

## WALPOLE ZONING BOARD OF APPEALS MINUTES OF JANUARY 13, 2016

A regular meeting of the Zoning Board of Appeals was held on Wednesday, January 13, 2016 at 7:00 p.m. in the Main Meeting Room at Town Hall. The following members were present: Matthew Zuker, Chairman; James DeCelle, Vice Chairman; Craig Hiltz, Clerk; Susanne Murphy and Mary Jane Coffey.

Mr. Zuker opened the meeting at 7:06 p.m.

### **7:07 p.m. William Cuqua, 150 Common Street, Case No. 15-15 Continued Hearing:**

The applicant was represented by Atty. James Brady, Main Street and Dan Merrikin, Merrikin Engineering, Millis, MA. Atty. Brady stated they met with the neighbors to try and come up with conditions acceptable to both parties. Mr. Merrikin stated they submitted a new plan with a revision date of January 12, 2016 with minor revisions changing the deck in the back of the house by shifting it to the north and adding a set of stairs. That is the only change as it stands now.

Atty. Cannon, Franklin, MA thanked Mr. Merrikin and Atty. Brady for their work throughout this process. On behalf of his clients, DeRosa and Watson, he wanted the board to know they agree with the revised January 12<sup>th</sup> plan, the proposed conditions and have no further objections. Atty. Brady stated there was some discussion at the last meeting about limited screening and there is a note on the revised plan.

Ms. Murphy stated that Atty. Quirk had said that a determination for a variance was not up to this board. Atty. Brady stated that what she said in part was if it was determined that if a variance was necessary that would be decided by the Building Inspector, which seems backwards to him. They have been to four hearings and he feels all problems have been flushed out. It seems crazy to go back to the Building Inspector. The abutters are not going to appeal this. It is their position that a variance is not necessary. Ms. Murphy stated that Atty. Quirk raised the issue. Atty. Brady stated that she never said directly that one was needed. She did say if the board felt it was necessary that the variance would issue first and the special permit would follow after. She also talked about whether or not they would have to republish and he believes they wouldn't have to. There is no ambiguity in the relief of what his client is seeking. Mr. Hiltz stated it is not this board that makes the decision whether or not a variance is needed. He agrees with Ms. Murphy. He asked if they want to amend the application to include a variance and Mr. Zuker stated they did that today. Mr. Merrikin submitted two decisions to the board. Atty. Brady stated they typically wouldn't rush this, but they have been working with their attorney right up until yesterday. When they came to an agreement, they did two decisions. They didn't want to finish this process and then have a new building inspector tell them they need to file for a variance. The decision states the board contemplated a variance and they felt it was or wasn't necessary. Mr. Hiltz stated the big piece being missed is that it is not in this board's authority or power to make that decision. That is the authority of the Zoning Enforcement Officer. If that

Zoning Enforcement Officer made a determination of whether or not a variance is needed, the relief is to come to this board and seek an appeal to the Zoning Enforcement Officer's opinion. If in the public hearing process additional relief is required, the application can be amended to obtain the relief the applicant seeks. It is not for the board to make that determination. At this point, it is the applicant's choice. What happens after that with the Zoning Enforcement Officer, happens. Atty. Brady stated he understands. He agrees they need to decide whether or not to ask for a variance. He would like a sense from the board. He doesn't want to put his client in the risk of a two-year problem. Mr. Hiltz stated you may still have a two year problem. Mr. Merrikin stated that when counsel talked about this at the last meeting, she said they have done this in the past. There is some discretion on the board's part to decide. He stated they may need a sideyard variance under Section 6-B-1 and also for a full dormer under Section 6-C-2. He has asked for a variance if the board deems it necessary. The board has the requests before them. Mr. Merrikin stated they submitted an amended application. The board could decide that the barn is already pre-existing nonconforming. The decisions are the same except for the variance part of it. Mr. Zuker thanked both parties for getting together and for coming to a resolution, which is what we asked. It is a beautiful barn and it would be a shame to knock it down. Mr. Merrikin stated if the board is hung up on which way to go, he would suggest they ask for a variance, which is the conservative approach. Mr. Zuker has always felt that was needed and Ms. Coffey agrees. Mr. Merrikin asked about the height issue with the dormers and Mr. DeCelle thinks it meets it because it is a building. Mr. Zuker stated he is not sure. He stated it is not up to us to determine what is needed. Mr. DeCelle stated we will determine if it is needed and Mr. Hiltz stated no. If they apply, we either grant it or not. We don't make determinations. Mr. Hiltz stated in this particular case, we have to stick very closely to our zoning bylaw. Mr. Merrikin requested a variance from the side yard setback and a special permit for the dormer. Mr. Zuker stated it would have been nice to have the amendment before today.

Ms. Coffey moved to accept the amended applications requesting a variance under Section 6-B-1 for sideyard setback and for the dormer under Section 6-C-2. Motion seconded by Ms. Murphy and voted 5-0-0 (Zuker, DeCelle, Hiltz, Murphy, Coffey).

Mr. Zuker asked for comments from the public and there were none. He stated there are no additional comments from any town board. Atty. Cannon stated he has seen this and is okay with it. His clients have no objections. Atty. Brady stated they went through this with Atty. Cannon. Because of the uniqueness of the property, it did warrant a variance. There is no other way to do this which is the hardship. They respectfully suggest that all criteria have been met.

Mr. DeCelle moved to close the hearing. Motion seconded by Ms. Coffey and voted 5-0-0 (Zuker, DeCelle, Hiltz, Murphy, Coffey). The board discussed the conditions of approval and voted as follows:

Mr. Hiltz moved to grant a **Special Permit** under Section 5-B.1 Use Table, Item 3.b of the Zoning By-Laws to allow a two-family residential use on the property. Motion seconded by Mr.

DeCelle and voted 5-0-0 with conditions.

Mr. DeCelle moved to grant a **Special Permit** under Section 6-C.4.A of the Zoning By-Laws to allow the proposed second housing unit to be located in the separate barn structure. Motion seconded by Mr. Zuker and voted 5-0-0 with conditions.

Mr. Zuker moved to allow the applicant to withdraw their request for a **Special Permit and/or Determination** under M.G.L. Ch. 40A Section 6 Paragraph 1 and Section 9:4 of the Zoning By-Laws to allow the conversion of an existing non-conforming two-story barn to a second housing unit. Motion seconded by Mr. DeCelle and voted 5-0-0.

As amended at the public hearing, the following applications were added:

Ms. Coffey moved to grant a **Variance** under Section 6-C.2 to allow a dormer to be added to the pre-existing nonconforming barn/carriage house structure. Motion seconded by Mr. DeCelle and voted 5-0-0 with conditions.

Ms. Murphy moved to grant a **Variance** under Table 6-B.1, sideyard setback, to allow the existing carriage house/barn to be converted from an accessory building to a principal building. Motion seconded by Mr. DeCelle and voted 5-0-0 with conditions.

Ms. Murphy left the meeting at 8:05 p.m.

**8:06 p.m. Stephen Townsend, Case No. 12-15, 321 East Street Continued Hearing:** Mr. Zuker informed the applicant that we only have a four member board tonight, but we do have the Mullin Rule and Mr. Foley who is not present can listen to the meeting tape and can then participate and vote at the next hearing. Atty. Nislick, on behalf of the applicant, stated they would like to move forward and present tonight.

Mr. Zuker opened the hearing. The applicant's attorney, Robert Nislick, Framingham was present, along with the applicants, Stephen Townsend and Kim James. Atty. Nislick stated his client applied for a building permit for a 30'x34' detached 3-car garage to be set back about 30' from the existing dwelling. The applicant has a car and his girlfriend has a car and a work-issued truck that he parks on the street presently. There will be no change in use. The second floor of the garage would have 8' ceilings and it will not be used for any commercial purpose and will have no living area. The building inspector had told him he needs a variance from Section 14 of the Zoning Bylaw. The lot is long and narrow.

Mr. Hiltz questioned a hardship. Atty. Nislick stated the house is aging but is reasonably well-preserved and well maintained. It is a fully functional single family house. It would be more difficult for him to add something to the existing structure. Mr. Hiltz asked why it would be more expensive to build the exact same garage to be attached as it would be to have detached.

John Idman, 37 Congress Street, the builder was present. He stated that if it is attached to the house, he can't get away from the pitch and it would be in the middle of the house and they still wouldn't be able to navigate the driveway hill. Attaching it to the house would mean it needs a

huge amount of fill. Mr. Hiltz questioned the cost difference to build the garage. Mr. Idman stated attaching to the house is more expensive than not attaching it. They would also need fire protection. Mr. Zuker stated we have no problem with them building the garage, but it comes down to calculations. We need to calculate what does meet the bylaw as they can't exceed 40% of 1700 s.f.. Atty. Nislick suggested that the scope of the variance is more modest than what it appears. If you look at other houses by comparison, it is likely that most of the houses have been added on to. The fact that he never changed his house works against him. The size of the accessory structure will be larger, but there is a specific exemption for the floor area. Mr. DeCelle stated if he just built the garage with no second floor, he could do that tomorrow by right. Mr. Zuker stated there is a calculation to meet the building requirement. Mr. DeCelle stated that technically they could build that garage by right without the second floor. Atty. Nislick stated if there were no storage space upstairs, they could build this tomorrow. Mr. Hiltz asked if we have any evidence that the other garages in the neighborhood are consistent with the size of this garage. Mr. Idman stated that right next door there is one that is no smaller than the one that Stephen wants to put up. Also, directly next door is a garage that is bigger than what they want to build. It is a huge structure.

Atty. Nislick suggests that in spite of the fact that the footprint of the garage exceeds the footprint of the house, it is much more modest than what it appears to be. A three-car garage is permissible. It would be a hardship for Mr. Townsend not to be allowed to build this garage. Mr. Hiltz stated anyone can make this go in front of town meeting and argue the ratio situation, but that would be changing the bylaw. To say you have a right to use the property for this is not really correct. Atty. Nislick stated the hardship is based on the topography of the land. To place the garage here would be the most logical and inexpensive way to do it. The garage will be set back from the public way. There is no one here in opposition and no one appeared previously. Mr. Hiltz stated the application is not for a dimensional variance, it is for a use variance. Atty. Nislick stated he applied for a variance from the definition. Mr. Zuker stated the only comment was received from the town engineer and she asked that contours be shown on the plan. At some point, we will need that even if this is granted. Mr. DeCelle asked that the proposed driveway be included. Mr. Zuker stated that clearly the pictures are helpful. Atty. Nislick asked if they need to show the contours on the plan and Mr. Hiltz stated yes and done by an engineer. Mr. Zuker stated we had asked for that previously. Mr. DeCelle stated we had also asked for an explanation of the 40%. Someone needs to figure out if this is a cellar or a basement, which we had asked for previously also. Mr. Zuker stated we need to have a stamped plan showing this. We need the gross floor area to be on the plan also. We don't want to hold you up. You have the right to build an accessory garage, but you need to conform to the requirements. We need a stamped plan by an engineer. Mr. Hiltz stated that would be essential to justify the variance. Mr. Idman stated that with the amount of property that he has here, why is all that important. He is not messing with any setbacks. Mr. Zuker stated that at some point there was a provision to limit the size of an accessory structure. Mr. Idman stated he understands that. Mr. Hiltz stated that 1) we need the contour lines on the engineered plan and 2) he needs something telling us what percentage we are at. That would help him. Atty. Nislick stated the board is saying it makes a difference to what degree it exceeds the 40%. They will provide that if that is what they are looking for. Mr. Hiltz stated the degree to what we are granting a variance, substantially or minimally is important. Ms. Coffey stated we have certain regulations and agrees that what Mr. Hiltz requested does make a difference. If we try to circumvent this it will open up the door to

other people. We have to go by the bylaw. Mr. Zuker stated that information is crucial. He is not completely sold, but he is not against it. A variance is the highest standard in any town. He is not there yet. Mr. Hiltz stated they could choose to move this to another location. Mr. DeCelle stated now it is a principal structure, not an accessory structure. Mr. Idman asked if it could be continued that it would never be made into a living area. Mr. DeCelle stated it is more than 40% and not an accessory structure. Mr. Hiltz stated if they would be willing to have a condition that it will be attached it would keep it as an accessory. Mr. DeCelle stated it could be built as a matter of right without putting the second floor on it. Mr. Townsend stated his house is small and he needs this second floor for storage. Atty. Nislick questioned the definition of the word "attic". Mr. DeCelle stated he is going up to a second floor and then an attic. Mr. Hiltz asked if they abandon the garage, what happens to this space. Also, there is a walk out basement.

The applicant stated he can have a plan as requested by the board within two weeks. Mr. Zuker stated that doesn't mean the board will approve this request.

There were no public comments.

Mr. Hiltz moved to accept an extension of time up to and including March 30, 2016. Motion seconded by Mr. DeCelle and voted 4-0-0. Mr. Hiltz moved to continue this hearing to January 27, 2016 at 7:00 p.m. Motion seconded by Mr. DeCelle and voted 4-0-0.

Minutes: Mr. Hiltz moved to accept the minutes of November 18, 2016. Motion seconded by Mr. DeCelle and voted 4-0-0.

Mr. Zuker moved to adjourn. Motion seconded by Ms. Coffey and voted 4-0-0. The meeting adjourned at 9:30 p.m.

Respectfully submitted,

Craig Hiltz, Clerk

Accepted 3/9/16