

CITY OF WALTHAM  
ZONING BOARD OF APPEALS

September 16, 2014

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, September 16, 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 2014-19, Blue Pearl - Veterinarians Emergency and Specialty Center, 180 Bear Hill Road, and it is for a sign variance, and Case No.2014-20, Yueh-O Jane Parker, 528 Lexington Street, it's for an appeal of the decision of the building inspector.

The first action this evening is for a motion to accept the minutes of August 26, 2014.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of August 26, 2014.

Will the clerk please read the petition in Case No. 2014-19?

The clerk then read the petition of Blue Pearl - Veterinarians Emergency and Specialty Center, Owner: Vescone Real Estate, LLC in an application for sign variances. The petitioner seeks to erect a ground sign at 180 Bear Hill Road, Commercial Zoning District.

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

Attorney Philip B. McCourt, Jr., 15 Church Street, Waltham came forward. Mr. McCourt presented each member of the board with a copy of his brief and a colored rendering of the proposed sign.

**Mr. McCourt:** This, as Mr. Hickernell just read, is a request for a ground sign that would be larger than what is technically permitted, particularly under the new interpretation of the building department and which needs to be relocated closer to the street than would ordinarily be permitted.

(Mr. McCourt then read his brief into the record and went over the plan of the locus with the board.)

**Mr. McCourt:** Tonight I have with us Kelly Parkinson and Megan Jones. They both work here with Blue Pearl and they are here to tell you about some of the problems they have with clients trying reach it. But more importantly, we have here, Tom Dunn from Metrosign, the company who has designed and will be placing the sign, should we be successful in getting it and he can describe to you not only the other details of the sign all of which meet the code. But most importantly, as an interesting chart, unfortunately I only saw it this evening, and he could share it with you not only verbally and with a copy that he has, it will show why it has to be larger in letters, that if you're coming in certain speeds along any road but particularly a road with this sort of challenging curbs and topography, it is necessary to have this large sign. So I am going to ask Tom Dunn to kind of describe what we propose.

**Tom Dunn, Metrosign and Awning, 170 Lorum Street, MA, forward:**

**Mr. Dunn:** Essentially it's been described very well (looking at rendering). It's a free standing sign. It does have upgrades in design where it has the address on the contoured top. This is an aluminum top that has that has routed text. We felt the need was important to have the address in there. There is a competing business on the same road, just to help both businesses to identify the site. It is 17 feet in total height. The bottom of the sign will be 8 feet above grade. The illumination is as shown and Blue Pearl has confirmed that they will meet any requirements in terms of when it can be on or off but they are a twenty-four hour business. Is there anything I can specifically answer about the details of the sign?

**Mrs. Rando:** Will the lighting be internal?

**Mr. Dunn:** The lighting is internal.

**Mrs. Rando:** Are there any other questions?

**Mr. Dunn:** The Blue Pearl text is shown at 11 1/2 inches (referring to the National Highway Chart) and it shows that the 12" letter at thirty miles an hour is visible for three-seconds. And there it also shows the letter height, the maximum viewable distance or impact, a 12" letter is visible from a hundred and twenty feet whereas if the sign was trumped down to the code that listed it, it gets cut in half. Essentially at 30 miles an hour you can read a six inch letter for 1.4 seconds and its visible from sixty feet.

**Mrs. Rando:** How many feet from the corner from the curb?

**Mr. Dunn:** The sign will be, I believe will be its four feet. Part of the reason they are looking for the setback variance is parking is very limited on the site and to have the six feet and twelve feet from the lot line they will lose at least one parking spot.

**Mrs. Rando:** How many parking spots do you have? I think the clinic that was there before hand came before us and didn't they ask for two parking spaces or extra parking spaces? I thought I had read on the building permit that they came before us.

**Mr. McCourt:** Yes, it's on the first page. I think in 1999. The parking here is long and rectangular and you're really off the road before you know it. That's why, as Tom was saying, we need that sign where it is so you know where to turn in and then the actual doorways are at this end (referring to the plan). So you could not see this from the road. You virtually can't see any signs.

**Mrs. Rando:** So, how many parking spaces do you have?

**Mr. McCourt:** I don't have that. It's not on this plan.

**Mrs. Rando:** And it's four feet from the corner?

**Mr. McCourt:** Four feet from the street setback.

**Mrs. Rando:** I know, from the corner.

**Mr. Dunn:** It will be four feet from the adjacent lot and three feet from the lot line.

(Mr. McCourt went over the plan with the board.)

**Mrs. Rando:** Are there any other questions regarding the sign?

**Mr. Hickernell:** You're aware that to keep the sign illuminated between midnight and six, you have to go to the city council?

**Mr. McCourt:** Yes. They'll have to decide whether or not to do that because of course in the evening the traffic is less but right at the moment that isn't on our agenda whatsoever.

**Mrs. Rando:** Attorney McCourt, you stated that there were other businesses there with signs that size. Which ones would you say?

(Mr. McCourt went over the plan with the board to show where the signs were.)

**Mrs. Rando:** Are there any questions?

**Mr. Sergi:** Just a quick clarification. On the material of the sign, being so close to the road with the plows, is it structurally sound?

**Mr. Dunn:** It will have a steel post.

**Mr. Sergi:** How is it bolted to the ground?

**Mr. Dunn:** It will be cemented four feet deep, six inches across.

**Mrs. Rando:** Is there anyone in the audience that is in favor of this Petition. (Three people raised their hands in favor.)

**Mrs. Rando:** Is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, you may continue with your proposed findings of fact.

**Mr. Sergi:** May I make a motion that we waive the reading of the Proposed Findings of Fact since its been on file and we have had a chance to read it.

**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 will make a motion that we waive the reading of the Proposed Decision since its been on file and we have had a chance to read it.**

**Mr. Hickernell seconded the motion and the board voted to waive the reading of the Proposed Decision.**

**Mrs. Rando: I am ready to entertain a motion on the Proposed Findings of Fact.**

**On motion of Ms. Gelineau, seconded by Mr. LaSane, the board voted that the Proposed Findings of Fact presented becomes the Board's Finding of Fact.**

**The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, yes.**

**Mrs. Rando: Do I have a motion on the Decision.**

**On motion of Ms. Gelineau, seconded by Mr. LaSane, the board voted that the Proposed Decision as presented becomes the Board's Decision.**

**The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, yes.**

**Mrs. Rando: It is granted. Good Luck.**

**Mrs. Rando: Will the clerk please read the petition in Case No. 2014-20.**

**The clerk then read the Petition of Yueh-O Jane Parker, in an appeal of the Decision of the Building Inspector. The locus consists of a parcel of land known and numbered as 528 Lexington Street. The property at 528 Lexington Street has been used and maintained as two family dwelling since 1946. The Petitioner is appealing the denial of a building permit for the property by the Inspector of Buildings. The denial is based on his finding that the second unit is illegal. The petitioner contends that the use of the property as a two family is a permitted and legal use. Location and Zoning District: 528 Lexington Street;Residence-A3 Zoning District.**

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

Joseph M. Connors, Jr., Attorney, 404 Main Street, MA, forward and presented each member with a copy of his brief and a copy of a plan showing the footprint of the building, the driveway and parking spaces situated on the locus.

Mr. Connors: With me tonight is Yuch-O Jane Parker and she is also with her husband Mel Martocchia who you may know is a real estate broker.

(Mr. Connors then read his brief into the record and went over the plan of the locus and Exhibits located in the back of his brief.)

Mr. LaSane: May I interrupt for one-second? Why do you think that is that the building inspector made the ruling that he made?

Mr. Connors: Well, I mean that would be pure speculation but my speculation would be because he's just taken another look at the same question that someone took a look at in 1996 and someone took a look at in 1986. He's just taken a different look at it and come up with a different opinion. There's nothing in the letter that indicates to me that he considered what happened in '86 or '96. And so, I really don't know, but I think he's looking at the same facts and I think he should have to rely on and certainly look at the history treatment of the property by his own office. He's changing interpretations of documents that have been issued ten or twenty years ago.

Mr. LaSane: Just take me back to your argument again about the seven year granting in 1946.

Mr. Connors: Okay. So I attached a copy of a couple of things as well, one of which is the statute. There's two statutes of limitations under Chapter 40A, Section 7. There's a six year and there's a ten year. It's critical to us, the application of the six year because that applies to uses. So the 41 ten year could apply to a dimensional violation. If you built a building too close to the lot line and it sat there for ten years, then I could say, okay ten years is up. You can't make us tear it down. But that's not what I am talking about. I am talking about a use. So it's the use. Single families are only permitted in the zoning districts. What happened was we got a building permit in 1946 to change the use.

Mr. LaSane: Why do you think they put a time period on it?

Mr. Connors: There's actually some reasons in the decision of the vote. It was 1946, I guess the veterans were all coming back so there was a housing shortage. You probably have seen it because I've seen it many other times and its articulated right in the decision of the board.

The other reasons that the board mentions in the 1946 approval is that they believe that there's no construction needed because its already built. I couldn't find any evidence of it but it is stated in the decision of the board in 1946 that it's returning to a nonconforming use, suggesting that maybe at one time it was a residential unit. I couldn't find any evidence of that, but that's kind of the opinion of the board.

But going back to your initial question, under statute of limitations, the six years applies to a use. So, I only have the right to protection of the six year statute of limitations for a use if I can show that a building permit was issued for it. If I'm in a residential neighborhood and I build a convenience store without a permit, it can be there a hundred years. The statute of limitations won't apply because the city didn't know I did it because I didn't pull a permit. So, I'm saying we did tell the city. We pulled a permit in 1946, permit #94, we said we are going to add an apartment to the garage, period! There was no restriction on the time so our statute of limitations then begins running from the time of the permit and arguably from the time that the seven years was up. So in 46 we got a permit and seven years is up in 53 and its now 2014. So interceding that was the c/o in 1986 where they said it's a legal use and alternatively in 1996 he says its only a two family and it can't be a rooming house.

Mr. LaSane: So you don't feel that it reverted back to a single family property after seven years from the 46 ruling?

Mr. Connors: I would say that the use continued on. And so, arguably it was illegal but it continued. It was illegal. It shouldn't have continued but the assessors records indicated, they assessed it as a two family and they were paying taxes as a two family. So, arguably it was illegal for at least up to 1959 but the city didn't do anything to enjoin it to stop it and so now in 2014, its too late. I would say its just equitable. I mean there are really not a lot of equitable arguments to say there is no stop limits in municipality, they can change their mind. But I'm saying the statute protects us from that, just as a practical matter, it's a nice looking unit. Its been utilized for many years and to just have to close it down because it won't lend itself to be added to the single family. It just doesn't work.

**Mrs. Rando:** Attorney Connors, I have a couple of questions. Did not the building inspector deny it because he thought it was a use variance? You're asking us to allow a use that is not allowed there. And, the variance that was granted ran out in what did you say in seven years?

**Mr. Connors:** It ran out in February of 53.

**Mrs. Rando:** And I also feel that your argument when you bring up the assessors with the taxes, you said it had just stopped a month ago, the apartment was being used until a couple of months ago. So they should be paying taxes on it. So they didn't pay it in vain. So that part of the argument doesn't really affect me. Maybe the assessors, I don't think they dive into as intricately as you think they do. I think they made a site view and saw life in two apartments and taxed them as a two family which justifiably they should have. It wasn't in vain.

**Mr. Connors:** It wasn't. It was deserved. But my point is that the use continued on.

**Mrs. Rando:** But it was illegal and as a municipality, don't we have to see something that's illegal whether it's now or ten years past. Aren't we supposed to do something about it?

**Mr. Connors:** I think there's an argument and there's case law that says that.

**Mrs. Rando:** And I don't think there's a state statute on a variance that ran out like that. I don't think there's state statutes on that in you're quoting six years and ten years. That is something I would want to ask the Law Department on that. I don't agree with that argument.

**Mr. Connors:** The statute says, I'm reading the statute, It says: "that if real property has been improved and used in accordance with the terms of the original building permit issued by a person duly authorized to issue such permits, no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provision of this chapter, or of any ordinance or by-law adopted thereunder shall be maintained unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within six years next after the commencement of the alleged violation."

**Mrs. Rando:** But you had no variance. You had no legal variance. It had run out.



Mr. Connors: It had run out but we had a permit for it. I'm not telling that the use was legal. It was illegal after the seven years were up. What I'm saying is that it was issued pursuant to a permit and the building permit itself has no restriction on the time use and the city didn't do anything to prosecute it, to close it down. They had ample opportunity in 1959 and they didn't do that. So, I agree with you. It was illegal but the city now, six years have passed, and they haven't commenced any action in any Superior Court to my knowledge. I haven't heard the building inspector show up here today to show it. So I mean he's taken a look at the same facts that was looked at in 1986 by the building inspector who issued a certificate of occupancy.

Mrs. Rando: That must have been given in error.

Mr. Connors: May be. In 1996, another letter was issued saying the only legal use is a two family and now the petitioner comes along in 1999 and buys what she thinks is a two family, she does her due diligence and goes down to the building department to get a permit to add a unit and you've got the c/o that's issued that says it's a legal use and you got a letter that says you can do that. I think the statute of limitations is right on point.

Mrs. Rando: At first I thought, why are we hearing this case? This sounds to me to be a use variance. And then I thought, well there's due process. You have to go before us because the building inspector told you, you do and before you go to court you have to go to the zoning board. But when I read it, it reeked of a use variance to me.

Mr. Connors: It was a use variance in 1946 it was a use variance.

Mrs. Rando: We can't touch or grant a use variance as of 1974.

Mr. Connors: Exactly, so I haven't asked you to revise the decision in 1946. I haven't asked you to grant another use variance. I am asking you to make a finding as to whether or not the building inspector has waived his right to enjoin the use by his failure to go to court and seek an injunction prohibiting the use and that's what the facts lay out that the use has been there for sixty-one years. That statute provides that if it was originally granted pursuant to a permit, he has six years to prosecute and he hasn't done that. So I'm not asking you for anything other than to rule whether or not he's correct or not.

Mrs. Rando: We have to find factual findings that he was wrong.

**Mr. Connors: Correct.**

**Mrs. Rando: Well, I don't personally see it.**

**(Mr. Connors went over the parking plan with the board.)**

**Mrs. Rando. We have a lot of violations here.**

**Mrs. Rando: Mr. Sergi, do you have any questions of Mr. Connors?**

**Mr. Sergi: No, not at this point.**

**Mrs. Rando: Mr. Hickernell?**

**Mr. Hickernell: Not at this point.**

**Mrs. Rando: Ms. Gelineau?**

**Ms. Gelineau: No.**

**Mrs. Rando: Mr. LaSane:**

**Mr. LaSane: No.**

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

**(Five people raised their hands in favor.)**

**Mr. Zampitella asked to speak.**

**Good Evening Madam Chair and members of the board. My name is Ralph Zampitella. I live at 19 Ledge Road in Waltham. I came here to support the petitioners because I have known him previously which is one reason and secondly I am very familiar with the dwelling and the locus.**

In 1978 a friend of mine bought the property and purchased it and asked me to supervise the reconstruction which was renovations only, cosmetic renovations even the alleged second floor, over the garage was previously rented. He asked the person who owned the house, is this a legal unit? and he said, yes this is a legal apartment. They didn't give him any documentation, he just took their word for it and we were both satisfied with that and we renovated the apartment. I knew the previous owners before that back in the early part of the century, the Greens and the Charles. Mr. Charles ran a dairy farm there for many, many years and that's what it was and the second floor was originally built for the offices. I thought at the time this is a lesser use being an apartment rather than an offices. Possibly back in the forties the Charles when they sold the house in the early fifties they could have sold that a nonconforming commercial use which they didn't choose to do. If I may say so that this is a classic case that the legislature has written laws for. That is as I recall being on the board, you're acting as the building inspector and that's you're only obligation to say yes, no or maybe to the building inspector when they overturn your decision. I don't think, Mrs. Rando, it may sound a little complicated because of my experience in construction. I worked with the building department for seven years and I'm so familiar with it and it seems like a lesser to me maybe than an average guy without my type of experience. I worked with the building department for seven years, off and on. I worked three years full time, two years as a substitute and two years a different classification. Many times and I remember prior to my being in the building department, I was in the building department almost every day getting plumbing permits. My father was in the electrical business we would get electrical permits and I remember this instance plus it was advertised in the newspaper for many years that many people were coming in now that had those World War II seven year occupancy. A lot of people never did anything after the seven years were up. In fact a lot of people sold the house during that seven years and never told their buyer that there was a restriction on the property. So what the building department did, they just stopped enforcing it. And the city council didn't want to do anything either and said let's pretend it never happened. The seven years never stopped and they got the variance, the Greens and Childs did in 46, and they never did anything about it and that's probably exactly what happened. Because of my fondness for the property, it's absolutely a beautiful property. Mr. Roche that I was working with was an interior designer. He brought that house exactly what it looked like in 1980 and I recall he purchased an old black stove, installed that, and it seemed ridiculous taking a 1960 stove and installing a 1920 stove and also I remember he had an antique bathroom with the high tank, you know, pull the chain, in 1978, so that was an oddity then. It is a nice house and I am very much in favor of it continuing and I hope the board will look at it as something a lot simpler and you're just taking the burden off the building inspector who just doesn't want to make that decision. Ralph Gaudet use to send everything up to the Law Department for an opinion and the law department said we don't want to hear it and you make the decision.

**Mrs. Rando:** Mr. Zampitella, it may be a beautiful apartment and maybe before 1975 when we could have granted use variances, maybe I would have considered it. But unfortunately times have changed and we can't vote on a use variance.

**Mr. Zampitella:** This was in use before Chapter 808 which allowed use variances, so wouldn't that apply if it was existing?

**Mrs. Rando:** No. We can't touch a use variance. I think Mr. Powers knew it was a use variance and that's why he didn't make a decision.

Is there anyone else in favor that would like to speak? Seeing none, is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, do you have anything else to add, Attorney Connors?

**Mr. Connors:** I just wanted to restate to the board that I did attach not only a copy of Chapter 40A, Section 7, but the Lord Case which was an appellant decision, a two page decision, which discussed whether or not to apply the six year statute of limitations on a claim of the petitioner that it had a legal two family. The case turned on whether or not a permit was issued for the two family. A building permit was issued but it didn't articulate a two family and I think that's factually distinguishable here and we have a permit that was issued in 1946 to add an apartment over the garage which creates a two family so under the Lord premise they were entitled to the benefit of Chapter 40A, Section 7, and I would also like to call your attention to another case, the Town of Marblehead vs. Deery which is a case that has discussed the equities of it and in that case there was a junction by the town to prohibit the continued use and the court found that the equities of the case required that they would not enforce and enjoy a use that the town alleged was illegal, so I would say that like that case we have equitable arguments here to say that we have an existing two family residence which is ready and available for use and it would be wasteful not to allow.

**Mrs. Rando:** Did you send these two cases on the computer to us?

**Mr. Connors:** I faxed them but for some reason I couldn't get the whole exhibit pile to go through as a pdf so I faxed them to Pam.

The Deery case I will give you. I only have one copy of it.

**Mr. Hickernell:** What's the site?

**Mr. Connors:** It's 356 MA 532 and the court found that the combination of circumstances leads us to deny the injunction relief on recognizable equitable principles.

**Mrs. Rando:** Are there any questions from the board?

**Mr. Hickernell:** I don't have any questions for the petitioner, Madam Chair. I think its possible the statute of limitations argument has merit and I'd like a chance to review this decision that the petitioner has cited for us.

**Mr. Connors:** That would be the Lord decision?

**Mr. Hickernell:** The Lord Decision you have already gave us.

**Mrs. Rando:** Does anybody else have any questions they would like the law department to answer?

**Mr. Hickernell:** Well to be clear, I am not asking the law department for anything. I can read it myself. I know what they think.

**Mrs. Rando:** Does anyone else have any questions of the Law Department regarding use variance or whatever?

**Mr. LaSane:** I have one question for the counsellor. So it is your position that you should be able to be in a position to evaluate the building inspectors conclusion. We should be.

**Mr. Connors:** Yes. The text of his letter he's found a couple of things but he denies the building permit so I'm saying I am entitled to a building permit. He denies it because he says its an illegal use and I'm saying it's a legal use or alternatively it's a use for which he cannot prohibit because the statute of limitations has run. I think I've articulated in my application, two theories of relief. So I ask you to overturn his decision and to issue me a building permit to do the work that was requested in the June 3014 application and then make a finding that the building inspector has failed to prosecute an action against the property within the time frame of the statute of limitations and, therefore, we can continue on.

**Mrs. Rando: All right, Mr. Hickernell would like to have time to look at the statute of limitations so we are going to continue this case to October 28th.**

**On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to continue Case No. 2014-20 to October 28th. The roll being called: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, yes.**

**Mrs. Rando we need a motion to extend the time to act on this case:**

**On motion of Mr. Hickernell seconded by Mr. Sergi, the board voted to extend the time to act on this case to December 16th.**

**One more motion is in order.**

**On motion of Mr. Sergi, seconded by Mr. LaSane the board adjourned at 8:20 P. M.**

*Barbara Rando, Chair*