2016 WL 3430554
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Massachusetts Land Court.
Department of the Trial Court, Worcester County.

Jean A. WOJCIK, Plaintiffs,
v.
James LOVETT, Lee Ann Lovett; and Theodore A. Boulay, Lawrence Gordon, Mark Morin, as they are members of the Town of East Brookfield Zoning Board of Appeals; and John Couture, as East Brookfield Building Inspector; and Town of East Brookfield, Defendants.

No. 14 MISC 481577(HPS).
|
June 22, 2016.

DECISION

SPEICHER, J.

***1** The shores of Lake Lashaway in East Brookfield will be decidedly less tranquil, according to plaintiff Jean A. Wojcik ("Wojcik"), if her next-door neighbors and fellow lakefront owners, James Lovett and Lee Ann Lovett (the "Lovetts"), are permitted to raze the summer cottage on their property and build a larger, year-round residence. The Lovetts are the successful applicants for a finding by the East Brookfield Zoning Board of Appeals (the "Board") that the proposed new dwelling will not be substantially more detrimental to the neighborhood than the existing nonconforming seasonal cottage. Wojcik disagrees, largely on the basis of her claim that the condition of Bennett Street, the road on which the Lovett property depends for access, will be worsened if it is used for access to a new year-round residence.

The plaintiff commenced this action on February 12, 2014. The plaintiff's motion for summary judgment was denied by the court (Speicher, J.) on June 29, 2015, in an Order that narrowed the issues for trial by allowing summary judgment in part for the Lovetts. Specifically, I ruled that: (1) the existing cottage is a "residential structure" as that term is used in G.L. c. 40A, § 6, which properly may be the subject of a Section 6 finding without regard to whether it is a "dwelling" within the meaning of the East Brookfield Zoning Bylaw (the "Bylaw"); (2) the Bylaw permits the razing of a nonconforming residential structure and its replacement with a reconstructed residential structure that exceeds 30 percent of the floor area and 50 percent of the fair market value of the original structure upon a finding by the Board in accordance with the applicable provisions of G.L. c. 40A, § 6 and the Bylaw; and (3) the fact that the new structure would be a single-family dwelling and that it would exceed the specified increases in floor area and market value noted above were not new nonconformities requiring the issuance of a variance.

A trial was held before me on December 17 and December 18, 2015, with a view of the subject premises taken on December 17, 2015. After the receipt of transcripts and the filing of post-trial memoranda and requests for rulings of law and findings of fact by both sides, I took the matter under advisement.

For the reasons stated below, I find and rule that the Board did not exceed its authority in finding that the proposed new dwelling would be "not more detrimental to the property and the surrounding neighborhood than the current use," nor did the Board err in not requiring the Lovetts to obtain a variance. Therefore, the Board's decision is AFFIRMED.

FACTS

Based on the facts stipulated by the parties, the documentary and testimonial evidence admitted at trial, and my assessment as the trier of fact of the credibility, weight and inferences reasonably to be drawn from the evidence admitted at trial, I make factual findings as follows:

The Parties and the Properties

1. Wojcik owns and resides at the property at 104 Allen Road, East Brookfield (the "Wojcik property"). The Wojcik property abuts the property owned by the Lovetts. The Wojcik property is a 1.9 acre, conforming lot with respect to lot area, and is improved by a dwelling used as a year-round residence by the plaintiff. The Wojcik property has its frontage on Allen Road. [1]

***2** 2. The Lovetts own property abutting and just to the north of the Wojcik property (the "Lovett property"). The Lovetts' property is a 22,080 square foot parcel located at 116 Bennett Street, East Brookfield and is improved by a seasonal cottage built in 1930. [2]

3. The cottage on the Lovett property contains approximately 776 square feet of living space (including the screened-in porch), is uninsulated, and is unheated but for a wood stove that is seldom if ever used. The cottage, which has three bedrooms, has never been occupied as a permanent residence, but instead has been used only as a summer cottage. The height of the cottage is about 21 feet. [3]

4. The Lovetts have owned the Lovett property since 2005, and have used it about 100 days a year, sleeping in the cottage only about five nights a year. [4]

5. The Wojcik property and the Lovett property are both lakefront properties on the shore of Lake Lashaway (the "lake"). Although the two properties abut, they do not depend on the same road for legal frontage or for physical access. Wojcik uses Allen Road for access to her property, and does not depend on Bennett Street for frontage or access. The Lovetts use Bennett Street for frontage and for physical access. [5]

6. The Wojcik property and the Lovett property differ in another notable way despite sharing a common boundary line. They are at significantly different elevations, with the developed portion of the Wojcik property at an elevation about 36 feet higher than that of the Lovett property. [6] One standing on the Wojcik property finds oneself looking down a steep hill at the Lovett property, through a stand of trees between the properties, and well above the roof of the Lovetts' existing cottage. [7]

Bennett Street

7. The record is inconclusive as to whether Bennett Street is a private or a public way, although it is likely private. On the ground, Bennett Street, which runs from Drake Lane, past the Property, and loops back to Drake Lane, is a dirt road of variable width, no more than about ten feet wide at any point. It is infrequently maintained, if at all, and until it was recently dug up and regraded to facilitate the installation of a water line to service the homes on Bennett Street, it was severely rutted. During the winter, the road has been plowed irregularly. [8]

8. Bennett Street encroaches on the Lovett property as it passes by their residence, so that it is partially located within the bounds of the Lovett property. [9]

9. Bennett Street also passes close by two other neighbors' houses. The kitchen door of the Nelsons' summer home opens into the right of way of Bennett Street, and the bulkhead of the Townsend home, across Bennett Street from the Property, comes within a foot or so of the right of way. [10]

10. Of the several other houses along Bennett Street, all but one, the Townsend home just across Bennett Street, are occupied only seasonally in the summer. The Townsend home is used all year round, but only on weekends. [11]

***3** 11. Despite disputed testimony about how accessible Bennett Street is to larger vehicles, including emergency vehicles, there was undisputed testimony, and I so find, that Bennett Street has been accessed by trucks delivering construction materials to the Nelson home, the Lovetts' other next-door neighbor, for the purpose of putting a new roof on the Nelson home, and that heavy construction equipment, including a backhoe, accessed the road to dig a trench and regrade the road for the installation of the water line. [12]

Zoning and the Proposed New Dwelling

12. The Lovett property is in a Residential Zoning District under the Bylaw, which was first adopted in 1979. In the Residential Zoning District, the required lot size for a single-family dwelling is 30,000 square feet; the required frontage is 150 feet; and the required front, side and rear setbacks are 25, 20 and 25 feet, respectively. Maximum lot coverage is 30 percent. Maximum height allowed is 36 feet from finished grade. [13]

13. The Lovett property, with the existing cottage, is nonconforming with respect to lot area and is conforming with respect to other use and dimensional

requirements. The existing cottage conforms to the setback and height requirements of the Bylaw and is in conformity with the lot coverage requirements. [14]

14. The Lovetts applied to the East Brookfield building inspector for a permit to raze the existing cottage on the Property and to construct a new single-family dwelling on the Property.

15. The new dwelling is proposed to partly overlap the footprint of the present cottage, but will cover a footprint of 1,522 square feet, where the present cottage has a footprint of approximately 776 square feet. The total floor area of the new dwelling is proposed to be 2,452 square feet. The building will be have three bedrooms, the same number of bedrooms as the present cottage. It will have a walkout basement facing the lake, and will be two stories as viewed from the lake and one story as viewed from Bennett Street. The height of the new building will be 21 feet, 2 and 5/8 inches on the Bennett Street side, and will be about 33 feet, lower than the 36 foot height limit, as viewed from the lake side of the building. The lot coverage of the new building will be less than the maximum 30 percent. [15]

16. The closest part of the proposed building (the garage) to the front lot line is set back 30 feet from the front lot line. However, because Bennett Street encroaches on the lot, the proposed new building is set back 15 to 20 feet from the edge of the Bennett Street roadway. If measured from the line of Bennett Street, the front setback of the proposed new building will not meet the front setback requirement of the Bylaw. If measured from the front lot line, it will comply. The proposed new building meets the requirements for side and rear setbacks.

17. Article V, Section 2 of the Bylaw includes the following definitions:

***4** Building Lot: A parcel of land occupied or capable of being occupied by one building and the accessory buildings or uses customarily incidental to it, including such open spaces as are required by this Bylaw. A building lot shall not include any part of a street which is relied upon to qualify the lot as to frontage.

Street Line: The dividing line between a street and a lot and, in the case of a public way, the street line established by the public authority laying out the way upon which the lot abuts.

Yard, Front: A yard extending across the full width of the lot and lying between the front lot line of the lot and the nearest line of the building. The depth of a front yard shall be the minimum distance between the building and front lot line. [16]

18. Article V, Section 4, paragraph 2 under the heading "Non–Conforming Uses" of the Bylaw provides as follows:

A non-conforming use or structure may not be improved if such improvement exceeds fifty (50) percent of the fair market value, or increase (*sic*) the floor space by thirty (30) percent or more of such use or structure at the time of the original change, or pre-existing non-conforming structures or uses may be extended or altered when the Board of Appeals makes a finding as designated by the Bylaw that such a change, extension or alteration is not substantially more detrimental than the existing non-conforming use is to the neighborhood.

19. Article V, Section 5 of the Bylaw includes the following instruction:

Set Backs: Each building shall be set back from the front (street) side and rear lot lines the specified number of feet.

20. The building inspector informed the Lovetts that he would not issue a building permit unless the Lovetts obtained a finding by the Board pursuant to section 4, paragraph 2 of the Bylaw.

21. The Lovetts, subsequent to receiving the building inspector's decision, petitioned the Board for a "variance" for "replacement construction ... at this time the Lot does not meet SF Requirement ... non-conforming lot—Section IV Paragraph 2." [17]

22. Following a public hearing concluded on January 28, 2014, the Board issued a decision dated January

28, 2014, in which it made the following finding: "the Board finds that the proposed plans are not more detrimental to the property and the surrounding neighborhood than the current use."

23. On February 12, 2014, Wojcik filed a timely appeal of the Board's decision pursuant to G.L. c. 40A, § 17.

DISCUSSION

STANDING

As an abutter to the Property, Wojcik enjoys a rebuttable presumption that she is an aggrieved person entitled to challenge the grant of the special permit by the Board, pursuant to G.L. c. 40A, § 17. *Marashlian v. Zoning Bd. of Appeals of Newburyport,* 421 Mass. 719, 721 (1996); *Marotta v. Bd. of Appeals of Revere,* 336 Mass. 199, 204 (1957). The Lovetts have challenged Wojcik's standing, contending that she is not an aggrieved person. "If standing is challenged, the jurisdictional question is decided on 'all the evidence with no benefit to the plaintiffs from the presumption.' " *Marashlian, supra,* 421 Mass. at 721, citing, *Marotta, supra,* 336 Mass. at 204. The party challenging the plaintiff's presumption of standing as an abutter can do so "by offering evidence 'warranting a finding contrary to the presumed fact.' " *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline,* 461 Mass. 692, 700 (2012), quoting *Marinelli v. Bd. of Appeals of Stoughton,* 440 Mass. 255, 258 (2003). "If a defendant offers enough evidence to warrant a finding contrary to the presumed fact, the presumption of aggrievement is rebutted, and the plaintiff must prove standing by putting forth credible evidence to substantiate the allegations." *81 Spooner Road, LLC, supra,* 461 Mass. at 701. Following rebuttal of the presumption by a defendant, plaintiffs have "the burden of proving, by direct facts and not speculative evidence, that they would suffer a particularized injury as a consequence" of the construction approved by the special permit. *Kenner v. Zoning Bd. of Appeals of Chatham,* 459 Mass. 115, 120 (2011). The facts offered by the plaintiff must be more than merely speculative. *Sweenie v. A.L. Prime Energy Consultants,* 451 Mass. 539, 543 (2008). On the other hand, if a defendant "fails to offer evidence warranting a finding contrary to the presumed fact, the presumption of aggrievement is not rebutted, the abutter is deemed to have standing, and the case proceeds on the merits." *81 Spooner Road, LLC, supra,* 461 Mass. at 701.

***5** It appears unlikely Wojcik could establish that she is a person aggrieved if required to do so. The entirety of Wojcik's claims of purported harms rested at trial on the inadequacy of Bennett Street for access, and the damage that will allegedly result to the condition of Bennett Street from construction activities and from increased use. However, the record shows that the plaintiff does not rely on Bennett Street for access to her property, but instead uses Allen Road. She claims the poor condition of Bennett Street interferes with the condition of a right of way to the lake over her property along the boundary with the Lovett property. But that right of way is for the benefit of one of her neighbors, and she offered no evidence as to how any debris from Bennett Street interferes with her use of her property. Wojcik's claim that mere increase in density can serve as a basis for standing is correct, but only where, as is not the case here, the proposed density exceeds the maximum density allowed by the applicable bylaw. Compare, *81 Spooner Road, LLC, supra,* 461 Mass. at 698 (new dwelling exceeded allowed floor area ratio) and *Marhefka v. Zoning Bd. of Appeals of Sutton,* 79 Mass.App.Ct. 515, 516–517 (2011) (new dwelling exceeded maximum lot coverage). Furthermore, the plaintiff's home, at an elevation 36 feet higher than the Lovett property, looks down at the Lovett property from a height that makes interference of any other sort (view, drainage, light, noise) extremely unlikely.

Nevertheless, the plaintiff has the benefit of an abutter's presumption of standing, and it is the defendants' responsibility, if they wish to rebut the presumption, to offer evidence contrary to the presumed aggrievement of which the plaintiff has the benefit. This the Lovetts have failed to do. It is not enough for the Lovetts to argue, as they do, that Wojcik has failed to offer sufficient evidence of a particularized harm to her in the use of her property, because she has no obligation to do so until the defendants offer evidence to rebut the presumption of standing. Accordingly, I find and rule that the presumption has not been rebutted, and that Wojcik is deemed to have standing. Thus, the case must be decided on the merits.

STANDARD OF REVIEW

The court's inquiry in reviewing a decision of a board of appeals granting zoning relief is a hybrid requiring the court to find the facts *de novo,* and, based on facts found by the court, and not those found by the board, to affirm the board's decision unless it was "based on a

legally untenable ground, or was unreasonable, whimsical, capricious, or arbitrary." *MacGibbon v. Bd. of Appeals of Duxbury,* 356 Mass. 635, 639 (1970). This is a two-part inquiry requiring the court to first determine whether the board's decision was based on a legally untenable ground. A legally untenable ground is a "standard, criterion, or consideration not permitted by the applicable statutes or by-laws." *Britton v. Zoning Bd. of Appeals of Gloucester,* 59 Mass.App.Ct. 68, 73 (2003). Only after determining that the decision was not based on a legally untenable ground does the court consider, on a more deferential basis, "whether any 'rational view of the facts the court has found supports the board's conclusion ...' " *Sedell v. Zoning Bd. of Appeals of Carver,* 74 Mass.App.Ct. 450, 453 (2009), quoting *Britton, supra,* 59 Mass.App.Ct. at 75. The court may not overturn the board's decision unless "no rational view of the facts the court has found supports the [zoning board's] conclusion ..." *Britton, supra,* 59 Mass.App.Ct. at 74–75.

***6** Wojcik offers three bases for a determination that the Board's decision was legally untenable or otherwise exceeded its authority: 1) the Board made insufficient findings to support its decision; 2) the proposed new dwelling violates the required front yard setback, thereby requiring a variance that the defendants did not request or obtain; and 3) the Board's determination that the new building will not be more detrimental to the neighborhood than the existing cottage is not supported by any evidence and exceeded the Board's authority for that reason. [18]

THE BOARD'S FINDINGS WERE ADEQUATE

G.L. c. 40A, § 6 provides in relevant part as follows:

> ... a zoning ordinance or by-law ... shall apply to ... any reconstruction, extension or structural change ... except where alteration, reconstruction extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.

By virtue of the proposed reconstruction of the residential structure on the Lovett property to replace the existing structure with one with a substantially greater footprint and gross floor area, the Lovetts were required to obtain a so-called "Section 6 finding" from the Board. See *Bjorklund v. Zoning Bd. of Appeals of Norwell,* 450 Mass. 357, 360–361 (2008). The Bylaw provides, in accordance with the authority granted under G.L. c. 40A, § 6, that the Board may authorize such a reconstruction upon making the required finding. [19] As was discussed in more detail in the *Order on Plaintiff's Motion for Summary Judgment* (June 29, 2015), the Bylaw provides that any improvement below certain threshold limits may proceed as of right, "or" any improvement exceeding those limits requires a finding by the Board that the improvement is "not substantially more detrimental than the existing non-conforming use is to the neighborhood." [20]

Wojcik argues that the finding made by the Board, "that the proposed plans are not more detrimental to the property and the surrounding neighborhood than the current use," was conclusory in nature and insufficient to meet the requirements for findings of fact that apply to the grant of variances and special permits. Contrary to Wojcik's argument, although Section 6 findings are sometimes treated in zoning ordinances and bylaws as special permits or are classified as such for the sake of clarifying the procedure to which they will be subject, there is nothing in G.L. c. 40A requiring that they be treated as special permits or that they be subject to the requirement for detailed factual findings that must be made in conjunction with the granting of a special permit or variance. Wojcik correctly points out that in *Bjorklund* and in *Gale v. Zoning Bd. of Appeals of Gloucester,* 80 Mass.App.Ct. 331 (2011), Section 6 findings by a local board are referred to as "special permits," but it is not clear whether the local bylaw or ordinance in those cases designated the Section 6 finding to be a special permit under the local bylaw or ordinance. In the present case, the Section 6 finding as embodied in the Bylaw, is not a special permit, and is subject only to the requirement

that the Board find that the proposed reconstruction is not substantially more detrimental to the neighborhood than the existing structure. This the Board did. By contrast, the Bylaw, in Section 7, requires the Board to make detailed findings on a number of issues in considering whether to issue a special permit under other sections of the Bylaw.

***7** The varying treatment of a Section 6 finding as an independent finding, or as a special permit, is not unlike the disparate treatment given to site plan reviews, which are treated as special permits procedurally in some municipalities, and as non-appealable administrative findings in others. See, e.g., *Quincy v. Planning Bd. of Tewksbury,* 39 Mass.App.Ct. 17, 22 (1995); *St. Botolph Citizens Comm., Inc. v. Boston Redev. Auth.,* 429 Mass. 1, 7–8 (1999). Where a local bylaw does not explicitly require that an application for a specific type of approval be treated as a special permit, the permit granting authority is not obligated to follow the procedural requirements for the granting of a special permit. For instance, where a bylaw did not explicitly classify a provision for site plan review as a special permit, a super majority vote of the planning board was not required in order to approve the site plan. *Osberg v. Planning Bd. of Sturbridge,* 44 Mass.App.Ct. 56, 57–59 (1997). Likewise, in the present case, where "the by-law, by utilizing separate chapters, clearly differentiates between processing of applications for (Section 6 findings) and applications for special permits," the Board was not obligated to follow the procedures applicable to special permits. *Id.,* at 59.

The Supreme Judicial Court has recognized and endorsed the distinction between those municipalities that choose to impose special permit procedures on Section 6 findings and those that do not. "G.L. c. 40A, § 6, authorizes, but does not require, a municipality to choose a special permit application as the procedure for extension or alteration of a nonconforming use." *Shrewsbury Edgemere Assoc. Ltd. Partnership v. Bd. of Appeals of Shrewsbury,* 409 Mass. 317, 322 (1991). East Brookfield, having chosen in its Bylaw to treat Section 6 findings separately and as something distinctly other than special permits, was not obligated to make the kind of detailed findings in support of a Section 6 finding that it would have been required to make to justify the issuance of a special permit. As such, the findings it made in support of its determination that the proposed new structure would not be more detrimental to the neighborhood than the existing cottage, were adequate.

NO FRONT YARD SETBACK VARIANCE WAS REQUIRED

Wojcik also contends that the new dwelling will introduce a noncomplying front yard setback as a new nonconformity, thereby requiring a variance in addition to a Section 6 finding. A zoning board of appeals may not grant an extension to a nonconforming use in the absence of a dimensional variance if the proposed extension creates new dimensional violations of the zoning bylaw. *Rockwood v.. Snow Inn Corp.,* 409 Mass. 361, 364–365 (1991). The introduction of a new nonconformity requires the issuance of a variance, and not merely a finding that the new nonconformity is not more detrimental to the neighborhood. *Deadrick v. Zoning Bd. of Appeals of Chatham,* 85 Mass.App.Ct. 539, 547–548 (2014).

***8** In *Deadrick,* the new nonconformity being proposed on an existing nonconforming lot was additional height to be added to the proposed new structure, exceeding the allowed height under the local bylaw. *Id.,* at 541. In the present case, Wojcik cites a front yard setback violation as a new nonconformity. The Bylaw requires a front yard setback of 25 feet. The plan for the proposed new dwelling shows a setback of 30 feet from the nearest part of the building to the front lot line, but a setback of only 15–20 feet from the building to the edge of Bennett Street where it encroaches onto the Lovett property. Wojcik's argument that the setback should be measured from the edge of Bennett Street instead of from the front lot line is not supported by any reasonable reading of the Bylaw. The Bylaw, in Sections 2 and 5, is explicit on this subject:

> Yard, Front: A yard extending across the full width of the lot and lying between the front lot line of the lot and the nearest line of the building. The depth of a front yard shall be the minimum distance between the building and front lot line.

The Bylaw provides that the front yard setback is measured from the "front lot line," not from the street, and not from the "street line," a defined term for where the lot meets the street. It is undisputed that the distance from the "nearest line of the building" to the "front lot line" is 30 feet, five more feet than are required by the Bylaw. Wojcik points out that in Article V, Section 2, a separate

provision of the Bylaw, the definition of "Building Lot", excludes the street portion of the lot from being considered part of the lot, at least for certain purposes: "A building lot shall not include any part of a street which is relied upon to qualify the lot as to frontage." This provision may have the effect of excluding the street portion of the lot from inclusion in the square footage of the lot for lot area calculation purposes (which would not change anything in this case, since the lot is already nonconforming with respect to lot area), but it cannot overcome the explicit direction that the setback is to be measured to the "front lot line," and not to the "street line."

"A zoning by-law must be read in its complete context and be given a sensible meaning within that context ... The intent of the by-law is to be ascertained from all its terms and parts as well as the subject matter to which it relates." *Murray v. Bd. of Appeals of Barnstable,* 22 Mass.App.Ct. 473, 478 (1986) (internal citations omitted). "If a sensible construction is available, [a court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results." *Deadrick, supra,* 85 Mass.App.Ct. at 553, quoting *Flemings v. Contributory Retirement Appeal Bd.,* 431 Mass. 374, 375–376 (2000). Where the Bylaw explicitly distinguishes between "street line" and "front lot line," and explicitly provides that the setback is from the "front lot line," the drafters must be presumed to have taken into account and meant to provide that even where a street encroaches onto a lot, and therefore that part of the lot cannot be part of the lot for other purposes, for the purposes of measuring setback, the front lot line, and not the street line, is the point from which the setback must always be measured.

***9** Even if Wojcik's interpretation of the Bylaw regarding a "Building Lot" was correct, the front yard setback must still, in the present case, be measured from the building to the front lot line, because Bennett Street, as shown on Exhibit 2, Tab 10, is located entirely on the Lovett property at the point where the setback must be measured. The front lot line is not itself within Bennett Street. Therefore, even if Bennett Street is "excluded" from the lot, the distance from the building to the front lot line, as measured from either end of the setback line, is still 30 feet. Neither end of the line is within Bennett Street. For both of these reasons, no variance from the front yard setback requirements of the Bylaw was required.

THE BOARD DID NOT OTHERWISE EXCEED ITS AUTHORITY IN MAKING THE SECTION 6 FINDING.

The sole factual issue raised by Wojcik with respect to her contention that the Board had no rational basis for finding that the new dwelling would not be substantially more detrimental to the neighborhood, is her claim that Bennett Street is inadequate to provide safe and convenient access, and that the increased use inevitably to arise from the introduction of a year-round residence will make the road worse. Given the deference owed to the Board's exercise of discretion in making a Section 6 finding, it cannot be said that the evidence is such as to require a finding that there were no facts upon which the Board could base its decision. Certainly the evidence did not compel a finding that, just because the road would be used by one property owner year-round instead of seasonally, its condition would become appreciably worse, or functionally inadequate.

In addition to James Lovett, three other property owners along Bennett Street testified. While they all agreed that the roadway has at times been rutted, none testified that they have been unable to reach their homes on Bennett Street or that access to their homes had at any time become inordinately difficult.[21] Ms. Nelson raised a concern regarding the fact that her doorway opens directly into the roadway, and Mr. Townsend expressed concern that his bulkhead is close to the edge of the roadway.[22] Neither of these conditions will change as a result of the introduction of year-round use of the Lovett property, and Ms. Nelson's property is occupied only during the summer.[23] Neither Ms. Nelson nor Mr. Townsend testified that there have been any adverse effects as a result of these conditions. These facts make it unlikely that any additional danger would be created to Bennett Street by a few new vehicular trips per day, and such a conclusion is certainly not compelled by this evidence. Furthermore, it was undisputed that the rutted condition of the road developed over a period of many years, during which there was virtually no maintenance, and the Board was not compelled to find that if the condition of the road worsened as a result of poor maintenance, it would not be repaired. In fact, Mr. Lovett testified that if necessary, he would repair the road, and I credit his testimony in this regard.[24]

***10** Based on the facts as I have found them, it cannot be said that "no rational view of the facts the court has found supports the [zoning board's] conclusion ..." *Britton, supra,* 59 Mass. at 74–75. Accordingly, I find and rule that the Board's decision was not "unreasonable, whimsical, capricious, or arbitrary." *MacGibbon, supra,* 356 Mass. at 639.

CONCLUSION

For the reasons stated above, the decision of the Board making a finding pursuant to G.L. c. 40A, § 6, allowing the razing of the existing residential structure on the Lovett property and the construction of a new dwelling, was not based on a legally untenable ground, was not unreasonable, whimsical, capricious, or arbitrary, and did not otherwise exceed the authority of the Board, and is hereby AFFIRMED.

Judgment accordingly.

JUDGMENT

This action commenced on February 12, 2014, as an appeal pursuant to G.L. c. 40A, § 17, of a decision of the Town of East Brookfield Zoning Board of Appeals (the "Board"). The case came on for trial by the court (Speicher, J.). In a decision of even date, the court has made findings of fact and rulings of law. In accordance with the court's decision, it is

ORDERED and **ADJUDGED** that the decision of the Board regarding property at 116 Bennett Street, East Brookfield, dated January 28, 2014, was not based on a legally untenable ground, was not unreasonable, whimsical, capricious, or arbitrary, and did not exceed the Board's authority, and it is further

ORDERED and **ADJUDGED** that the decision of the Board regarding property at 116 Bennett Street, East Brookfield, dated January 28, 2014, is hereby AFFIRMED, and it is further

ORDERED that today's decision, and this Judgment issued pursuant thereto, dispose of this entire case; the court has adjudicated or dismissed all claims by all parties in this action and has not reserved decision on any claim or defense, and it is further

ORDERED that no costs, fees, damages or other amounts are awarded to any party.

All Citations

Not Reported in N.E.3d, 2016 WL 3430554

Footnotes

1 The parties agreed to treat undisputed facts from the Summary Judgment Record as stipulations. Response by Defendant James Lovett and Lee Ann Lovett to Plaintiff's Statement of Material Facts ("SOF"), ¶¶ 1, 9, 57–58.
2 SOF, ¶¶ 2, 4–5, 13; Exh. 7.
3 SOF, ¶¶ 13, 17–20, 24, 60–61; Exh. 2.
4 SOF, ¶¶ 4, 19–20.
5 SOF, ¶¶ 15–16. 25.
6 Transcript, Vol. I, pp. 46–47.
7 View.
8 Exhs. 1–2.
9 SOF, ¶ 46; Exh. 2–10.
10 SOF, ¶¶ 25–26; Exhs. 4–5.
11 SOF, ¶ 7.
12 Transcript, Vol. I, pp. 70, 81–84, 98–99.
13 SOF, ¶ 10; Exh. 2–9.
14 Exh. 2–9.
15 SOF, ¶¶ 29, 41; Exhs. 3, 14.
16 Exh. 2–9.

17 This petition was apparently treated by the Board as a request for a finding under Section 4, Paragraph 2 of the Bylaw, and not as a request for a variance.

18 Wojcik actually makes a fourth argument in her post-trial submissions, that the existing cottage is not a "dwelling" within the meaning of the Bylaw, and therefore the conversion of the cottage to a year-round residence introduces a new nonconformity, to wit, a dwelling on an undersized lot. This argument was disposed of in the court's June 29, 2015 *Order,* in which I ruled: "The existing cottage is a 'residential structure' as that term is used in G.L. c. 40A, § 6, which may properly be the subject of a section 6 finding without regard to whether it is a 'dwelling' within the meaning of the Bylaw." I further ruled that "the proposed new structure will be a single-family dwelling in a district in which single-family dwellings are allowed as a matter of right." Thus, no new nonconformity is introduced by virtue of the use of the new building as a dwelling. Compare, *Deadrick v. Zoning Bd. of Appeals of Chatham,* 85 Mass.App.Ct. 539 (2014) (introduction of height violation is new nonconformity requiring a variance). This ruling is the law of the case and will not be further addressed in this Decision.

19 Section 4, paragraph 2 of the Bylaw: "... pre-existing non-conforming structures or uses may be extended or altered when the Board of Appeals makes a finding as designated by the Bylaw that such a change, extension or alteration is not substantially more detrimental than the existing non-conforming use is to the neighborhood."

20 Exh. 2–9, Article V, Section 4, paragraph 2.

21 Transcript, Vol. I, pp. 58, 81–84.

22 Transcript, Vol. I, pp. 97, 101.

23 Transcript, Vol. I, p. 92.

24 Transcript, Vol. I, p. 56.

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