

MINUTES
SUDBURY BOARD OF APPEALS
TUESDAY, NOVEMBER 9, 2004

The Board consisted of:

Jonathan G. Gossels, Chairman
Elizabeth A. Taylor, Acting Clerk
Thomas W.H. Phelps
Jeffrey P. Klofft
Richard D. Vetstein, Alternate

The meeting was called to order by the Chairman, Mr. Gossels.

Public Hearing – Case 04-38 – Cleveland & Margaret Manley – 436 Peakham Road
Notice was published in the Sudbury Town Crier on September 30 and October 7, 2004, posted, mailed and read at this hearing.

This hearing was rescheduled from October 19, 2004 because of a lack of a quorum.

Attorney Lisa Bergemann was present on behalf of Ledge Hill, LLC and Cleveland and Margaret R. Manley. Ms. Bergemann noted the Board had previously granted a special permit (Case 04-35) to allow demolition of an existing house and reconstruction of a new house at 436 Peakham Road. Following issuance of that special permit, there was some question as to whether a variance should have been requested because of the status of the lot.

As a result, Ms. Bergemann was looking for clarification as to whether a variance is required. It was Ms. Bergemann's understanding that Town Counsel has concurred with the Building Inspector's determination that the lot is legally nonconforming. If the Board determines the lot to be legally nonconforming, the special permit previously granted is sufficient for the proposed reconstruction.

Building Inspector James Kelly said with the information he was provided, he determined that the lot was lawfully created and is a nonconforming lot. He said according to the Bylaw a nonconforming lot is one which is lawfully in existence but which does not conform to the most recent effective zoning.

In response to a question from Mr. Klofft, Ms. Bergemann said the frontage for this lot was established in 1949 and the area configuration was created in 1961 which predates zoning.

Town Counsel Paul Kenny said the wording of the statute is such that the petitioners are concerned with the title. He said essentially this is an appeal of the Building Inspector's decision which the Board should uphold. In this way the title can be cleared up.

There were no further questions from the Board. No abutters were present. The public hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: “To uphold the conclusion of the Building Inspector that 436 Peakham Road is a non-conforming lot and that the Special Permit (Case 04-35) is all that is required for the proposed reconstruction.”

VOTED: In favor: 5 (unanimous) Opposed: 0

REASONS: The Board granted a special permit to demolish an existing house and reconstruct a new dwelling. This permit was granted because the property was considered to be nonconforming due to its frontage deficiency.

Subsequent to that approval, it was found that an Approval Not Required Plan was signed by the Planning Board, and the question arose as to whether application should have been made for a variance.

Based on information received by the Building Inspector and his review of that information, the Board concurs with the Building Inspector’s interpretation that the lot in its current configuration predates zoning and qualifies as a nonconforming lot and requires the special permit for the proposed reconstruction.

Public Hearing – Case 04-44 – Maria Dienhart, M.D. – 99 Pokonoket Avenue
Notice was published in the Sudbury Town Crier on September 30 and October 7, 2004, posted, mailed and read as required.

This meeting was rescheduled from October 19, 2004 at the request of the petitioner’s attorney who asked for a hearing before a five-member Board. Four members were present on October 19th.

Mr. Gossels, Chairman, explained the requirements necessary to substantiate the granting of a variance. He also explained that if anyone is not satisfied with the Board’s decision, they have the right to appeal to Superior Court or District Court within twenty days after the decision has been filed with the Town Clerk, and that possible other appeals may exist under current law.

Attorney David Wallace was present, representing the petitioner, Maria Deinhart, also present, in a petition for a variance to allow the creation of a building lot having insufficient frontage and area. The lot on which the existing house is located contains approximately 334 feet of frontage on Pokonoket Avenue and 125 feet of frontage on Indian Ridge Road.

Mr. Wallace said in 1955 there was a subdivision created which included Pokonoket Avenue and Indian Ridge Road resulting in many buildable lots which conformed to the zoning in 1955, which was 150 feet of frontage and 30,000 s.f. of area. He contended that through many ownerships going back to 1955, that Ms. Deinhart is the owner of basically two valid building lots as they were in 1955, that have now merged.

The property as shown on Exhibit C, submitted with the application, is currently comprised of Lots 11, 12 and 5B. The existing house has been there for many years. It is sited mostly on Lot 12 with a small portion on Lot 11. Those two lots have merged.

The area of Lots 11 and 12 which contains the existing house comprises over 57,000 s.f. of area and 334 feet of frontage on Pokonoket Avenue. Therefore, what Ms. Deinhart has exceeds the existing present Zoning Bylaw of 40,000 s.f. by 17,000 plus, and 180 feet of frontage by 50 feet. What she is left with is what was Lot 5, and now is Lot 5B which in the 1970s was carved out and reduced to its present 26,000 s.f.

In response to a question from Mr. Gossels as to the motivation for taking Lot 5A, Mr. Wallace said he believed this was done in the 1970s, for some reason, with the next door neighbor (Vannerson) who still lives there. He said basically it reduced what was a valid pre-existing grandfathered lot that had over 30,000 s.f. and it made it useless.

Mr. Klofft asked when the property was acquired by Ms. Deinhart. Mr. Wallace said it was purchased in 2000.

As a result Ms. Deinhart has a lot that contains the present home which is oversized by almost 1 ½ times. Then she has this other lot (5B) that has frontage on another street. Currently Ms. Deinhart lives with six members of her extended family which include her niece, her niece's husband, grandnephew, grandniece, nephew and sister-in-law. She would like to build another house on Lot 5B to be occupied by her niece, her niece's husband and their two children.

Mr. Wallace said Lot 5B has been engineered (Exhibit D). A house on that lot would conform in all other respects to zoning setbacks and will support a 3-bedroom house. The house would be in scale with other homes in the area.

Mr. Wallace believed there to be a hardship with the lot. The three lots together are T-shaped. There is an odd elongated section on Pokonoket Avenue and then a shorter section on Indian Ridge Road, where all the other lots when they were originally laid out in 1955 were pretty much conforming rectangular lots with 30,000 s.f. or more. Through time and through previous actions of previous owners the lot has become very dissimilar and odd looking, and Lot 5B has no use whatsoever at present.

Mr. Wallace felt this would be a wonderful use for this family. There would be no impact on the neighborhood and no additional traffic. It would essentially involve moving four people from one house to the new house with access from another road.

Mr. Gossels said that would be the case if this was an accessory dwelling unit. However, there's no guarantee that the house won't get sold. He said it's really not the same.

Taking a snapshot of the property, Mr. Wallace said one is really looking at 26,000 s.f. of land that has really no use and little value. It's assessed at \$7,776 and doesn't add value to the

town. If this were to become a valid building lot one would be adding value to the town without creating any impact at all. No demand on services, no increased traffic, no change in the character of the neighborhood. Lot 5B, which was originally Lot 5, was always intended to be a residential building lot. There will not be any harm to the town.

Mr. Wallace felt there is a hardship in the sense that we have all those people who are living together and would like to create a new household who have a piece of land that is available. It is not being done for commercial gain. No sale is involved. Getting back to the statute dealing with soil, shape or topography, he said the shape really is the thing. It's odd and does not conform to any other similar lots in the neighborhood.

Mr. Taylor said she heard what Mr. Wallace was saying about the extended family and the hardships. However, she felt the Bylaws already have a provision that allows that sort of hardship to be alleviated, which is the Accessory Dwelling Bylaw, rather than creating a nonconforming lot from scratch.

Mr. Klofft said that many times the Board is placed in positions to balance the rights of the property owner to effectively use the property vs. the property rights of the neighborhood, and all of that has to be balanced within the context of the Zoning Bylaws. He would disagree with Mr. Wallace in his notion that this would not impact the neighborhood on Indian Ridge Road. He said he went by there when this case was originally put forward in October and went back by there again today to look at it one more time. In his opinion, given where this lot would be, given the spacing of the other houses in the neighborhood, he felt this would have a detrimental impact on the neighborhood relative to the character of the neighborhood that exists there today. Especially given the unique placement of the Vannerson's house, he felt the problem is further complicated in that the property was acquired "as is". This wasn't a case where Ms. Deinhart was the property owner who swapped with the Vannersons. The purchaser of the property in 2000 knew what the existing situation was. It should have been readily apparent, given the low assessed value of the property that it wasn't intended to be a separate lot.

With regard to Mr. Wallace's point about no financial gain, Mr. Klofft said there would be financial gain because in time the two houses are going to be sold and there would be financial gain at that point.

Lastly, Mr. Klofft believed that the intent of the lot area and road frontage aspects of the Zoning Bylaw are designed to create a certain space and character of the neighborhood; this actually changes this with a smaller lot with less frontage. This was not the intent of the Zoning Bylaw.

In response to a question from Mr. Vetstein as to frontage in the area compared to this property, Mr. Wallace replied that the frontage of Lot 12 is 152 ½ feet, the frontage of Lot 11 is 163 feet. In general, it generally runs about the same on Pokonoket Avenue. On Indian Ridge, he referred to the plan submitted with the application which shows property frontage along Indian Ridge ranging from 150-152. Mr. Klofft saw frontages in the 200 ft. range on that plan.

Mr. Wallace said there is really not a material difference. If one builds a home which is conforming in all other respects, you really are not imposing on the neighborhood.

Mr. Vetstein asked about the nature of this neighborhood in terms of additions and reconstructions. Mr. Gossels said this is a very stable neighborhood.

Ms. Deinhart said she is adding a sunroom addition to her home. She was not aware of additions to other houses in the area.

Mr. Phelps said he agreed with Mr. Klofft comments. He said the owner of the property was aware of the status of the property when she purchased the property. He felt that any perceived hardship was self-imposed.

Mr. Vetstein how is case is this different from the variance granted earlier this evening. (Case 04-47)

Mr. Klofft felt there was a significant difference in frontage in addition to the fact that for the previous case both lots had sufficient area. For this case, the four lots closest to this one have 234, 233, 216 and 183 feet of frontage vs. 125 for Lot 5B.

Ms. Taylor pointed out another significant difference was that an error was made on the assessors maps for the previous case which resulted in insufficient frontage for those lots. Ms. Taylor felt it obvious that this is not a buildable lot.

Mr. Vetstein disagreed. He felt this lot had potential to be a buildable lot.

Mr. Phelps said that reasoning would allow anyone with a marginal piece of land in Sudbury to come in expecting a variance because they could put a nice house on an undersized lot with insufficient frontage.

Mr. Gossels asked for comments from abutters.

Nancy Rubenstein, 57 Winsor Road, neighbor was opposed to this petition. She said this is an older neighborhood, very wooded, with houses evenly spaced. There is not a lot of new construction but the houses are well maintained. She felt that this petition proposes squeezing in a house on Indian Ridge Road and that Ms. Deinhart was aware of the status of the property when she purchased the property.

Daniel Cinicola, 76 Indian Ridge Road, direct abutter to the property, said he purchased his house in 1994. Prior to purchase he spoke with the town specifically as to whether there could be an additional house constructed on that property. He was told that the lot was unbuildable which was the deciding factor to purchase his house as it afforded more surrounding open space. Mr. Cinicola said his house would be severely impacted should this variance be granted.

Mr. Wallace said Mr. Wallace said one of the inducements to Mr. Cinicola's purchasing his property was the vacant lot next door which afforded him more open space. Mr. Wallace did not think that was fair to his client. He emphasized that if this was a valid building lot, Mr. Cinicola would still be looking at a new house.

Mr. Gossels felt there to be a difference because there is a deficiency in frontage that exacerbates the problem. Mr. Klofft felt the deficiency in area affects the character of the neighborhood.

Ms. Deinhart said her plan was to deed the property to her niece and nephew who plan to live in the area indefinitely. She said she would realize no gain.

Mr. Wallace said when Lots 5A and 5B were created, the person who owned Lot 5 at the time also owned Lots 11 and 12. Because there was a dispute about where a fence was located between the Vannerson's house which was Lot 13, and Lot 12 which is his client's house, the land was reconfigured so that the previous owners of Lot 12 picked up a little bit of space on Lot 12 but lost 5,000 s.f. on Lot 5. In essence, what was a dispute about a fence ultimately resulted in land being taken away from Ms. Deinhart.

Ms. Deinhart said when she purchased the property, the previous owner had cut down all the trees on Lot 5B and it's appalling just to look at it. It was not something she would have done. She said if it were still a wooded area and a natural environment she would have taken that into consideration. It's just chopped down trees.

There were no further comments or questions from the Board. The hearing was closed.

After deliberation the following motion was placed and seconded:

MOTION: "To grant Maria Dienhart, MD, owner of property, a Variance from the provisions of Section 2600, Appendix B of the Zoning Bylaws, to allow the creation of a building lot having insufficient area (26,000 s.f.±) and insufficient frontage (124.5 feet), property located at 99 Pokonoket, shown on Town Map 309 as Lot 5B fronting on Indian Ridge Road, Residential Zone A-1."

VOTED: In favor: 1 (Vetstein) Opposed: 4 (Gossels, Taylor, Phelps, Klofft)

PETITION DENIED

REASONS: The petitioner seeks a variance to create a buildable lot which is deficient in area and frontage and would be created from an existing lot which contains the petitioner's dwelling. In order to grant a variance, four specific criteria must be satisfied. Failure to meet any one of the four criteria will cause the variance to be denied.

The Board finds that the petitioner does not meet the criteria for hardship in that the constraints of the property were known at the time of purchase. Action taken by previous owners which

resulted in the current lot configuration were known to the petitioner in that the Plan of Land prepared October 29, 1973 (Exhibit C) defines the lots and includes a notation “Lot 5B to be held in common ownership with Lots 11 and 12.” implying one buildable residential lot. Further, given the low assessed value of Lot 5B, it was apparent that this lot was never intended to be a separate lot. The Board therefore considers any hardship with regard to the property to be self-imposed.

With regard to a claim of hardship of quality of life because of an extended family situation, the Board finds that the intent of the Accessory Dwelling Bylaw is to address such situations; therefore, this is not considered to be a valid hardship under the criteria for a variance.

The Board finds that there would be a substantial detriment to the public good if this variance was granted in since the creation of an undersized lot with deficient frontage would impact a neighborhood where the frontages in many instances are above the required 180 feet. As a result the immediate abutters would be more visually impacted by a new structure because of the decreased frontage and area.

The Board finds that the variance would nullify and substantially derogate from the purpose of the Ordinance or Bylaw which is to create space and character within neighborhoods through zoning of lots by area, frontage and setback requirements. To allow the creation of a buildable lot in this case would run contrary to the intent and would set a harmful precedent for future development of nonconforming lots which would allow for increased financial gain beyond the constraints of current single residential lots.

Bond Reduction Request – Carriage Lane Development – 717 & 729 Boston Post Road

The Board was in receipt of two requests for bond reductions from Alan Marrone for the Carriage Lane development, one dated September 28, 2004m, the other November 4, 2004.

The Board was also in receipt of letters dated October 7 and November 4, 2004 from Town Engineer, I. William Place who, taking both requests prepared a cost estimate of \$18,285.00 to complete the project.

A motion was made, seconded and unanimously voted to reduce the bond currently being held for the Carriage Lane development from \$114,585.00 to \$18,285.00 and to request the Treasurer forward a check in the amount of \$96,300.00 payable to Mr. Marrone.

Correction to Case 04-29 – Green Meadow Realty Trust – 25 Poplar Street

After a public hearing held June 29, 2004 and continued to September 22, 2004, the Board voted to grant a special permit to Green Meadow Realty Trust for demolition of an existing residence and construction of a new residence.

Subsequent to the filing of the Decision, it was discovered that an error of omission was made in the conditions. Specifically, the Board had voted Condition 3 to require a 10-foot buffer

along the easterly property line, and further, that any disturbance within that buffer shall be replanted.

William Curley, Green Meadow Realty Trust, has been notified of the error and acknowledges that Condition 3 should have been included.

The following motion was then placed and seconded:

MOTION: “To issue Confirmatory Special Permit 04-29A which corrects the Motion under Case 04-29 filed on October 5, 2004 with the Town Clerk as follows:

After Condition 2 add the following condition:

3. A 10-foot wide buffer shall be maintained along the easterly property line. Any disturbance within that buffer shall be replanted with vegetated screening.”

This Confirmatory Special Permit is attached to and made a part of Special Permit 04-29 filed with the Town Clerk on October 5, 2004. With the exception of the above correction, all documentation and conditions of the original permit remain in effect.

VOTED: In favor: 5 (unanimous) Opposed: 0

Discuss Special Permit Guidelines

Mr. Gossels noted the Board’s guidelines specify a maximum renewal period of three years. He said in some instances renewals have been granted for permits which have been in existence for several years without incidence. He suggested that for those permits the Board might want to consider a longer renewal period, perhaps five years.

Following discussion it was the consensus of the Board that renewal periods are guidelines and the Board can use its discretion to impose longer terms on a case-by-case basis.

It was then on motion unanimously voted to include in its guidelines a provision for a 5-year renewal period at its discretion.

Prospective Alternates to Board of Appeals

Present: Nancy Rubenstein

Mr. Gossels thanked Ms. Rubenstein for attending this evening’s session. Ms. Rubenstein reiterated her willingness to serve as an Alternate. Mr. Gossels said the Board is evaluating the current makeup of the Alternate situation and encouraged Ms. Rubenstein to continue attending ZBA meetings.

There being no further business the meeting was closed.

Jonathan G. Gossels, Chairman

Elizabeth A. Taylor, Acting Clerk

Thomas W.H. Phelps

Jeffrey P. Klofft

Richard D. Vetstein, Alternate