



TOWN OF TEWKSBURY ZONING BOARD OF APPEALS

1009 Main Street
Tewksbury, MA 01876

Robert Dugan, Chairman
Len Dunn, Vice Chair
Gerald Kutcher
Associate Members:
Jaime Doherty
Dianne Bartalamia

DEPARTMENT OF COMMUNITY DEVELOPMENT

MEETING MINUTES March 31, 2016

The meeting was called to order by Rob Dugan, Chairman, at 6:30 p.m. at the Town Hall. Present at the meeting were Len Dunn, Gerald Kutcher, Diane Bartalamia, Jaime Doherty, and Melissa Johnson, Recording Secretary.

Approval of Meeting Minutes – February 25, 2016

MOTION: Mr. Kutcher made the motion to approve the February 5, 2016 meeting minutes; seconded by Mr. Dunn and the motion carried 5-0.

NEW HEARING

Michael Ganchi for a variance from Section 4130, Appendix B of the Tewksbury Zoning Bylaw to construct a garage addition onto the existing structure. Said property is located at **22 South Oliver Street**, Assessor's Map 70, Lot 155, zoned Residential.

Present was the applicant, Michael Ganchi, of 22 South Oliver Street and Tim Scali. The applicant is proposing to construct a 17x42 two car garage addition to the left side of the existing home. The area is currently a car port. A variance is being requested for a rear property setback of 10 feet 5 inches. Mr. Scali noted that a permit was obtained on October 19, 2015 to demolish the previous garage and this area has been filled. Mr. Scali explained that this property is located at the end of a dead end street where snow is often stock piled and flooding would be an issue.

Mr. Dugan asked how far the old garage was from the property line and Mr. Scali noted it was 14 feet. Mr. Dugan asked if a variance was obtained for the old garage and Mr. Ganchi explained that the garage was existing when he purchased the home. Mr. Dugan inquired about the size of the lot. Mr. Ganchi noted approximately 10,100 square feet and Mr. Scali noted .23 acres. Mr. Dugan asked how far the garage will be from the street and Mr. Scali noted 31.6 feet and the abutter to the rear is 26.3 feet.

Mr. Dugan opened the hearing to the public and no one came forward to comment.

MOTION: Mr. Kutcher made the motion to close both parts of the hearing; seconded by Mr. Dunn and the motion carried 3-0.

MOTION: Mr. Dunn made the motion to approve Michael Ganchi for a variance from Section 4130, Appendix B of the Tewksbury Zoning Bylaw to construct a garage addition onto the existing structure. Said property is located at 22 South Oliver Street, Assessor's Map 70, Lot 155, zoned Residential; seconded by Mr. Kutcher and the motion carried 3-0.
DUGAN, DUNN, KUTCHER

CONTINUED HEARING

Christine Kydd under MA General Laws, Chapter 40A, Section 8 as a party aggrieved by a decision made by the Building Inspector. Said property is located at **31 Floyd Avenue**, Assessor's Map 25, Lot 141, owned by John Curseaden, zoned Residential.

Present was Christine Kydd of 41 Floyd Avenue, Attorney Charles Zaroulis, town counsel, and Edward Johnson, Building Commissioner. Mr. Johnson disclosed that the recording secretary is his daughter; however, she is not a voting member on the Board.

Mr. Dugan explained that at the previous meeting both parts of the hearing were continued and that since that time he has visited the site and has no further questions.

Mr. Dunn asked Attorney Zaroulis if the property would have had to be owned by one person since the 1950's in order for a building permit to be issued. Attorney Zaroulis explained that the property would have to be owned by the same person(s) who owned the adjacent parcel since 1956; however, the zoning bylaw was amended after 1956 to provide that the Board of Selectman could issue a permit on a lot that was shown on a previous plan. This took the lot out of the general requirements for a nonconforming lot. The Board of Selectmen granted the lot a specific privilege by issuing the permit and within a year a home was constructed. Attorney Zaroulis noted that the person who obtained that special permit also owns the subject property tonight. The question then becomes did the owner do anything to indicate that he or she intended for the two lots to merge when the special permit was obtained. It is Attorney Zaroulis' opinion that the intent was not to merge as a special permit was obtained to build on the lot and there was also a fence between the two lots at one point. In addition, from information Attorney Zaroulis received from the assessor's office, the subject property is being assessed at a higher rate than a lot that cannot be built upon. Mr. Dunn asked if the two lots were on one tax bill and Attorney Zaroulis explained that it was a separate tax bill from the lot on Whited as it was designated as two separate lots by the Board of Selectmen when they issued the special permit.

Ms. Bartalamia asked if both of the lots would be entitled to a building permit if they were owned by two separate people from 1956 to present without a special permit ever having been issued as they would both have more 50 feet of frontage and more than 5,000 square feet. Attorney Zaroulis explained that the decision was in favor of the residents at the prior land court case as they were unable to produce a title showing separate ownership and this was never mentioned to the Board. Mr. Dugan explained that the case was when this particular property was previously before the Board.

Attorney Zaroulis cautioned the Board members against getting bogged down with ownership as it is not always crucial in zoning cases. Discussion took place on Chapter 40A where there can be a plan approved and not owned by the same person, and they are allowed three years to

convey out. Attorney Zaroulis noted that the difference here is there is a special permit that was issued by the Board of Selectmen which changed the rules.

Mr. Dunn asked if the Board of Selectmen issued a permit when they were not supposed to. Attorney Zaroulis explained that under the zoning act there are a certain amount of days to file an appeal with Superior Court. If one fails to file the appeal, then you waive your rights to appeal and the facts are irrelevant. It was noted that there was no appeal taken up at that time.

Attorney Zaroulis explained that it appears what happened is the person applied for a building permit and was denied. Within 3-4 days, they went before the Board of Selectmen and obtained a special permit and within one year a home was built and no one ever took an appeal.

Ms. Bartalamia discussed exceptions to mergers and noted that in case law a town can override common law merger and Tewksbury had been liberal about this in 1960. Attorney Zaroulis discussed some communities where town meeting approved a bylaw that particular areas are exempt from the zoning bylaw. However, Tewksbury did not do this.

Mr. Dunn asked if the Board of Selectmen had the legal authority to issue a permit and Attorney Zaroulis explained that town meeting had voted to amend the bylaw to allow the Board of Selectmen to issue a permit on a small lot if it was shown on a previously recorded plan. The two lots had to be owned by the same person. Even after the special permit was issued, if the same person owned the lot that a home was built on as well as the lot on Floyd Avenue could there have been a merger; did the person intend the two lots to merge. Attorney Zaroulis explained that had someone gone down to the assessor and said that they are being charged for two lots, he would say that there would then be a strong argument that the intention was the lots were merged. In addition, a fence was also installed and still remains today. It is Attorney Zaroulis' opinion that they did not intend for the two lots to merge.

Ms. Kydd noted that no other cases could be found similar to this.

Mr. Dugan asked if Lots 226, 227 and 228 are Whited Street lots and Attorney Zaroulis confirmed this.

Mr. Dugan opened the hearing to the public.

George Terris of 44 Floyd Avenue came forward and noted that it keeps being said that the two properties were owned by the same person. Mr. Terris explained that in 1959 "X" owned the "L" shaped lot. They took a portion of the lot and sold it to "Y" who filed for the special permit six years later in 1965. Mr. Terris feels that the lots should have been merged because they were originally together, but the lot was subdivided by "X" on his own. Mr. Terris explained that it is his understanding that merger is when one owner owns two properties abutting each other and they are under one acre, then they were combined as one lot. Nothing was recorded for the land transfer and a subdivision plan was never done. Mr. Terris noted that the owner of the property is an attorney and has not attended any of the hearings on this matter.

Mr. Terris explained that in 1926 the entire area was owned by one person. The grandfather, who owned all of the land, gave lots to one of the sons who in turn gave it to one of the brothers.

That brother sold a piece and held the other two pieces. Mr. Terris noted there are really six parcels in total and they were all connected in 1956, therefore, it is likely that in 1957 they were on the same tax bill and the two tax bills started when a portion of the lot was given out in 1959. Mr. Terris explained that when the Board of Selectmen granted the special permit in 1965 they were not made aware that the land had been given out by deed. Mr. Terris feels the land was illegally transferred and a special permit should not have issued. Attorney Zaroulis explained that it is not illegal to convey land, it is illegal to construct on the land once it is conveyed until you obtain a special permit. The execution of the deed is not illegal, however, it does not carry any rights to build. Mr. Terris noted that the owner of the property lost his rights as a grandfathered lot when he separated the land and sold part of it as it then created two nonconforming laws. Mr. Terris noted that at the previous meeting Attorney Zaroulis stated that if the Board voted against the matter, he would advise they sue against the town. Attorney Zaroulis noted that he did not ever state this. Mr. Terris suggested the tape be reviewed and noted that he feels the process has been done backwards as the owner of the property should be pursuing this not the neighbors.

Attorney Richard O'Neill came forward and noted that he is present on behalf of Mr. Curseaden who is the owner of record of the parcel located at 31 Floyd Avenue. Attorney O'Neill explained that during the recess period he spent some time researching how he could advance through the concept of doctrine of merger as simple as he could as it is complicated. When they first appeared before the Board, no one was aware that the Board of Selectmen had special permit granting authority from 1962-1968 for granting "new life status" to lots that no longer held the ability to be built upon. Attorney O'Neill explained that he found this out accidentally though working with another client. As a result, he went to the Board of Selectmen office, town clerk's office, and the building department and was surprised that there was a significant amount of information at the town clerk's office. Attorney O'Neill explained that he sat and read 10 years of meeting minutes to see if the permit was used and how often and found it was a provision that was used regularly by the Board of Selectmen and this was not the first and only case. There was an appeal process that lasted 6 years and none was ever taken. Attorney O'Neill noted that one of the lots was conveyed out in the 1950s and the other in 1965. When they applied for a building permit they were denied because the lot had been split. Attorney O'Neill explained that when you deal with merger it says you can never give it away, but you can add until you reach the 1 acre. This is not the first time the Board of Selectman were given special permit granting authority. Attorney O'Neill noted that the ZBA used to deal with all permits regarding automotive use; however, it was lost in 2002 by the town meeting and was given to Board of Selectmen. Attorney O'Neill provided a magnified copy of the tax map showing the lots to show what is going on in the neighborhood according to some of the abutters. Attorney O'Neill noted that 31 Floyd Avenue is the last remaining parcel of land in this area. The parcel at 54 Whited changed remarkably in 1987 and has seen many variances and was once a single lot. Map 2540, 2566, and 2568 was also a single lot. Attorney O'Neill explained that the first shot at doing the variance was to cut out 52 Whited and 41 Floyd Ave and the ZBA granted the variance; however, they forgot about Map 2554 Whited. Another plan appeared in September, 1987 that adds the third piece. As a result, there was a plan of land showing Map 2566 and 2568 without 2540 and the new plan shows 2540 added, but it was not a Board of Appeals plan, it was a Planning Board. Attorney O'Neill feels this is "funny business". Attorney Zaroulis thanked the Board members and Attorney Zaroulis for all of their time reviewing this matter.

A resident of 38 Whited Avenue came forward and noted that she lives in the home that has the special permit; which was given to her aunt Dolly Cursedean and her husband Sonny. At the time, the land on Floyd was in her Uncle Joe's possession. So there was two separate owners. It was requested the Board please keep this into consideration. The land has been maintained for over 20 years because of herself and the other people in the neighborhood as they all take turns maintaining the land with no thanks to the actual property owner.

MOTION: Mr. Kutcher made the motion to close both parts of the hearing; seconded by Mr. Dunn and the motion carried 3-0.

MOTION: Mr. Dunn made the motion to approve Christine Kydd under MA General Laws, Chapter 40A, Section 8 as a party aggrieved by a decision made by the Building Inspector. Said property is located at 31 Floyd Avenue, Assessor's Map 25, Lot 141, owned by John Curseaden, zoned Residential; seconded by Ms. Bartalamia and the motion failed to carry 0-3.
DUGAN, DUNN, BARTALAMIA

New Business

There was no new business.

Old Business

There was no old business.

Adjourn.

MOTION: Mr. Kutcher made the motion to adjourn; seconded by Ms. Doherty and the motion carried 5-0.

Approved: 5/26/16

*List of documents for 3/31/16 Agenda
Documents can be located at the Community Development Office*

Approval of Minutes – February 25, 2016

CONTINUED HEARING

6:30 Christine Kydd under MA General Laws, Chapter 40A, Section 8 as a party aggrieved by a decision made by the Building Inspector. Said property is located at **31 Floyd Avenue**, Assessor's Map 25, Lot 41, owned by John Curseaden, zoned Residential.

NEW HEARING

6:30 Michael Ganchi for a variance from Section 4130, Appendix B of the Tewksbury Zoning Bylaw to construct a garage addition onto the existing structure. Said property is located at **22 South Oliver Street**, Assessor's Map 70, Lot 155, zoned Residential.

- *Application packet dated 2/29/16*