

**CITY OF WALTHAM  
ZONING BOARD OF APPEALS**

**May 5, 2015**

The Zoning Board of Appeals held a public hearing at 7 P.M., Tuesday, May 5, 2015, 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, Edward McCarthy and John Sergi.

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

Mrs. Rando: We have one case before tonight, Case No. 2015-06, Walter E. Ohnemus, III and Patricia Jodi Ohnemus, Trustees of 48 Bef Cowasset Lane and 32 Cowasset Lane.

The first action this evening is for a motion to accept the minutes of March 31st.

On motion of Mr. Sergi, seconded by Ms. Gelineau, the board voted to accept the minutes of March 31, 2015.

Would the clerk please read the petition in Case No. 2015-06?

The clerk then read the petition in Case No. 2015-06, Walter E. Ohnemus, III and Jodi Ohnemus, Trustees of The 32 Cowasset Lane Nominee Trust. in an application for a variance. Subject Matter: The locus consists of a parcel of land known as Lot B a/k/a 48 Bef Cowasset Lane and a Portion of 32 Cowasset Lane as shown on the plan filed herewith. The Petitioners are proposing to construct, use and maintain a new single family residence

**on the locus. The locus is presently a vacant parcel. Location and Zoning District: Lot B a/  
k/a 48 Bef Cowasset Lane and 32 Cowasset Lane; Residence A-2 Zoning District.**

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

**Attorney Joseph M. Connors, Jr., 404 Main Street, Waltham, MA, Attorney for the  
Petitioner came forward.**

**Mr. Connors: I am joined here tonight with the Petitioner, Ted Ohnemus and his  
wife, Jodi Ohnemus, and I think his son and daughter are here too, Ted and Julie  
Ohnemus. (Mr. Connors submitted a brief to each member of the board.)**

**Mrs. Rando: Are there any changes in this from what we received?**

**Mr. Connors: No.**

**Mrs. Rando: Before you start, Attorney Connors, I don't know if we have the  
jurisdiction to hear this tonight.**

**Mr. Connors: Based on the letter of the Building Inspector?**

**Mrs. Rando: Based on the fact that the property is currently in litigation.**

**Mr. Connors: There's no prohibition from the court that prohibits me from moving  
forward.**

The first thing that I did in the litigation and just to back up for those that don't know what's being litigated. (Mr. Connors went over the plan showing the particular locus that was being litigated, lot B and right next door, Lot A.)

Mr. Connors: Lot B and right next door, Lot A and put them together it's a ten thousand square foot lot that they divided in the fifties and so we asked for a small lot opinion on one of the five thousand square foot lots. We came to the Zoning Board of Appeals and they granted relief here so we could build on the five thousand square foot lot. That was appealed by the building inspector, so that is in litigation, not this piece (referring to the plan). But I've been to court on one occasion and we have been instructed by the court to seek any other alternative methods to settle this case and this is one of the methods that we are attempting to settle the litigation. We're coming up with a new proposal, so what we have, right now we have rights to building on a five thousand square foot lot. Rather than litigate whether we can do that for the next two years, because that's what it's going to take in the Land Court, we are coming up with an alternative proposal. So there's no prohibition from the Land Court that prohibits us from doing anything. As a matter of fact, they encourage us to seek solutions. So this is a solution. If, in fact, we could build on an eight thousand square foot lot, then we would withdraw the case that's being litigated in the Land Court because we would no longer want to build on a five thousand square foot lot because it would be moot.

Mrs. Rando: Doesn't the Land Court litigation control any development that you put on this land?

Mr. Connors: Not that I know of.

Mrs. Rando: Well, I was reading the opinion of the building inspector, in the last paragraph: "Should you proceed with an application to the ZBA, please be advised that it is in my opinion that any approval by the ZBA would be contrary to GL 40A, ss10."

**Mr. Connors:** So I have a copy. (Mr. Connors submitted a copy of Section 10, Variances Of MGL, Chapter 40A. Zoning.)

**Mrs. Rando:** Let me say this: “It is also my opinion that your variance petition does not meet the statutory requirements” blah, blah, blah, because we would decide that, and he said that: “In my opinion that your variance petition is premature because you have not recorded the ANR plan depicted.”

**Mr. Connors:** Which is true. We have not recorded an ANR plan. In ordinary development procedure, if I have an ANR plan that’s approved, I am not going to record it until I can actually build on it, so - - -

**Mrs. Rando:** Is that the usual procedure? They hold onto it until they are going to build on it?

**Mr. Connors:** Yes. I mean if I have a new development and I have an ANR plan to build a single family home, I would record that ANR plan when I get my building permit. I mean, I’m not going to record a plan that now feeds an eight thousand square foot lot on a two thousand foot lot if I can’t do anything with it. That’s done many times. I’ve done that many times. And so this is an alternative to continued litigation.

**Mr. Sergi:** So you have an ANR plan. Have you approached the building department with it?

**Mr. Connors:** No. First I went to the Board of Survey and Planning. They signed the ANR plan. So it's a legal lot. The next step is to record it. But I can’t go to the building inspector yet because as the formality of doing this, I went to the building inspector and I submitted this application and he denied it. He said you don’t have lot area and you have

two setback violations. So right on the plan right here, (referring to the plan) so he's denying it based on these things. So, the only way I can get over the denial is to get two variances. And so I give you a copy of Section 10 because it says, the first line, "The permit granting authority shall have the power after public hearing". Its up to you. So, I mean, this letter here, first of all, I don't know who wrote it but I suggest that the Law Department wrote it, number one. Well, he told me the first thing to do was to go to the Law Department. He's trying to usurp the authority of the board by being the judge and jury or acting as the zoning board.

Mrs. Rando: Well thats okay by the soil conditions, shape or topography but where he said,"It is my understanding that the land comprising the proposed subject lot of this variance petition is the same land comprising the subject lot at the heart of litigation currently pending in the Land Court case..."

Mr. Connors: And it is. But, I mean, that was where we had approval of the Zoning Board to build on a five thousand square foot lot and the city's appealed that. With three variances to build on an eight thousand square foot lot, the five thousand square foot lot point is moot. We would withdraw it.

Mrs. Rando: Why didn't you wait until the Land Court's decision?

Mr. Connors: The last time I had a trial in the Land Court, I waited two years for a written decision. So I haven't even got there yet. I haven't even had the trial yet. You know we are in discovery phase.

Mrs. Rando: Didn't you just say you were going to wait for the decision and if you didn't get it you would build on the five thousand instead of eight thousand?

**Mr. Connors:** Right now we are attempting this as an alternative, but I'm still in the midst of litigation with the city. We are in discovery phase. I started in December and I got a response in late March, so it's a long time coming.

**Mrs. Rando:** I believe that we don't have the jurisdiction to hear it tonight. That's my opinion.

**Mr. Connors:** There's nothing in that letter that cites statute. Its pure speculation. I mean what's being litigated is the status of an old lot for a five thousand square foot lot. So we're attempting to create a new lot which is three thousand square feet larger than the one that is in litigation. And so, if this was approved and we recorded this, then the whole five thousand square foot lot would become moot. The case would be over.

**Mr. Hickernell:** Is it because it's the same land or because you would you make it a condition or what?

**Mr. Connors:** One, we would be using some of the same land and we are going to use eight thousand square feet of the area not five thousand so he would concede that he cannot build on a five thousand square foot lot because I have a variance to build on an eight thousand square foot lot. We don't need to build on a five thousand square foot lot if we can build on an eight thousand square foot lot. We'd be happy with an eight thousand square foot lot. So I don't think anything in the Land Court or Mass General Laws prohibits us from proceeding with this case.

**Mr. Sergi:** Counsellor, remind me again, why are we going on an eight thousand square foot lot rather than ten thousand?

**Mr. Connors:** Well, it's in my presentation. For two reasons. I'll tell you for two reasons, okay. One of the reasons is, if you look at now Mr. Ohnemus's house, it's built up

to the lot line, here. (He went over the plan with the board.) The second reason is, if I had a ten thousand square foot lot I would still need fifteen thousand square feet. So, I need a variance for that because the building inspector is not going to give me a building permit to build on a ten thousand square foot lot, either. You know, that law was created in 1936 just because of the conveyances that have gone along and put us here in the first place. And if that was an easy solution, we would. But again, the lot area in the zoning area is fifteen thousand square feet. So we really wouldn't accomplish much. So I believe that the building inspector is, one, is attempted to act as the zoning board.

**Mrs. Rando:** Do you feel that we should continue, Mr. Sergi?

**Mr. Sergi:** I mean, I guess I can read this and digest it.

**Mr. Connors:** I mean, the statute set the limit just that it says the authority is with the Zoning Board of Appeals.

**Mrs. Rando:** Mr. Hickernell, how do you feel?

**Mr. Hickernell:** There's nothing in the statute that deprives us of jurisdiction. The building inspector, if he felt strongly that we didn't have the jurisdiction, he should have stopped the stay of this hearing.

**Mr. Connors:** I mean they certainly could have gone to court and said, hey, we have a pending litigation and let's have a court order that you can't proceed. They didn't do that. So I don't think there's anything in the statute that prohibits us.

**Mr. Hickernell:** Madam Chair, the petitioner is entirely correct that the court would rather have this worked out rather than go to trial and we have jurisdiction.

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

**Ms. Gelineau: I am inclined to agree with Mark.**

**Mrs. Rando: Mr. McCarthy?**

**Mr. McCarthy: Where is this five thousand square foot lot? I mean where is it?  
This is eight thousand.**

**Mr. Connors: Well, Mr. McCarthy, I'll show you something. Its part of the presentation, but I'll skip right to that part to answer your question. So in 1936, there was a subdivision, the Forest Edge Subdivision, and that's what created this whole neighborhood up there and there was fifty lots created and they were various sizes, and one of which was known as lot 29 which is right here and originally was a ten thousand square foot lot.**

**(Mr. Connors went before Mr. McCarthy to show him the plan.)**

**Mr. Sergi: One quick question. Is that lot recorded, the five thousand square foot lot?**

**Mr. Connors: Yes, it was recorded. That's the plan dated in 1936, the ten thousand square foot lot and then what happened is in 1950 they divided lot 29 into two halves, two thousand square foot lots and those deeds were recorded in the 1950s. And so carrying it through the fifties and sixties to the seventies, eighties and nineties, Mr. Ohnemus acquired it and he thought he had a buildable lot for one of the halves, the northerly half, because he intended to use the southern half as his side yard. So the city assessed it as a buildable lot and I think it was in 2003, he was doing some estate planning and he essentially put the two halves back together again, inadvertently, and then when trying to get a building permit years later and he recognized his error and they did a confirmatory deed but the**



building inspector said, no, I'm not going to give you a permit for the five thousand square foot lot. You put it back together in 2003 and all your rights are gone. So then he came to the board and they approved it as a five thousand square foot lot. So then the building inspector appealed that decision of this board and it's in land court. So that's why we have a five thousand square foot lot. So still, Mr. Ohnemus owns two thousand square foot lots so he's put them together to make an eight thousand and a two thousand rather than continue to litigate whether he can build on a five thousand square foot lot and tried to meet it in the middle and create an eight thousand square foot lot which is more consistent with other lots in the neighborhood.

Mr. Sergi: Apparently what exists legally?

Mr. Connors: Legally? We have two five thousand square foot lots and I have a plan that shows it as an eight thousand and a two thousand which I would put in as a condition if I was approved that I have to record the ANR plan because that creates the lot.

Mr. McCarthy: I have no problem moving forward.

Mrs. Rando: Mr. Sergi?

Mr. Sergi: Well, I guess I can't argue with you here. I do think we have the jurisdiction to move forward with this.

Mr. Connors: I have prepared a written brief, Madam Chair and I'll just take it little by little not to confuse this. (Mr. Connors then read his brief into the record and submitted photos of the locus to the board.)

Mr. Connors: I went through the lots in the entire Forest Edge Subdivision. There's fifty lots. Of the fifty lots, two of two of them meet the fifteen thousand requirement, Lot 1

and lot 4. Every other lot is under fifteen thousand square feet. So the entire neighborhood up there is nonconforming, every one of them. You know we have an eight thousand square foot lot. There are lots literally across the street that are 7,928 square feet. And I actually took the fifty lots and I took the average. I think the average of all the lot area is 9873 square feet. That's the average lot area of all these lots up here. You know there's many of them that are in the eight thousand square foot range. There's a few of them that are under 8,000, there's 7,915, 7,815. But my point being, that of the fifty lots only two of them meet the requirements of the zoning ordinance. And many of them are equal to or less than the lot we are proposing here. So this is a residential neighborhood. It's a single family neighborhood. The entire neighborhood is nonconforming as to lot area. So, I think this is not substantially detrimental to the public good. It's a use that's consistent with every other use in the neighborhood. It's on a lot that's consistent with the lot area of almost every other lot in the neighborhood. I think on the front yard setbacks, only two of the twenty lots on the abutters plan met the front yard requirement of forty feet. Again, so because most of the lots are under fifteen-thousand square feet and don't meet the forty feet setback. So, again only two of the twenty met the front yard setback. So what we are proposing is not a substantial variation or derogation from the ordinance or from the neighborhood. Most of these lots, the majority of them are under fifty-thousand square feet. Many of them have issues with front yard setbacks. The entire neighborhood is nonconforming for the most part. So we feel that constructing and using the lot to construct a single family residence shall not be a substantial detriment to the public good. It shall be created use consistent with the intent and purpose of the subdivision, It shall allow the petitioners to add a new single family residence to their single family neighborhood on a lot consistent with other lots and setbacks in the neighborhood. Mr. Ohnemus has been in the neighborhood for how many years?

Mr. Ohnemus: All my life.

**Mr. Connors:** So, 56. So its been in his family with his father's property before him and his intention is to protect the house for him and his wife here (referring to the plan) so it's intended to keep it in the family. He is a long time Waltham resident. He's been on this street his entire life and his intention is to continue to be on that street.

**Mrs. Rando:** Attorney Connors, on page 5, last paragraph, would you read it?

**Mr. Connors:** Yes.

**Mrs. Rando:** "The Building Inspector has declined to issue a small lot opinion on the 5,000 square foot lot as he believes that the Petitioner merged the two halves of Lot 29 together by a 2003 conveyance." Well, do you have the small lot opinion or not?

**Mr. Connors:** Well that's what is the subject of litigation. So he denied it. I appealed. I came to the Zoning Board and you overruled him. So then I had it. I thought I had a right to build on the five thousand square foot lot but the building inspector appealed that to Land Court.

**Mrs. Rando:** Right. So when Mr. McCarthy asked if you got the small lot opinion, you don't have it in your hand yet. You have to wait until the Land Court decides.

**Mr. Connors:** So I thought I had one because this board overruled the building inspector. We would withdraw it. We wouldn't want to build on a five thousand square foot lot when we have an eight thousand square foot lot. Right?

**Ms. Gelineau:** Mr. Connors, had the conveyance if that not happened, he could have in theory built two houses.

**Mr. Connors:** I think in theory, yes. But that was the basis for the building inspector's denial.

**Ms. Gelineau:** I know that but Im just saying he is asking for less had that accident not happened.

**Mrs. Rando:** Mistake.

**Mr. Connors:** Correct. Arguably you could have the right to build on two thousand square foot lots. So, I think that this is almost a compromise. We'll build on an eight thousand square foot lot and we'll keep two thousand for ourselves and his intention was never to build two houses on two thousand square foot lots. His intention was only to build on one. (Mr. Connors went over the plan with the board.)

We would certainly entertain a condition that we settle the other case before we build on this one.

**Mr. Hickernell:** You referred to this as a possible compromise, I note that the building inspector is not here with you to join in and it's possible if we were to grant this requested relief it could still go to Land Court again. If you're lucky it will be merged with the other case.

**Mr. Connors:** So, yes, I think its a compromise.

**Mrs. Rando:** Before we go any further, is there anyone in the audience in opposition to this?

**Mr. McCarthy:** Could I ask a question?

**Mrs. Rando:** Yes. Go right ahead and ask your question.

**Mr. McCarthy:** What is the setback on your house now?

**Mr. Connors:** Twenty-five.

**Mr. McCarthy:** So this will be a little further back than you're existing house. Do you have a rendering of the house you want to build?

**Mr. Ohnemus:** No, I haven't. It's a one and a half story house.

**Mr. McCarthy:** It's a lovely little neighborhood and I'm just curious. All Waltham people live in the area. I don't see anyone in the audience opposing this.

(Mr. Connors submitted a petition listing those people in the neighborhood that are in favor.)

**Mrs. Rando:** Does anyone else have any questions at this time?

**Mr. Sergi:** He touched on, the one I was asking about the neighbors and you have letters here that shows there's nobody here in opposition.

**Mr. Ohnemus:** I have spoken to my next door neighbor who is most affected by it has no problem.

**Mrs. Rando:** What number is that.

**Mr. Ohnemus:** 48.

**Mr. Sergi:** My short calculations your square footage on the first floor is going to be probably twelve hundred square feet less, right?

**Mr. Ohnemus:** Right.

**Mr. Sergi:** Okay, so it's a small cape. I mean the second floor is what another five hundred feet?

**Mr. Ohnemus:** Maybe eight hundred. It's just for my wife and myself. My son is going to live next to it.

**Mr. Sergi:** I just want to touch on the variance, the hardship. Since the building inspector didn't agree with the hardship the way it was presented of the topography and such, I mean I've been there and visited and I see the slope.

**Mr. Ohnemus:** If you look in some of the pictures that I took today. If you look up into the bushes and the road, there's actually hard soil there that doesn't drain very well which, I know from having many years of water in the basement, you can't stop it when it comes down the hill. There's visible outcroppings of ledge in those burning bushes that are there. There's no question that by a literal enforcement of having a forty foot front yard pushing it back in, its just- - -

**Mr. Sergi:** So this lot has some difference compared to other lots in the area.

**Mr. Ohnemus:** It's hard soil today. When I dug next door twenty-five years ago it was hard digging but there was no ledge. I know that there's ledge there now and I know by keeping it forward I'm actually having the two thousand foot buffer.

**Mr. Sergi:** Maybe you should mention that Counsellor, there's ledge ledge.

**Mr. Connors:** I forgot to mention that.

**Mr. Sergi:** That's important I think.

**Mrs. Rando** polled the board to see if anyone had questions and they did not.

**Mrs. Rando:** Now you don't think that Ralph has the same back yard that you have or the Hayes house doesn't have the same backyard that you have?

**Mr. Ohnemus:** No, but I know from many years that some of the problems that they have, its a small back yard. Its pushed into the hill and it's immediately up like this and I can tell you from being next door, many times all that both of those houses took water over the years, mostly because of the conditions of the soil. So by pulling it forward a little bit it just gives you, you don't have that knee down under the foundation. I know I have stairs that go down into the basement in the house that I live it, and I have a steel plate at the bottom of it, this time of the year the water just goes down.

**Mrs. Rando:** And they do to. And the soil conditions would be the same then, right? They have the same clay that you are talking about?

**Mr. Ohnemus:** As the hard gravel passes, some of it called a blue gravel and digging it sometimes you feel like you are scratching at rock. We use on site drainage pits because we are not allowed to cast any of the water from the imperious surfaces onto the street so all the ground water and all the water from the roof and the water from the driveway is caught on the site.

**Mrs. Rando:** Well, I'm just trying to see how your lot differs from the other two lots. You claim yours is different from the other two.

**Mr. Ohnemus:** The lot that we are talking about now has visible outcropping of ledge and soil conditions as well.

**Mrs. Rando:** Is there anyone in the audience that is in opposition to this? Seeing none. Is there anyone seeking information? Seeing none. Is there anyone in favor? (Four people raised their hands in favor.)

All right, you may continue.

**Mr. Sergi:** Madam Chair, may I make a motion that we waive the reading of the Proposed Findings of Fact since it's been on file and we have had a chance to read it.

**Ms. Hickernell** seconded the motion.

**Mr. McCarthy:** Excuse me, Madam Chair, is there anything in the Findings of Fact about the ledge.

**Mr. Connors:** I'm going to propose it.

**Mrs. Rando:** All in favor? The board were all in favor.

**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.

**Mr. Hickernell** seconded the motion and the board were all in favor to waive the reading of the Proposed Decision.



**Mr. Sergi:** Councillor, would you like to add some proposed amendments?

**Mr. Connors:** I would add on Item j. on the Proposed Findings of fact: The locus has visible outcroppings of ledge situated thereon.

I do think we can add it to the decision as well.

**Mr. Connors:** On Page two of the Proposed Decision, the second paragraph after Prospect Hill. Add: Visible outcroppings of ledge will create additional construction hardships.

**Mr. Sergi:** I'll just toss this off to you, do you want to indicate that this is an attempt to compromise the ongoing litigation by way of settlement. I don't know if that's the right term to use.

**Mr. Hickernell:** Its part of litigation. I'm not sure we should put that in our decision. If we grant this it should stand and fall on its merits.

**Mrs. Rando:** How do you vote on the Proposed Findings of Fact as amended?

On motion of Mr. Hickernell, seconded by Mr. Sergi, the board voted to adopt the Proposed Findings of Fact, as amended.

**Mrs. Rando:** How do you vote Mr. Sergi?

**Mr. Sergi,** yes.

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

**Mr. Hickernell: yes.**

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

**Ms. Gelineau: Yes.**

**Mrs. Rando: Mr. McCarthy?**

**Mr. McCarthy: On the motion, Madam Chair, I would just like to say, I have a feeling about granting a variance of this magnitude which I realize this is an eight thousand versus a fifteen thousand lot. I am in favor of it only because the whole neighborhood is that size. All the lots, like you said, are undersized under fifteen thousand. So in this particular case, I am in favor of it. I vote yes.**

**Mrs. Rando: The chair votes, no, because I just really think we don't have the right to vote on this, this evening.**

**Do I have a motion on the Proposed Decision?**

**Mr. Connors: I would like to add a third condition: The Petitioner shall record the ANR Plan at the Middlesex Registry of Deeds upon the running of the appeal period and prior to applying for a building permit.**

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

**On motion of Mr. McCarthy, seconded by Ms. Gelineau, the board voted to accept the Proposed Decision, as amended, and grant the variance in Case No. 2015-06. The roll**

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

Mrs. Rando: I think your variance was also weak. The soil conditions seem to be the same as abutting properties.

The case is granted.

One more motion is in order.

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

*Barbara Rando, chair 6/2/15*