



Zoning Board of Adjustment Meeting
Monday, January 4, 2016 7:00 PM
City Hall Council Chambers

MINUTES
Approved 2/1/2016

I. Call to Order by the Chair

II. Attendance/Roll Call

Present: Richard Collins, Michael Hurd, Todd Russel, Carolyn Towle, James Petrin

Absent: Amy Richardson

City Staff: Michael McCrory, Jane Taylor

Mr. McCrory announced that David Nichols and Daniel Worcester had resigned from the Board.

III. Election of Officers

a. Chair

Motion: To appoint Mr. Hurd as Chair.

Made by: Mr. Todd **Second:** Mr. Collins

Vote: Unanimous in favor

b. Vice-Chair

Motion: To appoint Mr. Russel as Vice-Chair

Made by: Mr. Petrin **Second:** Mrs. Towle

Vote: Unanimous in favor

c. Clerk

The Board did not elect a Clerk.

IV. Minutes of Previous Meeting December 7, 2015

Correction: Mr. Petrin should be listed as present.

Motion: To approve the minutes of the December 7th meeting as corrected.

Made by: Mr. Petrin **Second:** Mrs. Towle

Vote:

V. Old Business

- a. (ZO 2015-00017) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22-209, R1 District Yards, of the City Zoning Ordinance to permit a deck within the side yard at **8 Bessie Avenue**. Tax map 129, Lot 66. Zoning District R-1. (Cont. from 12/7/2015)

This hearing was continued to the February 2, 2016 meeting.

- b. **(ZO 2015-00018) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22- 114, Nonconforming Structures, and Section 22-209, R1 District Yards, of the City Zoning Ordinance for an expansion of a nonconforming structure making it more nonconforming at **8 Bessie Avenue**. Tax map 129, Lot 66. Zoning district R-1.
(Cont. from 12/7/2015)

This hearing was continued to the February 2, 2016 meeting.

VI. New Business

- a. **(ZO 2015-00019) Michael & Elizabeth Lemieux, 519 Jarvis Hill Road** – seek a variance from Section 22-451(2) Floodway District: Prohibited Uses - Fill & Obstructions, of the City Zoning Ordinance to permit placement of fill in the F1-F2-SB districts and erection of a fence in said districts for agricultural and pit access at **149 Alden Road**. Tax Map: 182, Lot: 3. Zoning District: RR

Abutters present for the hearing were Rock Allard, Henry Trzesiara, Edward McLaughlin, Gary Herbert, Michael Reutz and Philip Mudge.

Mr. Petrin recused himself from the proceedings.

Mr. Herbert asked everyone to speak up because he couldn't hear.

Mr. Hurd said he has a four-member board this evening and asked Mr. Lemieux if he wanted to wait until five members could be present for voting purposes. Case law states you can hold public hearings with fewer than five members.

City Staff

Mr. McCrory discussed material submitted to the members prior to the meeting regarding location of the floodplain and the floodway for Spring Farm Brook in relationship to the access way to the applicant's property from Spring Farm Road. He stated that there is no dispute as to the existence of the access way, as it likely was built well before the existence of zoning regulation. The issue is the placement of fill in the floodway. Mr. McCrory gave background of Ed MacGlaflin obtaining a USDA grant several years ago to improve the access way on the applicant's property to be able to reach his abutting fields. These improvements were done under Natural Resources Conservation Service (NCRS) and involved adding one foot of gravel for a width of 12 feet. Subsequently the applicant placed additional fill in the access way to accommodate his gravel trucks. The City's Planning Office did not become aware of the issue until last summer. There should have been a request for a variance for the improvements under the USDA grant, but the issue before the Board this evening concerns the fill added to the floodway by the applicant.

Mr. McCrory further explained his observation of the road conditions and his review of various flood profiles and flood maps, stating that the fill in the access way now measured approximately 12 feet deep by 50 feet wide. He indicated that in addition to

the usual variance criteria, the Board would have to determine if the applicant had met the three requirements of Code Section 22-453(c) for the granting of a variance for prohibited activity in the floodway. He indicated that no evidence had been submitted by the applicant that the improvements to the access way meet the required standards and recommended that the Board seek a third party review of the improvements by a qualified engineer, as permitted by state law.

Mr. McCrory stated that the federal flood maps (FIRM) had last been updated in 2006 and that if the applicant disagreed with them, there was a process to request a change in them.

Randall Rhoades, PE, M&W Soils, appeared on behalf of the applicant. He said he had information and a map for the Board to review. Not being submitted under Board By-laws, the Chair requested a motion to accept the information.

Motion: To accept information

Made by: Mrs. Towle **Second:** Mr. Hurd

Vote: Unanimous in favor

Mr. Rhoades indicated that his map could not be compared to the FIRM maps because it is not based on the same data set. He indicated that the road is not acting as a berm, but there is a natural berm on the north side of the brook. He also indicated that the area to the south of the brook is two feet lower than the brook. He said there is no dispute that there was work done on the road.

There were several questions from the Board regarding whether the information presented meets the requirements of the zoning ordinance and how he was determining the base flood elevations. It was agreed that the elevations on Mr. Rhoades map did not agree with the elevations on the FIRM map because of the use of different data.

Mr. Russel asked why if the berm interrupts the flow of floodwaters why it matters.

Mr. McCrory indicated that there was no way to answer the question because we do not have information from the applicant on the base flood elevation.

Mr. Rhoades stated that it is the applicant's position that it doesn't matter.

Mr. Lemieux spoke, indicating that he was being stonewalled. He said he only put in the same amount he excavated out. He claimed Washington Street is all in a floodplain and was developed. He also stated that the FEMA and FIRM maps are notoriously inaccurate.

Mr. McCrory stated he had done a site visit on October 21 with Mr. Lemieux and had asked if Mr. Lemieux had box-cut the road. Mr. McCrory stated that Mr. Lemieux had replied that he had laid the fill over the existing roadway.

Mrs. Towle indicated there was so much information to digest it might be helpful to have a 3rd party review and continue the public hearing.

There was much discussion about determining how much fill was added to the road. The presumption is that the filter fabric marks the base of the added fill.

Mr. Hurd asked if doing core sampling would show what was added. Mr. McCrory said it would help inform of the pre-existing condition, but it would not provide enough information to determine the impact on the floodway of the fill added by the applicant.

Mr. McCrory cautioned the Board against prescribing/specifying method a method of determining the base of the road – burden of proof is on the applicant. He said the FIRM and Flood Insurance study form the basis for the zoning ordinance. The zoning ordinance prohibits placing fill in the Floodway. Mr. Hurd said, but if I took fill out first and then replaced it, is it still adding fill? Mr. McCrory said that rearranging the landscape is considered development, and if it's done in the Floodway, you need a zoning permit. In this case, the development is fill – fill that is evidenced by aerial photography, site observations, and abutters statements. The applicant's testimony is not based on the same datum as the flood map so it does not provide the necessary information. Mr. McCrory said that in his opinion there is insufficient information to render this a complete analysis to determine if this has impacted the Floodway. The concern is safety of the public and the protection of private property and public infrastructure.

Attorney Taylor directed the Board back to the wording of the ordinance and the criteria that the applicant needs to meet – will granting the variance result in increased flood heights? There should be no increase in flood levels during a base flood discharge.

Mr. Todd asked to see a copy of Section 22-453 in its entirety.

Mr. Rhoads said he understands the difference between the elevation data he submitted and the elevation data on the FIRMs. His data was based on construction numbers they use every day, because they are the numbers one gets from one's GPS. He is admitting that (the fill) is in the Floodway whatever the base flood elevation is – if we have 3 inches of fill above the cornfield, then we are taking up 3 inches of water space (whatever is retained by 3 inches of crushed stone). Mr. Rhoads did not feel that the amount of water that would be displaced by the 3 inches of fill was going to affect anyone downstream. He said he could make the data compatible, but he wasn't sure how the Board's determination would change.

Mr. Hurd called on the abutters to speak.

Mr. MacGlaflin explained his role in the earlier improvements as part of his need for improved access to his fields.

Mr. Allard said that no one was talking about the access way being a natural run-off for the brook when it floods. He said he can remember that road acting as a run-off, with water running down it passed the bridge onto Mr. Herbert's land and flooding the entire bottom of the cornfield. Then the pond was put in and a lot of the water went toward the pond. In 2005 there was a very large storm – water came from the area of the pit -

about a foot of silt and so much water came down that it knocked down full-sized pine trees. The road played an important role in directing flood water.

Mr. Ruetz, 30 Springfarm Road, said he had seen water go over the berm (during Tropical Storm Irene) and to the middle of the road. He offered pictures to the Board.

Motion: To accept the picture from Mr. Ruetz.

Made by: Mrs. Towle **Second:** Mr. Russel

Vote: Unanimous for approval

The pictures show his back yard flooded and the road before/after improvements.

Arthur Bastion said the brook used to cut the field in half. Mr. Clark (prior owner) changed the route of the brook (Mr. Bastion said probably sometime in the 1960s). The dirt that was removed (to create the new stream channel) was placed along the side of the pathway. This created the berm that's being referenced. Mr. Clark also had three large drainage pipes put into the field. They come out behind Mr. Herbert's house and drain into the brook. He said water always stood in the field.

Tim Bergeron, 65 Springfarm Road, said Mr. Lemieux knows how to build roads and knows there is a permit process. He didn't do any of that. He should do it right and get a proper survey.

There were no other comments from audience members.

Mr. Hurd said he wants to know the base flood elevation.

Mr. McCrory said there is a disagreement with the FIRM, a request is made for a Letter of Map Adjustment, the applicant must state the datum that's being used and whether or not it matches the FIRM datum. FEMA will review if the datums match. This is why we would recommend that the same datum be used. Mr. McCrory said that what was presented was an iterative computational analysis. He urged the Board not to draw conclusions on data that is not compatible. He said it may be possible to adjust the GPS data to meet FIRM data, but he couldn't be certain as there were too many unknowns.

Mrs. Towle said the Board is governed by the zoning regulations as they are written. She said she needs to answer if granting the variance will be in the public interest. She said she cannot answer that question based on the date that has been presented. She also said that one of the conditions would be for the fill to be removed before the permit could proceed, and she needs more information in this as well.

Mr. Hurd said we don't know how much fill to remove because we don't know how much fill was put in.

Mr. Rhoads said he could convert the numbers, but that doesn't take away from the fact that it is the other side of the road that floods.

Mr. Hurd repeated the need to ascertain how much fill was added.

Mr. Rhoads said it wouldn't make sense to have to remove fill below the base flood elevation.

Mr. McCrory said the numbers shown on the FIRM map are the base flood elevations.

Mr. Hurd asked what is the base flood elevation compared to the elevation of the road.

Mr. Rhoads said he would provide the information requested by the Board. Mr. Lemieux said he really didn't want to end up in litigation over this. He said if he had raised the road up a foot, then he would have had to raise the cornfield up a foot to make it blend. He said it makes no sense.

Attorney Taylor asked if the Board felt they had adequate information to make a determination on the variance. She said if the Board feels they don't have sufficient information, then they should clarify what they need and continue the public hearing.

Mr. Bergeron said there is a process that Mr. Lemieux has to go through to improve the road. Let him go through and let the surveyors and engineers advise him accordingly.

Motion: To take a five-minute recess.

Made by: Mr. Hurd **Second:** Mr. Russel

Vote: Unanimous for approval

The meeting came back to order. Mr. Hurd asked how to word this so everyone is on the same page. He said the Floodway appears to be from the centerline of the brook to the field. We have heard that 12 inches were removed and 12 inches were put back. We heard that 12 inches was put on top of what was existing. We don't know what we started with originally. We have a discrepancy between two different maps. He suggested a third party assessment of what was done on the road.

Mr. McCrory said a third party could review the data submitted, have access to the site, and report back to the Board. Attorney Taylor said the Planning Board does this occasionally. It is a statutory process that is permitted. Mr. McCrory said the cost is deferred to the applicant.

Mr. Hurd said he didn't know what he is being asked to go by. Where did the road start – where did it end – did we fill over what was there? Mr. McCrory said that that was a fair question that the Board should have the applicant try to answer.

Mr. Russel said he wasn't comfortable asking Mr. Lemieux to hire another person to do a job that he has already had Mr. Rhoads start. Mr. Lemieux should have Mr. Rhoads finish the job.

Mrs. Towle said the Board has certain criteria to which the Board must answer yes or no and she left she was unable to answer those questions at this time.

Attorney Taylor asked the Board to clarify for the applicant, would it like to know what is the base flood elevation compared to the elevation of the road. The Board agreed with this statement and that Mr. Rhoads should provide this information.

Motion: to continue till we get the information we are asking for.

Made by: Mrs. Towle **Second:** Mr. Russel

Vote: Unanimous in favor.

VII. Communications

VIII. Other Business

Mrs. Towle said she sits as an alternate – she would like to become a full member again. She asked that her application be submitted to Council. Ms. Taylor clarified that if Ms. Towle becomes a member through the regular application process, her term is not linked to her seat on the Council. Mr. Hurd added that it has previously been determined that there is no conflict of interest for her to serve on the Board at the same time she is a Council member. Attorney Taylor confirmed that.

IX. Adjournment

Motion: To adjourn the meeting

Made by: Mr. Russel **Second:** Mr. Hurd

Vote: Unanimous in favor

The meeting adjourned at 10:00 PM.