

DRACUT ZONING BOARD OF APPEALS

Meeting Minutes of February 27, 2014 at 7:00 p.m. @ Harmony Hall, 1660 Lakeview Avenue, Dracut.

Continued BOA 2005-13 @ 341 Broadway Road – Comprehensive Permit for 278 rental units with 4 buildings. Petitioner: First Dracut Development, LLC.

Mr. Lania was present representing the applicant. He updated the Board on the status of the project. Mr. Lania stated that during discussions with the Peer Review Consultant Mr. Prentiss regarding the Traffic Study done in 2007, Mr. Prentiss felt a brand new Traffic Study was going to be required as the data has changed significantly in the past seven (7) years. The applicant has hired Fraser Polyengineering Services to complete the Traffic Study and send to Mr. Prentiss by the end of the first week in March per a letter dated February 11, 2014.

Mr. Lania would like to request an extension to the April meeting for time to complete the Traffic Study, get to Mr. Prentiss for review and comments back to the Board prior to that meeting. He presented a copy of the Sight Plan Notice of Intent drawing dated February 19, 2014 that was submitted to the Conservation Commission showing the two (2) abutting parcels of land that were needed for mitigation by National Heritage with the restricted areas delineated. This plan has been submitted to Mr. David Paulson of National Heritage. Chairman Crowley requested Mr. Lania send a copy to Mr. Prentiss to complete his packet of information. Mr. Lania agreed to forward the drawing. A motion to continue to the April 17, 2014 meeting was made by Mr. Pagonis and seconded by Mr. Hamilton. The Board voted unanimously to continue.

2014-4 @ 12 Hovey Avenue – Appeal of Building Commissioner's decision relevant to application for special permit. Petitioner: Dale and Erin Inglis.

Chairman Crowley opened the meeting.

Attorney Kennedy will be representing the petitioners Mr. and Mrs. Dale Inglis. A packet of information (copies attached) from Attorney Kennedy which included Attorney Kennedy's brief dated January 28, 2014, Board of Appeals Case 2011-7 dated April 28, 2011 and a letter to Glen Edwards, Asst. Town Manager/Town Planner from Dan McLaughlin, Inspector of Buildings dated January 7, 2014. Attorney Kennedy stated they are before the Board relative to an opinion dated January 7, 2014 by the Building Commissioner. This originated before the Planning Board pursuant to Zoning By-Law 2.16.21 where the petitioner applied for a Special Permit to extend a pre-existing nonconforming use to a residential structure in the front part of the building. There has been a contentious history of the property relative to the various uses over the years. His client's intention is to try and use it for residential purposes as a studio apartment. It is their contention they are within the purview of 2.16.21 to extend a pre-existing nonconforming use. Mr. McLaughlin, Building Inspector's position is that they are applying for a use variance. They are here tonight to respectfully request the Board set the opinion rendered by the Building Inspector aside and allow them to proceed before the Planning Board relative to 2.16.21.

Mr. Hamilton questioned that 2.16.21 just apply to powers that the Planning Board have and not the Zoning Board. Attorney Kennedy stated that this originated with the Planning Board, but they had to overthrow the Building Inspector's opinion in order to proceed.

Chairman Crowley asked Attorney Kennedy if he had a letter from the Building Inspector. Attorney Kennedy said he has a letter dated January 7, 2014 addressed to Mr. Glen Edwards. Chairman Crowley noted that this letter is the Building Inspector's comment on their permit application to the Planning Board. Chairman Crowley verified with Attorney Kennedy that this letter is what they are basing their appeal on.

Mr. Hamilton asked if the petition is pending before the Planning Board. Attorney Kennedy stated the date was set with the Planning Board before they received the Building Inspector's opinion the day before the hearing. At the hearing they asked for an extension to appear before the Zoning Board of Appeals on the appeal of the Building Inspector. Mr. Hamilton asked what action the Building Inspector has taken as to their filing. Attorney Kennedy has rendered a decision or opinion that they were not lawfully before the Planning Board because of the Building Inspector's opinion they are seeking a use variance. It is there position they are seeking an extension of pre-existing nonconforming use that is already present on the property.

Chairman Crowley noted that Mr. McLaughlin states in the letter they are referencing and put into evidence that he had previously rendered this opinion in a Zoning Determination dated November 13, 2013. Attorney Kennedy stated he is not in possession of that communication.

Chairman Crowley asked when there appeal was filed with the Building Department. Attorney Kennedy stated it was filed January 28, 2014. It was received on January 29, 2014. The reason Chairman Crowley is asking for this information is that you have thirty (30) days to appeal a decision. One of the critical items here is when that opinion was given. He noted that it does not appear this appeal was filed in a timely manner, but will move forward and determine that later.

Mr. McLaughlin passed out a packet of information (copies attached) including the letter to Glen Edwards dated January 7, 2014, email to Mrs. Inglis dated August 30, 2013 and a letter to John Locapo dated March 3, 2011. He presented the Zoning Compliance Determination dated November 13, 2013 and an email to Attorney Kennedy dated November 13, 2013 (copies attached) referencing an attached zoning determination with a reply from him. Chairman Crowley read the email where it states in part, "12 Hovey is currently classified as a "Two-family Dwelling". Adding a third unit would move it into the only other available category – "Multi-Family Dwelling". This is not permitted in the zone. The Zoning Board are prohibited from issuing a "Use variance" (1.13.21)." Chairman Crowley noted the Board will continue on at this time, but notes for the record that 40A does require appeals to the Building Inspector's for an objection to a determination to be taken within thirty (30) of that application.

Mr. McLaughlin has no objection as it seems a perfectly reasonable use, however, from a legal stand point, if the old clock shop was still in business and the applicants wanted to change it to an apartment that would be something under the purview of the Planning Board under 2.16.21. But the clock shop has been gone for a long time and its proper use is as a two-family. This application is seeking to add a use to replace the abandoned clock shop with another use an apartment and that is prohibited by the by-law. The zone is a B-3 and no dwellings are allowed.

Chairman Crowley noted one of the criteria for pre-existing non-conforming structures and uses hinges on is the fact that it is previously a legitimate or legal non-conforming use. It is up to the applicant to prove it was, at some point in time, a legal non-conforming use. Chairman Crowley asked if the three (3) apartments were ever a legal non-conforming use. Mr. McLaughlin responded with not to the best of his knowledge. If it was never legal, you can't meet that criteria and cannot even be considered.

Chairman Crowley feels the whole use as a two-family is in question, regardless of what happens here. There is no way you can have three (3) apartments in a business zone and if you go all the way back in zoning, the town never had it so you could build three (3) apartments in a general district.

Chairman Crowley asked if there ever was a third apartment. Mr. McLaughlin stated the previous owner Mr. Locapo built the clock shop into an illegal apartment without any permits and was made to take it out which he did. At that time there was an opportunity for the land owner to object to the fact that it was a legal pre-existing use which he did not. The third apartment was never a legal use.

Mr. McLaughlin notes that Attorney Kennedy brings up the issue that Mr. Locapo had gone to the Planning Board to add a building trade shop in 2011. Mr. McLaughlin pointed out that Mr. Locapo could go to the Planning Board and ask for that change. At the time, the only criteria was that you had to show it was not substantially more detrimental than the two-family. In response to this case and one other one, the by-law 2.16.21 changed in November 2012 to make it clear that there is no provision for adding a use. The two options are that the existing option can be changed or altered (ex: if you had a trade shop you could make it bigger or change in some way) or a less detrimental option could be substituted under option two (ex: if you had a trade shop you could try and persuade the board that residential is less detrimental), but what you could not do is add a use.

Chairman Crowley asked when the people were considering buying the property if they asked about the zoning. Mr. McLaughlin referenced the email to Erin Inglis dated August 30, 2013. There were a lot of discussions with the realtors who were selling it. They were selling it as a three-family. Mr. McLaughlin got in touch with them and told them he does not think they can do that. Chairman Crowley read the email in question. He asked when they bought the house. Mrs. Inglis states they bought the house August 12, 2013. Chairman Crowley notes once again they received a zoning opinion in excess stating what Mr. McLaughlin is saying now.

Attorney Kennedy appreciates what the town and Mr. McLaughlin is saying. For the record he misspoke earlier, he thought there was a formal report and did not realize that Mr. McLaughlin was referring to that email chain back in November. Mr. McLaughlin noted the formal report was attached to the email. Attorney Kennedy does not believe he is in possession of it. They understand the town's position on the matter, but their contention is that because there is a pre-existing non-conforming use on the premises, they are petitioning the town to allow them to extend that use. The topography and the geography of the neighborhood is more residential than anything else and it is his client's desire to use it for residential purposes

Chairman Crowley noted you cannot extend a pre-existing non-conforming use to make it a legal conforming use. Mr. Hamilton asked why the clock shop is a non-conforming use if it is a business district. Mr. McLaughlin noted the use in itself is conforming to the zone, but all the other parts like the parking and so forth do not conform to the by-law and so that was a non-conforming use in a non-conforming structure. It does not conform with the by-law in a number of ways including the fact that it is part of a two-family dwelling. If it was a standalone clock shop in a conforming lot that would have been okay. Mr. McLaughlin stated that now the pre-existing non-conforming use a two-family dwelling in a B-3 zone. He is not questioning its legality as he is sure you could. The two-family is the proper use and you cannot add another use to it.

Regarding the zoning opinion, Mr. McLaughlin is required by 1.11.20 to give these Zoning Compliance Determinations and the Planning Board asks for them in their regulations. It is not an opinion it is a determination.

Mr. Hamilton questioned what the Board was being asked to overturn. Chairman Crowley stated that what is before the Board now is an appeal to the decision of the Building Inspector regardless of whichever decision you pick as they all say the same thing that it is not a legal expansion as a legal use.

There was a discussion about the application before the Planning Board with regards to the action taken by the Board of Appeals. Chairman Crowley notes there is another issue, with all deference and respect to the Planning Board that they may be missing to some extent and suggests they seek counsel on. They are not allowed to expand a use beyond the existing zoning. If they want to make a change that is substantial in use or in size, then they many times will bump up against different portions of the Zoning By-Law. He even questions whether or not they have the authority, even without the Building Inspector's approval, to go forward and grant this creation of a multi-family dwelling.

They would have to come back to the Board of Appeals for a variance and Mr. McLaughlin is correct that the Board cannot give use variances. Attorney Kennedy understands this, but it is their contention that it is not substantial extension or alteration as the structure itself is 400 square feet and is merely small in size. Chairman Crowley stated it does bump it up to become a multi-family by definition and that is not allowed in the zone so that would be a substantial change to what is allowed.

Mr. Hamilton asked if the decision of the Building Inspector is before the Board so they know what it is that is being appealed. Chairman Crowley understands what they are appealing is a letter dated January 7, 2014 to Glen Edwards as part of a Department Head Review for the Special Permit application to the Planning Board. All parties agreed.

There is no appeal to the previous decisions that were issued. There was no appeal to the decision last August which nobody appealed the decision then and there is other

correspondence off and on in between, none of which were appealed, but don't appeal until we get to this point. In the conversations referred to, Attorney Kennedy feels there was never any formal opinion issued by the Building Inspector. Chairman Crowley stated there was and it is the Zoning Compliance Determination. Mr. Hamilton wants to know what in the Building Inspector's decision is wrong that Attorney Kennedy wants the Board to change. Attorney Kennedy stated the fact that it is stated as a change, in their opinion it is not a change, it is an extension of the use that is already on the premises. Mr. Hamilton confirmed if it is a change of use then the Building Inspector is right or it is an extension of use and not a change of use then the petitioner is right and they can go to the Planning Board for an extension of the use.

In closing, Attorney Kennedy feels it makes more sense than anything to allow for the premises in question to be used for residential purposes. His clients had purchased the property with the hope of turning that front structure into a small studio apartment.

Mr. McLaughlin agrees he does not see any harm if this were able to be turned into a third apartment, but does not see any legal way for it to happen.

Who came forward in favor or in opposition?

Chairman Crowley read a letter from April Guerin, 14 Hovey Street, Dracut, MA (copy attached) noting as a tenant in the building she would prefer to see the front part of the building used as a personal apartment rather than a business. Chairman Crowley noted that there seems to be an implication that if this does not go through it would become a business and he questions whether that is legitimate either.

A motion to close was made by Mr. Hamilton and seconded by Mr. Pagones. The Board voted unanimously to close.

A motion to Uphold the Decision of the Building Inspector was made by Mr. Stephen Hamilton and seconded by Mr. Scott Mallory. Mr. Hamilton noted the question is whether the Building Inspector is correct in his interpretation that this is a change to a non-permitted use in this district as a multi-unit dwelling which is not allowed. Despite the plans of the petitioner which may very well be the best use of the property, the Board is restricted by what the zoning ordinances and thinks the Building Inspector is correct in his interpretation. Chairman Crowley agrees noting this is going to require an expansion or an alteration to the non-permitted use and he does not believe you should be allowed to and believes the Building Inspector is correct in his interpretation. Also for the record he thinks there is a deficiency with regards to the timely filing of this under the relevant chapter for an appeal to the Permit Granting Authority under Chapter 40. He does not feel you can move forward and make this a three-family because it is not allowed in that zone and the Board is not empowered to grant that as it would amount to a use variance. Looking at it historically, if there was an assumption made that they could do this, it should have been determined prior to the purchase, certainly not after the fact, just like you would not buy a piece of property to build a house on it to find out it was deficient because of size, setback or some other reason. Also for the record that once again you can talk to that section of the by-law all you want, but there are three steps that have to be made in order to get an expansion, alteration or change to a pre-existing non-conforming use and the first one has to be that it is a legal pre-existing non-conforming use, and that fact has to be proven by the petitioner. He finds it deficient in all three of these areas.

The Board voted unanimously to Uphold the Decision of the Building Inspector.

Acceptance of Minutes:

A motion to accept the January 16, 2014 minutes was made by Mr. Scott Mallory and seconded by Mr. Stephen Hamilton. The Board voted unanimously to accept the minutes.

Old Business:

Chairman Crowley reminded the Board that the Economic Development Committee still needs representation from the Zoning Board of Appeals.

Next Meetings:

Thursday, March 20, 2014

Thursday, April 17, 2014

Adjournment:

A motion to adjourn was made by Mr. Stephen Hamilton and seconded by Mr. Scott Mallory. The Board voted unanimously to adjourn.

Board of Appeals Members

_____ Chairman, John Crowley	_____ Vice Chairman, Stephen Hamilton
_____ Clerk, R. Scott Mallory	_____ Absent Member, David Meli
_____ Member, Heather Santiago- Hutchings	_____ Alt. Member, Michael Pagonos