

CITY OF WALTHAM
ZONING BOARD OF APPEALS
April 1, 2014

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, April 1, 2014 in the Public Meeting Room of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

In attendance were Chair Barbara Rando, and members Glenna Gelineau, Mark Hickernell, Gordon LaSane and John Sergi.

The Chair called the meeting to order at 7 P.M.

Mrs. Rando: Tonight we have two new cases before us. Case 2014-03, Walter E. Ohnemus, III and Patricia Jodi Ohnemus, Trustees of the 32 Cowasset Lane Nominee Trust and Case No. 2014-14 Captain's Row Realty Trust, 215 Lexington Street.

The first motion this evening is to approve the minutes of March 11th and March 18th.

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to approve the minutes of March 11th and March 18th.

Would the clerk please read the petition in Case No. 2014-03?

The clerk then read the Petition of Walter E. Ohnemus, III and Jodi Ohnemus, Trustees of the 32 Cowasset Lane Nominee Trust in an appeal from the decision of the Building Inspector. The locus consists of a parcel of land known as the northerly half of Lot 29 situated at or adjacent to 48 bef Cowasset Lane. The locus is vacant land. Petitioners are appealing the denial of "old Lot" status on the locus by the Inspector of Buildings.

Mrs. Rando: May we hear from the petitioner or the petitioner's representative please.

Joseph M. Connors, Jr., Esquire, 404 Main Street, Waltham came forward and gave a copy of his brief to the members. (Mr. Connors introduced Ted and Jodi Ohnemus and their son to the board.) He then went over a detailed plan of the property and read his brief into the record going over his exhibits in detail.

Mr. Connors brought up the Gerarci v. City of Waltham case which he felt was somewhat similar.

Mr. Hickernell: Only in part. The Zoning Board found that there was no standing and the court overturned that. So I don't think it's correct to say that it's the decision of the Zoning Board.

Mr. Connors: Well, I will strike that. I will say what the land court did was, they read the provision about 4.2183 and they found that a merger by deed is not going to negate your status or your entitlement to the exceptions of 4.218 and 4.2182.

Mr. Connors then cited the Selzer v. Board of Appeals of Orleans case and went over that with the board. Mr. Connors then went back to his brief and went over the Affidavits. He also submitted a list of abutters who indicated that they were in favor of this petition.

Mr. Connors: Bob Bibbo is here and he is a Registered Land Surveyor, I believe his father prepared the 2001 plan. He's familiar with 81X plans. He can certainly testify to the fact that that merger plan was not done in this case and that would be the route the Ohnemus's could have taken, if they so chose, but they didn't because it was truly not their intention.

(Mr. Connors then went over the Confirmatory Deed which was attached to the brief.)

Mrs. Rando: I think I found that page 5 was very confusing. I mean, I followed that down and it made sense and then I heard you say intent. So it comes down to whether it's intent or whether it's a legal issue. And then I go to the letter from Mr. Ohnemus where he said, I discovered a deed discrepancy. So he realized that there was a mistake in it. So what we have to decide truly is what you said. The deed that was conveyed in 2003, whether its legal or if it's not legal, if he has a right to do that or if by doing that he has an unbuildable lot here, that is what we have to decide.

Mr. Connors: Well, I think you need to decide whether or not his intention in that 2003 -

Mrs. Rando: Is it intention or is it legal? Did that ruin his chances?

Mr. Connors: Well, I think that the Seltzer case talks about intent because that's what happened and they built a home over two lots lines and so the court looked over the intent, and so sometimes you need to look beyond just the description of the deed and you need to find out what was the intent of the parties when they made the conveyance. And you could read over the four corners of the deed and say there's nothing in here that says it's for estate planning purposes but I have provided an Affidavit that states that. I think the only thing that segregates the two lots in that 2003 conveyance is the back title references.

Mrs. Rando You know, we have many cases where people have taken down buildings or barns and intended to rebuild it and when they go to rebuild it, they can't because they didn't check in with the building inspector to see if they have the building as to today's standards or if they could just rebuild it. But they intended to rebuild it. So I mean do we go by the legal standard or do we go by what's intended? I know you're stating that case but I'm really— -

Mr. Connors: I understand your concern because there's a conveyance that says it's lot 29, but I believe that it's unclear. The intent of the grantor is unclear. Because if they simply intended to convey and merge the property together they would have done an 81X merger plan and they didn't do that. So we have the deed, but I think you need to look at the deed with the plan and the most recent plan which is a 2001 plan that specifically defines it as a separate lot.

Mrs. Rando: Well, it says here that the deed recorded at the Middlesex Registry of Deeds on February 6, 2013 does not confirm the conveyance recorded ten years earlier.

Mr. Connors: Well, that's the opinion of the Law Department.

Mrs. Rando: Right.

Mr. Connors: But if you read the deed, it says we confirm the conveyance of 2003.

Mrs. Rando: "Thus the 2013 does not alter the fact that the 2003 deed extinguish any grandfathering rights that the original lot 29 may have had from January 1950." So that's what we have to decide here.

Mr. Connors: Yes. All I can do is appeal the decision of the Building Inspector where he has denied old lot status.

Mrs. Rando: Because I followed it all the way down but it basically comes down to this paragraph here.

Mr. Connors: Well, that's the opinion of the law department.

Mrs. Rando: And what are you saying it comes down to?

Mr. Connors: I think it comes down to the intent of the grantors in 2003 when you put together the existence of a 2001 plan that shows it as a separate parcel, two separate parcels. And it was a conveyance for a dollar. I mean it wasn't a bonafide transaction. They didn't convey it out in the open market. So I say that that's what it comes down to.

Mr. Hickernell: And further, if for some reason this had been intended to create some new and better lot, it would have been appealable and voidable by the fact that it didn't follow the procedure set forth in that in the statute.

Mr. Connors: Absolutely. And that it's illegal. It doesn't conform to the statute because we are creating a lot that has insufficient lot area and all other things. We are creating a lot today.

Mr. Hickernell: So it's a new plan of land. The law department said it's a new plan of land, but it didn't get there how it's suppose to get there.

Mr. Connors: Right. So I do think that it's not an easy case. You can't just look at the deed because I say that it's separately assessed and - - -

Mrs. Rando: I've heard that problem too, that people have been paying taxes on two lands and we don't consider that.

Mr. Connors: I'm just reading the ordinance and it says it's separately assessed. So it does say it. Now it doesn't carry over to the second page and I don't know why. Why did it say it in the first page but they don't carry it over to the second page? But it's in the first paragraph of 81218, it states separately assessed. That doesn't carry over to page two but it's definitely on the first page. So, I would say that one, its always been that. So I can tell you that its always been separately assessed at least since 1950 and Mr. Ohnemus was conscious of that. He was conscious of the fact that if I start to treat it as one, then I am showing an attempt that I want to merge them together and treat them as one. He's been paying taxes as a buildable lot since the day he bought it. So I think you have to take in the full picture because of that particular deed. It's for a dollar conveyance. It's for himself and his wife as trustees of the trust. You know, so you need to take in the full picture and I think the full picture includes the plan from 2001 that shows it's a separate lot. And the other thing, I think just the harsh reality of it all is that if he's lost his grandfather status that he created a ten thousand square foot lot that he cannot even build on. And I would say that no one would intend to do that, number one. Number two, it would be illegal to do that because you're not conforming to the law. You're not creating lots legally under 81X.

Mrs. Rando: What does he intend to do with that?

Mr. Connors: He wants to build a house right there (referring to the plan showing the proposed house) for himself. (Mr. Connors went over the plan with the board.)

Ms. Gelineau: So, it never was his intention to develop the southerly lot?

Mr. Connors: No.

Ms. Gelineau: So even if you merged them, you couldn't build the one house.

Mr. Connors: You couldn't build anything.

Ms. Glenna: It is possible though that if we recognized the confirmatory deed you could build two houses there?

Mr. Connors: Yes. But I mean, again, that's not his intention.

Ms. Gelineau: And once he builds a house on this side he could never build a house there, anyway, right? Because he's technically using it as part of his side yard.

Mr. Connors: This side would have ten feet so this side would have six. But for all intents and purposes that's what it would look like.

Mrs. Gelineau: It's not possible, right? What I'm saying is, could you build a house there some day?

Mr. Connors: I think technically, you could if the southerly half is entitled to the small lot exception. Technically he could, but as I say that's not his intention. We would certainly make that representation that he never intends to build on the southerly lot. You see here, his house over here, it's on the lot line, so if he did build over there then he's going to have problems.

Mrs. Rando: Mr. Sergi, do you have any questions at this time?

Mr. Sergi: Just by way of clarification, Peter Hardy, he drafted the deed?

Mr. Connors: Yes.

Mr. Sergi: And Peter Hardy, is he a real estate attorney or is he considered a real estate attorney?

Mr. Connors: No, Peter Hardy specializes in Elder Law and Estate Planning.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: I don't put much stock in Gerarci where the Plaintiff didn't actually put on a case and it's not actually and it's not on Appeals Court Decision, but I do find Selzer

important for our decision. I am surprised that intent mattered so much and I am prepared to take that into account. I don't have any questions on that.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: No.

Mrs. Rando: Mr. LaSane, do you have any questions at this time?

Mr. LaSane: Not at this time.

Mrs. Rando: Is there anyone in the audience in favor of this petition?

(Four people raised their hands.)

Mrs. Rando: Is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, you can continue with your Proposed Findings of Fact.

Mrs. Rando: Could I ask you one other thing? I noticed in the deed that every lot here is at least nine thousand square feet. Correct? There's one of them that's eight thousand something. But most of them are ten thousand.

Mr. Connors: There's seventy nine, eight thousand, it varies, but most of them run under ten thousand; eight thousand, nine thousand, Across the street you've got seventy nine feet, eight thousand, eight thousand, seventy three fifty, eight thousand. So, I mean, essentially the whole neighborhood is non conforming lots. They are all well under fifteen thousand.

Mrs. Rando: I don't see any under five thousand, do you?

Mr. Connors: No.

Madam Chair, I did submit electronically Proposed Findings of Fact and Proposed Decision.

Mr. Sergi: Have you changed them, Counsellor?

Mr. Connors: No, they remain the same as they were when I submitted the documents to the board.

Mr. Sergi: I will make a motion that we waive the reading of the Proposed Findings of Fact since they have been on file.

Mr. Hickernell seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

Mrs. Rando: You may continue with your Proposed Decision.

Mr. Sergi: In a similar fashion, I propose that we waive the reading of the Proposed Decision since its been on file.

Mr. Hickernell seconded the motion and the board voted to waive the reading of the Proposed Decision since its been on file.

Mrs. Rando: Are there any other questions, or any other concerns? Hearing none, I am ready to entertain a motion.

Mr. Sergi: I will make a motion that the Proposed Findings of Fact become the Board's Findings of Fact.

Mr. Hickernell seconded the motion and the roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, no. The vote was 4-1 in favor.

Mrs. Rando: Do I have a motion on the decision?

Mr. Sergi: I will make a motion that the Proposed Decision becomes the board's decision.

Mr. Hickernell seconded the motion and the roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes, Mr. LaSane, yes and Mrs. Rando, no. The vote was 4-1 in favor.

On motion of Mrs. Rando, seconded by Mr. Sergi, the board voted to take a five minute recess at 8 P.M.

The board reconvened at 8:05 P.M.

Mrs. Rando: Will the clerk please read the Petition in Case No. 2014-04?

The clerk then read the Petition of Captain's Row Realty Trust in an application for a Sign Variance. The Petitioner seeks to replace existing ground sign at 215 Lexington Street. Location and Zoning District: 215 Lexington Street, Commercial Zoning District.

Mrs. Rando: May we hear from the Petitioner or the Petitioners representative please?

Philip B. McCourt, Jr., Esquire, 15 Church Street, Waltham came forward and presented the board with a copy of his brief and photo of the proposed sign. Mr. McCourt read his brief into the record.

Mrs. Rando: Could you tell me, is there any sign in that area that is twenty four on either side?

Mr. McCourt: I don't believe, no.

Mrs. Rando: I don't think I've seen any up there.

Mr. McCourt: I don't know how it got, usually how these things get interpreted at some point, I would say five or six years ago someone wanted a sign that people for some reason felt was unattractive and therefore they looked at it it and read it, but I don't think literally, but it certainly is missing the words forty eight feet on each side.

Mrs. Rando: Have you seen signs up there sixty square feet?

Mr. McCourt: There's one that this board granted recently. I have not seen it myself even though I represented the petitioner --

Mrs. Rando: Was it the Tower Company?

Mr. McCourt: No. It was the one on the corner of Lexington Street which is even larger than that. I did the Special Permit for that gentleman. I think Mr. Bigham did the sign variance here. Across the street, Mr. Connors did the Mobil Station.

How is the sign going to be lighted?

Mr. Camerato: The sign itself is going to be illuminated from the inside.

If its permissible, where the landscaping is, we wanted to light up the trees that will show the landscaping. When you drive by you will see flowers and you will see the trees. But not the sign itself.

Mr. McCourt: We intend tonight to conform which is interior lighting which is defined in the code.

Mrs. Rando: Would the petitioner be willing to keep up the landscaping?

Mr. Camerato: That's my intent. We've already started cleaning out back where the brook is there's large piles of trash behind the building. It's gotten a lot better than what it was.

Mr. McCourt: And we are under intense scrutiny by the City Council on that. We are under a special permit that tells us to keep everything up to date.

Mrs. Rando: Mr. Sergi, any questions?

Mr. Sergi: No.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: Yes. So there's no intention to actually advertise the Used Car Sales on this sign?

Mr. Camerato: On the base of the sign, Peter Fuller gets twenty five percent of the sign which will be 2 x 10 and O'Reilly gets 4 x 10 and its going to be his only signage except for the sign that is on the building.

Mr. Hickernell: So I think we need to add something to the Proposed Decision to the effect that "Except that the Petitioner may change the lettering, design, and names of the tenants without seeking an amendment of this decision."

Mr. Hickernell: In Paragraph three of your Proposed Decision, six lines down, delete "indicate the food specials".

Mrs. Rando: Ms. Gelineau, any questions?

Ms. Gelineau: No.

Mrs. Rando: Mr. LaSane?

Mr. LaSane: Just two companies are going to be advertised on that sign?

Mr. Camerato: Yes.

Mr. LaSane: And O'Reilly has its own color scheme?

Mr. Camerato: I think that is their color scheme.

Mr. LaSane: How's Peter Fuller going to be?

Mr. Camerato: His colors I think are either going to be black or red.

Mr. McCourt: I think Mr. Hickernell's point is well taken. This is the size of the sign and the lettering or color whatever could be changed. It's just a representation to give you an idea of what that sixty feet would look like.

Mrs. Rando: Is there anyone in the audience that is in favor of this petition? (Two people raised their hands.) Is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, you may continue with your Proposed Findings of Fact.

Mr. McCourt: The Proposed Findings of Fact are exactly what we submitted electronically to the board, and I could read them if you would like.

Mr. Sergi: I will make a motion that we waive reading of the Proposed Findings of Fact.

Mr. Hickernell seconded the motion and the board voted to waive the reading of the Proposed Findings of Fact.

Mr. McCourt: As far as the decision, as amended, with the deletion of the reference for food is the same one as submitted.

Mrs. Rando: I think Mr. Hickernell wanted to add something else.

Mr. Hickernell: Right and I read it.

Mrs. Rando: And Carol that the "Petitioner will keep the landscaping up to standards".

Mr. Sergi: Madam Chair, in a similar fashion, I propose that we waive the reading of the Proposed Decision, as amended, since its been on file.

Mr. Hickernell seconded the motion and the board voted to waive the reading of the Proposed Decision, as amended.

Mrs. Rando: I am ready to entertain a motion on the Proposed Decision, as amended.

On motion of Mr. Hickernell seconded by Mr. Sergi, the board voted to accept the Proposed Decision, as amended, and grant the variance in Case No. 2014-04. The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, yes.

There being no further business, on motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to adjourn at 8:36 P.M.

A handwritten signature in cursive script, reading "Barbara Rando", is written over a horizontal line.