

HULL ZONING BOARD OF APPEALS

Applicant: Mark Zuroff

Property: 20 Park Avenue

Date: Thursday, July 17, 2014

Time Meeting Began: 7:44 p.m. (Recessed at 8:13, Resumed at 8:26)

Time Meeting Concluded: 9:35 p.m.

Place of Meeting: Hull Municipal Building, Louis C. Costa Room, 253 Atlantic Avenue

Zoning Board Members Present for Hearing:

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| Alana Swiec, Chair | Sitting | Attending | Absent | Abstain |
| Dr. Roger Atherton, Clerk | Sitting | Attending | Absent | Abstain |
| Atty. Mark Einhorn, Member | Sitting | Attending | Absent | Abstain |
| Phillip Furman, Associate | Sitting | Attending | Absent | Abstain |
| Jason McCann, Associate | Sitting | Attending | Absent | Abstain |
| Patrick Finn, Associate | Sitting | Attending | Absent | Abstain |

Others in Attendance:

Mark Zuroff, Attorney for potential owner

Joseph McLaughlin, Developer

Emily Hardej, Recording Secretary

General Relief Sought: Opening – Of a Public Hearing on an application filed by Mark Zuroff regarding property at 20 Park Ave., Hull, MA which according to the application seeks: To apply for a Special Permit/Variance to construct a two-family dwelling; pursuant to Hull Zoning Bylaws, Section 61-2f.

General Discussion:

Mr. Zuroff – I am an attorney and have an office at 175 Highland Avenue in Needham, MA. I am here for the potential owner of the property for an application for a permit to rebuild a family house on a lot that has been vacant for quite some time. I provided a second notarized statement in favor of the proposal from Mr. Paul Gratta of 14 Park Avenue. (Ms. Swiec read this letter into the record later in the hearing.) Last time we met, the ZBA suggested we file a variance application in addition to the special permit request on advice of Town counsel's opinion based on the Gale decision. I submitted a brief on May 12 citing case law and have extra copies if members don't have theirs. Mr. Finn said he hadn't seen it. Dr. Atherton indicated he was sure that it had been copied by Ms. Barone and distributed at the June 5 meeting, which he was absent from, but was told the materials - including his cover letter, the legal brief, the Duck Lane decision, the completion of the variance questionnaire portion of the application

for an appeal - requested by the Board were distributed. There followed a discussion of the relevance of the Duck Lane 2003 decision.

Mr. Zuroff repeated that they are here asking for relief by either special permit or variance. Although the special permit request was pushed of by Mr. Lampke use of the Gale decision, which he doesn't think applies and the Board can grant the relief with a special permit, since it does not necessarily require a variance because they are asking for setback and lot coverage relief. The lot is otherwise unbuildable. He opined that this could not be the intent of the bylaw. The ZBA is the local authority to interpret the bylaws and local situations and make determinations even if the bylaw says something else. He sits on a Zoning Board himself and they often grant relief because it is best for the Town to have a lot used to its maximum extent as long as it doesn't increase an abnormality within the neighborhood. The zoning board's power is to grant exceptions to the zoning code to allow development of property. It will benefit the Town to grant this property relief because you will take a vacant unused lot, collecting trash now, and convert it to a usable housing facility that is new, attractive, with off-street parking, and increase the tax base of the town. The neighbors have expressed no objections because they all have similar structures and lots. This is a unique situation because (1) it is in a flood zone, which requires the house be lifted up, and (2) it basically is a small house on a small lot that is very much in character with the neighborhood. The original two-family burned down many years ago and you will be replacing it with something much better that will benefit the neighborhood.

Dr. Atherton asked if they had considered his suggestion last time to move the house forward so that it will comply with both front and rear set-backs? Mr. McLaughlin said yes they had and had provided new plans within two days of the suggestion and provided copies of the new plans to Ms. Barone. Mr. Zuroff distributed copies to the voting members. Mr. Finn pointed out that the Duck Lane situation involved combining several lots to make the lot size conforming and had only dimensional non-conformities, which is different from 20 Park. Ms. Swiec responded that the applicant has stated numerous times that he is not interested in purchasing the adjacent property. She added that the Board needs to consider the application as presented.

Dr. Atherton stated he thought the legal brief was excellent. He mentioned that the authorities quoted at the end used Lamb vs. ZBA Taunton as a justification. It is a key issue in this case. The appeals court in that case decided that if a developer bought a property knowing that it was non-conforming, as in this case non-buildable due to lot size, he could then claim a hardship because it was non-buildable. That seemed a circuitous rationale, but the Lamb decision seems to justify that. Mr. Einhorn spoke up and said that is established law because the hardship goes with the property, not with the individual. He added that hardship is only one of four prongs that need to satisfied, and the developer would have to meet the other three.

Mr. Finn asked if that meant that anyone could buy a non-conforming lot and come to the ZBA asking for a variance because they had a hardship because the lot doesn't conform to zoning. Would the Board grant zoning relief for a single- family or two-family on a 2500 square foot lot laid out for beach cottages when minimum lot size by Massachusetts state law is now 5000 square feet? He said that previous Boards have been against that and the reason that Town Meeting created minimum lot sizes. He added

people will come flooding in to try and build on 2500 square foot lots. Mr. Einhorn commented that whatever is decided in this appeal will have no bearing on any other appeal; ZBA decisions do not set precedents, but we do want to be consistent. Mr. Zuroff reminded the Board this is a very small lot and there are similar lots with similar structures all around it. They are just replacing something that burned down and replacing it with a similar structure. Mr. Furman commented that he had bought a lot that had a structure that burned down and was told by the authorities that as long as it was re-built within the same footprint, it was grandfathered in perpetuity, even though it was 5,000 square foot lot rather than the current requirement of 6,500 square feet. Mr. Finn reminded the Board that when this appeal was originally sent to us, Mr. Lombardo said they only need a special permit because it burned down, but then Town Counsel decided that it required a variance based on the Gale decision. That is why he asked for the brief. Mr. Zuroff explained that after two years the grandfathering is lost. Mr. Finn said we need to continue the hearing to determine this.

Mr. Zuroff commented and said that Gale doesn't apply here that both he and Town counsel agree it doesn't apply. Dr. Atherton pointed out there is a newer Appeals Court decision (Deadrick v. ZBA Chatham) that says that any new non-conformity requires a variance. Mr. Zuroff indicated that is why they changed the application to include a variance, but the Board can still use special permits for non-conformities. Dr. Atherton indicated the Board should work through the requirements for a variance. The discussion moved on to size, shape, soil conditions, and topography.

Mr. McCann asked about the uniqueness prong, which he doesn't think this property meets. Mr. Zuroff responded that the property requires special treatment for the flood zone, but that doesn't make it unique. If uniqueness is the sole criterion, he pointed out the board can grant relief by special permit. Dr. Atherton commented that it is still new non-conformity that requires a variance. Mr. Finn added that after two years, it becomes a new non-conformity. He added that new zoning that took place after the blizzard of 1978 - that resulted in a lot of flooding - was to decrease density by increasing lot sizes. The intent was to prevent homes being rebuilt on these 2500 square foot lots; so to decide that doing so, as in this appeal, does not derogate from the intent of the by law, is not correct. It is density and flooding the Town was trying to get rid of. Mr. Finn said he is in favor of development, but the State law requires a minimum of 5,000 square feet and that ought to be the minimum for Hull. Mr. Furman pointed out there are a lot of properties on Manomet that have just garages on them because they do not meet the minimum of 6,500 square feet for single-family structures. He is sure there is a special law for burnt down houses.

Mr. Zuroff contended that zoning bylaws are for future building and doesn't really change anything that already exists. All they are asking is to essentially re-build what was already there and everybody in the neighborhood that they talked to has similar size lots and structures and are agreeable. We are adding a much improved structure on a vacant lot and making it into productive real estate. It does not derogate from the by law. The bylaws are to control future development. We understand the Town doesn't want more 2,500 square foot lots, but it doesn't mean that those already in existence should be abandoned. We are trying to restore a lot to usability and build something that fits with the character of the neighborhood. We understand Mr. Finn wants us to approach the Town and try to buy the lot next to it to increase the lot size, but this is not practical for the applicant.

Mr. Zuroff asked Mr. Finn if he thought the bylaw intended to prevent this lot from being built on? Mr. Finn responded that it was the intent of the bylaw to set new minimum lot sizes going forward. The intent was to prevent people from building on these small lots - adding to the density and flood problems. Mr. Einhorn pointed out there was a house there before, but he could understand the new bylaw applies to future building; but this is different –replacing a previously built structure. Mr. Finn reiterated that there is a lot next door owned by the Town that could be bought to make a 5,000 square foot lot and he would prefer a continuance so the applicant could approach the Town and see what could be worked out.

Ms. Swiec pointed out that a few years ago the Town had appointed committee to review all Town-owned and vacant properties and out of dozens that could be sold, the Board of Selectmen selected only two. Mr. Finn said he would like to continue the hearing so it could be taken up with the Town. Mr. McLaughlin said he's done everything this Board has asked – he revised the application to include a variance, revised the plan to relocate the structure, but he does not have time to wait for that to happen. We are convinced that that would take several years to implement, would require a public auction and there's no guarantee we would win the bidding. He has had this property under agreement for over a year, it sat in the Building department for nine months, then had to be revised and re-advertised, then a brief was requested along with additional variance information on the appeal application, and now Mr. Finn wants another continuance?

Mr. Furman stated that if the property is not under agreement, then there is no financial hardship. Mr. Zuroff responded that the deposit, the engineering costs, the legal expenses, the plot plan, and the architectural design costs were all financial costs. Mr. McLaughlin added that every time the Board asked for something, he gets it done within a few days and then, he comes here and no one seems to have what I sent. He has lost his earnest money and the costs cited by Mr. Zuroff; there is definitely a financial hardship.

A discussion then occurred regarding the voting membership. Dr. Atherton is a regular member of the Board; Mr. Finn and Mr. McCann, both associate members, were appointed because at the time of appointment, Mr. Einhorn was absent from the first hearing and Ms. Swiec expected to be absent from the next hearing, so she had appointed Mr. Finn and Mr. McCann. Later on the next hearing was postponed at the request of the applicant and Ms. Swiec was able to attend the re-scheduled meeting. Mr. Finn argued that if a regular member was present at all the hearings then that person should vote, not an associate member. Ms. Swiec said if he wanted to step down, then she could vote as she is a regular member and has attended all the meetings. Mr. Finn said it is the Chair's discretion on who votes. Dr. Atherton said he didn't think the Board should change the voting members based on how the vote is going or not going. Ms. Swiec agreed; she further stated that if he wants to step down that is up to him. Mr. Finn added he did not think it appropriate for an associate member to vote when a permanent member was present. Mr. Finn said he has no reason to recuse himself, but it is up to the chair. Ms. Swiec asked the sitting members if they were ready to vote on the motion?

Mr. McCann stated he found it difficult to consider that this is a pre-existing non-conforming structure and does not see how it meets all the requirements of a variance. Mr. Einhorn stated that there is some

discretion in a variance, and that there are other factors to consider – such as are abutters opposed and none seem to be. Dr. Atherton asked Mr. McCann whether he was troubled by the uniqueness requirement, or the topographical issue? Mr. McCann stated it is more the uniqueness part of it - the conditions of this property are not unique in this development. Mr. Finn added that the 2,500 square foot lot is not unique in this neighborhood; there are many others of the same size and shape. Mr. Zuroff rebutted that it doesn't have to be the only lot of this type - it has to be a classic uniqueness. Ms. Swiec stated she agreed with Mr. Zuroff's reasoning. Mr. McCann opined that if there is only one other like it, one could still make the argument it is unique. He could see both sides, but is now persuaded it meets the requirements.

Ms. Swiec stated it's time to make a decision. Dr. Atherton added that it's important for whoever is going to write the decision to have logical arguments to support the variance criteria and he's not hearing a clear set of arguments to support the variance. Mr. McCann stated he's not going to write something that's good for the Town and it's within our discretion; he wants something that fits the requirements for a variance. The structure meets flood zone requirements and is a two-family so it fits the zoning and is within the character of the neighborhood. Mr. Finn asked how is it unique as to size or shape of the lot? He pointed out the applicant didn't check topography on the application. Mr. Einhorn said it doesn't matter whether he checked the box or not, he can make the argument now.

Mr. Finn stated he wants a continuance so the only lawyer sitting on this can go over the brief that he had asked for and didn't get until tonight. Mr. Zuroff responded the brief had been submitted to the Board in early May. Mr. McCann stated it was a very short brief, only three pages, and after talking it over with the applicant, where he has received clarification and even more information; he's decided he doesn't need any more time to go over the brief. Mr. Finn stated he would like more time to consider the case law as to whether it is a self-created hardship. Mr. Einhorn said it is well-established case law, as he had explained earlier. Ms. Swiec indicated that this application has dragged on for far too long, and it was time to make a decision.

Dr. Atherton made a motion to approve the variance zoning relief requested by the applicant for all the reasons stated earlier by Mr. McCann. Mr. McCann seconded the motion. Mr. Finn asked why does this require a two-family? Dr. Atherton questioned his word "requiring"? Mr. Finn responded that you have obviously decided it is a buildable lot – all he is asking is why you require a two-family on a 2,500 square foot lot? Mr. McCann and Dr. Atherton both stated that they didn't require that, they were just allowing a two-family in a multi-family zone. Mr. Finn commented that he would have to vote no because this is not the right size for a two-family. He could see why they could say it is a buildable lot, but in no way could he agree to a two-family.

Mr. McLaughlin asked Mr. Finn if a one-family would be acceptable and Mr. Finn stated "I'm not saying that." He added he didn't think a lot of thought had been put into that motion that was seconded. Ms. Swiec said we have a motion that has been made and seconded, how do the members vote? Dr. Atherton and Mr. McCann voted "yes"; Mr. Finn abstained. Ms. Swiec asked on what grounds. He responded that he didn't think enough thought had been put into this, the Board had just received the brief and Mr. McCann needs more time to review it. Mr. Furman asked if the abstain counts as a

negative? Dr. Atherton responded the vote has to be a unanimous vote of all three voting members. Mr. Einhorn stated that the motion could be amended to vote continue. Mr. Zuroff asked if he could ask for another hearing? Mr. Einhorn asked what additional information would be obtained? Mr. Finn asked if it could be done, without prejudice? Mr. Furman said he would like to find out more about the ruling on fire grandfathering. Mr. Finn made a motion to reconsider the vote and deny the appeal without prejudice, so the applicant can come back in and apply for a variance. Mr. McCann seconded the motion to reconsider. Mr. Einhorn said the motion to approve the variance was not passed and that Mr. Finn should make the motion to reconsider to get additional information, or otherwise just vote.

Ms. Swiec said she could not just sit here every two weeks and be held hostage to this dragging the vote out, so either vote it up or vote it down. Mr. Finn said Mr. Einhorn had suggested an alternative. Ms. Swiec said she was handing the gavel to Mr. Einhorn. Mr. Finn pointed out that Mr. Einhorn is not voting – that he made a motion and it was seconded that requires a vote. He added we don't need another debate about whether we should do it this way. This is what he disagrees with. He isn't trying to upset her; he just wants to get this done in an organized fashion. Ms. Swiec and Mr. Furman left the hearing.

Mr. Finn stated that the Board should take a vote to reconsider the motion so we can deny the application without prejudice so they can re-apply. Mr. McCann seconded. Mr. Finn explained the earlier vote makes it so they cannot come back for two years – decisions are normally considered to be with prejudice, so by re-considering we can make it without prejudice, so they can come back. Mr. Einhorn asked Mr. Finn why he wanted to vote abstain rather than vote no. Mr. Finn responded he can't help the way he feels, so he abstained. He thought if he abstained, Ms. Swiec, a regular member who had attended all the hearings, could vote in his place. He added that the applicant have said they need a two-family to make it financially feasible, so he wanted to make it possible for them to reconsider and reapply. Mr. McLaughlin explained he had originally thought of building a single-family for his daughter but it hadn't worked out.

Mr. Einhorn indicated the Board could reconsider the first vote taken; Mr. Finn had made a motion to reconsider that by adding without prejudice. Mr. McCann said he didn't want to vote to deny because he is not denying it. Mr. Finn countered, it was denied because it didn't get a unanimous vote, he is just trying to modify it to be without prejudice. Mr. Finn said I'm trying to do something that will work and if done properly by replacing him with Ms. Swiec, they would probably get the approval. Mr. Einhorn asked for a vote on making the earlier vote without prejudice and the vote was unanimous (Atherton, Finn, McCann).

Mr. Zuroff asked what are we supposed to do now? Mr. McLaughlin asked are we supposed to reapply with the same application when you've already denied it? Mr. Finn responded that two members supported it and if you reapply, since Ms. Swiec seemed to support it and is a regular member, you would likely get a positive vote. He added that he abstained because he wanted more time and the motion was made and seconded, but the chair didn't want to continue it for him and he just saw the brief tonight.

Mr. Zuroff asked could they apply for the next meeting. Dr. Atherton pointed out that the new application would have to be re-advertised and that would take it beyond the next August 7 meeting that already had five hearings scheduled, so there would be no time. The next likely meeting would be August 21. Mr. Finn pointed out they should look into the burned down building possibly being grandfathered and the adjacent lot issue that he had raised. Mr. McLaughlin stated the adjacent lot is out of the question. Mr. Finn stated that at the end he was against the two-family, but he abstained to give them a chance to reconsider. Mr. McLaughlin stated if he thought he could build a single-family there and get value back he would do that, but it doesn't change the argument that there's a structure going on the lot. Mr. Finn said two members were willing to give a variance to make this a buildable lot. He doesn't understand requiring it to be a two-family. Dr. Atherton pointed there was no mention of requiring a two-family.

Action Taken, if any: Motion by Dr. Atherton, seconded by McCann, to approve a variance denied (Atherton and McCann in favor, Finn abstain). Motion by Mr. Finn, seconded by Mr. McCann, to deny the appeal for a variance without prejudice was approved – the vote was unanimous in favor (Atherton, Finn, and McCann). Mr. McCann volunteered to write the decision

Recorded by Roger Atherton

Approved _____

All actions taken:

All action taken includes not only votes and other formal decisions made at a meeting, but also discussion or consideration of issues for which no vote is taken or final determination is made. Each discussion held at a meeting must be identified; in most cases this is accomplished by setting forth a summary of each discussion. A verbatim record of discussion is not required.