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Freetown Zoning Board of Appeals

Wednesday, September 28, 2016
Town Hall – Assonet, Mass.

Present: James Frates, Bradford Paiva, and James Sarcia (associate).

Absent: Nicolas Velozo.

Call to order: James Frates called the meeting to order at 6:33 p.m.

Review of Open Meeting Law Complaint

The chairman opted to take the agenda out of order to address the Open Meeting Law complaint filed by Leia Adey, Assonet, regarding the August 31st meeting. The chairman asked if the board members had reviewed the response drafted by Town Counsel and if there was any discussion, and the members indicated they had reviewed the response and had no discussion. A motion was made by Mr. Paiva, seconded by Mr. Sarcia, to accept town counsel's draft response as written. The motion carried unanimously.

Case #534 (Remanded) – Robert & Patricia Buckley – 251A Middleboro Road, East Freetown

The chairman opened the public hearing. A motion was made by Mr. Paiva, seconded by Mr. Sarcia, to waive the reading of the public hearing notice. The motion carried unanimously.

Jason Rawlins, attorney for the petitioners, addressed the board. He explained that this case was heard previously, a variance was granted, and the case was then appealed and remanded by the Land Court to the Zoning Board of Appeals for reconsideration. Atty. Rawlins stated that this was remanded not because the decision was arbitrary and capricious, but because the decision was not supported by facts iterated sufficiently. He indicated that the proposal was not exactly the same as it was when heard in 2013, as the location of the proposed house had been changed and moved slightly closer to Long Pond to benefit the objecting neighbors at 253 Middleboro Road.

Atty. Rawlins stated that the lot is 33' wide on one end and 34' wide on the other end. Mr. Paiva asked if all lots in the area are the same. Mr. Buckley, petitioner, stated that they are not, and that they vary widely in dimension. Atty. Rawlins stated that the required side setback of 20' was not feasible on a lot that is only 33' wide, stating that the house would have to be invisible to be compliant.

Atty. Rawlins continued by stating that the topography of the lot is notable as it slopes to the shores of Long Pond, which went hand in hand with the soil conditions of the property. The house as it currently exists is not quite on the shore of Long Pond, separated by an existing deck. As discovered after the floods of 2010, the soil conditions of the existing location of the house have compromised the integrity of the structure; the ground will always be wet, and the wetness of the ground will always lead to rot and ruin of the house.

Atty. Rawlins summarized the position of his clients by stating that the shape of the lot makes it impossible to comply with the zoning by-laws as written, the house in its current location will keep flooding, the soils will keep being damp, the public would benefit from moving the house further from the pond and preventing any future pollution caused by the proximity of the house to the pond, the house in its proposed location would not be a detriment to the neighborhood but an improvement, and that granting the variance would not nullify or derogate from the intent of the town's zoning by-laws since a single-family house would be replaced with a single-family house. He also noted that the new house would be roughly in line with the house at 253 Middleboro Road.

Mr. Frates asked if an engineer produced a written report on the soil conditions. Atty. Rawlins did not believe the petitioners had a specific engineer's report, but noted that a Land Court judge found, as a finding of fact, that the soil conditions would continue to cause damage to the house over time, not necessarily in times of

flooding. Atty. Rawlins stated that facts outlined in the judge's findings of fact were sufficient to be accepted as facts by the board.

Mr. Frates asked if the house has a basement. Mr. Buckley stated the house has a shallow foundation.

Matthew Costa of Gay & Gay in Taunton, attorney for the neighbors at 253 Middleboro Road, next addressed the board. Atty. Costa stated that the board should consider the legal standard, that conditions are unique to the property and not common to the surrounding properties. He stated that the conditions must be specific to the parcel in question and that the Land Court nullified the previous decision because the board did not make proper findings in these circumstances.

Atty. Costa provided a printout of the Assessors' map of the area with the wetlands layer showing. He argued that the map showed numerous parcels of similar shape and size all along the pond off Middleboro Road, and dwellings located in close proximity to the pond such as the dwelling in question.

Atty. Costa then presented pictures of the existing Buckley home taken from the Holmes' porch at 253 Middleboro Road. He argued that the present home is two stories, but its lower elevation rendered it not an objectionable obstruction to the Holmes' view. Mr. Frates disputed this assertion, stating that he felt the existing home did block a desirable view of the pond. Atty. Costa countered that it was not as offensive as a two-story home five feet from the property line in relatively the same location as the neighboring home. Mr. Frates question the distance from the existing house to the proposed house, but it was not immediately clear.

Mr. Frates asked if the Holmeses were trying to argue that they want no house on the Buckley property, and Mr. Sarcia questioned if there was any compromise or happy medium that could come about. Atty. Costa responded that the Holmeses do not want a new house on the Buckley property as there is already an existing house. He continued that during the trial, contractors submitted estimates showing the Buckley house could be sufficiently repaired for approximately \$58,000.00, and argued that wanting a new house was not a hardship – the Buckleys can fix what they have. He added that a building code problem is not a zoning problem.

Mr. Paiva asked if the existing house could flood again. Atty. Costa responded that in the flood of 2010, the first-floor of the Buckley home was under two inches of water. He allowed that the Buckleys have a legal right to raise in elevation or alter the home they have now with a special permit as a pre-existing non-conforming structure, but that they do not need and are not entitled to a new home.

Mr. Sarcia did not believe that the risk of flooding was not unique to the property. He stated that flooding affected many properties around the pond, including his own. He asked why the new house would be moved back toward Middleboro Road on the property rather than elevated in place. Atty. Rawlins responded that they wished to remove the home from the floodplain altogether. Mr. Sarcia asked about lifting the house up out of the floodplain, and Atty. Rawlins stated they also wanted to be out of the buffer zones for Conservation Commission purposes. Mr. Sarcia stated the house would still be in the 100-foot buffer zone in its new location, and Atty. Rawlins agreed but stated it would be outside the 50-foot buffer zone. Mr. Sarcia was surprised the property owners would want their home further back from the water's edge.

Mr. Frates referenced the letter submitted in advance by Atty. Costa, which stated the applicants could apply for a special permit. Atty. Rawlins was uncertain what that referred to. Atty. Costa stated that a builder could repair the existing structure and lift it and place it on a new and proper foundation for substantially less cost than new construction. He stated that an engineer's report concluded that the soils drain well and that the water table is eighty inches below the surface of the ground. Messrs. Sarcia and Paiva found that conclusion dubious. The engineer's report, from U. S. Forensics and stamped by a North Carolina engineer, were received into the file.

Mr. Paiva asked if the house has settled over time. Mr. Buckley stated it had.

Gerald Velozo, 5 Friend Street, Assonet, owner of abutting properties, stated that if the cost to repair the house exceeded 49% of the cost to rebuild the house, then the house must meet federal standards when repaired or remodeled, and may need to be raised several feet. He also stated he had no objection to the Buckleys' request.

Atty. Costa argued that it is not a hardship to want to build a bigger house; that it is a want and not a need.

Mr. Sarcia asked if the Buckleys raised and added onto the house, wouldn't that impede the view of the pond more than constructing a new house further to the east? Mr. Paiva agreed with that statement, and said it impedes the view more than a house built in line with the house at 253 Middleboro Road. Atty. Costa argued that a house built in line would make the neighborhood more crowded. Mr. Paiva responded that the area as a whole is crowded. Mr. Frates stated that town by-laws do not address views and that the board should not consider and cannot regulate peoples' views.

Richard Holmes, abutter at 253 Middleboro Road, East Freetown, said he could not open his bedroom windows without seeing the new house if it were constructed as proposed. He stated he had a clear acre of land.

Mr. Frates asked what the side setback of the Holmes house is. Mr. Holmes stated 35'.

Elaine Holmes, also of 253 Middleboro Road, stated that he house is a year-round house and was built to be a year-round house. She argued that the Buckley house is an 80-year-old summer cottage and that that fact does not give them the right to build a new house. Mrs. Holmes stated she did not buy her house expecting the Buckleys to be able to construct a new home on a different part of their property.

Mrs. Holmes further stated that the Buckleys bought their home to be a summer home. Mr. Buckley vehemently objected to that statement and said he has never considered his house to be a summer home.

Mrs. Holmes stated she is a realtor and offered estimates on costs of construction, arguing that cost is not a hardship.

Mr. Frates stated the plans showed the existing house has side setbacks of zero feet and 3.4 feet, and the proposed house has side setbacks of 5.4 feet and 5.5 feet.

Mr. Sarcia inquired about case law mentioned in the petition. Atty. Rawlins stated it was referenced near the end. Atty. Costa argued that the cases cited were not relevant. Mr. Sarcia asked to see the cases referenced if there was a chance this would wind up back in court. Atty. Rawlins opined that the matter would likely end up back in court no matter how it is decided. He noted that the board previously granted the variance and should take that fact into consideration. Atty. Costa argued the board should not consider that fact. Mr. Frates stated that two-thirds of the board is made up of new members and that for that reason the board was hearing the case as if for the first time.

Mr. Sarcia again asked if there was a happy medium, and couldn't the house be moved back somewhat without offending the neighbors? Mrs. Holmes argued that it could not, and stated she and her husband bought their property knowing where the Buckley home was situated.

Mr. Frates stated that the Buckleys have rights in how they use their property regardless of how the Holmeses feel. He stated the Buckleys could build a substantial addition that would extend to the proposed location of the new house, or erect a large fence that would likewise obstruct the Holmeses' views.

Mr. Sarcia asked if the existing house was in a flood zone prior to 2010. Mrs. Buckley responded that it was. Mr. Buckley reiterated that they want to move the house out of the flood zone.

Mr. Paiva asked how much of an elevation change there was between the existing and proposed locations. Atty. Rawlins stated about five feet. Mr. Paiva stated he understood why they did not want to remain in the same location.

Mr. Frates stated that the Buckleys have a right to have a house on their property. The question at hand was where.

Atty. Rawlins added that the proposed house is not proposed to be as tall as it was when proposed in 2013. Mr. Frates asked if this was a concession made for the neighbors. Atty. Rawlins stated the Buckleys altered the proposed height and proposed location to try and appease the Holmeses. Mr. Paiva asked how much lower the roofline is proposed now than in 2013. Mr. Buckley responded six feet lower.

Mr. Sarcia stated he had a hard time determining the hardship. Atty. Costa said the Holmeses' documentation all shows the house can be sufficiently reconstructed where-is. Atty. Rawlins stated the soil conditions are too wet. Mr. Frates suggested an engineer should have put that in writing.

Mr. Sarcia, Mr. Frates, and Atty. Costa then discussed what findings the board must make to grant a variance.

Mr. Frates stated he would like time to consider the matter before rendering a decision. Discussion was held on whether or not to close the public hearing, or to continue the public hearing. Ultimately, the decision was made to close the public hearing and have only a deliberative/voting session at the next session.

A motion was made by Mr. Paiva, seconded by Mr. Sarcia, to close the public hearing and to next meet on Tuesday, October 4th, at 6:30 p.m. at the town hall to deliberate and decide on the petition but not to accept any new public input or testimony. The motion carried unanimously.

Proposed Changes to Application Form

This item was passed over.

Other Business Properly Before the Board

Leia Adey asked if the board planned to address her Open Meeting Law complaint regarding the August 31st meeting. Mr. Frates stated that the board had addressed it at the beginning of the meeting. Mrs. Adey stated she was present at the beginning of the meeting and did not hear a discussion or deliberation. Mr. Frates stated that there was no discussion and the vote was to accept Town Counsel's response. Mrs. Adey wanted to know why there was no discussion. Mr. Frates said the members chose not to discuss it, but to accept the response as drafted. Mrs. Adey was not satisfied with the response, but the board members considered the matter closed.

Minutes of Previous Meeting

A motion was made by Mr. Sarcia, seconded by Mr. Paiva, to accept the minutes of August 31st as presented. The motion carried unanimously.

Meeting Adjourned

A motion was made by Mr. Paiva, seconded by Mr. Sarcia, to adjourn the meeting at 7:45 p.m. The motion carried unanimously.

This is a True Record by me.

Attest: _____ Michael T. McCue, Senior Clerk