

ZBA Minutes April 16, 2008 – Suslowicz/Lyons, Fitzgerald

Members Present: Robert Cadle, Chase Duffy, Cynthia Maxwell, Alison Manugian, Harris McWade

Suslowicz/Lyons

Chairman Cadle convened the hearing by reading the Legal Notice.

Chairman Cadle noted that he knows both abutters, the Andersons and the Manns. Atty. Lyons said that the questions are ones of law and not of the actual property, so he has no objection to Chairman Cadle sitting.

Mrs. Duffy noted that she also knows abutters and is glad that there is no objection because it is a legal question.

Atty. Lyons said that he has plans that some board members are familiar with and will be using these as a reference for the legal questions, noting that the lot is on the Duck Pond side of the road. He said that the Mann's house is a little further down the street. He stated that this lot was created back in the 1920's or 30's and thus predates zoning; the previous BI said the owner needed a variance to knock down the existing house and build a new structure; that the lot is non-conforming but the house itself meets zoning requirements for setback, yard building coverage and height; and that the variance granted by the ZBA in February 2006 was appealed by the abutters to the Land Court and is still pending. Atty. Lyons said that he looked at the bylaw again and wonders if a variance is actually necessary, citing the Rourke case of January 2007. He noted that the court says a grandfathered lot for a dwelling is a grandfathered lot, but when he went to the Building Inspector, he was told that a variance was required. He also noted that the since the time of filing of the original application, the SJC came out with another case from Norwell in which the reliance was solely on State law whereby there was a 34,000 square foot lot and an 1800 square foot house was proposed. He said that in this case the ZBA needed to make a finding that the new structure was not more detrimental to the neighborhood. He then referenced Section 218-6.E.1 and 218-6.E.2 (alteration of a conforming structure on a non-conforming lot) which he thinks applies.

Mrs. Duffy asked how to judge when the building permit is asked for, ie. now or when the house is razed.

Atty. Lyons said that it doesn't matter because the lot predates zoning.

Chairman Cadle asked about the 150-foot circle.

Atty. Lyons said that it is approximately a 140-foot circle, drawn by an engineer that didn't understand how to determine the circle. He said that the circle has to do with the lot and the dwelling has to be within the circle. He noted that the existing house could be rebuilt as it is, which is 30x18 and that the new dimensions are 36x26.

Discussion ensued regarding whether the footprint can increase or whether just the dwelling height could increase.

Chairman Cadle felt that the court ruled that even in the same footprint, a height increase increases the non-conformity of the lot, and thus, Section 218-6E doesn't apply.

Atty. Lyons said that the court determined that it couldn't compel the removal of the house because it's on a pre-existing non-conforming lot. He said that if there is no bylaw, Bjorklund said that there needed to be a ruling from the ZBA. Atty. Lyons is arguing that because Groton has bylaws, the ZBA does not need to make a ruling. He said that he has a case that was a split decision and a ZBA ruling that a variance was needed won, but that there is no precedent. Atty. Lyons noted that the Bransford ruling became law of the State and noted that an alteration is okay if the alteration is to a conforming structure. He felt that if one takes the convoluted SJC ruling, it is okay to alter the structure. He said that he thinks that the Bjorklund case outlines the way to act, because Groton is more liberal in dealing with the law.

Mrs. Duffy said that she feels that the PB has given the ZBA the discretion to determine these cases and noted that the Board has been fairly liberal.

Chairman Cadle agreed, noting that Atty. Lyon's client has a variance.

Atty. Lyons agreed but noted that an abutter is appealing. He said that the house meets all zoning criteria according to the Groton Bylaw.

Chairman Cadle asked for a clarification, whether in Groton a distinction is made between a non-conforming lot and a conforming house.

Atty. Lyons said yes, but because the State doesn't separate, the two are grouped together.

Atty. Lyons said that the Building Inspector also noted non-use. Atty. Lyons noted that the owner was old and dying and the house wasn't habitable, the estate was in probate and thus they couldn't act on the variances.

Chairman Cadle asked for clarification regarding how Section B of 218-6 comes into play.

Atty. Lyons said that the Building Inspector should have known this could be done by right and thus that is how Section B comes into play. He said that it is an open question as to why the house not used for two years, ie illness, moving abroad, etc, as to whether a house loses its grandfathered status.

Chairman Cadle said that one of the things the previous Building Inspector would look at to determine use is electric bills.

Atty. Lyons said that it is not a non-conforming use because a house in a residential neighborhood does not stop being a house because it was not used for two years.

Chairman Cadle asked whether Atty. Lyons had any argument regarding use or non-use for a dwelling.

Atty. Lyons said that there is no clear law and thus he is asking the ZBA to make a determination.

Mrs. Duffy asked who Atty. Lyons was representing. Atty. Lyons said that it is the heirs of the estate of Barney Suslowicz and not a builder.

Atty. Anctil asked for clarification regarding what Atty. Lyons is asking for from the Board and whether he will then apply for a Building Permit.

Atty. Lyons said that the only question before the ZBA is whether a variance is not needed and thus a building permit could be applied for. He noted that he understands that the variance granted is under appeal.

Mrs. Duffy noted that if the house doubles in size there is more water and septic use.

Atty. Lyons noted that this proposed dwelling is smaller than the surrounding houses and limited to two bedrooms with a good septic system.

Chairman Cadle asked about the land court standing.

Atty. Lyons said that they are questioning the Andersons standing and redirecting.

Chairman Cadle asked why they are here now before the ZBA, particularly with a court case pending.

Atty. Lyons said that the court would care how the ZBA rules and figures that either way the Board acts, an appeal will be mounted and will be before the court. He then asked what would happen to the property if the court overturns the ZBA.

Chairman Cadle said that a dwelling could be built in the exact footprint so the lot would not be a total loss. Atty. Anctil said that if they built in the same footprint his client would not object.

Discussion ensued regarding when Atty. Lyons became involved in the case and when the discussion that no variance was required would have begun.

Atty. Lyons said that his client doesn't want a 540-foot cottage and wants to expand.

Atty. Cadle said that they still wouldn't have the required 150-foot circle under 218-22G.

Atty. Lyons noted that he knows that he does not have the 150-foot circle and that the lot is not conforming.

Chairman Cadle said that he understands the client's point of view that the lot may be made unbuildable or less buildable and potentially worth less, but on the other hand the Town of Groton has a policy that once a non-conforming structure/lot is taken down, a variance is required.

Atty. Lyons suggested that it is dangerous to leave part of the structure standing. He said that if the Board agrees with his interpretation of the bylaw then the structure could be taken down. He said that if the legislature speaks, the Board needs to listen.

Mrs. Duffy said that it is not with this bylaw.

Atty. Lyons said that under 218-6.E, it is.

Mrs. Manugian asked how the schedule of intensity fits in with 218-6.E.1.

Atty. Lyons said that all parts of the bylaw do not have to be met, but if a dwelling meets any one of the requirements, a variance is not required.

Mrs. Manugian said that Section 2 clarifies how the Board could make a decision regarding whether there is an increase in non-conformity. She said that she sees that lot size makes a difference and is tied in with the overall non-conformity of the lot.

Atty. Anctil, representing the Andersons, wrote an oppositional letter and agreed that Section 6 is confusing. He said that he wants to make a brief transgression from paper to the practical implication, noting that he lives off of Whiley Road and received approvals to build his house in a process that took 19 months and five meetings with the ZBA. He said that he ended up with a much better project because of the meetings with all of the boards. He then described some problematic situations in the Lake area that could be lessened by the construction of sewer in the area. He said that this proposal tonight says that a six bedroom home with six feet of setback, along with sewer could be constructed by right. He said that with sewer, no feedback would be necessary from the Con. Comm. or the BOH and that a "McMansion" could be constructed. He said that he feels he has addressed the issues brought up by Atty. Lyons and urges the ZBA to retain control of this process. He said that under Section 218-6B, the dwelling has not been used for more than two years and has not been re-established. He noted that his clients wouldn't object to a seasonal use only, same size structure, but

said that they lose any rights here because the existing dwelling was out of use for more than two years. He said that the courts have ruled that they had time and if the dwelling was not rebuilt or used during that time, then the grandfather status is lost. He stressed that a dwelling cannot be increased by 400% and not have the requirement to come before the ZBA. He said that it does not matter whether it is a 400% or 4000% increase.

Chairman Cadle asked how they got to the 400% increase figure.

Atty. Anctil said that the project is going down and creating a walk out basement, and up to create a full second story, along with a dormer. He said that from the Lake the structure will have three stories and the rear of the house is hidden by a steep driveway. He said that under 218-6E there is a proposal to tear down the structure and increase the footprint, and he does not see how this is an alteration by right.

Chairman Cadle asked about the waiver argument in the Rourke case and they justify bringing up this two years after the fact.

Anctil doesn't think anything radical has happened over the last two years to make this different and it is not under the ZBA purview. He said that this is an actively involved case and thinks there will be new issues and that it should be dismissed on a waiver basis.

Chairman Cadle asked whether Atty. Lyons' clients were represented by an attorney at the initial ZBA hearing.

Atty. Anctil said that they were not.

Mr. Anderson said that he understands that the Board needs to determine whether a variance is required but feels that there were some substantive misrepresentations made. He noted that the drawing submitted by the applicant is misleading and makes the lot look much larger than it is. He said that 83 truckloads of fill will be required to level up the land and even then only a very small part of the lot is okay to locate a house on. He said that they are planning on doubling the size of the house, adding stories and taking up 1/3rd of lot. He questioned how a permit could be obtained by right to build if they have a BOH variance when a condition of the BOH variance is subject to ZBA approval. (Mrs. Anderson noted that this is the

same for the Con. Comm.) Mr. Anderson noted that there has been six years of non-use with three and one-half of those years before the first application.

Atty. Lyons said that they are only talking about ZBA setbacks, noting that other Boards don't apply here.

Chairman Cadle noted that the map submitted with the application is very misleading.

Atty. Lyons noted that is project is much smaller than the abutting house and that the Anderson's house is much closer to the lake.

Chairman Cadle noted that he was upset with the submitted map. Atty. Lyons removed the map and showed a plan depicting the whole lot. Chairman Cadle said that he wanted to see this plan earlier and gave an example of a typical Lost Lake lot.

Discussion ensued regarding Atty. Lyon's by-right argument.

The hearing was continued to May 14th at 7:30 pm, the motion being seconded and passed unanimously.

Fitzgerald

Chairman Cadle convened the hearing by reading the Legal Notice.

Andrew Ungerson, representative of the applicant, noted that he is a friend of the family and in the construction trade. He said that the Fitzgeralds want variances from side and rear setback, noting that the house was destroyed in early December by a gas leak. He said that the family doesn't want to move and the neighborhood wants them to stay. He said that the destroyed dwelling was a 1000 square ft home built in the 1890's on a stone foundation. He noted that they want to rebuild in the same footprint except for an expansion to the rear, with three bedrooms instead of two, including a master bedroom and a family room. He said that they are also asking for a variance to relocate fully onto their property, a shed that is partially on the neighbor's property. He stressed that this is not a monstrous colonial but merely a rebuild with a small expansion to allow for a family and to fit in with the neighborhood.

Chairman Cadle asked whether the site had sewer. Mr. Ungerson said that it did have sewer.

Chairman Cadle asked about the degree of increase.

Mr. Ungerson said the new house would increase by 1700 square feet to be a total of 2700 square feet, not including the basement. He said that he needs to check out the water table to determine how damp a basement would be, noting that the new footprint will 1390 square feet, versus the old of 651 sq. ft.

Mrs. Manugian asked about lot size. Mr. Fitzgerald said it is just under 7000 sq. ft.

Discussion ensued regarding the exact specs of old versus new. The left (easterly) sideline setback of the new structure will be ten feet, the right (westerly) sideline setback will be 13 feet at its closest point; the relocated shed will have side and rear setbacks of 10 feet and 3 feet, respectively. Applicant also requested that the decision note that the preexisting front setback is eight feet.

Mr. Ungerson noted that there were many different additions over the years, done in a piecemeal fashion. He said that the applicant wants to square off and even out the structure, which is why he is asking for variances.

Mrs. Manugian asked about the location of neighboring houses.

Mr. Ungerson noted that neighboring houses are closer to the lot lines.

Discussion ensued regarding abutting properties and the similarities.

Chairman Cadle asked why he didn't go straight back rather than jogging out.

Mr. Fitzgerald said that he played around with the plan and to get everything to fit, including bathrooms and bedrooms, he needed a slight jog, noting that the sideline setback would be closer to 11 feet than ten. He said that also for aesthetics, he wants to look like there is an attached barn that shows a little from the road.

Chairman Cadle asked for audience comments and there were none.

The Board moved to grant a variance from side and rear setback with the understanding that the front setback will remain at eight feet, the shed will be moved totally onto the applicant's property, and as constructed on the submitted plan. The motion was seconded and passed unanimously.

The meeting adjourned at 9:45 pm.