

**CITY OF WALTHAM
ZONING BOARD OF APPEALS**

September 30, 2014

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, September 30, 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 one new case before us, Case No. 2014-21, Pasquale Torcasio, 41 Williams Street, for a variance for existing lot area.

The first action this evening is for a motion to accept the minutes of September 23, 2014.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of September 23, 2014.

Mrs. Rando: Will the clerk please read the Petition in Case No. 1014-21?.

The clerk then read the Petition of Pasquale Torcasio in an application for a variance for existing lot area to allow the construction and use of a commercial building on the property known as 41 Williams Street. Said building to be constructed on a legal non-conforming lot containing 6,932 square feet. The lot and proposed building meet all other

requirements of the Zoning Ordinance. The existing non-conforming residential building shall be taken down and the new building will be used for commercial purposes, including storage of materials and parking of vehicles. Location and Zoning District: 41 Williams Street; Commercial Zoning District.

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

Philip B. McCourt, Jr., Attorney, 15 Church Street, Waltham, representing Mr. Pasquale Torcasio, came forward and gave each member a copy of his brief.

Mr. Sergi: Is this what was sent to us, already sent to the legal department, and they received it?

Mr. McCourt: Yes. The same thing.

Mr. McCourt then read his brief into the record.

Mr. McCourt: So, I'm prepared to attempt to answer any questions or get you more information or anything in relation to this, but our bottom line is to ask that you consider granting the lot area variance for existing lot. We can't meet ten. We have the sixty-nine. We want to continue sixty-nine, obviously. And if we don't, we have nothing.

Mrs. Rando: Well, that's not really, you have nothing. I think you have a problem with the hardship because you state that financial hardship is not being able to make reasonable use of your property. There's a house on that piece of property and that house on that property kind of hurts your hardship, in my opinion, because you could sell the house. You could rent the house. So there's no hardship.

Mr. McCourt: Of course there is. The house, first of all, is a nonconforming use that wouldn't be permitted. If we take that house down, he can't build a house. He can't add to the house other than coming here and asking for ten percent.

Mrs. Rando: That's right.

Mrs. Rando: You could sell it and someone could live in it.

Mr. McCourt: Yes, but that's out of character with the entire neighborhood.

Mrs. Rando: He's making use off the land, so I don't see a hardship.

Mr. McCourt: What do you mean?

Mrs. Rando: He's making use of the premises. He can sell it. He can make money that way. He can rent rooms.

Mr. McCourt: He bought it to build a garage knowing he had to come here.

Mrs. Rando: And you said that if we vote, it will be unusable.

Mr. McCourt: Well no. If you deny it would be unusable for its commercial purposes. Other than I do agree, if you took that house in its current position and configuration and even if we say, well we could come here and ask for a ten percent increase, I mean it still would only be a single family house because under the provisions of the special permit for nonconforming use, you can't make it worse. So, you can't go even to

a two. You can't let us have a two because we can't build any house there. You can't let us have another house. You can't get any house at all. I mean that's one of those things, you might say unfortunate parts of having a lot in a zone that doesn't have any, you might say, by right or at least accepted ability to make further use of the lot other than, I agree, he could fix that house up and you know it's very marginal and mostly the lot as you can see on this red dotted line, I mean, this has been parked by DiPronio for years. He bought it. One of his men lived in the house from time to time. Sometimes he just stored equipment in it.

Mrs. Rando: I just don't see a hardship here. And as far as substantial detriment to the public good the ordinance is so that people will not build on less than a hundred and thirty square foot lot and he's got six thousand, nine hundred and twenty-three instead of ten thousand.

Mr. McCourt: I think if you read the cases, it's very clear.

Mrs. Rando: I did. I read the cases and the cases didn't say anything about there being any building on these lots. Those were the cases that you mentioned.

Mr. McCourt: We are here for an undersized lot. That's what we are here for.

Mrs. Rando: But I don't see a hardship. And you can't say that the size of the lot is a hardship.

Mr. McCourt: Well of course it is. You can't build on it.

Mrs. Rando: So every small lot, you should let them build on it because that's a hardship!

Mr. McCourt: If they fall under that category, yes.

Mrs. Rando: Not your category.

Mr. McCourt: No, no. Not my category. The zoning ordinance says it's in a commercial zone but you have to have a minimum of ten thousand square feet. We have even worse than that. We have a single family house on it that, yes, they can't make us take that down, but it's in an area, a neighborhood that's it's really not viable to either use it because of its age and condition. I'm not saying it's totally unlivable but it's definitely it's aged and why would you invest in something that's in a commercial zone, in a nonconforming thing. No one would want to do that. If we take it down, we can't build anything. There should be an exception, in my opinion, in the zoning that says that if your'e an existing lot that you haven't changed just like they do in the residential areas that is undersized but in the zone, you ought to be able to build something in the zone meaning you have the requirements which we do. And that ought to be in there.

Mr. Hickernell: But it's not. I mean it would make the case a lot easier.

Mr. McCourt: We wouldn't even have to come here. I mean that ought to be in the ordinance. I think the cases are very clear.

Ms. Gelineau: Why do you think they did that? There are probably more than not so why do they fall under that category. I agree with you but I'm just curious what their intent might have been.

Mr. McCourt: In 1952 they probably made from a planning point of view the bad decision. So there have been several changes to the zoning, the basic ones, first zoning in 25, second zoning in 1952, changes to the zoning ordinance and in December of 88. In 1925

obviously there was no zoning so they drew big lines, if you go into the hall or something, you could see where there are large areas, a lot of farm land and they kind of drew it up with some sort of planning. Plan is idea in mind. In 52, in my opinion, they made in a pure planning point of view, a bad mistake by zoning the way they did. What they should have done was in reverse. Decide what area of general ought to be commercial or that and not zone that's where you see those little dots and it would zone sometimes what was there. But here the majority of business, it was a business zone. Felton and Charles Streets were business zones, particularly Felton Street forever. That was a poor decision that they made at the time. In 88, they didn't repeat that. They did not change the map they changed certain zoning criteria that they had. So they left behind lots like this that were unfortunate from a planning point of view and this is definitely a business area from the start when you turn the corner onto Felton Street right to the end where Central Welding and the auto body shops and that but we also have this mix of prior existing residential uses. We also have certain items of what you can put into any garage. You can't bring down some huge front end loader. You know we have an ordinance that covers that of storage of larger trucks and things and that's pretty clear and its been well enforced. You can store certain curb weights and items. You certainly can store other things and items like that.

Mr. LaSane: So Attorney McCourt, when did the current owner come in possession of this property?

Mr. McCourt: Mr. Torcasio? DiPronio is disposing all of this property in the general area, is my understanding, although I don't know that for sure. He bought it in November of 2013.

Mr. Sergi: The DiPronio's have owned, the deed said 69. That's when the trust was created.

Mr. McCourt: Right.

Mr. LaSane: My second question is, in most cities and towns in this state where there is a shortage of housing, affordable housing. Developers come up with a plan, if they are destroying a certain number of units housing for commercial property purposes are replacing what they are taking down for housing. So that's the problem I'm having. You're taking away housing with no plan to replacing it anywhere else, and then the second point, you know, the development game is a gamble. I heard you say in the beginning that they purchased this with the intent of coming to the zoning board for the plan you're putting forth now.

Mr. McCourt: There's a lot of interest in this building and if you wanted to have even an opportunity to do it, obviously it was a judgment call on his part to purchase it because the DiPronio's I think are in a pattern to dispose a lot of their property. I'm not positive and I don't represent them and I don't know. But I believe that larger parcels are for sale. They just wanted to dispose of this because its across the street from their main property.

As far as replacing a house, I don't know.

Mr. LaSane: Because the public good goes, a broad spectrum of discussions are under public good.

Mr. McCourt: Both broad and limited.

Mrs. Rando: Attorney McCourt, isn't it also a fact, that if an owner of his property can make more of an economical use of his property, that does not justify us granting a variance.

Mr. McCourt: Well, it depends on how you want to interpret what you said. We can't create our own variance. We didn't do that. This lot was created in 1854. So he purchased an existing commercial lot in the zone. Number one, he's not a developer. He's a man who has a contracting business and he needs to store some vehicles whatever they would be permissible in that area. But he just wants to build a garage to accommodate this stuff. As a matter of fact it's less unsightly than it is now because arguably the storage of trucks on the lot is permissible and has gone on for fifty years or more and this just makes it more acceptable for variance for the lot area.

Mrs. Rando: Unfortunately he has a small lot.

Mr. McCourt: Very unfortunate. They provide for it in the residential. So you can call small lots in that area should not have any future?

Mrs. Rando: Well he can make use of it.

Mr. McCourt: Hows that?

Mrs. Rando: He has that house there. He doesn't have a hardship.

Mr. McCourt: Of course he has a hardship.

Mrs. Rando: It's not the shape. The shape isn't size.

Mr. McCourt: We could talk about shape but that is irrelevant based on the size.

Mrs. Rando: That's one of the criteria.

Mr. McCourt: No, that's one of many criteria. You know how people would say, well, do you have ledge, do you have rock, you have the shape of the lot, do you have this or that? I mean, obviously few cases, there are a few, few cases have all those criteria. You look at that as a general direction of what to do. An undersized lot in a zone that makes you have ten thousand square feet and gives you no way around that is clearly an objective hardship, no matter who bought it, whether it was Torcasio or Joe Jones, or DiPronio when he bought it. I mean it's an objective hardship, nothing he created.

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

Mr. Sergi: No, I just have a question. I am familiar with this area. I know its always been used commercially. I know that DiPronio's business has always been Arc Welding and they used this lot totally for commercial.

Has this house been rented to anyone else other than an employee? Renting this house, I don't think they were renting it to make money. This was used as a business purpose, correct?

Mr. McCourt: Correct. They stored some of their paperwork and they had an employee there. Now, whether years ago, it was used by someone else, I couldn't answer that. But certainly in their ownership that's what they used it for.

Mr. Sergi: I'm familiar with the house next to it. That's another landscaper, right?
Mr. Butera is another landscaper?

Mr. McCourt: Yes, from Newton.

Mr. Sergi: So he uses that commercially as well, right?

Mr. McCourt: I believe he does.

Mr. Sergi: So chances are, no one would buy this house to live in this house. I wouldn't think so knowing this area. What is the likelihood of him renting this house in this area?

Mr. McCourt: Well, to justify keeping it up or remodeling it, very unlikely. I mean I don't want to say that you could not move into this house and do some work, but it's not an economical way to use this building. It ought to come down.

Mr. Sergi: It's not a residential area.

Mr. McCourt: Exactly. And even if we, as I say, tear it down or do anything we are stuck now with the lot. That's a sad factor but that's what it is. That's probably why it was never torn down.

Mr. Sergi: What year did you say the zoning was changed?

Mr. McCourt: Well zoning was first created in 25. I think it was a commercial zone then. I'd have to step into the hall and look at that. I don't know that. But certainly since 1952, its been commercial. That's when they drew, in some cases, broad lines but also in cases where you have little dots like the condo property on Totten Pond Road. This was Dixie's Bait Shop prior to Totten Pond Road being put in the 60's after the construction

and opening of 128. So they zoned it at that time for Business B and Business A which permitted construction of the condos. That isn't why they did it. They zoned what was on the land on the whole before they zoned virtually all this land commercially. In hindsight, what they probably should have done, especially if not here, they actually drew a line and made it a commercial zone. Then at some of these other areas, they probably should have just drawn, you know this is all single residential, two family residential and let something like the Dixie Bait Shop be a nonconforming use. But they didn't.

Mr. Sergi: When did the zoning requirements change for lot size?

Mr. McCourt: It definitely happened in 52 but there has been no change in commercial zone since then. You need a minimum of fifty feet frontage, here we happen to have eighty and ten thousand square feet. So that hasn't changed since 52.

Mr. Sergi: And all the surrounding properties are similar. Your'e saying that the other properties fall under the same type of category.

Mr. McCourt: Many of them smaller. If you look, next door is 47, then 57 and this actually is a larger parcel.

Mrs. Rando: I think you have to remember that, in order for us to grant a variance, there's criteria that he has to follow and one is relating to circumstances relating to soil conditions, shape, topography. You don't get that. Substantial hardship, you don't have that. You have the house unfortunately. Desirable relief could be granted without detriment but the ordinance says 10,000, you have 6,000. So it is detriment in the intent of the ordinance.

Mr. McCourt: There are many variances legitimately granted and upheld by courts that may have only one of those things.

Mr. Hickernell: Which one do you have?

Mr. McCourt: I have lot size.

Mrs. Rando: That doesn't have anything to do with lot shape.

Mr. McCourt: That is one of the criteria.

Mrs. Rando: Hardship is another and you don't have that.

Mr. McCourt: Well, of course I do. You don't want to listen to my argument which I understand and respect you for.

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

Mr. Hickernell: I do. Has the residential use been abandoned on this property. It seems to me that if we deny this variance and the petitioner or some subsequent owner tries to get a building permit to keep up the house and put it in rentable or sale-able condition, you might get slapped with abandonment to the use. And then you would be in a position where nobody could make economic use of the land. So, you're alleging here, and you haven't yet, that the nonconforming use has been abandoned and that's the only way I see through this for the petitioner. I'm not positive if that even does it, but that's my thought on it.

Mrs. Rando: Ms. Gelineau, do you have any questions at this time?

Ms. Gelineau: No, not at this time.

Mrs. Rando: Mr. LaSane?

Mr. LaSane: No.

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

(Three people raised their hands in favor.)

Enrico S. Corsetti , 141 Webster Street, West Newton: I am the owner of 100 Felton Street. We bought the old Plumber's Edge building. We currently own use of that. I just understand, I sat here and listened to all your questions and can totally relate to it. But what I don't understand, well you say that there is no hardship. Well, now you have these lots that are six or seven thousand square feet which you are collecting taxes on and getting the benefit from, the city is for city services, but now you tell a perspective owner, you can't do anything with it. Who in their right mind would go down there and dump a hundred thousand dollars in that existing home.

Mr. LaSane: Well, let me flip that question back to you. Who in their right mind as a developer would buy a property not knowing what the economic use would be moving forward?

Mr. Corsetti: But, there has to be an economic use.

Mr. LaSane: That's not the question I asked. Once the developer buys speculation -

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Mr. Corsetti: But there is no speculation, sir. Can I just make my point.

Mrs. Rando: I think you made your point. Do you have something else to add besides that?

Mr. Corsetti: I don't want to get controversial. But what it is, then the city has a massive problem on their hands. You have six to seven thousand square foot lots, even some that are three and four thousand square foot lots as Mr. Butera has there and he is parking in the back. But that's not for you to here right now. So, and you're collecting taxes on them but somebody can't do anything with it.

Now, going back to the other question, lets say we put the money in. Lets say a person puts the money into the home. Who is going to go down there. Financially it won't justify renting or renovating the property. So they are unfortunately, unfortunately the city has bottlenecked itself into these lots and in your infinite wisdom you have to deal with that somehow. You can't just take all these four thousand, five thousand square foot lots and throw them away. Unfortunately this is a problem for the city and I am a taxpayer on Felton Street. I own a five family home on High Street and I have a vested interest in Waltham. So I would just like to see where are we going to go with this? Maybe you might not like a contractor's garage but it's going to be a better fit. Have anybody been on Williams Street? It's a construction area. That's what it is. You have the oil company down at the bottom. You have make shift garages on the left. It is what it is. Now the petitioner is trying to propose a much better use of the property. Yes, it doesn't fit but we have to make some allotment, ten thousand to six. We can't create land. We just can't. So now we are in a position where we have to come and ask for permission, which is fine, and build something that's nice; that the city is going to collect taxes on, can monitor it much better and we have to go forward. I mean. I'm just saying. Something has to be done with

these lots or it has to come out in the paper, everybody with a six thousand square foot lot, just give them up. I mean, that's people's hard earned dollars. I mean, something has to be done with it. There has to be some use. I mean putting a new residential home on Williams Street doesn't fly. It just doesn't.

I appreciate your time. I'm more concerned, because I looked at it before he did to buy it. You've got to be able to develop a piece of property somehow.

Mrs. Rando: Is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, I think we have one letter that needs to be read into the record from Councillor Logan.

The clerk read a letter dated September 29, 2014 from Councillor Logan in opposition.

Mr. McCourt: I didn't see this letter that Mr. Hickernell read and I wouldn't be prepared to debate it or I'm sure the cases that I cited has substantial different facts than cases here which appears was they were using the size to somehow increase what they wanted within a certain zoning district.

What I would like to do is have the chance to take in all that has been said and the counter arguments and particularly to review this letter to make a response to it so that at least on the record we have a clear understanding, So based on that, I'd ask that we'd be granted a continuance in which to provide further information and response.

Mr. Hickernell: I will make a motion that the Petitioner's Attorney's be allowed to continue this case so that he can respond to this letter.

Mr. Sergi seconded the motion. Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando yes.

Mrs. Rando: We have voted to continue Case 2014-21 to November 18th.

One more motion is in order.

On motion of Mr. Sergi, seconded by Mr. Hickernell, the board voted to adjourn at 8 P.M.

Barbara Rando, Chair