



## Hull Zoning Board of Appeals Minutes

Applicant: **Mark Zuroff**

Property: **20 Park Avenue**

Date: **Thursday, December 4, 2014**

Time meeting began: 7:35 pm

Time meeting concluded: 9:35 pm

Place of meeting: Hull Town Hall, Main Meeting Room

Members present:	Alana Swiec, Chair	<b>Sitting</b>	Attending	Absent	Abstain
	Roger Atherton, Clerk	<b>Sitting</b>	Attending	Absent	Abstain
	Mark Einhorn, Member	Sitting	Attending	<b>Absent</b>	Abstain
	Patrick Finn, Associate	Sitting	Attending	<b>Absent</b>	Abstain
	Phillip Furman, Associate	Sitting	<b>Attending</b>	Absent	Abstain
	Jason McCann, Associate	<b>Sitting</b>	Attending	Absent	Abstain

In Attendance: Mark Zuroff, Attorney for potential owner  
Joseph McLaughlin, Developer

**General relief sought:** A public hearing on a reconsideration of an appeal filed by mark Zuroff regarding property at 20 Park Avenue, Hull, MA, which according to the application seeks to apply for a special permit/variance to construct a two-family residence, pursuant to Hull Zoning bylaws, Section 61-2.f.

**General discussion:** Swiec opened the hearing and explained this is a reconsideration which requires a specific and material change to the original application. The change proposed is a reduction from a two-family to a one-family. The Board consensus was that this is both a specific and material change.

Atherton pointed out that the new plans have several problems, but this is not the most significant issue. The errors include the new egress has reduced the lot coverage, but that the old calculation is still shown on the plans, and some of the new egress is shown on part of the plan and the old is still shown in other aspects. The Board can make its decision conditional on the plans being corrected. The higher priority item is the material sent to the Board regarding the Appeals Court decision – Mitchell v. Revere ZBA. Since the Board received this recently and it was sent only yesterday to Zuroff, it would be reasonable for us to grant a continuation while he

researches the issues raised by that decision. In that case, the Revere ZBA had granted a variance for construction on a small lot, but the Court found that the ZBA has exceeded its authority in granting the variance because it had not related the hardship to the soil conditions, shape, or topography of the lot, as required for a variance.

McLaughlin questioned the source of this new information. He was informed it was Joe Duffy, former Chair of the Hull ZBA. McLaughlin stated at the last hearing he was informed of the need for a significant change which they have complied with, only to now find there is yet another issue. He doesn't believe Duffy has standing with the Board and furthermore represented him in a legal case 20 years ago and so has a conflict of interest. He added that Duffy isn't even here; he's just sending this to the Board and the Board is supporting it. Atherton countered that Duffy has helped the applicant in providing the Board with a convincing reason to justify not applying Section 16 and having to send the appeal to the Planning Board because the decision was without prejudice and had instructions to return to the Board with greater justification for the proposal. So the decision was not final as required by Section 16. Duffy is not interjecting himself into the process, he's pointing out a relevant legal case that the Board should be aware of.

Zuroff stated that the Mitchell case is public information and there's nothing wrong with the Board having it. He appreciated the fact that it was emailed to him before the hearing. He added the Board should consider the source and be aware there's a possible conflict of interest. He plans to address the Mitchell case, as he hasn't had a chance to fully review it. It appears to be similar, but different. It was a commercial property and there was an abutter opposed. In this case, there are no abutters opposed, in fact some wrote in support. The Board should note there is no one here in opposition and that there is little likelihood of anyone appealing. The Board will have to consider that in determining whether the Mitchell case should be a factor; it's adverse to our position, but not the same circumstances.

McCann stated this case has taken a long time because there's been a lot of confusion about the method to be used in considering this appeal. The appeal is complicated, the facts are unique, there are a lot of issues to consider, and there were different opinions about whether it was a special permit (SP) or a variance (V). We now are closer to clarity – we all agree a variance is required. The Board now has the applicant's brief and the responses to the variance questions on the application. The problem has always been whether the property is unique and whether the hardship relates to the soil conditions, shape, or topography of the lot. He does not believe this has been specifically proved. From his review of the Minutes, it is not a very unique property, it is just small. He requested that the applicant focus on that piece.

Zuroff responded that his client is willing to reduce the lot coverage. We would then only be dealing with dimensional requirements and that's a SP. The Gale decision wouldn't apply because it is not a reconstruction or expansion of an existing structure. If the lot coverage complies, he believes it only requires a SP, not a V. There is a unique lot – it is the only vacant lot in this neighborhood that is not Town-owned. It is across the street from an overlay district which changes the character of the neighborhood. There are virtually no zoning restrictions in the overlay district. Atherton responded there are a number of zoning restrictions, several pages of them – it's not the blank check that Zuroff claims. Zuroff continued that this lot is the lowest one on the street and is a collection basin for storm water runoff. If not addressed by allowing

his client's planned development, it will be a health hazard. His client plans to install a storm water drainage system, as part of the construction, which will be of benefit to the neighborhood. They didn't point this out before because their engineer hasn't been available, but we can get that for you. McCann responded that is a unique topographical issue, but it does not impact your ability to build the dwelling where you want to build it. Zuroff - it does require some special kinds of construction. McCann - but it is not like a hill or rocks on the lot causing you the problem, it's the size of the lot. McLaughlin - we still have to go to Conservation, as a result we're going to have to build a different house there. Zuroff - the alternative is to abandon the lot and he doesn't see how that benefit from that. It is the optimum use of the lot.

McCann - the uniqueness part of the Variance requirement is so specific and unless the decision is done properly, it will be overturned. Zuroff - but there's no one here contesting it. All the appeals are generated by abutters who are upset about the development taking place and there aren't any on this one. McCann - just because there are no apparent abutters in opposition, it should still be done the right way. The board has tried in so many different ways to make something work, but there is nothing unique about this property that affects the building other than the small lot size.

Atherton asked if the discussion could return to McLaughlin's saying he would be willing to cut back to 30% or less lot coverage. By his calculations, the removal of most of the egress structure in the back would reduce the lot coverage to 34.5 %, although the plans still show 36.8%; but is not the 30% suggested by Finn. McLaughlin interjected that his principle planner is in Aruba, but since he's changing it to SF, smaller lot coverage is feasible. Atherton admitted he did not know whether this was legal, but if one is building a SF in a MF zone, is the builder held to the SF or the MF dimensional requirements? The difference is that in MF,  $2 \times 15 = 30$  and that leaves a width of 5 ft. to build in. If it SF, then it is  $2 \times 10 = 20$ , leaving 15 ft. to build in. His condominium is 15 wide and has plenty of room for a SF. If you take the front and rear setback of  $20 + 25$ , that would leave, on this lot 50 ft. and his condo is 48 ft. and the same three stories, so a dwelling that meets SF zoning is feasible on this lot. The lot size and frontage would still be non-conforming, but are pre-existing. He asked if it could be argued that a SF, even if in a MF zone, would only have to meet SF zoning requirements? It's a legal question that he can't answer. If McLaughlin were willing to do so, it might only require a SP and the Board only has to decide whether the new n/c is more detrimental than the existing n/c. With the current setbacks and lot coverage, we are stuck with a Variance. Furman agreed and added that the addition of the storm drain system and these other changes would make it specific to the property, and acceptable to him.

McCann stated he could find nothing in the bylaws to support the idea of different setback requirements in a MF zone if the dwelling were SF instead of MF. Atherton admitted he didn't know, he just asked the question. McCann responded that, although it was an interesting solution, he didn't think the board should move in a direction of approving something it didn't know. McCann said he wanted to stick to what is required by the law. Zuroff pointed out that the Board has discretion. McCann responded the Board has discretion with a SP, but with a Variance, the Board has to meet the specific requirements. Swiec stated that they need to submit a plan that shows the drainage system, the relationship to the dwelling, and the revised dimensions of the dwelling. Zuroff stated they would do so if the Board if the Board stated this

as a condition. They do not want to do so and then have the Board change its mind again. Swiec stated she needs to see the redrawn plan before she can commit; but she's OK with what's been discussed, if it's properly drawn up.

McCann responded that he thought variances applied to existing structures and was using 61-2, and does not see where it would allow the interpretation that Atherton is suggesting on an undersized lot. Zuroff interjected there could be circumstances where a variance would not be required. McLaughlin and Zuroff added that 32-1 refers back to 31-1 uses being allowed in MF zones. McCann repeated he sees no alternative to a variance.

Swiec stated that zoning was intended to correct some of the bad things done in the past, but did not intend to say that any lot not yet built will become unbuildable – to deny their right to their property in perpetuity. If the written word doesn't allow this, how much latitude can we then take with discretion? McCann responded that discretion is restricted by the specific criteria of the variance. He cannot justify a SP for new construction on this n/c lot. Current bylaws require 6500 sq. ft. with 60 ft. frontage and this lot has 3500 sq. ft. and 50 ft. Zuroff responded that they believe they have satisfied the requirements of a variance. McCann stated that the issue is uniqueness as it relates to the soil conditions, shape or topography. Zuroff responded that the uniqueness is the drainage issue. These lots were established long before zoning.

Swiec asked if they wanted to continue to do further research on these newly-raised issues? Zuroff responded that they were willing to do that but wanted some indication whether the Board is willing to grant relief if we downsize the house and meet the SF setback requirements. Otherwise, his inclination is to withdraw and go about this in another way. The discussion then explored the “uniqueness” of the property. McLaughlin stated he would have his engineer at the next meeting to provide evidence about the uniqueness of the soil conditions and the topography of the lot to support the claim that the property is unique in this neighborhood. Swiec asked McCann if he would consider this? He indicated he thought so - that he didn't have concerns about the other elements of a variance.

Atherton asked for clarity. The issue he raised has not been answered, but McCann seems unaccepting of that as a possibility and is focused on the variance issue. If so, then they do not have to worry about the lot coverage and redesign of the building to meet SF requirements, but only about the uniqueness and proving the hardship is related to the soil conditions, shape, or topography. He is trying to move towards a SP and McCann's focused on the variance without structural changes. Zuroff added that following McCann's logic, they could go back to a two-family. Atherton indicated that it was McCann that argued the reconsideration required the change to a one-family. McCann stated he was now comfortable with the SF, avoiding Section 16, but still thinks a variance is required – he needs convincing on the variance part. The applicant has addressed this several times, but he doesn't feel satisfied. He made a motion to deny the variance; and later added without prejudice. Zuroff moved to withdraw. Swiec checked with the Rules and Regulations; and it turns out that is not allowed at this late stage of the hearing. McCann asked the Chair to acknowledge his motion. Atherton seconded for discussion.

Zuroff read from 40A, section 10 and concluded that it doesn't say anything about uniqueness or siting. It just requires substantial hardship. Atherton quoted from it saying "...but not affecting generally the zoning district" – it is in that sense that it must be unique – not like the other lots in the neighborhood. McCann responded that he used the word unique because in the case law, when dealing with cases like this, the Courts will often use the word unique. Zuroff and McCann agreed the word unique is not in the statute. McCann asked for a vote. Atherton said they need a unanimous vote to obtain the relief they seek, and they do not have that. Swiec agreed.

McLaughlin asked McCann - if he brought his engineer with soil samples and other evidence that the conditions of the Statute were met, would that be enough? McCann said we'd been at this a long time and they had had plenty of time and specific direction to have done this already, McLaughlin said they've been here several times and each time we're sent in a different direction and they've responded each time. McCann said he has repeatedly brought up the need for specific evidence and argument to support each of the required criteria for a variance. Zuroff said he is willing to bring that evidence but needs his engineer to do so. McCann read excerpts from the brief and application questions and stated he did not think these were sufficient to prove the applicant's claim. That is why he made the motion and would like the other members to consider it.

Swiec opined that a yes vote would be to deny the request for zoning relief. Atherton explained that to have a vote the Board would need a reason to justify the vote. McCann stated that would be "a failure to prove a the requirements for a variance that owing to circumstances relating to soil conditions, shape or topography, especially affecting such land or structures but not affecting generally the zoning district in which it is located, a literal enforcement of the provisions of this bylaw would involve substantial hardship...". Atherton stated that they have made an offer to provide the information and by denying them the opportunity to do that we're not giving them the benefit of the doubt. He personally feels that, because of the Mitchell decision, it's going to hard to justify, and why he tried to move it to a SP. He is going to vote "no" to provide them the opportunity to provide the information we've asked them to provide.

Swiec opined that she's inclined to give them the relief they're seeking, but the Board needs to have the language and justification to formulate the decision on. She also thinks this is an extremely unusual case, so she would give them the benefit of the doubt, and give them the opportunity to bring the soil samples and drainage evidence. She stated her role is to bring people as close to their dreams as possible within the constraints of the bylaws. She is willing to give them the benefit of the doubt; and maybe the engineering will change things. McLaughlin stated he apologized for not fully understanding what the Board wanted in terms of the elements of a variance.

McCann withdrew his motion and Atherton withdrew his second. Swiec made a motion to continue to allow them to bring in the engineering evidence. McCann stated the Board needs a new and revised plan, but the lot coverage and side setbacks do not need to be revised as Atherton suggested because we're still dealing with a variance. McLaughlin stated he would still try to bring it down to 30% lot coverage. Swiec asked Furman about his views. He said that is his experience as a builder, the requirement is 6,500 sq. ft. Sometimes 5,000 sq. ft. is allowed if

it's grandfathered but anything less than 5,000 is a worthless piece of land. His concern is that by allowing less, we open up a situation where everyone aggressively pursues construction on pieces of land under 6,500 of which there are quite a few. The Town decided years ago the minimum lot size and that should be it for building on. Atherton agreed this is an important Town-wide issue with small lots.

Swiec elaborated on her motion to continue by adding that the revised plans should show the drainage system, provide soil samples and some topography information. McCann asked for additional case law supporting that these conditions substantiate the hardship as it relates to the construction of the new dwelling. Atherton added it would be helpful if arguments regarding the Mitchell case could be provided.

**Action taken, if any:** The hearing was continued to January 15, 2015 at 7:35 pm. The applicant signed a new continuation form.

Was final vote taken?            Yes            **No**

Recorded by:                        Roger Atherton

Minutes 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 the meeting must be identified; in most cases this is accomplished by setting forth a summary of each discussion. A verbatim record of discussions is not required.*