

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
WEDNESDAY
JULY 24, 2019**

RECEIVED

AUG 21 2019

WESTPORT ZONING
BOARD OF APPEALS

Members present: Roger Menard, Chairman
Gerald Coutinho, Vice Chairman
Peter M. Borden
Constance Gee
Barbara Pontolilo

Chairman Menard called the Zoning Board of Appeals meeting to order at 6:32 p.m. in the Westport Town Hall, 816 Main Road, Westport, MA with the reciting of the Pledge of Allegiance.

Pledge of Allegiance

Chairman's Announcement - Under MGL Chapter 30A, Section 20(f), meeting being recorded.

6:32 p.m.

STEPHEN F. ROCK and DEBORAH ROCK/STEPHANNE PROSKE and DREW PROSKE - RE: Application for a variance from Zoning Bylaw 4.1.3 to allow the subdivision of their lots for purposes of the Rocks conveying a tract of land containing 3,789 sq. ft. to the Proskes, direct abutters. The subject properties are located at 41 Plymouth Boulevard, Westport, MA (Rock) and 35 Plymouth Boulevard, Westport, MA (Proske) and are shown on Assessor's Map 18, Lots 73-74 and Lots 75-78 and are pre-existing, non-conforming lots.

Members present: Roger Menard, Chairman, Gerald Coutinho, Vice Chairman, Peter M. Borden, Constance Gee and Barbara Pontolilo.

Also present:

Brian R. Corey, Jr., 519 American Legion Highway, Westport, MA, attorney for the petitioners.

Ralph Souza, Building Commissioner/Zoning Enforcement Officer, Town of Westport.

Chairman Menard read the Public Hearing Notice.

Attorney Corey addressed the Board, stating that:

1. The petitioners are direct abutters and neighbors.

2. The proper boundary lines for lots on Plymouth Boulevard have been in question for many years.

3. The first time that these two lots were surveyed was this year for purposes of installation of new septic systems.

4. As a result of the survey, it was determined that the fence separating the two properties, which has existed for at least 35 years, is not indicative of the actual legal property line.

5. The petitioners removed matured trees that existed along the property line to perform septic system work.

6. Both parcels are currently non-conforming pursuant to current Zoning Bylaws.

7. Town records have been inaccurate for many years.

8. The submitted plan dated April 22, 2019 shows the proper property lines.

9. The parties understand they must apply to the Planning Board because both parcels would become of a further non-conforming status.

10. The petitioners would accept a finding and proceed to the Planning Board.

12. The petitioners' mortgage holders (the Rocks and Proskes have their own different mortgage lender) will also be interested in the ruling by this Board and the Planning Board.

13. The Assessor's Office indicated that the Proske property contains slightly more than 19,000 square feet when, in fact, after surveying the property, the Proske lot contains 21,635 square feet. With the conveyance by the Rocks, the Proske property will contain 25,514 square feet.

14. The Assessor's Office indicated that the Rock property contains approximately 28,000 square feet when, in fact, the Rock property contains in excess of 39,000 square feet. Once the conveyance is effectuated, the Rock property will contain 35,142 square feet.

Chairman Menard read excerpts of an e-mail sent by Town Counsel Jeffrey Blake. The following are the excerpts cited by Chairman Menard:

In my opinion, any request to alter the allowed dimensions of a pre-existing non-conforming lot would require a finding by the ZBA as both parcels are pre-existing non-conforming. However, it is my further opinion that neither a variance nor a finding is the proper means to effectuate the boundary determination. This can only be achieved by a determination by a court of competent jurisdiction.

The mere fact that one party has been using the land of another for 20 years does not automatically qualify for a claim of adverse possession. Adverse possession is not self-effectuating and requires a determination by a court of competent jurisdiction. Therefore in my opinion, the fact that the portion of the property in question has been occupied by the abutter may or may not mean it has been adversely possessed.

In my opinion, a variance is not the proper means by which the Rock parcel can be transferred to the Proske parcel and even if the ZBA granted the variance it would not act as a transfer from one parcel to another. In my opinion, the correct avenue for the property owners to pursue is a claim in Land Court for adverse possession. To the extent that the application can be read to request an alteration of the pre-existing lots, the request should be for a "finding."

Pursuant to G.L. c.40A, s.6 and the Town's Zoning Bylaw, "pre-existing non-conforming structures or uses maybe extended or altered, provided that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority . . . that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use [or structure] to the neighborhood." However, in order to be protected as a preexisting, nonconforming structure and eligible for a so-called "Section 6 Finding," the structure/lot or use must have been "lawfully in existence" prior to the zoning change which rendered it nonconforming. For purposes of G.L. c.40A, s.6, the Courts do not distinguish between a nonconforming structure and a nonconforming lot. See, Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 861 (2005) (Greaney, J., concurring) (stating that the distinction between a nonconforming structure and lot is one that analytically and practically should not be made. The two concepts are intertwined and separating them would permit a landowner to circumvent valid and useful minimum lot area requirements").

The undersized Lots and the dwellings located thereon are protected as a "nonconforming structures" in their current condition due to the fact the lots lawfully existed with the present lot line configuration. However, by reconfiguring the lot lines and reducing the size of the lot, the Parties would be, in effect, creating new lots, with different lot lines and a reduced lot area in one of the lots. In Wells v. Zoning Board of Appeals of Billerica, 68 Mass. App. Ct. (2007), the Appeals Court concluded that changes to lot area may have the effect of terminating pre-existing nonconforming protections and rendering the dwelling located thereon unlawful. In Wells, a prior nonconforming structure stood on a combined lot of 12,000 square feet. When the prior owner divided the property, retaining the parcel on which the house stood while selling off adjacent undeveloped parcels, and thereby reducing the lot area of the improved lot, the Appeals Court concluded that "the prior nonconforming dwelling lost whatever protection it might otherwise have held."

Therefore, in my opinion, the proper means to effectuate the re-drawing of the boundary is for the Parties to get a determination from a court of competent jurisdiction as to the

adverse possession claim and have that court make a determination as to the correct boundary.

As outlined above, in my opinion, to the extent that the ZBA can grant any relief, it would be for a "finding" and the Board should follow its normal notice procedure as outlined in c.40A, s11.

Attorney Corey represented to the Board that the petitioners would be willing to accept the Board's issuance of a finding.

Mr. Coutinho asked about the issue of possible adverse possession. Town Counsel's opinion letter noted that adverse possession is not automatic, solely because one party has utilized the other's property for many years. Accordingly, the appropriate relief should be sought through a court of competent jurisdiction (i.e. Land Court).

Attorney Corey stated that all parties acknowledge the error and understand fully the legal issues. The parties would like to resolve this matter amicably and have no intention of filing litigation against each other. The property was subdivided in 1957, before the Zoning Bylaws or Building Code existed.

Both Chairman Menard and Vice-Chairman Coutinho acknowledged that there are many sections of Westport for which the documented property lines do not match the actual property. Going to Land Court to adjudicate all of the erroneous property lines would not seem to be reasonable since it would be extremely expensive and take many years.

Chairman Menard stated that if the petitioners are amenable to the Board's issuance of a finding, there should be a written request submitted by the petitioners for the lesser relief. He also expressed a concern with the holding in Wells v. Zoning Board of Appeals of Billerica, a 2007 case, wherein a finding issued by the Board would render the pre-existing non-conforming protections unlawful.

Attorney Corey stated that a 2014 case, Deadrick v. Zoning Board of Appeals of Chatham, clarifies Wells, in that the Board need only to find that the proposed change in property line would not be substantially more detrimental than the existing non-conforming use to the neighborhood.

Building Commissioner Souza stated that one of the properties has two legal structures on it, which were constructed before the existence of the Zoning Bylaws and the Building Code. Any

structure to be constructed must now meet the requirements of the Zoning Bylaws and the Building Code.

Mr. Coutinho said that the Board's action would not, in and of itself, create new lots as further legal processes would be required to create new lots. He also noted that the application requested a variance and the public notice indicates as such. However, he further stated that he sees no issue with granting a finding; that the petitioners requested a variance; Town Counsel advised that a variance was not the proper relief to be granted by the Board and, therefore, he would defer to that opinion; and that the Board could issue a finding with the parties acknowledging that they take a legal risk by doing so.

Attorney Corey submitted a written request, asking that the Board grant the lesser relief of a finding, acknowledging that there may be legal issues in the future with which the petitioners will need to contend.

Ms. Pontolilo made a motion to close the hearing at 7:11 p.m. Ms. Gee seconded the motion and was voted unanimously.

Discussion ensued. Chairman Menard stated that the most prudent manner in which to proceed would be to issue a Finding that the proposed change is not substantially more detrimental to the neighborhood.

Ms. Pontolilo agreed, with no further comment by Ms. Gee and Mr. Borden.

Mr. Coutinho made a motion that the Board issue a finding that the petitioners' request would not represent any action that would be substantially more detrimental to the neighborhood, that the Board makes clear that this action does not, in and of itself, create new lots, and that the petitioners understand that there may be legal issues that they will be required to address in the future. Ms. Pontolilo seconded the motion and the Board voted unanimously in favor.

Chairman Menard advised of the 20-day appeal period.

The hearing on this matter concluded at 7:16 p.m.

Action Items:

Re: Administrative Items

1. Discussion regarding a Purchase Order required by the Accounting Office for publication expenses for fiscal year 2020.

2. Chairman Menard stated that the Planning Board had requested comment by the Zoning Board regarding the Ferry Drive Definitive Plan. There was brief discussion by the Board. Mr. Coutinho made a motion that the Planning Board be notified that the Zoning Board has no comment on this project. The motion was seconded by Chairman Menard and the Board voted unanimously in favor.

Approval of Minutes

The minutes of the June 19, 2019 meeting had been previously reviewed by the Board. There was discussion regarding the necessity of making a minor revision. Chairman Menard stated that he would revise the minutes for approval by the Board.

Topics not reasonably anticipated forty-eight (48) hours in advance of the meeting - None.

Other Business

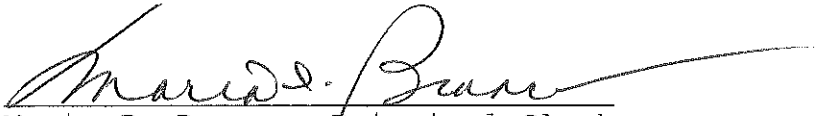
Chairman Menard stated that he and Mr. Coutinho attended a meeting of the Steering Committee who is working on the review and revisions of the Zoning Bylaws. He noted that they attend biweekly meetings with an eye on the first phase of the process being completed by September for consideration at Town Meeting in April 2020. He said that there will likely be several revised Bylaws, which will be submitted for approval at Town Meeting separately so that each Bylaw being revised will be considered on its own merit. This process may involve submission of revised Bylaws at several Town Meetings.

7:32 p.m.

Motion made by Ms. Gee to adjourn the Zoning Board of Appeals meeting. The motion was seconded by Mr. Borden and the Board voted unanimously in favor.

Adjournment.

Respectfully,


Maria I. Branco, Principal Clerk
to the Zoning Board of Appeals.

APPROVED:


Roger Menard, Chairman