

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS

IN THE MATTER OF: WD Jaguar, LLC
Petitioner

OPINION OF THE BOARD

REQUEST FOR VARIANCE
25 Milford St.

Hearing: August 25, 2010
Decision: August 31, 2010

MEMBERS PRESENT: Joseph Musmanno, Chairman
David Cole, Clerk
Anthony Biocchi
Peter Gluckler, Jr.

THE WRITTEN OPINION WAS DELIVERED ON NOVEMBER 2, 2010

RECEIVED

NOV 04 2010

TOWN CLERK

*70 Day appeal
dated Nov 24, 2010*

OPINION OF THE BOARD

This is a proceeding of the Zoning Board of Appeals of the Town of Medway, MA (hereinafter the Board) acting under the Zoning By-Laws of the Town of Medway, MA, 02053 and the Massachusetts General Law C40A, as amended, in which the petitioner, WD Jaguar, LLC, requests a Variance (V.F.4) to frontage requirements at 25 Milford St., 4 Meryl St., Medway, MA 02053.

Hearing

Notice of the Public Hearing by the Zoning Board of Appeals in this matter was published in the Milford Daily News on August 11 and 18, 2010. Notice also was sent to all "parties in interest" and posted in the Town Hall as required by Massachusetts General Laws Chapter 40A, Section 11. The Public Meeting to conclude deliberations in this matter was posted as required.

The Public Hearing was held, and the record closed, on August 25, 2010. At the hearing, no one spoke in favor of; several spoke in opposition to the application. Deliberations and decision by the Board on the matter concluded on August 31, 2010.

Hearing Summary

Background Information: The lot in question was created through the approval, endorsement and recording of the Rolling Hills Definitive Subdivision Plan in late 2006. The subdivision plan pertained to a 3.3 acre parcel at 25 Milford St., which included a pre-existing residential structure built in the early 1920's. That parcel had approximately 266 feet of frontage on Milford Street. The plan shows the division of the property into a drainage parcel, a parcel for a 453' long private way, Harmony Lane, off of Milford St., and three single family house lots. Lot 1, where the pre-existing residential structure is located, became a corner lot which derives its frontage partially from Milford St. and partially from the "to be constructed" Harmony Lane.

The Applicant's representative, David W. Krumsiek, Esq. of the law firm of Perry, Krumsiek & Jack, LLP, came before the Board to request a variance to frontage requirements for the premises located at 25 Milford St., located in the ARII zoning district and shown as Lot 1 on the Rolling Hills Definitive Subdivision Plan. Mr. Krumsiek stated that the present owner bought the property out of foreclosure from the previous owner, who in turn bought it from the developer Mr. Garofalo, who still owns the remaining land on which the proposed sub-division is to be built. The sale by the developer was in violation of the covenants entered into when the sub-division plan was approved. The present owner cannot sue the developer because of lack of privity of contract and because the land has passed through foreclosure. This is a unique situation; if the owner cannot obtain relief, nothing can be done with the lot. A proposed owner has already moved in and is currently renting the property. The hardship was created by the developer who conveyed the lot in violation of his covenant; the present owner did obtain title insurance at the time of purchase. Ultimately, if relief is not granted, the town's interest will be degraded due to the likely deterioration of the existing building. The developer cannot sell either of the two back lots in the proposed sub-division without constructing the approved road.

In response to a question from the Board as to why the Board should absolve the present owner of his failure to perform due diligence, Mr. Krumsiek pointed out that the owner's attorney contact the Planning Board and informed the title insurance company of the situation, and that when one is buying property out of foreclosure there is very limited time to do title research.

Ms. Affleck-Childs, Planning and Economic Development Coordinator, explained the approaches made to her Board regarding the subject lot. She had had a telephone conference with the applicant's attorney prior to the applicant's closing on the property in which the question of the lot release was discussed. She indicated to the attorney that the question would have to go before the Planning Board. The Planning Board has subsequently provided to the Zoning Board of Appeals the memorandum of record. Under State Law, there would be an automatic two year extension of the period within which the developer must begin construction. The Planning Board was seriously troubled by the illegal release of the subject lot and might consider rescission of the sub-division approval. The Planning Board has twice declined to give a release for the subject lot.

Findings Of The Board: By Vote of 4-0

We have the case of a parcel conveyed from a subdivision without an appropriate release, and subsequently foreclosed upon and conveyed again. The present owner lacks privity of contract with the subdivision developer, and the chain-of-title has been severed by the foreclosure.

The petitioner demonstrated unusual circumstances relating to the parcel. Standing on its own, as a result of its unusual provenance, the parcel only has approximately 65 feet of frontage on an existing way. The balance of its intended frontage is along Harmony Lane, which exists only in plan form as of this date.

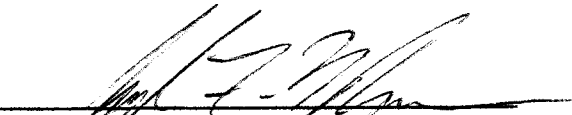
The hardship as a consequence of this circumstance was described as an inability to convey the parcel. However, the clear intent of the subdivision covenant was to prevent conveyance until the roadway is constructed. The period in which the developer is expected to complete construction of the roadway has not yet expired. While the present owner did not intend to enter into this covenant, the provisions remain sufficiently intact that grant of effective exclusion from them would be contrary to the requirements of MGL c41 s81u, and would derogate from the intent of the Zoning Bylaw.

The petitioner correctly argues that it has no control over the completion of the roadway. Nevertheless, it is premature to grant relief, because to do so presumes the Developer will not complete the roadway. There is a plan that is current, on-file with the Town and the Registry of Deeds, and well within its time allowance for completion of the work. Until it is executed, or expires, or is revised, or is rescinded, the plan should control.

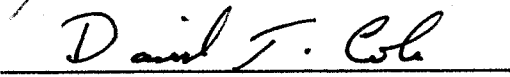
Relief Denied: By Vote of 4-0

The Board hereby makes a detailed record of its findings and proceedings relative to this petition, sets forth its reasons for its findings and decision, incorporates by reference any plan or diagram received by it, directs that this decision be filed in the office of the Town Clerk and be made a public record and that notice and copies of its decision be made forthwith to all parties or persons interested.

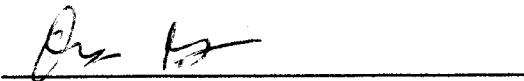
***IN ACCORDANCE WITH MASSACHUSETTS GENERAL LAW, CHAPTER 40A,
SECTION 11 NO VARIANCE, SPECIAL PERMIT OR CONSTRUCTIVE GRANT OF A
VARIANCE TAKES EFFECT UNTIL RECORDED IN THE REGISTRY OF DEEDS.***



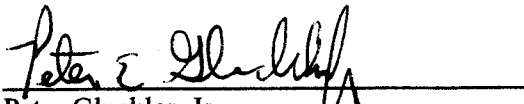
Joseph F. Musmanno, Chairman



David Cole, Clerk



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Peter Gluckler, Jr.