

STURBRIDGE ZONING BOARD OF APPEALS
MINUTES OF
WEDNESDAY, August 14, 2002

Present: Theophile Beaudry
Mary Blanchard
Jeff Bonja
Lawrence Boniface
Robert Cornoni
Pat Jeffries
Ginger Peabody, Chairman

Also in Attendance Lawrence Adams, Town Planner
Nancy Campbell, Clerk

G. Peabody opened the meeting at 7:00 PM and read the agenda. The Board introduced themselves. The minutes for July 10, 2002 were reviewed. M. Blanchard noted that on page 2, after the motion to close the public hearing for The Spaho Corp., Howard Sarty's name was spelled "Sarty" and not "Sardy".

Motion: to accept the minutes of July 10, 2002, as corrected, by M. Blanchard
2nd: J. Bonja

Discussion: L. Boniface questioned his comment noted in the minutes regarding the driveway location for the McNally variance. He did not recall saying the driveway should be on Podunk Road. Board members concurred with the wording in the minutes.

Vote: All in favor

NEW BUSINESS

G. Peabody handed out Rules and Regulations for Special Permits and asked the Board to review them for discussion at the August 28th meeting.

G. Peabody explained that the following hearing was different from previously held hearings in that it was an appeal to a decision of the Building Inspector. Under M.G.L. Chapter 40A, § 15, the Chairman has the power to summons witnesses. G. Peabody had requested Mark Lev, Building Inspector and Leonard Jalbert, Jalbert Engineering, to attend the hearing. She noted that L. Jalbert was present. Mark Lev was unable to attend for health reasons, but had submitted to the Board a memo stating his procedures for issuing a building permit.

PUBLIC HEARING FOR JOANN CARON-PRESCOTT AND SUZANNE E. CARON, AS PRINCIPAL OF CEDAR LAKE, LLC. – ADMINISTRATIVE APPEAL – RELIEF FROM A DECISION OF THE BUILDING INSPECTOR DATED JUNE 12, 2002 DECLINING TO TAKE ENFORCEMENT ACTION AGAINST THE SETBACK VIOLATION AND PROPERTY ENCROACHMENT BY ROBERT COTTONE

G. Peabody opened the public hearing at 7:05 PM. J. Bonja read the legal notice.

Attorney Suzanne Caron presented the appeal and noted that she was a licensed attorney within the state of Connecticut, but not Massachusetts. She was before the Board as a landowner on behalf of her family to represent their interests. She gave a brief background on the property stating her grandparents had purchased it in the 1920's. Presently, her mother, Joann Caron-Prescott, was the sole owner of the 24 acres. In 2001 Jalbert Engineering conducted a survey of the property. In 2002, the Caron's, along with a surveyor from Jalbert Engineering walked the property. Of their 35 abutters, they noted approximately nine fairly minor encroachments on their property. Upon communicating with the abutters, the encroachments were resolved except for that of Robert Cottone. S. Caron contacted R. Cottone's attorney and asked to submit the letters exchanged between herself and R. Cottone. G.

Peabody questioned whether or not the Board wished to see the letters since the purpose of the public hearing was to determine the appeal of the Building Inspector's decision. S. Caron withdrew the letters.

S. Caron also wrote a letter to the zoning enforcement officer/Building Inspector, Mark Lev. M. Lev responded with a letter stating he did not see a problem, which prompted the Caron's to file their petition with the Zoning Board of Appeals. S. Caron introduced L. Jalbert who explained the survey by outlining the Caron property and highlighting the problem in question. L. Jalbert stated that there were 36 major abutters to the property, the survey was signed by Regulations of the Registry of Deeds under 81X meaning that it was existing monumentation, no boundaries were changed, it was an instrument survey and controlled by Massachusetts standards. In the process of completing the survey, surveyors discovered a few overlaps and encroachments relative to the Caron-Prescott property.

S. Caron introduced her mother, Joann Caron-Prescott. J. Caron-Prescott stated that in 1970 they sold a small parcel of land to Mr. Halton, the former owner of the present Cottone property, so he had room to park his car. J. Caron-Prescott received notification from the Conservation Commission (ConCom) of a hearing for the Cottone property, but was unable to attend the hearing. She did, however, visit the Cottone property site, thought the concrete work was on her property and stated so to R. Cottone. She asked if he had surveyed his property and he responded that he had not. S. Caron provided the Board with seven photos (Hearing Exhibit A) of the garage taken by J. Caron-Prescott.

S. Caron introduced her brother, David Caron. D. Caron stated he had visited the site, as well, and felt that R. Cottone's garage was on their property. He contacted M. Lev with his concern. M. Lev replied it was not his job to take any action and that D. Caron would have to survey his property before anything could be done. D. Caron noted that he had considered surveying the property, but the expense was somewhat prohibited at that time.

S. Caron asked L. Jalbert to discuss the degree of accuracy of the survey. The Prescott-Caron survey was an instrument survey done with a transit or an EDM, electric distance equipment, checked mathematically on computers and checked with abutting deed descriptions. The accuracy was a minimum of 1:10,000 feet which meant that in approximately five miles, any geodetic position within the property would be off a maximum of one foot. L. Jalbert said R. Cottone submitted a mortgage survey (a 3rd order survey) to the Building Inspector when obtaining his building permit. A mortgage survey is done with a tape measure, a visual inspection and it is assumed that the property corners are where they should be. In his opinion, this was not an accurate survey and would be used for bank purposes only. L. Jalbert commented that the garage had been constructed approximately 87 feet from the water and not the 65 feet as stated on the building permit application. He also stated that normal procedures for application of construction with the Town are unlike that of abutting towns, in that Sturbridge does not require a certified foundation plan. Therefore, in his opinion, there would be no way to check for a violation in the regulations. S. Caron asked if the garage was on Plan A (see attached) when L. Jalbert created the plan. He said it was not. S. Caron then concluded that the R. Cottone had drawn the garage on the plan based on his own estimates. S. Caron requested a five minutes recess from the Chair, which was granted at 7:35 PM.

G. Peabody passed out the note from M. Lev's doctor stating the reason for his absence from the meeting, as well as the procedures for filing an application for a building permit (both attached.)

G. Peabody informed the Board she had spoken with Tyrone Jones (Stallion Hill project) who asked if the Board would consider waiving any of the Chapter 40B Rules and Regulations. In a letter dated August 5, 2002, (see attached) she told T. Jones she doubted the Board would be willing to waive the Regulations. However, he was welcome to come before the Board and make his request. She also noted she had sent a thank you letter to ConCom thanking them for their input on the McNally Variance heard at the July 10th Board meeting.

The public hearing resumed at 7:35 PM.

S. Caron referenced R. Cottone's application for permit to build (File Exhibit A), line #15, asking L. Jalbert what the setback requirement was from the right of way to building. He stated the setback on a public way, which he believed

Caron Road to be, was 30 feet. Because the application stated the garage would be located 12 feet from the street, L. Jalbert felt the application should have been denied and the applicant should have had to submit an application to the Zoning Board of Appeals for a setback variance. To his knowledge, no variance had been requested for either the front or rear setback violation. There was then discussion regarding the measurements of the garage and the property size and the conclusion was that the building did not fit on the property without intruding into the setback. L. Jalbert added that a deck had been added onto the garage, which overlapped the boundary line creating the encroachment. It was S. Caron's opinion that the building should be removed.

G. Peabody asked for clarification questions from the Board. There were none. The procedures for filing a building permit were reviewed. Also obtained from M. Lev and reviewed was, "Inspect, but don't survey" (see attached), which stated that building officials should never attempt to perform measurements...particularly when the code in Section 113.6, 111.0, site plan, provides proper methods for obtaining these measurements. G. Peabody had researched and referenced Chapter 23-27.3, State Building Code, Article 23-27.3-111.0, New Buildings and Structures (see attached). The Board agreed it would like to ask questions of M. Lev if necessary. G. Peabody stated that M. Lev had not given the Board the entire file on the building at 53A Caron Road. Anyone wishing to review the file would have to do so at the Building Inspector's Office.

Attorney Edmond Neal was present to represent Robert Cottone. Atty. Neal stated that R. Cottone's first contact with the Caron's was when he started the building of the garage in 1997. It was J. Caron-Prescott's opinion that R. Cottone owned the property only to Caron Road. R. Cottone pointed out an iron pin to J. Caron-Prescott saying the land had been purchased by the previous owner to the iron pin. Atty. Neal referenced a survey done by Henry Racicot on June 26, 1976 (Registry of Deeds, Book 427, Page 102, dated August 9, 1976) when the former owner of the property, Mr. Halton, purchased land from the Caron's for parking. Atty. Neal stated that the iron pins from this survey were ignored when Jalbert Engineering conducted the survey for the Caron's. Therefore, he felt that this was, at most, a title difficulty involving lines and recommended a survey be conducted on R. Cottone's property. R. Cottone had a tape survey done by Jalbert Engineering on March 19, 1999 (Hearing Exhibit B), which indicated there was no zoning violation. Therefore, it was Atty. Neal's opinion that M. Lev was correct. Atty. Neal also noted that the Caron's first complaint letter had gone to the Building Inspector, followed with a second letter to R. Cottone. The Building Inspector visited the site and ordered R. Cottone to remove the deck from the garage. When G. Peabody asked L. Jalbert to measure the Halton survey (Hearing Exhibit C) he said it was not to scale.

G. Peabody clarified the purpose of the public hearing was to determine whether or not the Building Inspector made an error in issuing the building permit to R. Cottone and not the validity of the surveys. She asked L. Adams for his opinion. He said the Board, in this case, was acting as the Building Inspector and asked if it felt there was a zoning violation and would it have issued the building permit. He felt the Board needed to disprove or support the decision of the Building Inspector by either agreeing with his determination or disagreeing with it.

G. Peabody noted that it had been the practice of the Board, the Building Inspector and others to rely on a tape survey.

S. Caron asked permission to respond to Atty. Neal comments. She felt that 1) it was troublesome R. Cottone did not have a survey of his property and wanted it noted that they had been relying on a survey that was conducted in 1976; 2) a red flag went up on the application when it was noted that the garage would be 12 feet from the road; 3) the Building Inspector did not carry out Item #2 of the procedures for filing an application for a building permit and 4) the State Building Code was not followed.

Atty. Neal responded saying it was not M. Lev's burden of proof before the Board, not R. Cottone burden of proof, it was petitioner's burden of proof to show that M. Lev was wrong. He also felt the the surveys used by the Cottone's were acceptable (Halton 1976 survey and Jalbert 1999 survey) and that iron pins had been ignored by Jalbert Engineering in their survey for the Caron's.

J. Bonja asked L. Jalbert if there was a conflict with the description that was in the deed for the Cottone property with the survey that was done by Jalbert Engineering. L. Jalbert said the verbal description of the Cottone conveyance was vague, whereas the plan description done by H. Racicot was definitive. Therefore, he relied on the Racicot plan of record rather than the deed description that was furnished to him. L. Jalbert said the Racicot plan and his plan were in line. L. Boniface asked if Caron Road was town or private. L. Jalbert stated that it was a private way with a variable width (12-18 feet) owned by the Caron family. However, the rights to the road are owned by the abutters. S. Caron commented the Caron's did not maintain the road. He stated that the violation was at the rear property line. L. Boniface asked if the Building Inspector told the Caron's he could not help them with the issue of the measurements for the garage, that they would have to have the property surveyed. D. Caron said the Building Inspector did say he should have the property surveyed, which he did not do until just recently. D. Caron offered to meet with the Building Inspector to address his concerns. The Building Inspector commented that was not his job. S. Caron felt the proper response would have been to have R. Cottone prove he was within his property boundaries and not the Caron's responsibility. G. Peabody felt that was a question to ask the Building Inspector.

G. Peabody asked if the Board had any questions to ask the Building Inspector. They had none. She asked R. Cottone if he knew he was in violation at the time he was building the garage. He said D. Caron and J. Caron-Prescott informed him they thought he was building on their property because they believed he owned only to the road. He explained when he purchased the property he was shown a pin to the back of the property which allowed him sufficient of room to build. G. Peabody asked if L. Adams had any clarification questions. He felt the issue was not the process by which M. Lev reached his decision to grant a permit, but whether or not the structure was in violation of zoning and if the Board have adequate evidence to make a determination.

Motion: to continue the public hearing, by L. Boniface
There was no seconded, the motion fails.

Motion: to close the public hearing, by J. Bonja
2nd: P. Jeffries
Discussion: None
Vote: All in favor

S. Caron submitted the following documents - Quitclaim Deed (Hearing Exhibit D); Written Deed #G3743 (Hearing Exhibit E) and Jalbert Engineering Plan Survey Dated 11/15/01, DWG # 01855 - 4 Sheets (Hearing Exhibit F).

G. Peabody asked for discussion of the Board. J. Bonja felt there were two issues; 1) the building did not appear to match that of the application and 2) there appeared to be a clear zoning violation and no variance had been brought to the Board. The evidence was reflected in the survey done by a certified surveyor and he did not feel there was a conflict between the old and the new surveys. M. Blanchard did not feel the sketch was much different than what was built and the Building Inspector visited the site twice seeing no zoning violation, therefore she supports his decision. P. Jeffries did not recall a request for a variance on this issue and the Board must rely on what the individual submit. T. Beaudry felt the Board needed a certified copy of a plan before it issued a variance. He felt this should have never happened. G. Peabody felt the garage is in violation according to the tape survey submitted and that the zoning bylaw must be followed.

Motion: to overturn the Decision of the Building Inspector regarding 53A Caron Road, Sturbridge, MA, Assessor's map 21, Lot 53, Book # 19740, Page # 184, by G. Peabody

Amended Motion: to uphold the Caron appeal regarding the Decision of the Building Inspector at 53A Caron Road, Sturbridge, MA, Assessor's map 21, Lot 53, Book # 19740, Page # 184, J. Bonja

2nd Amended Motion: G. Peabody

2nd Main Motion: J. Bonja

Discussion: L. Adams commented that the applicant needed more than a sustain or a denial, they needed a remedy.

G. Peabody withdrew her motion.

J. Bonja withdrew his second.

Motion: to continue the discussion process of the Decision of the Building Inspector regarding 53A Caron Road, Sturbridge, MA, Assessor's map 21, Lot 53, Book # 19740, Page # 184, until August 28, 2002, at 7:05 PM, by L. Boniface

2nd: J. Bonja

Discussion: None

Vote: All in favor

DISCUSSION AND APPROVAL OF VARIANCE APPLICATION INSTRUCTIONS

The Board had discussion regarding the instructions for its variance application and the quality and type of survey it would require for a variance application. G. Peabody asked L. Adams to explain the different levels of surveys available to the Board for the application purposes.

Motion: to replace the word "accurate" on line #2 of the Requirements Necessary for Proper Filing of Petition For Variance with the words "boundary line", by J. Bonja

2nd: G. Peabody

Discussion: None

Vote: All in favor

Motion: to approve the instructions for Requirements Necessary for Proper Filing of Petition For Variance as amended, by M. Blanchard

2nd: J. Bonja

Discussion: None

Vote: All in favor

Motion: to adjourn, by G. Peabody

2nd: P. Jeffries

Discussion: None

Vote: All in favor

OLD BUSINESS

There was none.

Adjournment at 9:35 PM