

**ZBA Minutes Meeting of April 1, 2009** – Lyons/Suslowicz

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

Chairman Cadle convened the Lyons/Suslowicz hearing by reading the Legal Notice.

Atty. Lyons was present as agent for the estate of Suslowicz. He presented a plan of the property that was submitted both to the Cons. Comm. and BOH to issue the order of conditions for wetlands and the septic system. He said that the existing house is on Duck Pond, noting that the new, reconstructed house is shown in a similar area but not in the exact footprint of the existing dwelling. He noted that he was here last year based on an advisory opinion from the Building Inspector and the judge determined that a formal building permit needed to be applied for. He said that this was applied for, the request being for a 1450 square foot cape-style house, slightly larger than the existing house. He said that this request doesn't impinge on any by-laws, except for acreage and frontage. He said that he is formally asking to replace the existing house with this proposed dwelling and the BI said no, that a variance is required, and it is from that denial that the appeal is based.

Chairman Cadle asked for clarification, about whether the Smith decision was appealed.

Atty. Lyons said that an advisory opinion can't be asked for and thus this is a formal request for a building permit.

Chairman Cadle asked whether the ZBA decision was dismissed based on the Smith case.

Atty. Lyons said no, that it was dismissed without prejudice by all parties due to the informal question technicality. He then went on to discuss the ZBA decision, noting that he wants to focus on 218-6.E.2, that this is due by right, because that is the cleanest section to focus on. He said that 218-6.2.D is right on point, noting that a reconstruction is subject to by-laws at the time of change. He said that this is a grandfathered non-conforming lot, noting that the structure is conforming, while the lot is not. He said that the by-law looks at the building, which complies. He referenced a lengthy letter he sent to the BI, wanting him to focus on these two sections of the by-law and

noting that they are good by-laws and good public policy. He said that many houses in town are on non-conforming lots and are themselves non-conforming. He said that if the Board upholds the BI any tiny changes will require ZBA action and he felt that that is not the intent of the by-law. He said that under section 218-6.2 a house can be torn down and reconstructed, noting that the BI thought that he wanted to have two houses on the lot because he didn't apply for a demolition permit. Atty. Lyons said that he is asking the Board to overturn the BI and said he will address other issues related to the building code when asking for a building permit.

Mrs. Duffy noted that she didn't vote for the variance originally and will still vote in favor of the BI's decision to deny a Building Permit, which she feels is correct.

Atty. Lyons said that he asked the court to hold off on a decision on the variance appeal based on the outcome of tonight's meeting.

Chairman Cadle felt that Atty. Lyons doesn't hold much hope on getting the variance to hold up based on the amount of energy spent on other avenues.

Atty. Lyons said that even with the variance, any future work on the dwelling would require that the decision be revisited, and he thinks the by-law wasn't written to do this.

Chairman Cadle said that the reconstruction needs to comply with all by-laws, not just the three cited by Atty. Lyons, noting that the dwelling does not fit in the 150-foot circle, nor is the acreage or frontage in compliance. He said that he thinks this brings the situation back to the Bourkland case.

Atty. Lyons said that this is not so and cited the lot area computation by-law, 218-22F, noting that they are not recreating the lot.

Mrs. Duffy said that she disagrees, particularly due to the amount of site work that will be required, including but not limited to retaining walls, etc. She said that the lot is being reconstructed.

Atty. Lyons said that there is no doubt that the topography is being changed with the introduction of fill for septic, etc., but said that they are not changing the lot itself.

Mrs. Duffy said that the rock retaining walls are holding something together that wasn't needed before.

Atty. Lyons noted that the lot is a parcel owned in single ownership as shown on a single plan, adding that the boundaries and not topography are what is at issue.

Mrs. Duffy said that there are a lot of regulations regarding both taking and adding fill.

Atty. Lyons said that these regulations are related primarily to the removal of fill.

Mrs. Duffy said that the tear down proposal makes the lot unbuildable without a variance.

Atty. Lyons said that he didn't want to have to go into a lot of case law because that can muddy the situation, but said that he will, noting that the statute is more permissive to land owners if towns allow it.

Chairman Cadle said that section 218-6E.1 is very similar to state statute and that can't separate out structure from lot and if intensify structure, can't do.

Atty. Lyons noted that section 218-6.2, was created in 1994 and 1996, in response to court cases. He said that this doesn't apply to a residential single family structure. He noted section 218-6-E.1, and said that in most towns a structure can be changed with a finding from the ZBA that said structure doesn't derogate from intent and thus a special permit is not required as long as the non-conformance isn't increased to the building. He noted that the Willard, Goldhirsh and Dialaway cases all affected changes to 218-6.E.2.

Chairman Cadle asked whether Atty. Lyons had a real timeline or whether this was just an opinion.

Atty. Lyons said that it is anecdotal and then cited the Willard case as an example.

Mrs. Duffy said that they are not adding to, but tearing down a structure.

Mrs. Manugian said that the Willard case talks about alteration or addition, not reconstruction.

Atty. Lyons said that later cases talk about reconstruction.

Mrs. Duffy said that she feels that that case is dealing with reconstruction without change, which is not the case here.

Atty. Lyons said that existing structure is conforming and only the lot is non-conforming. He said that the proposed dwelling is conforming.

Mrs. Duffy said that the proposed structure is not the same as the existing structure and is not an exact reconstruction, but a reconstruction with changes.

Atty. Lyons said that the Dialaway case talks of a house replaced by one torn down and a determination was made that reconstruction is allowed as long as the building itself conforms. He said that there is already a house there and thus there is no change in density.

Mrs. Duffy asked about the increase of the size of footprint.

Atty. Lyons said that he was unsure but thought it was about a 30% increase.

Mr. Anderson said the original is 540 sq. ft. and the new is 960 sq. ft.

Atty. Lyons said that the footprint doesn't matter because it doesn't increase the non-conformity.

Ms. McWade said that it does matter.

Chairman Cadle said that he wants to change the focus, noting that although plans were submitted with the building permit request, he thinks they are just canned plans that don't show the additional story or walk out basement as discussed at previous hearings. He asked whether those were the actual plans of what would be built.

Atty. Lyons said that he thinks that who ever bought the lot would hire an architect to draw up plans that conform, noting that he wants to move forward.

Chairman Cadle said that he thinks a three story structure with decks plus fill would be an intense modification of the site.

Atty. Lyons said that if someone wants to build a deck, he shouldn't have to get a variance, which is why they are here.

Mrs. Duffy said that she is unsure of the scale of the map and what the actual setbacks are.

Discussion ensued regarding the map, etc.

Atty. Lyons said that an applicant should be able to do something to a property that is fundamental to the bylaws, which includes rebuilding a structure.

Chairman Cadle asked what is different in argument tonight, from last year.

Atty. Lyons said that they are not focusing on the State law but just on Groton bylaws, specifically 2186.E.2., that any house should be reconstructed by right.

Discussion ensued regarding the reading of the by law and how to determine whether a by right reconstruction is allowed. Atty. Lyons said that a, b and e are there such that a replacement can be done as long as the non-conformity is not increased.

Further discussion ensued.

Mrs. Duffy said that they don't have any real plans for this proposal.

Atty. Lyons said that for all intents and purposes, the plans are such as submitted to the BI in the request for a building permit.

Chairman Cadle asked about negotiations with the abutter appealing the variance.

Atty. Lyons said that that was not appropriate to discuss.

Chairman Cadle said that this is a duplicative application since the only difference is relying just on local law rather than State law.

Atty. Lyons said that because of the judge's ruling, last year's case is a nothing and this is the formal request.

Chairman Cadle said that that is one way to look at it. He also agreed that Judge Tromblay's decision is well reasoned but noted that it applies to a totally different set of circumstances, where a developer had neglected go to the Planning Board for a permit. He then asked whether Judge Tromblay directly said to Atty. Lyons that he had to file more formally. Atty. Lyons said no, that it was mutually decided upon by both parties to withdraw and apply directly.

Atty. Lyons said that the bylaw is designed to not make a homeowner jump through hoops, noting that he wants the Board to agree with the statute.

Ms. McWade said that she doesn't see how the bylaws say that a structure can be torn down and rebuilt as whatever suits the applicant without first getting a permit. She said that she may need to reread the by-law, but that she doesn't think that is the intent.

Chairman Cadle said that purpose is not to let people in the lake area convert cottages into the Taj Mahal. He said that he thinks the by-law is talking about an addition, dormer, an extra bedroom and/or normal repairs, but not total replacement. He said that he does not think the by-law applies here.

Atty. Lyons said that 218.6.E.2 could be looked at as long as the non-conforming nature of the structure is not being changed. He said that line two of 218-6.E.2 refers to reconstruction and extension and thus fits within sections b and d.

Mrs. Manugian asked about non-use.

Atty. Lyons said that the BI didn't mention non-use so it is not appropriate to do so here. There was some disagreement about that and thus more discussion ensued.

Atty. Lyons said that if the Board insists on raising the non-use issue, they have the right, but because the structure is not non-conforming, non-use doesn't apply.

Chairman Cadle said that the Town has the ability to enforce non-use and abandonment. He said that abandonment is much harder to address but the Town didn't adopt that, and just deals with non-use.

Mrs. Duffy noted that there are no definite plans.

Atty. Lyons said that the plans before the ZBA are the plans submitted with the building permit application.

The Board noted it's position that if a conforming structure on a non-conforming lot is torn down, then there is have a non-conforming lot left.

Discussion ensued regarding the plans for the house submitted with the building permit application.

Atty. Lyons said that he wants to rule only on the plans submitted tonight.

Atty. Lyons cited the decision of the ZBA, such that the applicant could build a house that conforms, even if it is not in the same footprint.

Mrs. Duffy noted her unhappiness with the new set of plans, adding that she doesn't feel adequately informed. She asked whether the new plans are what the BI rejected. Atty. Lyons said that they were.

Chairman Cadle said that if the last decision is not a nullity, shouldn't this be considered a repetitive decision.

Atty. Lyons said that it is different because it's a formal appeal. He said that he only noted that decision because of the BI's reference to it.

Chairman Cadle said that it doesn't matter how the decision is referenced, but just that it exists.

Atty. Lyons said that this is a first time application.

Chairman Cadle said that it is exactly the same.

Atty. Anctil said that he thinks the Board understands the application well. He said that one thing that was not mentioned is that even if the structure is not abandoned, it certainly is a conversion to a year round residence and thus not allowed by right. He said that this was not mentioned in the BI's decision, noting that nothing really has changed in the last year. He said that because it may not be ripe for judicial review, they went back to the BI, and thus there is this appeal. He said that the appellant is claiming to have a by-right ability to build if the dwelling complies with setback requirements. He noted that if the Lake area gets sewer, the town will likely have a situation with the smallest lots will have the biggest houses with no oversight at all. He said that other than noting some concerns of Mr. Anderson, he submitted a letter suggesting that this is a repetitive application.

Chairman Cadle said that he wants to hear Atty. Anctil's thoughts about the repetitive application.

Atty. Anctil said that he thinks that if Atty. Lyons hadn't appealed within 20 days of last year's decision, there would be no standing. He said that the appeal was voluntarily dismissed by the applicant and he doesn't see the difference between this and any other land court/use decision. He said that there is a two year requirement that can't a petition cannot be resubmitted. He said that the only reason we are here because of an appeal, and stressed that otherwise, there would be no standing. He said that the Board has to make a decision from a zoning standpoint, noting that this appears to be a 3 bedroom home instead of a 2 bedroom home. He noted that Atty. Lyons said he thinks an applicant should be able to put on a deck by right but he (Anctil) has an objection to that because it is under sized lot. He said that Atty. Lyons is asking for a by right ability to be able to build there while surpassing requirements of requesting a mere conversion from seasonal to year round use. He said that he does think the Board could grant a special permit for seasonal conversion because both the BOH and Cons. Comm. are okay with it.

Mr. Anderson, abutter, said that there was more than two years of non-use before the variance was sought. He also noted that the application and plan as filed have discrepancies: either the canned plan or the plan on the bulletin board tonight are it, but they are two different plans and it can't be both. He said that he does not think it is the intent of the by-law that this can be done by right, without the zba having jurisdiction, even as a huge addition. He



noted that there have been three years of legal maneuvering that has cost a lot of money, and this would make it just so the courts can't hear it.

Chairman Cadle asked Mr. Anderson about a comment he made last time, that the site would require 83 yards of fill, and how he arrived at that figure.

Mr. Anderson said that there would be one foot over most of lot area, and using the slope dimension he could come up with that figure.

Atty. Anctil asked how section 218-22.g, computation of lot area, figures in.

Chairman Cadle said that it is a requirement and depends on how it is split out, lots vs. structures. He said that everyone agrees that the 150-foot circle won't fit in this lot. He said that he wonders whether this makes the lot, or the structure, further non-conforming, or both.

Atty. Lyons said that the PB clarified this 8 or 9 months ago, that the structure has to be mostly in the circle. He said that this was once a seasonal residence, and because they are not proposing to use an existing structure, but a new structure, and thus, no special permit for a seasonal conversion is needed.

Chairman Cadle said that they are replacing, and not reconstructing, a structure.

Atty. Lyons said that Atty. Anctil mentioned sewer. He noted that they are waiting for sewer in the Lost Lake area. He wanted to bring the Board back to the very words of the by-law, noting that they are talking about now and not one or five or 10 years from now.

Mr. Anderson said that the BOH decision specifies that when sewer comes in, they have to connect because the septic is inadequate. He said that using Atty. Lyons argument, they could then put in a 6000 sq.ft. house by right on that tiny lot.

Ms. McWade noted concern about the seasonal conversion issue.

Atty. Lyons said that he wants to address the issue of whether the application is moot, noting that an appeal was filed and withdrawn without

prejudice and thus it can be opened again. He said that there will likely be an appeal either way and thus the process will be kept open.

Chairman Cadle said that from his perspective, the estate comes in for and gets variances and then on an advisory level asks for a building permit because the variances are not needed. He said that now we are here again because that advisory opinion didn't matter, although the request is still for a permit with no variances.

Mrs. Manugian asked whether the site plan in the new packet is substantially the same. Atty. Lyons said that it was, but he just wants to focus on zoning issues.

The Board moved and seconded to close the public hearing: the motion passed unanimously.

Mrs. Duffy said that she wants to uphold the Building Inspector and doesn't want to view the structure without the lot.

Chairman Cadle said that that was the analysis made the last time.

Ms. McWade said that she has several issues but agrees with Mrs. Duffy that the house and lot are not separate issues.

Mrs. Manugian agreed as well.

Mrs. Maxwell noted that reconstruction is reconstruction, and not an alteration or an addition.

Mrs. Duffy said that just because setback requirements are met, that anything can be done.

Ms. McWade said that the proposal just doesn't seem reasonable.

Chairman Cadle asked about the repetitive petition possibility.

The Zoning Coordinator noted that based on discussion with Town Counsel, this application should not be considered a repetitive petition, and as agreed on by all parties, an official request for a building permit needed to be made.

Chairman Cadle said that he thinks this is a repetitive petition and also agreed that the lot and structure cannot be separated.

The Board moved to uphold the Building Inspector's denial of a building permit. The motion was seconded and passed unanimously.

Of note: the seasonal conversion issue could be relevant.

The meeting adjourned at 9:45 pm.