

BOARD of APPEALS
Public Hearing
February 9, 2012
8 p.m., The Annex

MEMBERS PRESENT: Richard O’Leary
Cynthia McKean
William Monti
James Murphy
Brian Ivanhoe, Chairman

OTHERS PRESENT: Bruce Thompson, Building Inspector
Janice Will, Recording Secretary
Members of the Public

Chairman Brian Ivanhoe called the February 9, 2012 Town of North Salem Zoning Board of Appeals meeting to order.

The Chairman set the next meeting for Thursday, March 8, 2012.

The minutes of the January 12, 2012 meeting were unanimously accepted.

HEARING CARRIED OVER

BA12-04 Baxter Road LLC (141 Baxter Road) – **Special Permit** – To amend existing Special Permit BA08-39 (commercial boarding operation for up to 13 horses) to include boarding, breeding and personal use of up to 29 horses, construction of a 16-stall barn and a garage with employee living quarters, construction of employee living quarters in an existing barn, modification of an existing sand ring and additional paddocks/fencing, per Article XIII Section 250-72.

The secretary informed the Chairman that this applicant had not submitted a revised application yet.

PUBLIC HEARINGS

BA12-05 Howard Daniel Fogle III/Virginia F. Fogle (27 Lakeview Road) – **Area Variance** – To decrease the minimum front yard setback in an R-2 zoning district for construction of a storage shed per Article V Section 250-15. A front yard variance of 12 ft. is requested (50 ft. required; 38 ft. proposed).

Mr. Fogle addressed the Board, explaining that he had an 11 ft. x 9 ft. tractor shed on his property, and he needs an area variance to put a 12 ft. x 16 ft. shed in the same location.

Chairman Ivanhoe commented that the new shed is nice-looking.

Richard O'Leary asked if the shed is already in place, and Mr. Fogle replied that it is.

Noting there were no other questions or comments, the Chairman closed the public hearing.

Gerald Reilly read a draft resolution, noting that the variance is for an as-built shed.

Motion by: James Murphy
Seconded by: Richard O'Leary

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Mr. Murphy: Aye
Chairman: Aye

Area Variance granted, as requested.

BA12-06 Robert J. Nicholas (523 Route 22) – **Area Variance** – To increase the maximum height of a fence in a front yard per Article VI Section 250-22. A variance of 2 ft. is requested (4 ft. permitted; 6 ft. proposed) for installation of a fence.

Robert Nicholas introduced himself. He stated that he had his property listed for sale last year, and there were numerous complaints by prospective buyers about road noise. Mr. Nicholas said he wishes to try and abate the noise from Routes 22 and 684 by installing a fence along a section of the front of his property, adding that a taller fence will do more good. He stated that only 40 to 60 ft. of the approximately 137 ft.-long fence will be right in front of his house.

The Chairman noted the inclusion of a photo of fencing at 403 Route 22 and asked if Mr. Nicholas' fence will be the same.

Mr. Nicholas answered that his will be similar.

Chairman Ivanhoe asked if the fence will be painted or allowed to weather naturally.

Mr. Nicholas replied that he will probably let the fence weather, as it is to be built of cedar.

The Chairman stated that it is customary to install fencing with the "good" side facing outward.

Mr. Nicholas responded that his will not be a stockade fence, and it will be the same on both sides.

There were no further questions, and the Chairman closed the public hearing.

Mr. Reilly read a draft resolution, including the finding that the fence is being installed to deflect noise from Route 22, a major thoroughfare.

Motion by: William Monti
Seconded by: Richard O'Leary

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Mr. Murphy: Aye
Chairman: Aye

Area variance granted, as requested.

BA12-07 John Steele Gordon (8 Bogtown Road) – **Area Variance** – To decrease the minimum front yard setback in an R-2 zoning district per Article V Section 250-15 and Article VI Section 250-20. A front yard variance of 33 ft. is requested (50 ft. required; 17 ft. existing/proposed) for reconstruction and expansion of a non-conforming single-family dwelling and creation of a parking area.

Anthony Totilo (architect), Robert Treadway (neighboring property-owner) and John Gordon were all present. Mr. Totilo passed out photos of the existing conditions on the subject property. He pointed out the fire damage to the single-family dwelling on the lot, explaining that there is too much damage to try and save the original building. He stated that he would like to keep to the existing footprint and reconstruct the building in the same location.

Mr. Totilo explained that the plan is for the house to be raised a couple of feet above street level, which will be safer than the lower grade of the existing building. Approximately 3 ft. is also to be added on the second floor at the wing wall. Mr. Totilo said the total height of the rebuilt house will be approximately 24 ft. to the ridge line. He noted that existing walls on the subject property will remain.

Chairman Ivanhoe said that although the footprint will remain the same, the configuration of the new house is somewhat different from the old one. He added that the house is nicely drawn in the plans and appears to have an historical look.

Mr. Totilo said the change is the enclosure of a porch at the rear of the house and the house will remain a single-family dwelling. He went on to say that his client will continue have a library and workroom in the middle part of the first floor building.

Mr. Gordon said he has used the 2 rooms that way for years. He added that there was another fire in 1998.

The Chairman asked if the building will be gutted to the studs or demolished.

Mr. Totilo said the building will be taken down completely and rebuilt with a new foundation and added crawl-space for mechanical equipment.

Chairman Ivanhoe asked if the house has any historic designation.

Mr. Treadway said it does not, but the building (which will once again look more like a barn when it is rebuilt) has been there since approximately 1760.

The Chairman explained that he asked because historic designation would have had to be considered.

Chairman Ivanhoe asked that any exterior lighting not be visible at its source.

Ms. McKean inquired about the apartment.

Mr. Gordon said it will be rented out again, once the house is rebuilt.

Mr. Totilo explained that the apartment takes up the left side of the first floor and all of the second floor loft space.

The Building Inspector stated that the residence had been considered an accessory apartment because Mr. Gordon, who lives across the street, owns the property. Mr. Thompson explained that although it is Mr. Gordon's property, the two lots are separate; the apartment is the principal dwelling on its lot/not accessory to another use. He said that the building is legally non-conforming and may continue to be there.

Mr. Reilly asked if there isn't a rule in the Zoning Ordinance which states that if more than a certain percentage of a non-conforming building is lost to fire, it may not be rebuilt.

Mr. Thompson said the rule only applies to non-conforming uses; the use on the subject lot is conforming/only the location of the house is non-conforming.

Mr. O'Leary noted that the mass of the building is being increased.

Mr. Thompson said that was correct and is the reason for the area variance application.

Chairman Ivanhoe commented that he had not realized the apartment was a rental unit.

Mr. Gordon stated that he lives across the street. Although the 2 lots are technically separate, he considers the subject property to be an accessory to the lot on which he resides.

Ms. McKean asked if she was correct in saying that Mr. Gordon uses part of the first floor, but there is only 1 residence in the subject house.

Mr. Gordon said that was right; he uses it as an office.

Mr. Reilly noted that an office is a home occupation according to the Zoning Ordinance, and such a use must be in one's residence. Now that the house is to be torn down, he said he was not sure the use may be continued.

The Building Inspector said it is not a non-conforming use.

Mr. Reilly explained that he was not sure it can be called a home occupation because it is on a separate lot from the owner's home.

Mr. Gordon commented that the building used to have 2 stalls and asked if he could keep a horse in it.

Mr. Reilly said an office is not a stall and he was not certain about the office use.

Mr. Thompson said home occupation is a permitted use in a residential district.

Mr. O'Leary said there will be 2 residents and 2 dwellings.

Mr. Reilly said the problem is that the subject property is rented to someone else, and Mr. Gordon lives across the street.

Mr. Gordon noted that the apartment takes up only part of the building.

Mr. Reilly asked to see the Zoning Ordinance so that he might read the specific definition for home occupation. Mr. Reilly said the issue was that the office use is either commercial or home occupation. Commercial uses are not permitted in residential districts, but it was his understanding that home occupation is only permitted in one's residence. Mr. Reilly explained to the Chairman that he did not want the Board to approve something that may not be permitted.

Chairman Ivanhoe explained to Mr. Gordon that the Board did not wish to deny him the use of his office, but they wanted to make sure they can legally allow it.

Mr. Reilly read from Article II, Section 250-5 (Definitions) of the Zoning Ordinance re Home Professional Office: "An accessory office of a person located within his or her dwelling".

Mr. Reilly stated that the house was used, in part, as an office in the past, but it needs to be determined if it is still a permitted use in a newly-rebuilt house. He said he was not prepared to answer the question, feeling he needed to look into the issue and make sure the use is legal.

Mr. Totilo asked if leaving a portion of the existing building intact would make a difference.

Mr. Reilly said he did not know. He added that it would be better to wait until the next ZBA meeting, because he could not recommend at this time that the Board approve the office as it is.

Mr. Thompson stated that Mr. Gordon has used the office for years, and he reiterated that this use is permitted.

Mr. Reilly explained that the use may always have been illegal, because Mr. Gordon has never lived in the house.

Mr. Thompson said it will be a matter of how long the office has been used.

Mr. Reilly stated that he did not know the facts. He said that for the office to qualify as a pre-existing, non-conforming use, it would have to have been used continually since before the existence of the Code which permits home occupation now in order to be allowed to continue. He added that if this is the case, Mr. Gordon can probably keep his office. Mr. Reilly said the burden is on the applicant to establish this. He apologized for complicating the hearing of the application.

The Chairman said the timing would seem not to be burdensome, but Mr. Totilo said he is anxious to start construction as soon as possible.

Mr. Reilly asked that Mr. Gordon provide him with the facts regarding history of the use of the subject property, and he will then make a recommendation to Mr. Thompson. He noted that the building has existed since the Revolutionary War and it must be clear that part of the house has been used as office space continuously since before the Zoning Ordinance came into existence in order for the use to be permitted.

The Chairman asked how long Mr. Gordon has owned the property.

Mr. Gordon said he has owned it since 1980, and his grandparents had owned it since 1919.

Mr. Treadway said the apartment was put in in 1928 by Mr. Gordon's grandmother, but the Chairman said the apartment is not the issue.

Mr. Gordon asked if he could use the space for storage, and Mr. Reilly answered that he could.

The Chairman stated that the issue is that the office is in a building which is not Mr. Gordon's home.

Mr. Gordon said this is an accident of history; he owns the property on both sides of the road (2 lots) and has always used them together.

Mr. Treadway said only 2 families have owned the property since the 1770's: the Smiths and the Gordons.

Mr. Reilly stated that the only permitted way of using a residence for home occupation is for the property-owner to live in the building. He added that it is up to the applicant to prove that the home occupation is a pre-existing, non-conforming use; if the Board agrees, the use may continue and Mr. Gordon will only need an area variance; however, if the office is not used for 12 months, the use would no longer be permitted unless a use variance were granted.

Chairman Ivanhoe said there are special circumstances due to the history of the property, and he invited questions from the Board members.

Mr. Monti asked if Mr. Gordon had decided to rebuild the house as it was before, would he have had to come to the ZBA.

Mr. Thompson said he would not have needed an area variance.

Mr. Monti noted that the volume of the house is to be increased and a parking area added.

Mr. Reilly said that even if the house were to be rebuilt exactly as it was before and no parking added but the subject of the home occupation came up, the Building Inspector would have to address the issue as a potential violation. He offered as an example an Article 78 proceeding in Mount Pleasant wherein an 80-year-old business became illegal because the nature of the business was changed.

The Chairman said he sees the situation as special and suggested that maybe the Board could allow the office use but cause it to expire at such time as the property is sold.

Mr. Reilly said it might be possible to merge the 2 lots despite the road between them and permit Mr. Gordon to use the office as long as he lives there, but he was not sure. He pointed out that if the lots were merged the reconstructed building would become an accessory apartment, or there would be 2 principal uses on one lot.

Mr. O'Leary said it would be preferable for Mr. Gordon to be able to prove the pre-existing non-conforming use.

Mr. Monti commented that Mr. Gordon might never have said how he plans to use part of the subject building.

Mr. Reilly said it didn't matter, because the Board does know about the office use. He added that if Mr. Gordon merely said he would be renting the building as a residence to someone else, he (Mr. Reilly) never would have had reason to bring up the office issue.

Mr. Monti noted there was nothing stated in the variance application about office use.

Chairman Ivanhoe stated that establishing a pre-existing, non-conforming use would be the best way to resolve the issue. He moved on to discuss the proposed parking within the front yard, asking Mr. Gordon if there will be parking for 2 cars.

Mr. Gordon said there is room to park 3 cars, and cars have been parked there since the Model T automobile came out.

Mr. O'Leary asked if there are parking requirements for single-family houses.

Mr. Thompson said he did not think there were a specific number of spaces required, but no parking is permitted in a required yard (setback). After consulting the Zoning Ordinance, he stated that the requirement is 2 parking spaces per dwelling.

Mr. Monti wondered, if Mr. Gordon rents out the whole house, could the tenant offer the office use to him.

Steve Partenza, Mr. Gordon's builder, had arrived late to the meeting. He stated that he did the construction work after the 1998 fire and asked what the issue is now.

The Chairman explained that a home office in a dwelling other than one's own residence is not permitted.

Mr. Partenza said there had been an office and an apartment at the time of the 1998 fire, and a Certificate of Occupancy was issued when the house was restored with an apartment and office.

Mr. Reilly stated that a Certificate of Occupancy cures nothing, and a municipality is never prevented from enforcing the Zoning Ordinance.

Mr. Partenza asked if there would still be an issue if the house were repaired instead of being rebuilt.

Mr. Reilly said that even then, if the Building Inspector found out there was a home office used in the building by someone who does not live in the house, it would be, prima facie, a violation of the Zoning Ordinance unless Mr. Gordon can prove that the office is a pre-existing, non-conforming use.

Mr. Partenza said he had assumed that everyone knew there was an office in the building.

Mr. Reilly said the Board wants to see the problem cured and the situation made completely legal. He added that no one on the Board seems opposed to this.

The Chairman agreed with Mr. Reilly.

Mr. Partenza asked if the house could be rebuilt without the office.

Mr. Reilly said the office may be built as well; it just may not be used by someone who does not live in the house.

Someone asked if Mr. Gordon could rent the building to himself and then use the office legally.

Mr. Reilly informed the Board that they could proceed to vote on the area variance application without going into the matter of the office use.

Chairman Ivanhoe asked if Mr. Gordon would let the Board know what he finds in the way of records.

Mr. Treadway said there is a long public record regarding use of the building.

The Chairman asked if the home occupation needs to be included in the area variance application.

Mr. Reilly asked that the results of the record research be provided to him. He said the Board was willing to consider the application for the setback variance for the rebuilt house and parking area; Mr. Gordon just may not legally use the office until it can be established as a pre-existing, non-conforming use.

Mr. Reilly said he will get back to the ZBA with the date of the establishment of a Zoning Ordinance that deals with home occupation, and Mr. Gordon must establish how long he has used part of the building as an office. If the office use pre-dates the Zoning Ordinance and has been continuous, the use will be legal.

Chairman Ivanhoe said the Board would vote on the area variance application so Mr. Gordon may begin reconstruction of the building, and the issue of the home occupation will be added to the resolution.

Mr. Reilly explained that the office is really an issue for the Building Inspector and not the Board of Appeals, because the applicant is not asking for a use variance. If the office use turns out to be legal/not in violation, it will never involve the Board again. Mr. Reilly said the Building Inspector will put a note in the property file that the use has been looked into and is legal and also transferable as long as the use is continuous.

The Chairman stated that if the office use turns out not to be a pre-existing, non-conforming use, Mr. Gordon may apply for a use variance.

There were no further questions, and Chairman Ivanhoe closed the public hearing.

Mr. Reilly read a draft resolution.

Motion by: William Monti
Seconded by: James Murphy

Mr. O'Leary: Aye
Ms. McKean: Aye
Mr. Monti: Aye
Mr. Murphy: Aye
Chairman: Aye

Area variance granted, as requested.

BA12-08 ZHW1 RE LLC (218 Titicus Road) – Special Permit – To amend existing special permit BA11-40 (For construction and maintenance of an accessory apartment) to allow construction of a larger accessory apartment than that approved by BA11-40, per Article XIII Section 250-68.

Joseph Lazarcheck and Yutaka Takiura, architects, were present for the applicant. It was explained that their client wishes to amend his special permit for an accessory apartment to finish a room on the top floor of the building, consisting of approximately 800 sq. ft.

Chairman Ivanhoe asked if the apartment is the same one the ZBA looked at in 2011, and Mr. Takiura said it is.

Mr. Monti asked Mr. Lazarcheck to describe again what his client wants to do.

Mr. Lazarchck stated that within the existing building space, there is an area on the third floor that his client wishes to have finished. Mr. Lazarcheck explained that the new room will be an accessory use for the apartment and a permanent stairway will be constructed to replace the existing pull-down stairs.

Mr. O'Leary asked if there will be living space on 3 floors.

Mr. Lazarcheck said the apartment will only be on 2 floors; the first floor of the building is a garage.

Mr. Reilly noted that the apartment will now consist of 2400 sq. ft.

The Chairman asked if there will be any problem with residential use of a third floor.

Mr. Thompson explained that the applicant will sprinkler the entire building so that he may use the third floor. He said the amendment is needed because the apartment will be larger than what the Board approved when they granted the original special permit.

Mr. O'Leary asked about windows or skylights in the third floor area, and Mr. Lazarcheck said everything is existing; the only change will be the addition of sheetrock.

Mr. O'Leary asked if any neighbors had commented, and Mr. Lazarcheck said they had not.

Ms. McKean asked what a "Moroccan room" is.

Mr. Lazarcheck said that's just what his client wanted to call it.

Mr. Monti asked how the sprinkler system will be built, and Mr. Lazarcheck responded that he is working with an engineer.

Mr. O'Leary asked about the expense, and Mr. Lazarcheck stated that he didn't know what the total would be, but the water storage tank is the most expensive part of it.

Chairman Ivanhoe asked for the capacity of the tank, and Mr. Lazarcheck replied that there will be 10,000 gallons under pressure.

Mr. Monti asked if a halon system had been considered.

Mr. Lazarcheck said they were looking into that, but he didn't think there would be much difference in cost.

The Building Inspector said the difference in requirements for commercial versus residential sprinklers is that a residential system must be able to drive a certain number of sprinkler heads, whereas a commercial system must drive all heads.

Noting there were no further questions or comments, the Chairman closed the public hearing.

Mr. Reilly read a draft resolution.

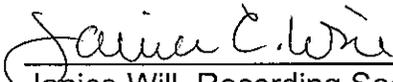
Motion by: *William Monti*
Seconded by: *James Murphy*

Mr. O'Leary: *Aye*
Ms. McKean: *Aye*
Mr. Monti: *Aye*
Mr. Murphy: *Aye*
Chairman: *Aye*

Special permit amendment granted as requested.

The meeting was adjourned at approximately 8:55 pm.

Respectfully submitted,



Janice Will, Recording Secretary