkbox"/> Denied		INSPECTION: Use Group: <i>R3</i> Type: <i>50</i> <i>300896</i>		Zone: <i>R3</i> CBL: 123-I-002	
		Signature:		Signature:		Zoning Approvals: <i>to remain</i> <i>1</i> <i>Hamilton</i>	
		PEDESTRIAN ACTIVITIES DISTRICT (P.A.D.)		Action: <input type="checkbox"/> Approved <input type="checkbox"/> Approved with Conditions <input type="checkbox"/> Denied		Special Zone or Reviews: <input type="checkbox"/> Shoreland <i>dl</i> <i>3</i> <input type="checkbox"/> Wetland <i>10/23/96</i> <input type="checkbox"/> Flood Zone <input type="checkbox"/> Subdivision <input type="checkbox"/> Site Plan <input type="checkbox"/> major <input type="checkbox"/> minor <input type="checkbox"/> mm <input type="checkbox"/>	
Permit Taken By: Mary Groisk		Date Applied For: 18 October 1996		Signature:		Date:	

- This permit application doesn't preclude the Applicant(s) from meeting applicable State and Federal rules.
- Building permits do not include plumbing, septic or electrical work.
- Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..

P/U for debris

CERTIFICATION

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provisions of the code(s) applicable to such permit

Carey Monsell
SIGNATURE OF APPLICANT Carey Monsell ADDRESS: DATE: 18 October 1996 PHONE:

RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE PHONE:
White-Permit Desk Green-Assessor's Canary-D.P.W. Pink-Public File Ivory Card-Inspector

Zoning Appeal

- Variance
- Miscellaneous
- Conditional Use
- Interpretation
- Approved
- Denied

- Historic Preservation**
- Not in District or Landmark
 - Does Not Require Review
 - Requires Review

Action:

- Approved
- Approved with Conditions
- Denied

Date: *23/10/96*

CEO DISTRICT *6*

m. Carey

City of Portland, Maine - Building or Use Permit Application, 389 Congress Street, 04101, Tel: (207) 874-8703, FAX: 874-8716

Permit No: **961064**

Location of Construction: 191 Ashmont St	Owner: Diggs, Jo	Phone:
Owner Address:	Leasee/Buyer's Name:	Phone:
Contractor Name: C.A. Monnell & Co.	Address: 23 Glenwood Ave Fald, ME 04103	Phone: 774-2125
Past Use: I-1a	Proposed Use: Same	COST OF WORK: \$ 13,000.00
		PERMIT FEE: \$ 85.00
		FIRE DEPT. <input type="checkbox"/> Approved <input type="checkbox"/> Denied
		INSPECTION: Use Group: <input checked="" type="checkbox"/> Type: <input checked="" type="checkbox"/>
		Signature: _____
Proposed Project Description: Rebuild/extend roof		Signature: _____

PERMIT ISSUED
Permit issued:
OCT 24 1996
CITY OF PORTLAND

Permit Taken By: **Mary Greisk** Date Applied For: **18 October 1996**

- This permit application doesn't preclude the Applicant(s) from meeting applicable State and Federal rules.
- Building permits do not include plumbing, septic or electrical work.
- Building permits are void if work is not started within six (6) months of the date of issuance. False information may invalidate a building permit and stop all work..

P/U for debris

Zone: **CBL123-1-002**

Zoning Approval: _____

Special Zone or Reviews:

- Shoreland
- Wetland
- Flood Zone
- Subdivision
- Site Plan major minor mm

Zoning Appeal:

- Variance
- Miscellaneous
- Conditional Use
- Interpretation
- Approved
- Denied

Historic Preservation

- Not in District or Landmark
- Does Not Require Review
- Requires Review

Action:

- Approved
- Approved with Conditions
- Denied

Date: _____

CERTIFICATION

I hereby certify that I am the owner of record of the named property, or that the proposed work is authorized by the owner of record and that I have been authorized by the owner to make this application as his authorized agent and I agree to conform to all applicable laws of this jurisdiction. In addition, if a permit for work described in the application issued, I certify that the code official's authorized representative shall have the authority to enter all areas covered by such permit at any reasonable hour to enforce the provisions of the code(s) applicable to such permit

Signature of Applicant: *Cary Monnell* DATE: **18 October 1996** PHONE: _____

RESPONSIBLE PERSON IN CHARGE OF WORK, TITLE: _____ PHONE: _____

White-Permit Desk Green-Assessor's Canary-D.P.W. Pink-Public File Ivory Card-Inspector

CEO DISTRICT

COMMENTS

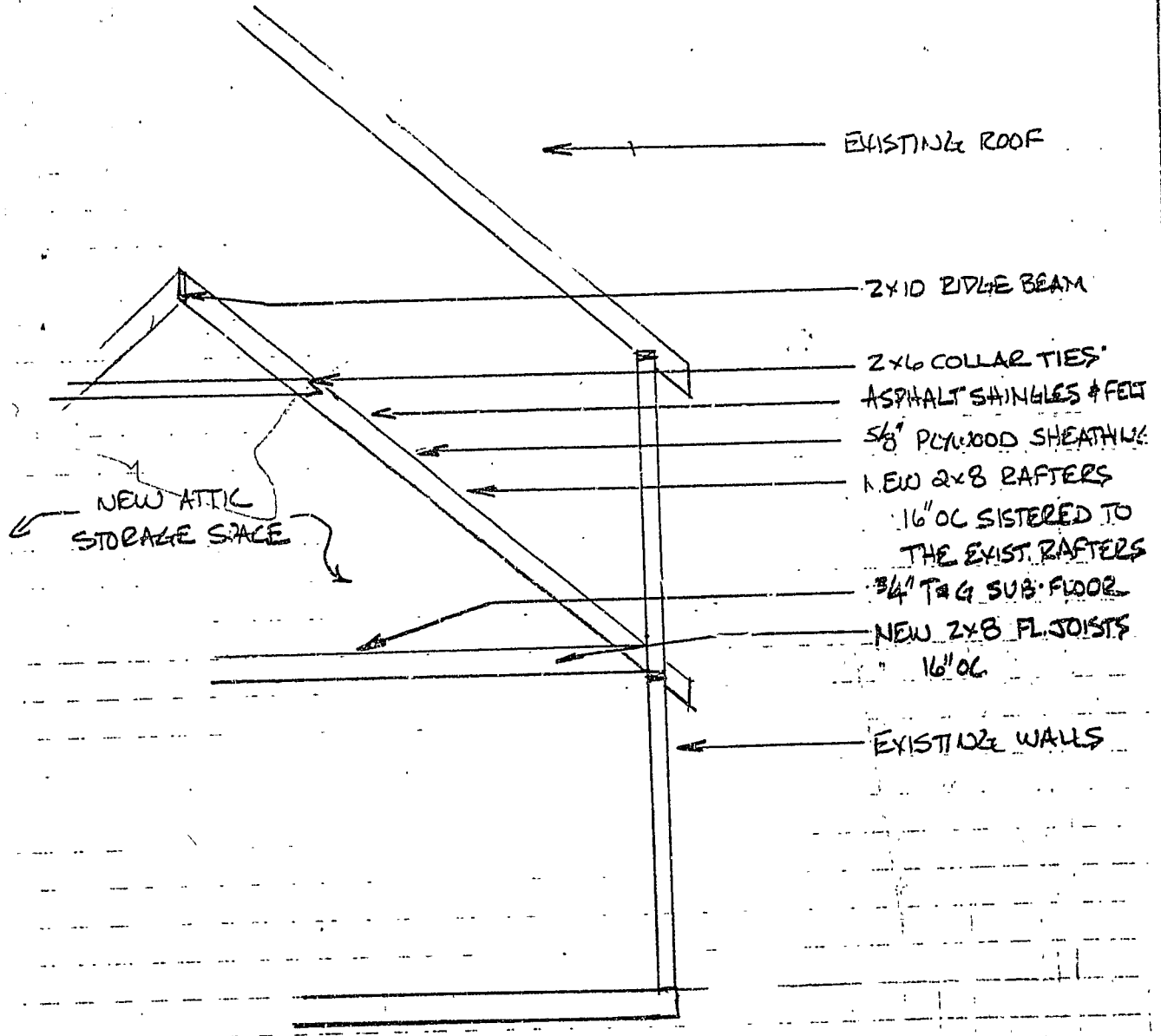
11-31-96 - No way yet
1-27-97 - Work is all completed. Haven't called for
a framing inspector

Type	Inspection Record	Date
Foundation:	_____	_____
Framing:	_____	_____
Plumbing:	_____	_____
Final:	_____	_____
Other:	_____	_____

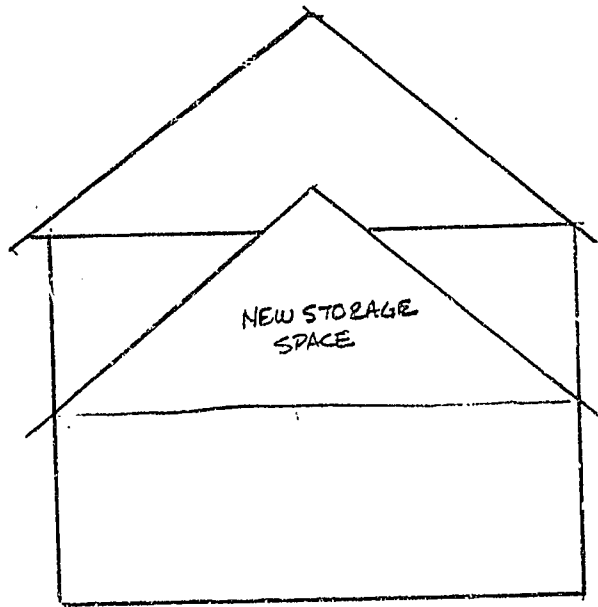
DIGGS - 191 ASHMONT ST.

PROPOSED NEW ATTIC STORAGE SPACE

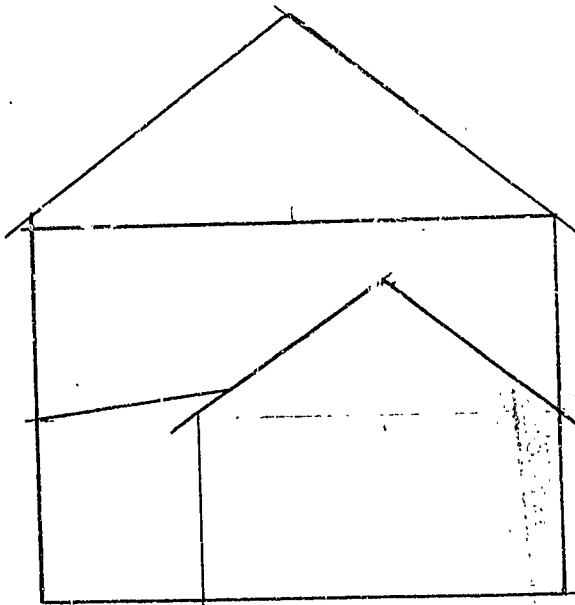
- 1). REMOVE EXISTING SHED ROOF & ADJOINING GABLE ROOF
- 2). FRAME NEW GABLE ROOF FROM OUTSIDE WALL TO OUTSIDE WALL
- 3). PROVIDE DOOR TO NEW STORAGE SPACE



SCALE: 1/4" = 1'-0"



PROPOSED
STRUCTURE



EXISTING
STRUCTURE

SCALE:
 $\frac{1}{8}'' = 1'-0''$