

CITY OF WALTHAM
ZONING BOARD OF APPEALS

October 28, 2014

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, October 28, 2014, in the Auditorium of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

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

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

Mrs. Rando: Tonight we have one continued case, two cases for an extension of time and one new case before us:

Case 2014-20, Yueh-O Jane Parker, 528 Lexington Street, and its for an appeal from the Building Inspector; Case 24-23 Gibraltar Pools Corp./Bernard Djevalikian, 6 Sachem Street, and that's for a Special Permit; Case 2014-17, Varnum Park for an extension of time and Case 2013-17 Matthew Halloran, 112 Shirley Road for an extension of time.

The first action this evening is for a motion to accept the minutes of October 7, 2014.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of October 7, 2014 .

Would the clerk please read the petition in Case No. 2013-28, Petitioner 232 Realty LLC, in an application for a Special Permit to change to similar use an Appeal from the Decision of the Building Inspector. The petitioner requests a Special Permit to utilize residentially zoned land which has been used by the City of Waltham as a gravel bank and storage area to be utilized as an area for storage of construction supplies and building materials associated with the Ideal Concrete Block Business operated on the adjacent property at 232 Lexington Street as a similar use of not less restricted character. The petitioner appeals the Decision of the Building Inspector prohibiting use of the nonconforming residentially zoned land adjacent to 232 Lexington Street for the purpose of storage of construction supplies and building materials associated with the Ideal Concrete Block business without a Special Permit. Location and Zoning District: 17 AFT Varnum Park, Residence A-3 Zoning District.

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

Attorney Richard F. Dacey, 707 Main Street, Waltham came forward.

Mr. Dacey: I do represent the Petitioner 232 Realty LLC. This matter has been adjudicated by this board by a decision dated May 20, 2014. The decision has been recorded in the Registry of Deeds and no appeal has been taken.

The petitioner has been working on his mitigation measures alterations to the site during the summer and some, not all of his mitigation measures, are now complete. The order that was entered by this board required that the alterations be done within ninety days of the decision and that has proved to be insufficient time to get all of the work done.

I will tell you very briefly, what has been done is that the new fence is installed along both boundaries. All of the trees are in. The box trailers have been removed off the back

property. What is delayed is moving the mulch. There were piles of mulch back there. The strategy was to sell as much of it and then just remove the remaining portion of it. The other piece that's significant is the concrete wall along the left hand side of the property.

The petitioner respectfully requests that he could get all of this work done by December 31st of this year and with the permission of the board the time to do this work will then be extended from the order date to December 31st.

Mrs. Rando: What was the order date?

Mr. Dacey: Ninety days from the date of the decision. It wasn't a specific date.

Mrs. Rando: What was that? May, June, July, August?

Mr. Dacey: Yes. The document was actually recorded on June 5th. So we had to wait for the appeal period to expire. Then we had to do the recording at the Registry of Deeds and then file the decision in the building inspector's office. So that the earliest date he could have actually started by the order, he should have been finished by the end of September.

Mrs. Rando: So you're passed your time. You passed the time that we gave you. Is that what you are saying?

Mr. Dacey: Yes. Well, there's remaining work to be done that isn't complete.

Mrs. Rando: Right. It was supposed to be done by this date and you missed that date and now you're asking for an extension.

Mr. Dacey: Yes.

Mrs. Rando: Have we ever given an extension after someone has run out of time like that? Usually they come and ask for an extension before the time has run out. Why didn't you come in before?

Mr. Dacey: Well, I think it was actually the decision of the building inspector who said when are you going to get it done? And I don't think that he would have insisted that we made a formal filing for a matter of ten days, but it's apparent the wall, which is a structural issue, had some engineering component to it that required more attention, so it was actually the building inspector who suggested that we file for the extension. So, that's why we are here.

Ms. Gelineau: I think the ninety days was self-imposed, right?

Mr. Dacey: Yes.

Ms. Gelineau: You said you could do it in ninety days and I think if you had said, I need six months that night, we probably would have agreed to it. But we agreed to your request and you have made your best effort.

Mr. Dacey: We may have been a little optimistic. I would also point out that most variances are conditioned on completing the work, starting in one year and finishing in two. So we were very optimistic to think that we would start and complete in ninety days.

Mrs. Rando: That is actually part of the decision. All work required by these mitigation measures and alterations to the site plan shall be accomplished in ninety days from the date of the decision. I never remember giving an extension after the date has run out. Why don't you just open it up? I don't particularly look forward to it either, but - - -

Mr. Dacey: We are not going to do that. If we did that we would wait for the building inspector to seek enforcement. I think what the building inspector would like to do is, he would like a reasonable opportunity to come down and make sure everything is done. This has just got a little beyond what we thought, but it's not that most of the work hasn't already been done. As I said the fence is in, the trees are installed, the signs are up and it was a matter of selling the mulch or move the mulch and they decided to sell the mulch so they didn't have to move it and it's mostly gone and the only thing that is structural that needs to be done is the concrete wall. I think that the original anticipation was that the wall could have been installed by their own personnel and the building inspector has determined that it is a sufficiently complex structure that requires engineering and that's the reason for the delay.

Mrs. Rando: I have no problem with extending the date at all. It's just that I never remembered as long as I have been on the board that we have ever extended a date after the time has run out and I hate to open up pandora's box.

Mr. Dacey: Well, this is a little bit of an unusual situation in that, as Ms. Gelineau indicated, these conditions were voluntarily offered and probably if you were imposing a restriction, typically, it would have been one year to start and two years to finish which we thought was way more than necessary to accomplish what we needed to accomplish. So we absolutely created a problem for ourselves here. So there is a portion of my request here tonight that basically asks for your indulgence. We simply miscalculated a bit on the amount of work that we could do in ninety days. It's not that they haven't started. They have. It's probably eighty percent done. The building inspector is not upset with this other than he wants to be able to come in and inspect work after its been submitted on an engineered set of plans. He doesn't want the wall done unless it's structurally designed.

Mr. Sergi: Counsellor, the wall is sixty-five feet in length and six feet high, so, I mean you want to make absolutely sure that it's properly installed. I think that's a unique issue.

Mr. Dacey: And that is the delay. The delay is that they said, don't even attempt this yourself, go get a structural engineer. I mean, the blocks are all there. They need to get the engineer in and do the soil test. So, it got a little more complicated than we thought.

Mrs. Rando: Mr. Hickernell, how do you feel? Do you have an opinion on this case?

Mr. Hickernell: With Mr. Sergi, I think this is a pretty unique set of circumstances. The time they asked for originally, I granted it, and I don't have a problem granting it now.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: No questions?

Mrs. Rando: Mr. LaSane?

Mr. LaSane: So - - -

Mrs. Rando: Why didn't you come in August before the time ran out when you found out?

Mr. Dacey: You know, I think if the building inspector made a point of it, I think we would have. I don't think that anyone thought that this was as elaborate a construction project as it turned out to be and by the time the building inspector said, I am not going to let you do this without a set of engineering drawings, it was too late to do the work. So, that's basically what happened.

Mrs. Rando: So you're saying, if anyone has the usual wording, which is a year or two years, if they miss it we should give it to them. That's what you are saying, it's not necessary to put this in the decision.

Mr. Dacey: I actually think there is language in a variance statute, Chapter 40A, that allows you a six month extension but that's by variance. This is not a variance. This is an Appeal from the Decision of the Building Inspector which I don't think is limited that way. I think the only real limitation is the self-imposed limitation that we offered you and you accepted. So, if you want to distinguish this from the scriptures of Chapter 40A, you could do it easily.

Mr. LaSane: Well, I am just basically nervous about the precedence.

Mrs. Rando: I am too, doing something we have never done where we have two cases tonight that are very similar. My opinion would be to get an opinion from the law department whether we have the right once it's in the decision. I will make that motion, do I have a second? Hearing none, I am ready for a motion to accept the extension of time to December 31st.

Mr. Sergi: I will make a motion that we extend this to December 31st. I don't see this as a variance issue and I think that we have the right to do that and not set a precedence.

Ms Gelineau 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 four to one in favor.

Mrs. Rando: Is there anyone here from the Halloran family for an extension of time? Seeing none, let's do Case 2014-23 Gibraltar Pool Company, 6 Sachem Street, the owner is Bernard Djevalikian.

Mr. Hickernell: Perhaps, Madam Chair, after the next case we should make sure that Mr. Halloran is not downstairs.

Mrs. Rando: Yes, good. We will do that after this.

The clerk then read Case 2014-23 Gibraltar Pool Company, Owner Bernard Djevalikian for a Special Permit for an above ground swimming pool. The petitioner is seeking a special permit to install an above ground swimming pool that cannot conform to the required side yard and rear yard setbacks. Location and Zoning District, 6 Sachem Street, Residence A-3 Zoning District.

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

Jay Henshaw, Gibraltar Pools came forward representing the homeowner Barnard Djevalikian.

Mr. Henshaw: Basically the issue with this is, we were surprised when we went to pull the permit that we were so close to the property lines. Sachem Street ends out at a very large undeveloped parcel of land and a paper road which is Graymore Road. The way this property was put in, and Mr. Djevalikian wasn't aware of, was that his driveway is actually a right of way. In the plans, I gave you a picture of an overhead shot of the pool, of the property rather. You can see the driveway, and that is actually what would be Graymore Road. (Mr. Henshaw submitted four photos of the property.)

According to the building inspector and the engineering department, the interest in developing the rest of that land was lost due to the difficulty of getting utilities in there. So, there doesn't seem to be any interest in continuing the development of that land which is physically undeveloped land. So, what we propose to do will have virtually no impact on any neighbors. It's not a permanent structure and basically what we are seeking is relief of side and rear property setback requirements to install an above ground swimming pool. Due to topographical conditions and the placement of the dwelling this is the only area on the property the pool can be installed. The property is located on a cul-de-sac at the end of Sachem Street bordering on a large undeveloped area. According to the Waltham building inspector's office, there is no current interest to develop this area owing to among other things the difficulty of running utilities into the area. We are asking for relief of five feet, allowing for placement of the pool to be five feet off the side property line instead of the required ten feet. We are also requesting relief of three feet allowing for the pool to be seven feet off the rear property line. Presently, there is a right of way allowing for the driveway accessing the garage under the house. This right of way extends approximately twenty feet. The proposed above ground pool is on the inside of the right of way.

This above ground pool is not a permanent structure and will not significantly alter the land or surrounding area. If this Special Permit is approved, the proposed above ground pool will be within the spirit of the use of private residential property and allow the homeowner reasonable use of the property without damage, harm or disturbance to surrounding land or neighborhood. If the Special Permit is granted, the proposed pool will comply with all other building and zoning regulations.

Mr. Hickernell: So, it is an above ground pool and if it suddenly becomes easier to run utilities in there, it wouldn't be that big of a deal to get rid of the pool and the owner would understand that that was a risk.

Mr. Henshaw: Yes, he understands it.

Mrs. Rando: There's quite a slope in back of this yard.

Mr. Henshaw: Pictures number three and four will show you the area.

(Mr. Henshaw went over the photos with the board.)

Mr. LaSane: Worst case, if the pool fails, where does your water go?

Mr. Henshaw: The structure of the pool won't allow it to fail. If the liner failed, the water would drain just into the yard. The pool can't structurally fail the way its built. But if the liner failed, it would drain out into the yard.

Mr. LaSane: So, it's not a permanent fixture, so he will be emptying it once a year?

Mr. Henshaw: He wouldn't have to empty it. The land around the area isn't conservation land, no wetland issues and that. The structure of the pool is very secure and you don't throw away the water.

Mrs. Rando: Did you speak to the neighbor, the one on your right?

Mr. Henshaw: I haven't spoken to him. There is another pool if you look right to the right of that neighbor, there is a pool.

Mrs. Rando: Above ground?

Mr. Henshaw: Yes.

Mrs. Rando: So, actually, in this picture number three, the pool would be over here.

Mr. Henshaw: In picture number three the pool would be behind the house.

(Mr. Henshaw went before the board to go over photo number 3.)

Mrs. Rando: Do you have any other papers? What about the Proposed Decision and Findings of Fact?

Mr. Henshaw: No, I wasn't aware of that until late this afternoon.

Ms. Gelineau: There's no restriction on the distance of the house?

Mr. Henshaw: No.

Ms. Gelineau: Is that because it's an above ground?

(Mr. Henshaw went over the plan with Ms. Gelineau.)

Mrs. Rando: You have no Decision or Findings of Fact?

Mr. Henshaw: No. Again this is a more formal hearing. I am not an attorney, so I kind of blew that by. I just have this narrative which I just read to you.

Mrs. Rando: I suggest that we give him five or ten minutes. I'll give you something to follow and you can give us your idea of a Decision or a Finding of Fact and then we can vote on that.

So, I have a motion for a five minute recess. Do I have a second?

Mr. Sergi seconded the motion and the board voted to give Mr. Henshaw five minutes to prepare a Proposed Findings of Fact and Decision.

Mrs. Rando: While we are waiting for the earlier case to write a Findings of Fact and Proposed Decision, we are going to take another case.

Would the clerk please read the petition in Case No. 2013-17, Matthew and Dawn Halloran, 112 Shirley Road, and that's for an extension of time.

The clerk then read the petition in Case No. 2013-17, Matthew Halloran in an application for a variance. The petitioner seeks a variance to allow the construction of a detached garage, with second floor and windows for walk up storage. Location and Zoning District: 112 Shirley Road, Residence A-4 Zoning District.

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

Matt Halloran, 112 Shirley Road, Waltham came forward.

Mr. Halloran: Just last year I was granted a variance for a two car garage with walk up storage at my residence. It was basically the third phase of construction in the back yard working our way out. We are in the process of an 8 x 20 addition but we had to incorporate some on site drainage for the drainage calculations and we were working our way to the garage. And the garage, due to time over the long cold winter from the time I got accepted for the variance, the over cost that I ran into with the addition and other stuff, I was hesitant on pulling the permit on the garage but we are now ready to go. So I have written a letter asking for an extension just because it's getting very close to expiring, that it will allow me the time to get my builder and everyone back in order and keep everyone working steadily through before the ground freezes and we can't excavate our ground.

Mrs. Rando: And your time runs out 11/22?

Mr. Halloran: I believe its 11/1.

Mrs. Rando: Any questions from board members? Hearing none, I am ready for a motion.

On motion of Mr. Hickernell that the petitioner be granted a six month extension to begin and to complete the work. Mr. Sergi seconded the motion the board voted to grant a six month extension of time.

Mrs. Rando: All right, Gibraltar Pool, are you ready?

Mr. Henshaw: Basically, the Proposed Findings of Fact and the Decision, the petition we are seeking is relief of side and rear property setback requirements to install an above ground swimming pool. Due to topographical conditions of the placement of the pool on this property, it is the only place it can be installed.

The property is located on a cul-de-sac at the end of Sachem Street bordering on a large undeveloped area.

According to the Waltham Building Inspector's office, there is no current interest to develop this area owing to, among other things, the difficulty of running utilities into the area.

We are seeking relief of five feet around the placement of the pool, to be five feet off the side property line, instead of the required ten feet.

We are also requesting relief of three feet allowing for the pool to be seven feet off the rear property line.

Presently there is a right of way allowing for the driveway accessing the garage underneath the house. This driveway extends approximately twenty feet on the side of the house. The proposed above ground pool is on the inside of the right of way.

PROPOSED FINDINGS OF FACTS;

1. The above ground pool is not a permanent structure and will not significantly alter the land or the surrounding area.
2. If the Special Permit is approved, the above ground pool will be within the spirit of the use of the private residential property.
3. It will allow the homeowner reasonable use of the property without damage found and disturbance of the surrounding land in the neighborhood. If the Special Permit is granted, the proposed pool will comply with all other building and zoning requirements.

PROPOSED DECISION:

The granting of this decision is based on the following:

1. The aforementioned Findings of Fact.
2. There are conditions affecting this parcel of land and not others in the area because of the decision not to further develop the area.

3. Desirable relief may be granted without substantial detriment to the public good because the character of the neighborhood will not be compromised or altered.

4. The property is located in a residential zone and the proposed pool is within the spirit and the use of residential property.

Mr. Hickernell: That recites some of the requirements for a variance. It's really just a Special Permit. So my suggestion, and I apologize for not doing this before you went through the trouble to write this out, and obviously at the pleasure of the board for your Proposed Decision, after incorporating the Proposed Findings of Fact, simply state that: "The board finds that the proposed setback will not be injurious to the neighborhood."

Mrs. Rando: Is there anyone in the audience in favor of this petition? Seeing none, is there anyone in opposition? Seeing none, is there anyone seeking information? Seeing none, I don't believe that there are any letters to read into the record.

All right, he has read the Findings of Fact, do I have a motion to accept the Proposed Findings of Fact?

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to adopt the Proposed Findings of Fact to be the board's Findings of Fact.

Roll call: 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 Proposed Decision?

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted that the Proposed Decision becomes the board's decision.

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

Mrs. Rando: Would 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 a 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, Waltham, the Petitioner's representative came forward.

Mr. Connors: The petitioner is here with me tonight, Yueh-O Jane Parker and her husband Mel Martocchia. The last time we were here, in fact, we made a presentation and I do believe that the issue was a question on one of the cases that I had submitted and actually I think Mr. Hickernell wanted an opportunity to review that and the case law related to that. But that was the case that I cited that evening. I think I gave him a copy which was the Town of Marblehead vs. John Derry. So I do have additional copies of that particular case if the board would like it. I have another case and I don't want to confuse the board or belabor it, but I think it was a simple case that was decided in December 2013

by the Court of Appeals and it is a Rule 128 decision and it's essentially a one page decision that articulates the distinction between a ten year statute of limitation and a six year statute of limitation. (Mr. Connors submitted a copy of this to each member of the board.)

I thought that this was kind of a succinct case that states on the bottom right hand column, the second to right last paragraph: The six year statute of limitation applies to challenges to structures and uses that were built or improved in accordance with a building permit. Whereas the ten year statute of limitations applies to challenges made to structures not built pursuant to or any lines on a building permit. And I just think I am kind of restating myself in what I said before, but I do think that's exactly what we have here. We have a six year statute of limitation that applies to uses that were permitted by a building permit and that time frame has run out for the city. And as I stated before, I gave out and cited a case which is the Town of Marblehead vs, Derry, which is really, that particular case was more of an equitable argument but in that case, the court found that even though technically there was a violation of a setback, the court found that just equitable principles just prohibited the issuing of an injunction adjoining the structure from violating a particular setback. So, I would say that one, the plain language of the statutes states that the building inspector would have needed to take action within six years of the last date that the legal use of the two family was permitted which would have been seven years after 1946. And then, aside from that just equitable principles of fairness that we also had here a landowner that purchased the property in 1999 and relied on a certificate of occupancy that was issued in 1986 that said the use was legal. Subsequent from that, there is a letter from the building inspector in 1996 which again says the only legal use of the property is as a two family.

I think it is clear that the statute of limitations protect us from also this equitable issue as well. Unless the board would like me to, I don't think there is any reason to kind of rehash everything and if the board has any questions, I will be glad to answer them.

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

Mr. Sergi: No.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: I find the cases cited by the petitioner are on point. I have no questions.

Mrs. Rando: Ms. Gelineau?

Ms. Gelineau: No.

Mrs. Rando: Mr. LaSane:?

Mr. LaSane: No.

Mr Connors: Madam Chair, I did submit Proposed Findings and Proposed Decision some time ago and those remain as written.

Mrs. Rando: Is there anyone in the audience that it 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, are there any letters. (There were no letters.)

Mrs. Rando: You may continue with your Proposed Findings of Fact.

Mr. Sergi: Counsellor, have you incorporated all of the cases in the Findings of Fact?

Mr. Connors: I didn't, but I could if the board would like me to do that. Based on the particular cases I cited to the board, I could add that a Findings of Fact so I would add

Mr. Hickernell: May I make a suggestion, on your Proposed Decision, the second to last paragraph, states "that the board, therefore, finds that the use of the existing structure on the locus property as a two family residence is legal and may continue legally," I would propose added to that sentence, "additionally for the reasons cited in Town of Somerset site and in the alternative Guaranteed Builders, Inc., site.'

Mr. Connors: And I can add those two particular cases to the Proposed Findings of Fact as well.

Mr. Sergi: I am okay with that.

Mrs. Rando: All right you may continue with your proposed Findings of Fact.

On motion of Mr. Sergi, seconded by Mr. Hickernell, the board voted to waive the reading of the Proposed Findings of Fact since its been on file and they have had a chance to read it.

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

On motion of Mr. Sergi, seconded by Mr. Hickernell, the board voted to waive the reading of the Proposed Decision, as amended, since its been on file and they have had a chance to read it.

Mrs. Rando: I am ready for a motion on the Proposed Findings of Fact.

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted that the Proposed Findings of fact be adopted by the board as the board's Findings of Fact.

Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, no. The vote was four to one in favor.

Mrs. Rando: Do I have a motion on the Proposed Decision, as amended?

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted that the Proposed Decision, as amended, be the board's decision.

Roll call: Mr. Sergi, yes; Mr. Hickernell, yes; Ms. Gelineau, yes; Mr. LaSane, yes and Mrs. Rando, no. The vote was four to one in favor.

Mrs. Rando: One more motion is in order.

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to adjourn at 8:15 P.M.

Barbara Rando, chair