

**ZBA Minutes May 14, 2008** – Lyons/Susclowicz

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

Chairman Cadle reconvened the hearing.

Atty. Lyons, agent for applicant, noted that after last hearing both he and Atty. Anctil had submitted letters. He said that at the time he met with the BI, the Rourke case was a new court case. He said that three days before he wrote the letter to the BI, the Bjorklund case was decided and he said that he agrees with Atty. Anctil that this is more applicable than the Rourke case. He said that he took the by-law and did an analysis under Section 218-6, noting that he feels this can apply to any proposed change or reconstruction. He said that Sections 6.E.1, E.2 or E.2.b could apply but still feels that they are entitled by-right to a building permit if the proposal doesn't increase the non-conformity. He said that in his opinion the lot meets all zoning criteria except lot size and thus doesn't need a variance because it meets zoning criteria. He then discussed the letter 5/8/08, noting that the court held that an owner in Norwell could reconstruct and didn't have to remove the existing house. He said that it is unclear whether the court was only dealing with Norwell's zoning or state regulations. He said that it would require approval under the statute but noted that Groton has bylaws that are more liberal than those of c. 40A. He said that he thinks this is awkward because the BI is sending people to the ZBA for variances when a building permit should be issued by right.

Mrs. Duffy said that she felt that this case doesn't deal with replacement but just with renovation.

Atty. Lyons said that Paragraph 2 deals with replacement, noting that there is a pattern in Groton to require a variance for something that should be given by right.

Chairman Cadle said that one thing that runs through Atty. Lyon's argument is that the existing structure meets setback, building coverage and height requirements, which is nice, but the sections of the bylaw aren't limited to those only. He said that Atty. Lyons is relying only on those three and the language of the by-law isn't limit to that. He said that there are still problems related to lot size, frontage and the 150-foot upland circle.

Atty. Lyons asked for additional clarification, noting that he thinks the Chairman means that if there is a conforming house on a conforming lot, then a variance would not be required. He said that he doesn't think that is why the bylaw is there, noting that in the Bjorklund case they are saying a structure on a non-conforming lot is a non-conforming structure, and here there are things that only apply to the structure and not the lot.

Chairman Cadle said that the structure doesn't comply with all zoning requirements.

Atty. Lyons said that that is the lot and not the house, noting that the PB had a discussion about this about a month ago and determined that this goes to the shape of the lot and not to the structure.

Mrs. Duffy said that structure is on lot and thus tied in with the non-conformity.

Chairman Cadle noted that in going back to the Bjorklund case it says that the structure is tied into the lot and historically the Town has interpreted this section to be in sync with Section 6 of Chapter 40A.

Atty. Lyons said that Section 6 of 40A talks about things that can be done by right.

Chairman Cadle said that this is the part of the second paragraph of Section 6 that is a mess.

Atty. Lyons said that there is a provision for E.1 that doesn't really apply to a residence.

Chairman Cadle said that if the structure does not increase the non-conforming nature then they would need a special permit from the ZBA.

Atty. Lyons said that although they are separate, there is some interplay between them. He noted that Section 3 stands independently of 1 and 2 and that 2.b and 2.d really are what applies to reconstruction.

Chairman Cadle said that if it fits there then they have satisfied Section 1.

Atty. Anctil said that he tried to make a difficult set of circumstances into the simplest form possible, noting that they are just here on the by right plan. He then went over a chart that he submitted to the Board. He noted that the property wasn't used for more than two years and although the previous owner was ill, the statute doesn't offer any protection from that. He said that the proposed dwelling doesn't even fit into a 100 foot circle and if the dwelling were put in the circle, then it wouldn't comply with setback. He said that the usable dry land to build a home on is 3400 square feet, noting that the plans don't show the actual building envelope. He said that there are a number of things that make the dwelling and lot non-conforming and thus no by right permit is acceptable. He then explained on the second to last page what could be non-conforming about a lot and allow a by right building permit, although because the dwelling was abandoned for more than two years, none of this analysis applies.

Chairman Cadle said that he feels that it is undisputed that the property was unused for more than two years.

Atty. Lyons disagreed, noting that the house couldn't be used because of Title V problems and the estate was doing everything to keep permits going.

Mr. Anderson, abutter, said that this is untrue and that there were three and one-half years of non-use before the septic plans were presented and two and one-half years before the first perk tests were done. He noted that the place was never used in a winter.

Atty. Lyons noted that in the Galloway vs. Auburn case, the house was taken down and 21 years passed before anything happened and the court determined that 21 years was too long to wait.

Chairman Cadle said that this talks about abandonment vs. non-use and talks about intent.

Atty. Lyons noted that the courts are messy about this and mostly refers to gravel excavation or the non-use of a wharf in Provincetown. He said that the higher court doesn't speak to residential non-use.

Mrs. Duffy suggested looking up the Vlahos non-use case, of the Elm Street Garage.

Atty. Anctil said that Bob Collins handled a case in the lake area for a house that burnt down and the Board determined that the place wasn't used for more than two years and the permit was denied.

Chairman Cadle said that they have many issues tonight.

Atty. Lyons said that there are two things: one- is there non-use and two- are we entitled to a building permit under 218-6E. He said that if there is non-use, then they would need a variance, which they have and is under appeal.

Chairman Cadle said that the only thing before us is whether the BI is correct in his decision that Atty. Lyon's client is not entitled to a by-right building permit.

Atty. Lyons said that the Board needs to look at non-use and the Section E's in question.

Chairman Cadle noted that the original plan is significantly different than what is up on easel and asked Atty. Anctil who did the plan.

Atty. Anctil said that his firm did, using the original engineering plans submitted with the variance application.

Atty. Lyons agreed that the lot doesn't meet the 150-foot circle and argued that it doesn't matter.

Atty. Scott Bowen said that it does matter because the circle is too small and the proposed dwelling sits outside of the circle. He said that if the house fit into a too small circle, might be okay, but it doesn't fit even fit into a smaller circle. He said that the wetlands protection bylaw means that the dwelling has to be 50 feet from the pond, on two sides of the lot. He noted that the big thick black line on the plan is the 50 foot setback from the pond.

Mrs. Duffy noted that a lot of excavation needs to be done.

Mr. Anderson said that 53 truck loads of dirt would be needed just for the site work for the driveway and site leveling.

Chairman Cadle asked for clarification regarding the difference in the plans.

Atty. Lyons said that Atty. Anctil's plan doesn't show the entire lot, noting that he disagreed with Atty. Anctil's plan that the house has to be 50 feet from the actual wetland. He said that the circle could go up to the very edge of the wetland, if it were an actual wetland, but the Conservation Commission determined that that part of the lot is not an actual wetland.

Mr. Anderson said that this was not true and that it is an actual wetland and has been delineated by the Con. Com.

Mrs. Duffy noted that she didn't like the original plan because there was too much house and too little land.

Atty. Lyons said that he wants to stick to the question at hand.

Ms. McWade said that she is confused about the non-use issue and asked about obtaining electric bills.

Atty. Lyons said that the house is in use tonight with this hearing process. He said that there is no non-use because they are going through the process to do what is necessary to meet the sanitation code to make it habitable.

Ms. McWade said that she feels that it should be clear when the house was actually used and when the process was started, and if there was no use for more than two years than nothing else applies.

Atty. Lyons asked the Board to consider that it is their own house and they are old and sent to a nursing home. He said that one's family could not do anything with the house and if the owner never returns and dies, then lawyers advise that nothing should be touched because of probate. He said that only then can the family file for a permit to do something with the property, but it can't be lived in until it is upgraded. He noted that the original owner could always come home but when the property changes hands, Title V is triggered.

Ms. McWade asked what the date between when the owner died and when permits started be applied for was.

Mr. Anderson said that the sister had power of attorney and could have done something prior to the owner's death in 2005. He said that there was no probate and she had time to start and didn't for three and one-half years.

Atty. Lyons noted that the permitting process is ongoing and no one could use the house until the permitting process is over.

Ms. McWade said that she feels that there is non-use and thus the Board's decision should be clear and simple- to reject the application on grounds of non-use.

Mrs. Manugian said that she liked the flow chart and by going to the end, she agrees that this not a by-right situation. She that if the lot doesn't comply then the structure doesn't comply and non-use doesn't need to be resolved.

Mrs. Duffy said that the proposed alteration doesn't meet all sections of the bylaw. She also noted that they have a variance.

Atty. Lyons said that he does not know if the variance will survive the court and asked whether the BI is exceeding his authority in requiring a variance.

Mrs. Duffy said that she felt that Atty. Lyons is doubling back on the law by saying that the BI shouldn't require variance, noting that they waited too long to bring this up. She said that she wants it to be resolved by the courts.

Chairman Cadle said that this is a question of law and he thinks a judge would put the ZBA decision on the bottom of the pile and only use it to help with the interpretation of our local bylaw.

Mrs. Duffy said that she feels they are opening up something that hasn't run its course.

Atty. Lyons said that he couldn't wait and that this needs to be with the original court case when a decision is made, and then come back to the ZBA.

Atty. Anctil said that nothing has changed in the two years since the variance was granted and the estate of Suslowicz came with Atty. Lyons to say that no variance is needed. He said that he thinks they need to let the court figure it out, noting that he wants a written decision, no matter what the outcome. He also noted his concern that if the Town adopts Atty. Lyons' assertions, then anything could be built on the lake, including an

8000 square foot, three story building for a total of 24000 sq feet. He said that that is clearly not the intent of the bylaw.

Mrs. Duffy said that she is willing to have the court take a look and decide.

Atty. Lyons said that Atty. Anctil raised timeliness issues that should be dealt with in court but the ZBA decision should only deal with the questions at hand. Atty. Anctil said that in his opinion there is nothing before the Board because no building permit was asked for and thus there are no grounds for an appeal.

Chairman Cadle said that Mark Bobrowski disagrees with that.

Anctil said that there is a recent mass land court decision vs. Lexington that a letter without formal application isn't sufficient.

Mr. Anderson noted that seasonal year round use should come into play. He said that this is a conversion to year round use, a permit hasn't been obtained and the BOH permit was conditioned that ZBA approval was required. He said that the BOH permit would not be valid if ZBA approval was not obtained.

Mr. Lyons said that both the BOH and Con. Comm. decisions require that the applicant go before the ZBA but he felt that an applicant can't be forced to come before the Board. He also said that he found a street listing that shows Mr. Suslowicz as using the house as a residence, as of 1989.

Mr. Anderson said that the listing also noted that there was no insulation in the house and that it has never been used as year round residence, at least for 20 years prior.

The Board moved to uphold the decision of the BI that a variance is required before a building permit is issued. The motion was seconded.

The Board moved to close the public hearing; it was seconded and passed unanimously.

Mrs. Duffy said that she feels that in removing a tiny house on a tiny lot and replacing it with a much bigger house requiring much site work, that the BI was correct in sending them to the ZBA for a variance.

Chairman Cadle said that he doesn't want to keep the issue narrow i.e. that a variance is a necessary prerequisite, because there may be an issue concerning the viability of a special permit but this was not before the BI.

Mrs. Manugian said that she doesn't feel that that limits the Board down the line.

The Board moved to withdraw the first motion and start again. That motion was seconded and passed unanimously.

Chairman Cadle said that he feels that sometimes a special permit would be required.

The Board moved to uphold the BI that the proposed reconstruction cannot be built by right under Section 218-6. The motion was seconded and passed unanimously.

Chairman Cadle agreed that this case is controlled by the Bjorklund case and that the cottage and lot have to be treated together and the proposed structure would be an increase in the non-conformity because it doesn't meet all the applicable bylaws.

Mrs. Duffy said that it doesn't meet the intent of the by-law.

Chairman Cadle said that he doesn't think the Board should deal with the non-use issue now.

Atty. Lyons said that he thinks the Board should deal with it because it will be a ZBA issue later after the court case is decided.

The Board as a whole felt that not enough information was available to deal with that issue tonight.

Chairman Cadle said that he feels that the non-use issue might come before the ZBA later, but not tonight. He also noted that the letter to the BI didn't ask for a ruling on the non-use issue.



Atty. Lyons said that he just asked for a ruling of the by right issue, which the Building Inspector said no to and didn't say why. He felt that the non-use could trip the by right issue.

Chairman Cadle said that the Board will see if it comes back.

Atty. Lyons said that he wants to see the draft decision.

The Board as a whole said that they were not comfortable with that.

Atty. Lyons said that if the Board has good clean examples for Sections E(2)(b) and (d) that would apply, this could bolster the Board's argument.

The meeting adjourned at 9:45 pm.