

**TOWN OF STERLING
ZONING BOARD OF APPEALS
Minutes of Meeting**

DATE: June 16th, 2009
TIME: 6:30 pm
LOCATION: Butterick Municipal Building

Board Members Present:

Joe Curtin, Jeffrey Donaldson, William Bird, Renee Perry

Alternate Present:

David Lozier

Town Counsel:

Stanley Weinberg

Agenda:

- 6:30pm Open Meeting and Roll Call
- 6:35pm Case # 582 Edith Corbett, Barbara and Ronald Roberti, Carol and Angelo Rossi-
Administrative Appeal 55 Lakeshore Dr.

Proceedings:

- 6:50pm Mr. William Bird opened the meeting with a roll call and then opened the continuation for the meeting on 55 Lakeshore Drive.
- Mr. Bird noted that from last meeting each party was invited to send a point paper and both sides would be invited to discuss the information they presented, would be given the chance to submit any new evidence, and present any questions be heard. Mr. Bird asked both attorneys if they had any objection to the submission of any new evidence.
- Mr. Luke Tashjian, representing the applicants, said that he objected to the submission of new photographs as they were received after he received the point paper, he added that this was not an appropriate avenue to submit them. The photographs were in support of the position that there are no discrepancies in elevation or grading issues. There is a lack of information on other adjacent properties (conforming or non conforming properties) so that is why he is also objecting to them. In addition, since last meeting, Mr. Mark Brodeur has presented his findings on looking at the two plans and that he did not find discrepancies in them. As such, Mr. Tashjian submitted his review of that to show that there are differences in the size and length of the structure, the porch, and that the plans submitted provided a deck on the back of the property that increased the footprint of the property over the 1390sqfeet. Most of those discrepancies have been pointed out and they are substantial changes, substantial deviations and volume changes, and show further encroachment on the back set back which were not include in Mr. Brodeur's letter.
- Mr. Bird said that the meeting has not been closed yet and nothing has been concluded, and the Board was now hearing new evidence.
- Mr. Tashjian replied that this was his new evidence. He added that he objected to an issuing of a certificate of occupancy on May 13, 2009. He was not notified of it and he had to find it in the file at Building Inspector's office. There is also another law suit regarding this

property by Attorney James Gettens, and that is why Mr. Brodeur should have acknowledged these issues and should have maybe copied Mr. Tashjian on it. Mr. Tashjian noted that he cannot accept such conduct. He also submitted a copy of the letter replying on the issuance of the certificate of occupancy.

- Mr. Bird noted that the Board is studying the evidence and will be able to make a decision after all the facts have been looked at.
- Mr. Thomas Bovenzi, representing the McNamaras said that he wanted again to summarize their position on the case. He looked at state law and how non conforming lots were being treated, and how some communities do not even allow for their tear down. On the contrary, Sterling bylaws were very permissive and they have a defined term that modification includes “reconstruction, enlargement and change” which Sterling Bylaws allows. They could come to the ZBA and be granted the special permit as long as the changes were not detrimental to the area. As such, the ZBA’s granting of the special permit came within the confines of the bylaws which does in fact allow for the tear down or modification. Looking at the difference from the special permit application to the point of what was built, was a decision that states that the proposed modification would be allowed as what was in the application, but also the Board looked at the submitted sketches of the plans and saw the proposed changes. However, when the project went underway, they found that the wall would not be code if continued with the project like that. The determination was done correctly by the Building Inspector to conform to the bylaws. There was no opposition to the original permit and if at that time any abutter saw that it was something they do not agree with, then that was the time to present it.
- Mr. Bovenzi continued that the Building Inspector reviewed it three times, and although the Board is the permitting authority, the Building Inspector was not supposed to attend all meetings and he could interpret the issues. This was clearly within the power of the ZBA to issue the special permit, and the permit clearly was done within the jurisdiction of the ZBA. The house conforms exactly to what the law allows to be done, it has doubled in size on the bottom and it now has a second story. That is why it was correct to uphold the decision of what the Building Inspector rightfully and reasonable did.
- Mr. Tashjian asked Mr. Bovenzi about his statement that the plans submitted to the ZBA were sketches and subject to change, and that he would like to see where on those plans they mention “subject to change.”
- Mr. Bovenzi replied that on the notations on locus plans it says that “this drawing might not show construction details, specifications for the Board improvements and are approximations etc.” This was just a sketch of a plan and approximate. The law allows for that. The Board only was concerned with 25 feet set back. If the height or anything else was an issue, then the Board would have been point it out. However, those were not substantial issues, and the Board was mainly concerned with any substantial detrimental changes to the area.
- Mr. Tashjian disagreed with Mr. Bovenzi that plans submitted with the application were incorporated in the decision and they do not include ± 9 feet here or ± 3 feet there. The work allowed in the special permit was different from what was built.
- Mr. Joseph Curtin said that he read the point papers of both sides and kept going back to the submitted site plan. With regards to the confirming of the structure it was all right but what was submitted in the site plan as part of the application, he was struggling with how there has been such deviations even though Mr. Bovenzi said that it was allowed.
- Mr. Bovenzi asked Mr. Curtin if he was concerned with the elevation change.
- Mr. Curtin replied that when the elevation changed then the raising in the foundation would affect neighbors.
- Mr. Bovenzi agreed that plans submitted are part of the application, but what was granted comes in association with what was applied for. The decision of the Board only talks about

one section of the plan. The standard applied under Section 6 of the bylaws, that what was proposed does not make any detrimental changes to the area and make no difference. The Board did not specify any elevation concerns. Fairness requires that we look at the granted special permit decision. The bylaws which are very liberal allow for rebuilding as part of reconstruction. The applicants were looking for a draconian remedy.

- Mr. Tashjian rebutted that his clients were not asking for a tear down as a remedy but his clients care about their reputation in town and were not looking for a draconian remedy.
- Mr. Bird stated that the Board's decision would not be based on a draconian remedy.
- Mr. Jeffrey Donaldson asked Mr. Tashjian again about what is it that he was requesting of the Board.
- Mr. Tashjian replied that tearing down the house would be a very extreme measure but he hoped that the McNamaras would remedy the situation.
- Mr. Donaldson asked if there were other issues than the retaining wall, and where he wanted to end up the situation. He asked about the remedy that is requested from in this case. Mr. Donaldson added that this would be helpful to the Board to understand before making their decision.
- Mr. Tashjian replied that in this case a variance would be required since the special permit was not sufficient in this case. A variance would be needed.
- Mr. Donaldson said that what if the variance could not be obtained due to an appeal, and then we would be back to square one.
- Mr. Tashjian thought that maybe at that time they would sit at the table to decide what to agree on.
- Mr. Curtin said that when we started talking about pivoting and tilting the house, he was not personally shocked that the house was gone.
- Mr. Tashjian stated that they moved the chimney, changed other things, and that is why it seems inconsistent to read that they said in one plan to remove the chimney, add the easterly wall, with removing the structure and tearing it down.
- Mrs. Renee Perry asked again about the relief that Mr. Tashjian is seeking.
- Mr. Donaldson concurred.
- Mr. Tashjian noted that they did not agree yet on the remedy or what will satisfy them.
- Mr. David Lozier argued if the Board rendered the special permit void, then we would not be able to issue a special permit again for it, and at the same time from the discussion, we found that a variance is not viable. As such, where would this end up at, since the Board does not know what would be done at that time.
- Mr. Tashjian replied that he would not be able to comment on this and maybe Town Counsel Mr. Weinberg would be able to guide the Board on that.
- Mr. Donaldson asked if there were other abutters involved.
- Mr. Tashjian said that he represents other abutters. However, his clients were directly affected by the structure.
- Mr. Bovenzi stated that from the case law, the Board cannot be working in vacuum.
- Mr. Tashjian did not agree.
- Mr. Bird asked Mr. Tashjian to talk about the wall and where it existed.
- Mr. Tashjian replied that they are talking about the concrete wall on the side of the house.
- Mr. Bird added that it was not part of the house.
- Mr. Bovenzi said that wall lies under the Building Code and not the zoning.
- Mr. Donaldson added that it is a matter of taste and if the wall is a key point then its height might be important.
- Mr. Tashjian said that the wall was more than 4 feet tall so it requires a permit.
- Mr. Calvin Goldsmith, Goldsmith, Prest & Ringwall (GPR) engineers for the McNamaras, noted that when we started talking about the drainage we talked with the Conservation Commission and the Board of Health, and they had to maintain the swale.

- Mr. Weinberg stated that Mr. Goldsmith had to introduce himself for the record.
- Mr. Tashjian said that there is a big difference that they have a big concrete wall on their side.
- Mr. Curtin noted that they had the original septic system location as per the original plan and wonder why it changed.
- Mr. Goldsmith replied that what we did prevented a whole run off and this was made to accommodate the guidelines of the Conservation Commission and Board of Health to prevent run off. It did not change substantially, and the septic was in the same location. They thought that this would be a better solution for the abutters to prevent any water coming to them. The height of the wall is 4 feet and it pulled further away from the Rossi's house. The solution seemed a better option, it is a simple plan and the issues were how to make the transition between the front yard to the backyard at the side of the house. We did it that way to keep all water away.
- Mrs. Perry asked Mr. Mark Brodeur if he had recommended to the McNamaras to demolish the house or they came in and asked to do it.
- Mr. Brodeur replied that he did not meet with the McNamaras, but he had a couple of discussions with their contractor. There was nothing underneath the structure and they were afraid when they opened it up. They were certain that it was 99% rotten. It was not a viable structure.
- Mr. Donaldson explained to Mr. Bovenzi that he wanted to sum up the issues. He had an analogy that similar to an evolution, he wondered if they ended up with a new species, or that they did not. He questioned if they end up with a totally new species that is so far away from what they began with, because he struggles with it. It felt that this is the heart of the disagreement and Mr. Tashjian did a very good job explaining his side and wanted Mr. Bovenzi to explain his.
- Mr. Bovenzi replied that when we read the application and look at the submitted plans we find that the landowners were requesting to put substantial change, ripping both sides and putting new story on top. The McNamaras wanted to salvage what could be salvageable and under the Sterling bylaws they could have only come to the Board to raise a second story. They were asking for a two story building, and they could have kept the wall in their own right, but not obligated under the bylaws. They were basically instructed that they could not keep the wall, and in the context of what was granted and the bylaws, the new wall would not be substantially detrimental. In fairness to the landowner and the Building Department, they did what they were allowed to do, and the decision was not objected to. The architectural plans show the basement clearly. The remedy was not to take apart what was granted, and this Board has two hats. They were the granting Board, and now they are the reviewing Board to what was applied out of the decision. Fairness dictates that the landowners rely on the language of what was granted in the special permit. This is the same species. The Board could have made a more precise decision but they did not.
- Mr. Stanly Weinberg recommended seeing if there were any questions from the audience before closing the hearing.
- 7:55pm Mr. Bird said there was a 10minutes recess.
- 8:17pm Mr. Bird noted that the hearing was closed.
- Board members started deliberation.
- Mr. Bird said that his main concern was about the procedure of events. Does the structure represent what was granted from the Board, and other items such as any changes. Counsel for both sides presented detailed information. The first issue that's key was the demolition. Looking at the record of proceedings, the McNamaras asked in their application to increase the size of the house and to add a second story to it. There were no question from the floor at the hearing, and the permit was approved, saying that all local and state laws be upheld with a 25 foot set back on the easterly side.

- Mrs. Perry asked if there was any square footage included.
- Mr. Bird replied to the negative.
- Mr. Bird also said that there were questions on the seasonality of the structure. The bylaws section 2.2.4
- Mr. Curtin said that the term modification is loosely defined in our bylaws and was not very specific, especially with reconstruction that it could include tear down.
- Mr. Donaldson agreed that reconstruction was in our bylaws and it is defined loosely and was used by our Building Inspector.
- Mr. Bird added that there was no community presence at the meeting as well.
- Mr. Bird said that the issues were that the foundation was not supportive.
- Mr. Curtin added that he understood that reconstruction could include demolition. From the meeting, maybe he was presumptuous when he heard that they wanted to do pivoting.
- Mr. Bird replied that from the meeting, the Board did not have a reason to go further since there was no community presence. Moreover, the Board hates to be too restrictive and demand that we have certified drawings with very specific details and add more costs to the homeowners, so we generally approve the words they submit to the board after explaining what they wanted to do. There is some wiggle room, so how tight do you want the drawings to be? It is the case where homeowners came to the Board and they met the zoning requirements, and then they had the demolition happen and there were no opposition from field. The first time he heard about any problems with Lakeshore Drive was when there were some discussion on the height. Looking at the drawings you do not see the other houses in relation to it.
- Mr. Donaldson added that it was at that point that the Board ask if the project would be more detrimental to the area when we are studying the case. This is a judgment we make at that point and then there was not opposition. The lingering concern is that we understand the evolution but as looking to the demolition for example, here we have homeowners working closely with the Building Inspector and there was a field decision made about the demolition. Mr. Donaldson added that he could see how reconstruction fits within the word “modification.” The homeowners were relying on the Building Inspector’s expertise and inspection that there was nothing underneath that could be saved.
- Mr. Bird added that they did not have the option of building on that foundation so as to meet state requirements. However, the question was whether he was obligated to come back to the Board. He was hired for his expertise in the field and he made a judgment. The question was did he err in that judgment, since he was not available when the case was heard. Mr. Bird also talked with other two building Inspectors about their positions and they take strong stances when it comes to field decisions.
- Mr. Curtin said that the ultimate result to him was whether the modification piece was known to the Building Inspector at that time, and if the demolition should have been in a public notice as per Building code. The State Building Commissioners said that he did not err in that, so the demolition piece is not the key part as it is part of a reconstruction. Our decision was not very precise, but the Board does not need to be more restrictive. The package we had reviewed was more detailed than what we mostly get in applications.
- Mr. Bird asked if they kept part of the wall would that have been alright.
- Mr. Curtin replied affirmatively as it happened in other towns.
- Mr. Donaldson thought that what was there if it was rebuilt with lower elevation would not have been an issue. Our building Inspector makes field decisions since we do not know what would be under the foundation.
- Mr. Bird added that another issue was if there was an error in notifying abutters under 780 CMR. The Building Inspector’s opinion and also the opinion of State Inspector that since there was no disruption of utilities so notification was not required.

- Mr. Lozier added that there seemed to be a disagreement on whether it was required or not so maybe we could show deference to the Building Inspector.
- Mr. Bird added that nobody complained about it as well.
- Mr. Donaldson said that if no one complained, we could not know about it.
- Mr. Bird summed up the history that they applied on November 27th2007, and they were granted in January 8th 2008, and the decision was recorded on December 10th 2008. He went back to look at the procedures that the board has done prior and found out that notifications of the public hearing were done to abutters, the period of no appeal passed with no one appealing the decision. The demolition permit did not require that the abutters be notified as per section 5112.2 of the building code which states that notification would be only needed if there was a disruption of utilities.
- Mr. Bird said they tore the building down and it lost its non conforming status if it was abandoned. He does not see that as a problem.
- Mr. Weinberg pointed out that we keep going back to the issue if demotion was part and parcel of the building permit. Abandonment was probably not the case.
- Mr. Curtin said that they could probably move to the issue of the plans since they have discussed in detail the demolition issue.
- Mr. Donaldson noted that this was where he struggled the most, and on how they reached what they reached.
- Mr. Curtin noted that he wanted to look at the Building Permit plans.
- Board members took a closer look at the building permit plans.
- Mr. Curtin said that they would look at what was submitted and what they ended up building in the architectural plans.
- Mr. Donaldson said we are looking at the issue if there was an increase to the non conformity of the house.
- Mr. Curtin said that it is such a confined space and the submitted plans were complete as required in our bylaws.
- Mr. Bird said that the board covered issues of demolition.
- Mr. Curtin added that the other issue about whether or not the site plan was considered is part of the application.
- Mr. Donaldson asked if they were different from what was presented and if they were made better.
- Mr. Bird noted that there were other boards involved with the ZBA such as the Conservation commission and the Board of Health.
- Mr. Curtin we need to look at the issue of the swale.
- Mr. Donaldson pointed out that the house exceeded the height and the elevation, and the problems that came after that.
- Mr. Curtin said that the septic system also was an issue.
- Mr. Bird there were some issues that were not our jurisdiction.
- Mr. Curtin also mentioned the retaining wall. The ZBA did not put other specific issues in its decision.
- Mr. Bird talked also about drainage issues.
- Mr. Curtin asked Mr. Weinberg if the submitted site plans were according to the bylaws.
- Mr. Weinberg replied that the plans are part of the application and they were not necessarily too detailed or were subject to some changes within the meetings. In reaching a conclusion about the plans, the Board looks at issues that could be detrimental to the area and if the Board does not include specific notification on the plans then there is a grey area.
- Mr. Donaldson said that he still needed to look at all the information presented.
- 9:35pm Mr. Bird suggested to continue the deliberations on June 25th at 6:30pm.
- Meeting adjourned.