



## Town of Groton Massachusetts Zoning Board of Appeals

Meeting Agenda and Minutes

### March 6, 2014 – Johnson

#### Present

Mark Mulligan, Chairman

Robert Cadle, Member

Alison Manugian, Member

Bruce Eason, Associate Member

Jay Prager, Member

#### Not Present

Megan Mahoney, Associate Member

Cynthia Maxwell, Member

A quorum was attained. The meeting was called to order at 7:05 pm.

#### Meeting Minutes

##### Johnson Special Permit/Variance

Chairman Mulligan reconvened the public hearing.

A Site walk was held on the 3<sup>rd</sup> of March at 8 AM.

Rob Anctil, Atty. for Johnson, thanked the board for attending the site walk, noted the memo received tonight from Ira Grossman/BOH and said he wants to start there. He said there are two issues: 1) merger, and 2) non-use. He said Mr. Grossman said the property has not used since 2009 and that it shouldn't be used post 2012 due to safety issues. He said his client bought the property in 1984 and later acquired the two adjacent lots from an abutter. He said his client then built a barn on those lots and upon hiring a surveyor, found he didn't own the lot the house was actually on, and thus bought it from the town under a tax title. He said Ray Poskowski built a house on another adjacent property that was sold and was then acquired by a bank. He said this was subsequently bought by Mr. Johnson and is where he currently lives. He said the house was built in 1996 and lived in until 2011, and was acquired via a different transaction. He said there have been four total transactions, noting that his client knows he can't build on the barn lot. Atty. Anctil said he has looked for similar merger properties, whereby two properties with existing

dwellings were bought by the same owner with no merger. He then cited the Bobrowski book, noting that most lots merged and spoke of the reasons, one of which is to create spacing between houses that is consistent with the neighborhood and town zoning bylaws. He said they are trying to maintain what has been here for quite some time, noting that it is not good public policy to say two homes have to merge into one. He said most merger cases deal with situations with frontage on two different roads, or one vacant lot, or non-use.

Member Prager asked about the order to tear down the house on 366 and why that wouldn't force the merger issue. He said there is only the barn on the lot other than the condemned house.

Atty. Anctil said an order to tear down was issued in May of 2013 and this application was filed in December, noting that he feels the clock has been added for these dates.

Member Prager said he made no mention of the 2012 letters, ordering no occupancy of dwelling until repaired/settled, etc., and asked how that memo fits in with the overall request.

Atty. Anctil said his client stayed on the property in violation of that order not to. He said he used it up until February 2012 and therefore is within the protection window since this was filed in 2013.

Member Prager asked why filing an application days before the deadline would make non-use not an issue.

Atty. Anctil said that would take care of that issue and cited filing a site plan review application as working in the same way. He then discussed some of the non-use issues, noting that his client slept there and worked on cars there.

Member Prager said he feels the board needs to go to town counsel because there are some very thorny issues, particularly because the BI said it is not a habitable place.

Atty. Anctil said the law favors merger, which is the universal approach. He said use is not defined in zoning bylaws and the by law says use is use.

Member Prager said he feels uses are as shown under section 218-13. He feels use is as in a habitable dwelling and said he wants to ask town counsel.

Chairman Mulligan said he doesn't necessarily agree, asking what happens if an owner goes into a nursing home and doesn't use the property, is that non-use.

Member Prager said this is different because there is no habitable dwelling here and the owner had other places to live. He said in an extreme example, the house blows down, the owner shows up and camps, waits 25 years and then comes back and wants to rebuild. He asked how the board should handle that, noting that there were no extraordinary circumstances here, which would allow a continuation of a business, for example.

Atty. Anctil said there are no business uses here.

Member Prager said he feels with a business use, that business needs to be conducted, and with a residential use, there has to be a residence that is habitable within that two-year period. He said watching the house fall down is buying into the non-use.

Member Mulligan asked how one could know that Mr. Johnson didn't do anything, noting that he doesn't like the non-use issue because he doesn't want to take property rights away.

Atty. Anctil said the alternative is abandonment, which signifies intent, noting that non-use is intended to be more restrictive. He said there is no intent here so his client has the right to reestablish use by rebuilding. He said the town could adopt a standard of nonuse, which hasn't been done here, noting that the board needs to determine whether Mr. Johnson's activities establish some sort of use.

Member Prager said he wants town counsel's opinion looking at the board's questions and Atty. Anctil's memos.

Atty. Anctil said the non-use bylaw provides more flexibility than abandonment. He said his client didn't abandon the property because he bought the neighboring property. He said Mr. Johnson never intended to abandon, noting that he never disconnected the electricity to the barn (was disconnected to house).

Mr. Johnson said the electricity was disconnected after the condemnation notice was issued in 2013.

Atty. Anctil said there will be case law supporting the merger issue, noting that his client would have the by right ability to rebuild except for the non-use issue.

Member Prager asked whether there would be any by right ability to build if there is a merger and the residence is torn down prior to reconstruction.

Atty. Anctil said his client would leave one wall standing to keep rights if needed, noting that this is paradoxical.

Discussion ensued regarding the issue with law vs. zoning.

Atty. Anctil said he wants this to be a win/win for both the neighborhood and his client, noting that the board has the right to grant variances for anything.

Chairman Mulligan asked about utility bills.

Atty. Anctil said he doesn't have any, noting that there wasn't much activity.

Chairman Mulligan asked whether there was straight evidence of some utility activity.

Atty. Anctil said yes.

Member Manugian said she has much of the same questions that Member Prager has.

Atty. Anctil said that visiting the property constitutes use, noting that non-use is never going there.

Member Manugian said she is not advocating taking away land but only the right to rebuild the structure/dwelling.

Member Easom said he wants town counsel to provide an opinion on how residential is applied to use and whether as Member Prager says, can one claim use without a habitable structure or is lying down on a pile or rubble sufficient as use.

Member Prager said he wants an opinion as to whether the dwelling has to be habitable during that two-year period, barring no extreme emergency. He said the health agent says the dwelling was not habitable under the State sanitary code.

Member Cadle said he is in full agreement with Member Prager.

Discussion ensued regarding whether the property was deemed uninhabitable prior to 2012.

Dr. Horowitz said yes, but prior to that the septic system was deemed failed because it had a big hole and there is an unproven well. She said the BOH has been dealing with this for the past ten years, noting that it has worsen over the past two to three years. She said he is still using the property as a dumping ground and there is no evidence that he is complying with what he has been ordered to do. She said 2012 was when the roof fell in.

Member Manugian said they probably can't resolve the non-use issue tonight but she said she is willing to grant a permit to allow reconstruction as long as the existing structure is totally down, and that all other issues re: merger/non-use fall into place.

Atty. Anctil said he doesn't want to leave here with his client saying he doesn't want to tear the house down.

Discussion ensued as to whether Mr. Johnson has the option to say he doesn't want to tear down the house.

Atty. Anctil said this is a voluntary agreement with the court and his client will tear down the house. He said that although they are two separate issues, he wants a favorable vote from the board.

Chairman Mulligan said he wants to know what rights the board has to grant relief to the applicant.

Atty. Anctil said he wanted to get before the ZBA as a control of his client's destiny, noting that his client wants to build slightly larger if possible. He said he doesn't want to go the variance route. He said he would rather a determination be made that non-use is not an issue, merger is not an issue, and that his client

can by right, build in the same footprint. He said they could come back for a special permit after the board of health issues permits.

Dr. Horowitz, BOH, said she is also concerned about a special permit, noting that she doesn't think he can add to the structure. She said she is okay with a rebuild of a same sized structure provided BOH septic approval has been obtained and water is brought to the site.

Discussion ensued regarding the one wall standing myth.

Member Easom said he feels grandfathering is preserved through date of filing.

Member Prager said he wants the merger/non-use issue resolved.

Atty. Anctil said the structure has to be torn down, noting that he would like to come back with a letter from town counsel and have a meeting in the first week of April. He said they would show proof of progress, noting that his client needs an asbestos check and a demo permit.

The hearing is continued to 6 PM on Tuesday April 8<sup>th</sup>.

Dan Wolfe asked about process, noting that the court has mandated the house be torn down and since there is no plan wonders if the location would be known if the board allows him to rebuild in same footprint. He said a dwelling seems to be shown in two different locations and there is no exact reference as to where the house sits other than in a picture. He said he wants to forestall problems.

Discussion ensued regarding how to ensure the house is constructed in the exact footprint.

Mr. Wolfe said he feels there is another process question, whether the board considers this application to be complete. He said the content requirements in the bylaw have not been met.

Atty. Anctil said he feels they have met the requirements for a rebuild in the same footprint.

Discussion ensued regarding what is required.

Member Prager said a certified plan should be filed prior to the demolition and the other board members agreed. He said that if there is no plan, it could be argued that Mr. Johnson can't rebuild because he would not know where the dwelling should go.

Member Manugian made a motion to continue the hearing to 4/8/14 at 6 pm, pending opinion from town counsel and a plan showing setbacks. The motion was seconded and passed unanimously.

## **Other business**

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## **Minutes and Bills**

Member Prager moved to approved minutes from 1/29/14, seconded and passed unanimously  
A Groton herald bill was signed (Field, Rosa, Johnson, Harrower/Price)

Member Manugian made a motion to adjourn at 8:25 pm. The motion was seconded by Member Cadle and passed unanimously.

Minutes approved April 2, 2014