



TOWN OF WEST BOYLSTON ZONING BOARD OF APPEALS

127 Hartwell Street * West Boylston MA 01583 * zba@westboylston-ma.gov

MEETING MINUTES

June 16, 2014

Chairman: John Benson

Members Present: John Benson (Chairman), Francis Cahill (Clerk) and Kristina Pedone

Others Present: David Femia (Associate Member) and Secretary Toby Goldstein

Members Absent: Jon Meindersma (Vice-Chair), Charles Witkus, and Paul Hennessey (Associate Member).

The meeting was called to order at 7:20 p.m. by Mr. Benson.

Mr. Benson then read aloud the names of the members of the board who were present. According to section 6.2A of the bylaws, Mr. Benson designated Mr. Femia to replace Mr. Witkus as a full board member. Next, he read the first item from the agenda, the petition by Donald and Kathleen Dill et al, Administrative Appeal, regarding 94 North Main Street. He also indicated that the board was in possession of the petition with attachments, Exhibits A through E.

Mr. Benson opened the hearing, and asked if the petitioner was present (he was). Attorney Mark Bobrowski, of Concord, also present, was representative for the petitioner, explaining that he was present to go through the petition and explain how the petitioner reached the point that he is at tonight. Mr. Benson wanted to be certain that the petition is to appeal the 4/9/14 letter by the Building Inspector, Mark Brodeur, denying a request by the petitioners (dated 4/3/14, exhibit with petition) for him to enforce Town of West Boylston zoning bylaws (according to section 2.6, F2), regarding amount of nonpervious surface per lot, and section 3.2B (regarding residential use of multi-family construction projects) at 94 North Main Street ; Mr. Bobrowski opined that this may not cover all aspects of the appeal. He opined that the essence of the appeal is that the petitioners claim that the Comprehensive Permit expired, thus the project would not conform to the current zoning bylaws, including the two zoning provisions just referred to. Mr. Bobrowski continued that, although he opined that there are some defects as to how the appeal was constructed, it was the refusal of the petitioners'

request to pull the building permit that was issued in January that is the basis of the appeal and he would ask that the board would treat it as an enforcement request of Chapter 40A, Section 7, allowing six years for enforcement of zoning from the date that the violation has been brought forward by the person(s) making the appeal. He continued that it should not be construed as an appeal of issuance of the building permit, as the petitioners did not know that the building permit was issued when it was issued.

Mr. Benson then, to clarify, asked if this petition is an appeal of the Comprehensive Permit? Mr. Bobrowski replied that it is not, but it is the appeal of the determination by the Building Inspector not to enforce the provisions of the Comprehensive Permit, and it is their opinion that the permit is now invalid, and a building permit cannot be obtained under an elapsed Comprehensive Permit. Mr. Benson then clarified that it is not enforcement of the provisions of the Comprehensive Permit, but that the permit has elapsed, and opined that an elapsed permit cannot be enforced, and Mr. Bobrowski replied that an elapsed permit has no validity, so it could be considered enforcement of the permit or enforcement of the fact that the permit elapsed, and he opined that they are one in the same. Mr. Benson clarified that Mr. Bobrowski is saying that, the appeal is, that the permit has elapsed, and therefore any building permit issued pursuant to it is invalid? Mr. Bobrowski replied that it is, and if it is greater than 30 days after the issuance of the building permit, and the residents did not act before the 30 days because they did not know about the building permit, then under the case of “Fitch vs. Board of Appeals of Concord”, they asked for zoning enforcement rather than appealing the issuance of the building permit. Mrs. Pedone asked about Mr. Bobrowski’s statements regarding the residents not having notice of the building permit being issued, and stated that they do not need to be notified of this. Mr. Bobrowski acknowledged that, in most towns in Massachusetts, including West Boylston, they are not required to be notified; however, he added that the petitioners are seeking zoning enforcement in this situation, to make clear that the Comprehensive Permit is dead, and they have up to six years to do so, according to “Fitch vs. Board of Appeals of Concord.” Mr. Benson attempted to clarify, that the petition at tonight’s hearing is actually an appeal for zoning enforcement. Mr. Bobrowski suggested possibly generating a new appeal. He continued that, if one looks back at the material from the petition, the appeal is the inability to obtain enforcement of the zoning bylaws from the Building Inspector. He referred to the earlier letter from the petitioners on 4/3 requesting a Cease and Desist order from Mr. Brodeur to the developer, and opined that it was appropriate, and the request for enforcement of the bylaws regarding use and structure was also worded correctly. Mr. Bobrowski opined that it can be difficult for lay people to develop a petition.

Mr. Benson then questioned Mr. Bobrowski, that if the petitioners are seeking enforcement by the ZBA because the Comprehensive Permit is invalid, why do they believe it is invalid, to which Mr. Bobrowski replied that the permit lapsed. Mr. Benson responded that it was extended, but

Mr. Bobrowski claimed that the extension was not issued to the proper party. He explained that the board voted to issue the extension to Barre Savings Bank on May 28, 2013, but that, under HAC rules, the subsidizing agency must approve ownership transfer and provide written notice of the transfer to the ZBA and to the housing appeals committee. He saw nothing in the records showing that Barre Savings Bank obtained approval from the subsidizing agency to transfer ownership of the property to them, or that they provided written notice of the transfer of ownership to ZBA or the housing appeals committee, so, in his opinion, the transfer of ownership to Barre Savings Bank was null and void. He continued that there was another transfer of ownership from the bank to the present owner (Crescent Builders), and does not know if anything in the records reflects that transfer. In other words, a transfer of ownership must be done in a certain way, according to 760CMR, 56.05 (12)(b), and the transfer must not be a substantial change to the original permit. He opined that whoever came before the ZBA seeking the extension of the Comprehensive Permit was not authorized to do so.

Mrs. Pedone commented that the original owner and holder of the permit went into bankruptcy, and there were no substantial changes made to the original comprehensive permit when the transfer took place. Mr. Bobrowski replied that the bank, as the mortgagee, should have known about the requirements for transfer, and if the property was taken by foreclosure, the bank, as transferee, was subject to the rules. Mrs. Pedone then responded that the ownership wasn't transferred to the bank; they owned it through the foreclosure. Transfer to Crescent Builders happened after the extension was issued; the bank was owner of the property when they appeared before the board. Mr. Bobrowski replied that since the bank was the owner by virtue of foreclosure, DHCD was probably the subsidizing agency, but they did not send approval of the transfer of ownership, and the bank did not give written notice to ZBA or the housing appeals committee. Mr. Bobrowski opines that the permit had no benefit from the Permit Extension Act because it was not validly extended.

Mr. Femia then went through a possible summary of the permit's process. He stated that the permit was originally issued to Brian Lever, who then went through bankruptcy. Mr. Femia then asked what should have happened next, should the bank have gone through DHCD to transfer the Comprehensive Permit into their name, then ask for the extension, then would Mr. Ali have to go through the same process? Mr. Bobrowski replied that those are the rules that they would have to follow. Mrs. Pedone wondered if the bank should have known that this was the process that they had to go through. Mr. Bobrowski replied that it could have been innocent and missed by the board and Town Counsel; however, the three steps are to notify DHCD, ZBA, and HAC, so there would have not been an appropriate transfer of ownership to the bank and not an appropriate issuance of the permit extension to the bank. Mr. Bobrowski added that the Permit Extension Act does not apply to Comprehensive Permits, and HAC regulations are the only rules that they need to work with.

Mr. Benson then reviewed the petition and asked Mr. Bobrowski if the cover letter dated 4/23/14 from the petitioners gives the ZBA authority to act at this meeting, to which Mr. Bobrowski replied that it does. He repeated that, on 5/28/13, when the extension was issued, Mr. Lever was no longer property owner, and there had been a de facto transfer of the permit to the bank because of foreclosure, so when the bank appeared before the board for the permit extension, he opined that they were transferee in everything but name because they hadn't perfected their position; he opined that they should have followed the rules of ownership transfer previously discussed. Mr. Benson asked to what rules Mr. Bobrowski was referring; he asked, if the bank was successor-in-interest, did they need approval by HAC before appearing before the ZBA for the extension, and, as a rule, if a party requires an extension, before it has the authority, does the HAC have to approve the transfer? Mr. Bobrowski replied that the party does need HAC approval, or else anyone can seek an extension, but Mr. Benson responded that the bank was not just "anyone", but successor-in-interest. (Mr. Bobrowski then gave copies of transfer and lapse provisions to Mr. Benson).

Mr. Benson then asked Mr. Bobrowski if it was his opinion that when the bank came before the ZBA, seeking the extension, they were successor-in-interest to the property, but regarding the transfer of the Comprehensive Permit, they did not have the authority to extend the permit? Mr. Bobrowski agreed that they did not unless they went through the process mentioned previously. Mr. Benson then asked Mr. Bobrowski if he believed if Barre Savings Bank did not succeed in obtaining transfer of the permit, then they could not obtain the extension, and Mr. Bobrowski agreed that they could not.

Mr. Benson, reviewing the 4/3/14 letter to the Building Inspector, asked Mr. Bobrowski what was sought from the Building Inspector by the petitioners? Mr. Bobrowski replied that, since the Comprehensive Permit had expired in January, 2014, when the building permit was issued, they were seeking zoning enforcement; Mr. Bobrowski stated that he would not have done it that way.

Mr. Benson then asked Mr. Bobrowski if he was aware that the Building Inspector issued a Cease and Desist Order on 5/13/14? Mr. Femia added that there were certain conditions that the developer, Mr. Ali, had to follow, which were not followed, so the building permit was rescinded. Mr. Benson continued that several things were cited in the Cease and Desist Order.

Mr. Bobrowski referred back to the 4/3/14 request letter to the Building Inspector, which was the initial request for enforcement of the bylaws and for stoppage of work. Also, he opined that the Comprehensive Permit was not extended properly. Mr. Benson then discussed the petitioners' arguments that the permit was not properly extended. Under 40B, the Permit Extension Act does not apply, as was stated by Mr. Bobrowski earlier this evening, but prior to this, Mr. Benson recalled that the petitioners asserted that the permit was not properly

extended because they were not given proper notice of the request for extension, not because of Barre Savings Bank's authority to receive the extension. Mr. Bobrowski opined that the better reason was the bank's authority, and that the process was not done correctly. He also stated that the petition is past the time limit to correct the 5/28/13 meeting. But, any new reason to reverse the Building Inspector's decisions is acceptable. Mr. Bobrowski also stated that Mr. Brodeur rescinded the building permit, but it was greater than 30 days from the date of the request by the petitioners for the Cease and Desist and zoning enforcement; however, he opines that the building permit was erroneously issued. Mr. Benson asked if Mr. Bobrowski was arguing that the permit should have lapsed because the bank requested the extension and the Building Inspector was not authorized to grant the building permit. Mr. Bobrowski continued that, since it was not appealed within 30 days, the option was to seek zoning enforcement.

Mr. Benson asked Mr. Bobrowski what he would do if the board thinks that the Administrative Appeal is wrong. Mr. Bobrowski replied that the petitioners could return with zoning enforcement wording.

Mrs. Pedone next mentioned that, in the 2008 Amended Comprehensive Permit, it is stated that any transfer of the permit is not considered a substantial change; the Comprehensive Permit runs with the land. This was voted upon by the ZBA that was sitting at that time. Mr. Bobrowski insisted that this does not replace HAC regulations with the (3) requirements of transfer. Mrs. Pedone responded that the board had voted and acknowledged to be fact multiple times that the permit runs with the land, but Mr. Bobrowski opined that they cannot ignore the HAC regulations. Mrs. Pedone then referred to the Housing Appeals Committee (HAC) Docket No. 04-10 (the "Decision")(See "Amended Decision, October, 2008" – on file).

(At this point, there were no more comments or questions from Mr. Bobrowski or the board, and the hearing was open to public comment). Next to speak was Mary Orciuch, attorney for Iqbal Ali and Crescent Builders, current owners of the property. Ms. Orciuch opined that Patricia Gates, attorney for Barre Savings Bank, could provide ownership transfer documentation that the petitioners and the board were seeking, and she thought that their client should continue until more information is obtained. Mr. Benson asked her if she could get the information by July 29, the next meeting date which was agreed upon by the board, and she said that she could do that. Mr. Benson verified with Mr. Bobrowski, that if they continue the public hearing to July, the board does not want the petitioners to construe that, by adjourning, that the board ruled on the matter of zoning enforcement. Mr. Bobrowski replied that that he would bring this up at the next meeting.

Mr. Benson then asked for a motion to continue the public hearing. Mrs. Pedone moved to continue the public hearing to Tuesday, July 29, at 7:15. Mr. Cahill seconded. All in favor. (The

board agreed to hold the meeting again in the Senior Center Room at 127 Hartwell Street, whether or not Town Hall has moved to 140 Worcester Street by that time).

Mr. Dill then asked what the purpose was of extending the hearing, and Mr. Benson replied that they want all the facts. Mr. Dill then asked, if Barre Savings Bank was inappropriately issued the Comprehensive Permit extension, will the board vote on the validity of the extension, and Mr. Benson replied that they are only voting on enforcement of the Building Inspector's decision; they do not know if something else will be filed by Mr. Bobrowski in the interim due to possible defects in the petition that was filed. Mr. Dill asked where that would leave the Comprehensive Permit, and Mr. Benson replied that he cannot answer that. He then asked for all parties involved to produce any other evidence, anything else to be filed, and any other documentation, and provide it to the board at least a week in advance of the next meeting.

Mr. Benson adjourned the meeting at 7:55 p.m. for 10 minutes.

Minutes of April 28 and May 19 Meetings:

At 8:55 p.m., Mr. Benson announced that the meeting was back on record. After review of the minutes and discussion, Mr. Benson proposed continuance of both sets of minutes; Mr. Meindersma was present on 4/28 but is not there this evening, and Mr. Witkus was present on 5/19 but not this evening. Mrs. Pedone moved to continue the minutes to July 29. Mr. Cahill seconded. All in favor.

With no further subjects to discuss on the agenda, Mr. Femia moved to adjourn the meeting at 8:57 p.m. Mr. Cahill seconded. All in favor.

Respectfully submitted,

Toby S. Goldstein, Secretary

Date Accepted: _____ By: _____

