

**CITY OF WALTHAM
ZONING BOARD OF APPEALS**

November 25, 2014

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, November 25, 2014, in the Auditorium of the Arthur Clark Government Center, 119 School Street, Waltham, MA.

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

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

Mrs Rando: Tonight we have one new case before us, 2014-25, William M. Ducey, 697 Lincoln Street in Waltham. and that is for a variance.

The first action this evening is for a motion to accept the minutes of November 18, 2014.

On motion of Mr. Sergi, seconded by Mr. LaSane, the board voted to accept the minutes of November 18, 2014.

Mrs. Rando: Would the clerk please read the Petition in Case No. 2014-25, 697 Lincoln Street?

The clerk then read the petition on Case No. 2014-25, William M. Ducey for a variance on frontage. The locus consists of a parcel of land known as 697 Lincoln Street. Two buildings are situated on the locus. The Petitioner is proposing to create two lots and then to construct use and maintain a new single family residence on the locus. The commercial building on the locus shall be demolished. Location and Zoning: Lot B at 697 Lincoln Street; Residence A-2 Zoning District.

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.

Mr. Connors: I am representing Mr. Ducey. Mr. Ducey is to my left. I do have a brief. (Mr. Connors submitted a copy of his brief to the board members. He also submitted photos and copy of building permits and a petition signed by the neighbors who were in favor. He then went over an abutters plan and read his brief into the record.)

Mrs. Rando: I've read it and I've listen to and I still would like to ask a couple of questions so that I have my facts straight before I say anything.

You have Lot A which is 15,114 and that has a single house on it. You have Lot B thats 17,585 and that's a commercial building, correct?

Mr. Connors: Right.

Mrs. Rando: Now Lot B, you need frontage. You want to create four new lots, Lot A, Lot B, Lot C and D. Lot A will have the single family house on it?

Mr. Connors: Yes.

Mrs. Rando: Lot B is the one you need the frontage on?

Mr. Connors: Yes.

Mrs. Rando: Lot C and D are going to remain vacant.

Mr. Connors: No. Lot C and D abut these residential lots here, (referring to the plan), so he's had a discussion with these owners to just conveying the land for a dollar because they are really out there on an alley.

Mrs. Rando: So the problem is that you have to have eighty feet of frontage in the area that you're in and you only have 37.12 feet which means that you have to have 42.3 feet more. You have sixty something percent you need for this.

Mr. Connors: I have about forty-six percent, I believe. Forty-six percent of what's required under the ordinance.

Mrs. Rando: Are you building your whole case on getting a variance for Lot B? Your whole case is hinged on Lot B getting the frontage. Is that correct?

Mr. Connors: Yes.

Mrs. Rando: I also have one other question. In part of your brief you mention a building window. I have never heard that said before. I see it on the plan but I have never

heard that term.

Mr. Connors: Well, Mr. Bibbo made that terminology up. But what he was trying to do is just create essentially an area in which we construct a single family residence. If we did so, we would conform to all the required setbacks, so what he tried to do was show it. If we build a single family in this building window then we showed a twenty foot setback, a forty foot setback and we met all the required setbacks. What I am trying to show is that we don't know exactly the dimensions of what we are going to construct but what we are showing is that it has to be built and constructed within this building window. Otherwise it would be another variance, so that is not our intention.

Mrs. Rando: My problem is with the variance. I don't think you have a hardship. I don't see how you feel that you can come in and ask for frontage as a hardship. If frontage was considered a hardship, we'd have everyone in here who did not have the proper frontage asking for a variance. How do you justify that?

Mr. Connors: Well, I mean, you can ask for a variance on frontage. And so, the way I was able to create the lot, which was created was an Approval Not Required Plan which says on the plan, "This not a buildable lot". So it's not a buildable lot, Lots B, C, and D are limited as not buildable lots. And so the only way that Lot B can become a buildable lot is if I receive a variance for the frontage.

Mrs. Rando: But there's extensive case law that state the deficiency in frontage of a lot is not a circumstance relating to soil, topography or shape of the lot. So how are you bringing shape and topography or whatever into the argument?

Mr. Connors: Well, I think it is. I think in this instance we have a structure that is

situated, the majority of it on a Lot B. So I have an existing commercial structure that sat there for fifty years and its of no use to anyone now, so he needs to be able to tear that down and finance it to do it.

The other thing is the shape of the lot. It would be one thing as if I had four rectangular lots and one of them was thirty-seven feet. That's not what I have. I have a lot that exceeds the lot area requirements of 15,000 sq. ft. But because of this unique shape lot, the best I can do and to make that conform is create a lot that has a frontage of 37 feet. So it definitely comes from the unique shape of the lot. I mean I have two buildings on the lot which wouldn't be permitted today technically, unless I go to the Board of Survey and Planning and get permission to construct two buildings on a lot. That's what I have here. So I think what's unique for us is that this isn't vacant land. I have a building that's been sitting there for many years that he'd like to get rid of.

Mrs. Rando: I think that Chapter 40A clearly states that the City Council is the one that sets the rule for the frontage requirement for lots. When the City Council established the lot size, how are we to overrule that?

Mr. Connors: MA General Laws, Chapter 40A, Section 10 entitles you to grant dimensional variances.

Mrs. Rando: I think that 40A clearly states that lots that do not meet the maximum frontage are not deemed build-able. It's not a hardship.

Mr. Connors: Well, I think they are not buildable until I get a variance.

Mrs. Rando: I don't think you have a hardship for us to grant a variance. We just had a case a couple of months ago that had insignificant frontage and we didn't grant that

for the same reason.

Mr. Connors: Well, I think, in this instance I have a commercial building that has been sitting there which I think is different than most of the cases. So this is an opportunity for him to put himself in a financial position where he can demolish the existing commercial building which is now obsolete and has been deteriorating for fifty years. And I do think that MA General Laws allows you to grant a dimensional variance for frontage.

Mrs. Rando: You don't have a hardship, I think. That's one of the statutory requirements.

Mr. Connors: I have a unique shape and I have a structure.

Mrs. Rando: And I stated that there were two cases that I found today that state that you cannot use the shape, topography of the land.

Mr. Connors: Well, I think you can and there are cases out there that would suggest that - - -

Mrs. Rando: Are you basing your case on the Johnson Case?

Mr. Connors: No. Well, I mean I think that's a hardship. The structure is the hardship in the Johnson Case. But there are other cases that talk about whether or not a frontage variance can be granted and there are cases that say it can be.

I can read a case right here that's Peters vs. Cricone vs. The Planning Board of

Dracut. It was a case where there was a plan marked as a non buildable lot and it says in the case that the “Prior to the submission of the plan to the Planning Board, the Dracut Board of Appeals granted the Plaintiff a variance from the applicable zoning by-law frontage requirement of 175 feet. So, there’s a case that I am citing, and I’ll give a copy to the board. So I think that you are legally entitled to do it. Whether or not you would like to do it, but I do think that under the law, if I meet the requirements, I am entitled to a variance. But that’s the case where the court cites, in that case, it had to do with the ANR Endorsement and that was what was litigated but also the court noted that they were entitled to an ANR endorsement and one of the basis was that they had a variance requirement so you couldn’t deny the ANR Endorsement because they already had cured the frontage problem.

Mrs. Rando: Well I found a case today, *Karet vs. the Board of Appeals of Worcester, 1989*, it states that the Zoning Board of Appeals exceeds its authority in granting a variance to construct a dwelling on a lot with less than the minimum frontage required.

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

Mr. Sergi: Well, just one clarification, Counselor. When you said you created these lots, you just recently created these four lots in this manner?

Mr. Connors: They were actually created in 2008 right here on an ANR plan that has yet to be recorded. In 2008, the real estate marked declined so now he is in a better position to do it.

Mr. Sergi: And when Mr. Ducey purchased this was it the way it is today?

Mr. Connors: Yes. So, you will see in my Exhibits B and C and the two D's to Mr. Ducey and the D is the newly created lot in 1975. In 1975 they created Lot 1, he bought it. He didn't create it, he bought it and that's what he has now and so we are asking to cut that Lot 1 into A,B,C and D.

Mr. Sergi: I tend to agree with the comments of the Chair, Counselor. I've seen a lot of these type of lots that are cut up in this manner throughout the city, which, in my opinion, is a disgrace. I don't think it's a good thing to do. So I don't think you have sufficient hardship.

Mr. Connors: I would point out to the board if you look at right behind him there's two lots, the old rattail lots, that they use to create that have twenty feet of frontage so we exceed that by almost twice as much and we meet the lot area requirements. So, I understand that if this was vacant land it would be one thing if he's building a house behind another house but he has this commercial building that he's trying to get rid of.

Mrs. Rando: Mr. Hickernell?

Mr. Hickernell: Counselor you'd agree that the commercial use on the lot is abandoned, right?

Mr. Connors: Yes.

Mr. Hickernell: Do any of the cases in which a structure is the unique circumstance for a variance involved in the demolition of that structure?

Mr. Connors: I haven't seen any, no.

Mr. Hickernell: I am not sure I agree that this is a bad idea. I think there's enough space there to support another home but I'm not sure that the code gives us the discretion in this case.

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

Mr. LaSane: No, not at this time.

Mrs. Rando: Mr. Rudnick?

Mr. Rudnick: Counselor, I guess the hard time I am having with this is, it's not about the frontage. I mean, frontage is not your hardship. It's what you are trying to cure, but it's not the hardship. You're alleging that the building is the hardship and that's more like a hardship to me.

The trouble I am having is that this parcel as it is today, they're making economic use of the lot. It's a very large house lot. It's got a house on it and I understand there's a building that needs to be demolished and that's a hardship, but it seems that the thing you're asking for a variance from is, you know, essentially it's a deficiency in the property that you are creating. This property did not have any deficiencies at all other than the diminimus setback deficiency of the building which, frankly, sounds like you're blaming that on the city that the city actually caused that setback.

Mr. Connors: I'm saying that that affected it.

Mr. Rudnick: In any case, that's a pre-existing. But the thing is that this locus is currently making good economic use of the land as a single family house lot which is what

this neighborhood is built for and you're subdividing the lot and creating the need for the variance by subdividing the lot. There was no need here for a variance here to make economic use of the lot. It sounds to me like you would like us to assume that you are subdividing the lot in order to pay for the demolition of the building which is the only hardship you have is that derelict building on the property. And I do understand that and I agree that it is a hardship. But I'm not sure that it is a hardship that relates in any way to the frontage. The hardship that created the frontage is that you made a bad division of the lot. And I do see that you don't have the opportunity to make a better one. So, I am trying to balance that. But essentially what I am looking at here, without knowing the personal stories of any of this, is a landowner who would like to subdivide his lot and make two house lots out of it and reap the economic benefit of now owning two house lots and build a new house on one, or sell that to somebody else and build a house on that one. So, I mean, your description of the purpose of the subdivision being to get rid of the problem of this building going across both lots and being derelict. I have to be better convinced of that. It seems to me the purpose of the subdivision is to create another buildable lot that's an extremely valuable lot. And you're asking us to grant a variance for a lot that doesn't even have fifty percent of the frontage required in order to create another buildable lot. I have no problem with the building window. I think that's nicely done but it shows us clearly that we can fit any number of varieties of buildings in that lot and have all the setback requirements. I hear your point about the existing pork chop lots around there. I don't think it's our interest at the zoning board to create more pork chop lots. I think the idea is to have less of them and using the abutting lots as being similar to yours only underlines your case that your lot is unique. I agree its unique but you can't start pointing at the pork chop lots and say we could do the same.

My issue frankly is just one. You're creating your lack of frontage. There was no lack of frontage until you subdivided the lots. Now you are creating a lack of frontage and

you are asking us for relief on that so, try and address that.

Mr. Connors: Also, I have two buildings on one lot. I am trying to separate, that's what I am trying to do which I think is a unique circumstance here because it doesn't happen today without some type of approval.

Mr. Rudnick: I am more than willing to stipulate the building as a hardship. The trouble is I don't think the hardship relates to the variance request. The hardship relates to the owner's ability to pay for the demolition.

Mr. Connors: Well, I mean think also, the only way I could create a separate lot for the two separate buildings was to attempt to conform to the requirements of the ordinance as much as I could with Lot A. So Lot A completely conforms.

Mr. Rudnick: Can't you just tear down the building and let it go? That's do able.

Mr. Connors: It sure is.

Mr. Rudnick: I mean they don't have to create two lots in order to get rid of the building. You could just get rid of the building.

Mr. Connors: Right, but he can't just financially afford that. You know, it's just not going to happen.

I'm going to point out to you, on Exhibit D, for what its worth. On Exhibit D you will see that this lot 1 that was created. I guess at one point and time they were separated lots, and you can see there's a dash line there. (Mr. Connors went over the plan with the

board.) I think we are improving it from what was there from 75. So in 75, they had sixty feet of frontage and they had fifty-seven feet of frontage for two separate lots and then they put them together. So, I think that we improved the lot. We will fully comply with the requirements of the ordinance whereas back in 75 it didn't even do that and again we far exceeded the lot area requirements. So the frontage has to do with the shaping of the lots around the structures as they sit on the lot. And really, I guess to your point, that we shaped the lot in such a way that we would not create a noncompliant home on Lot A. So, we shaped it to shape it around the commercial building but also to make sure that the single family fully complied with the ordinance.

Mr. Rudnick: I don't mean to imply you did a bad job with that. It's a great approach in trying to break up the property. I'm just not quite buying that the purpose of subdividing is to get the building torn down. The purpose of subdividing is to create two different lots. Its benefit will be to get the building torn down.

Let me ask you a couple of slightly unrelated questions. You said this came before the board in 1975 about a different use where they wanted to sell lawn equipment, I think it is.

Mr. Connors: Right.

Mr. Rudnick: So were Zoning Boards of Appeals issuing use variances at that period? Was this thrown out because the Zoning Board could not issue a use variance or did the Zoning Board throw it out? Do you have information about why?

Mr. Connors: It says, "Petition denied by B/A for a variance to permit the use of 697 Lincoln St. for the display, sales, rental & serv. of recreational vehicles & lawn &

garden equip. & for a variance.” It’s 1974.

Mr. Rudnick: Do you know, counselor, when they stopped issuing use variances at Zoning Boards?

Mr. Connors: No, I can’t tell you.

Mr. Rudnick: Do you think that this building was considered a commercial use actually, originally. It seems more like an out building in a farm use. The farm went away so it became a commercial use.

Mr. Connors: No, because the farm was there and then - - -

Mr. Rudnick: This was back in 24.

Mr. Connors: Back in 24, it started out, there was two permits pulled in 24 and one was for the single family and one was for the milk one. Then in 52 the permit was pulled by the corporation. The Neighborhood Farm Dairy Corporation. So at that point it was a going concern as a regular business.

Mr. Rudnick: There weren’t cows at that point. They were bringing in the milk.

Mr. Connors: So the cows kind of went away.

Mr. Rudnick: I don’t have any more questions, Madam Chair.

Mrs. Rando: So, you're saying, If I am correct, that this plan that he has before us now, that the petitioner is trying to resolve the fact that there was a deficiency in meeting the zoning requirements of frontage. Is that what you're saying, Mr. Rudnick?

Mr. Rudnick: What I am saying is I understand the hardship to be the building itself, that the deficiency of frontage comes from the subdivision of the lot, not from any pre-existing hardships. The hardship of this building existed the day before the subdivision plan was filed. There is a true hardship there. No variances were required at that time. So I do have sympathy for the idea that maybe the applicant can't afford to tear down the building. But, I don't think that our business here is to make it affordable for people to tear down buildings on their lots by creating substandard lots. Again, I do think it's a nice looking lot except for the frontage issue, but it does seem that the only reason we are here to talk about that issue is because of the subdivision, not because of the hardship. I guess that's the fine print. I'm just having a hard time getting convinced that.

Mrs. Rando: Is there anybody in the audience that is in favor of this petition? (Five people raised their hands in favor.)

Is there anyone in the audience in opposition to this petition? Seeing none. Is there anyone in the audience seeking information on this petition? Seeing none, and I don't believe that there are any letters.

All right, you may continue with your Proposed Findings of Facts.

Mr. Sergi: Madam Chair, I will make a motion that we waive the reading of the Findings of Fact since they have been on file in the Legal Department and we have had a

chance to read them.

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, Madam Chair, I propose that we waive the reading of the Proposed Decision since its been on file at the Legal Department.

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

Mrs. Rando: All right, I am ready to entertain a motion on the Proposed Findings of Fact. Do I have a motion on the Proposed Findings of Fact? (No one made a motion.)

Mr. Hickernell: Madam Chair, I'll make a motion that the petition be denied. I think again, I understand and Mr. Rudnick the reason for it. I simply don't feel like we've got the discession to bend the zoning laws to accommodate this particular petition.

Mrs. Rando: I have a motion on the table to deny the petition by Mr. Hickernell.

Mr. Connors: Madam Chair, could I ask for a minute to consult with my client to see if he would consider other options before the board votes?

Mrs. Rando: It's usually done before we've gone this far.

Mr. Hickernell: The motion hasn't been seconded. I will withdraw my motion without prejudice and make a motion for a five minute recess. Mr. Rudnick seconded the motion and the board voted to take a five minute recess at 7:55 P.M.

The board reconvened at 7:57 P.M.

Mr. Connors: Madam Chair and members of the board, I have consulted with my client and with your permission would like to request permission to withdraw this application noting the concerns of the board. I would like to withdraw it and we will take another look at it in a different way.

Mrs. Rando: All right, Attorney Connors would like to withdraw his application.

On motion of Mr. Rudnick, seconded by Mr. LaSane, - - -

Mr. Hickernell: I've got a question to the motion. Is the motion to accept the withdrawal without prejudice?

Mr. Rudnick: Yes, that would be my motion.

Mrs. Rando: Now we have a motion to withdraw the application without prejudice. We have a motion by Mr. Rudnick and seconded by Mr. LaSane.

Roll Call: Mr. Sergi, yes; Mr. Hickernell, yes; Mr. LaSane, yes; Mr. Rudnick, yes and Mrs. Rando, yes.

Mrs. Rando: 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 Pandzich