

**TOWN OF WEST GREENWICH
ZONING BOARD OF REVIEW
280 VICTORY HIGHWAY
WEST GREENWICH, RI 02817
October 21, 2014
7:30 P.M.**

A regular meeting of the West Greenwich Zoning Board of Review was held on October 21, 2014. Present were Chairman Ken Jones, Dr. Clyde Fish, Raymond Stewart and Gilbert Rathbun. Also present was alternate Charlotte Jolls and Town Solicitor Michael Ursillo.

A. CALL TO ORDER – 7:30 P.M.

Chairman Jones called the meeting to order at 7:30 p.m.

Petition of Richard Dodson: Dimensional Variance to merge lots 4-27, 4-26, 4-24 and 4-1 under Article II, Section 1, Subsection D. Premises located on Falls River Rd. and Arthur Richmond Rd., West Greenwich, RI 02817, Plat 45, Lots 4-27, 4-26, 4-24 and 4-1.

Attorney Erik Wallin representing Richard Dodson introduced himself. He stated that we will address specific concerns but we have no intention in changing landscaping or mailboxes that the abutters have put up. Attorney then called up Richard Dodson.

Attorney Wallin asked Mr. Dodson to describe his plans using the map in front of them. Mr. Dodson said he would like to merge all the lots into one lot. Also, he would like to retain the option to build on the front lot in the back section because of the brook that has to be crossed through wetlands. As far as the right side of the road goes, he has no intention of doing anything with it. He's going to continue the road straight through to the end of the cul-de-sac to access the back area if they can get across.

Attorney Wallin asked Mr. Dodson if he had spoken to an engineer about crossing the brook. Mr. Dodson replied yes and the engineer said he felt he could do it, but wasn't sure about the cost. Attorney Wallin asked if you could cross the brook, where would you build your house on that. Mr. Dodson said in the back. Attorney Wallin asked what, if anything, would you do on lot 4-1. Mr. Dodson replied I'd like to build a barn. Attorney Wallin asked what other use you might imagine for the rest of the lot. Mr. Dodson replied agricultural use, have horses on it or grow some grapes, no construction. Attorney Wallin said the reason you are before the Board is for a variance for frontage. Dodson replied yes. Attorney Wallin asked if the only place you could pick up that frontage is on Falls River Rd. Mr. Dodson said correct. Attorney Wallin asked so without that you couldn't develop the property at all? Mr. Dodson said that's correct. Attorney asked the back portion that's divided into 3 lots are unbuildable at this point and without access? Mr. Dodson replied yes. Attorney Wallin asked if there would be anymore subdividing if you get access and this merger. Mr. Dodson said we would not subdivide. Attorney Wallin asked how many acres there were. Mr. Dodson replied twenty eight acres. Attorney Wallin asked if he had any intention in making anymore changes or assert any rights except for the changes he is asking for right now. Mr. Dodson replied no.

Board Member Stewart asked if the twenty eight acres of land included the 13.83 acres. Attorney Wallin responded yes it included that.

Board Member Fish asked if the stipulation about the crossing of the brook is based on cost or DEM allowing him to do it. Mr. Dodson replied both. I talked with them and they think it can happen, but no engineering has been done.

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Chairman Jones mentioned that Mr. Dodson was told at the last meeting to bring his Registered Land Surveyor with him to this meeting. Also, there was no title block on the map. There were questions on location of the road and that was why we asked him to bring surveyor for testimony. We asked your client how long he needed to have his surveyor come. I wanted to know that that the flags were put there by a registered land surveyor in the field and not at his desk. We wanted to get him on the record stating that he located the road and in fact where it is. Attorney Wallin said I agree. Chairman Jones stated I expect to see it up to Class 1 standards so we know where that road is in relation to where the lot lines are to abutting properties. Attorney Wallin stated now that I know what you need, I will get it. Chairman Jones stated just so we are absolutely clear you need an ink stamp on a plan from your registered land surveyor. As I look at this plan these grades seem fairly steep to me. I would also like to see based on testimony of agricultural use how your client would like to utilize that. In the beginning when your client came in, he just wanted one home back here. But during discussion this other piece came up. This was contrary to the recommendations we got from Planning Board and Building Official. These are things we need to hear at next meeting.

Attorney Jon Brunero Jr., who represented the abutters, presented himself. He read the names of the abutters he was representing. Before we go any further I would just like some clarity. The applicant is proposing to build on the lot that says "non buildable", is that correct? Mr. Dodson replied yes that was correct.

Attorney Brunero stated at this point in time I would like to present exhibit number one. This is a copy of the subdivision map which was recorded in the town of West Greenwich on Feb. 23 1988. This is the subdivision that Mr. Maguire and Mr. Stewart put in the land evidence records and the recorded subdivision has a non buildable lot #16. That property was conveyed out by Mr. Maguire and Mr. Stewart by Kelly Brook Inc. The deed was recorded in the town of West Greenwich land evidence records on February 23, 1988. I would like to give a copy of the deed and have this marked as R2. This deed shows metes and bounds descriptions of each parcel. I have taken the liberty on page 935 of highlighting what I think is the critical issue before this Board. Now, lots number 6-16 are conveyed together with a 1/12 interest in Arthur Richmond Rd. Lots 1-4 have no interest on Arthur Richmond Rd. whatsoever. Subsequent to the recording of that deed there were deeds drawn and recorded in 1990. I want to introduce R3, the Tax Assessor's map. That Tax Assessor's map shows the division of lots 1, 2, 3 and 4 where they lopped off the back lots and I have taken the liberty of highlighting that in pink. Now the deeds that were recorded in 1990 from a Jon Perry to a Gary Malikowski, Jon Perry and Gary to Gary, Jon Perry to Gary are legal descriptions of parcels of land that are in the pink. There is no right of way. It says that they are a portion of lot. The legal descriptions of land in pink are R4. These deeds show that the division has no right of way to Arthur Richmond Rd. or any other road. They may have an easement by necessity from lots 1, 2, 3 and 4. That's where they can come in from, but not from my clients' right to pass and repass on these lots. Now, the word non buildable lot this is a restrictive covenant that runs with the land in perpetuity. You just can't say as a Zoning Board we're going to change that. Every person here has a vested right that when they bought this property they relied on this subdivision that this was non buildable. What the intent of the developer was is immaterial. The word non buildable is there and it will be etched there until hell freezes over. The only way that this non buildable lot can disappear is as follows: every person in this subdivision says we are agreeable to remove it. Every mortgagee has to

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come in and say we agree to remove it. Then and only then will the non buildable lot go away. We are not in the position that we want to do that. We bought this with expected covenant that runs with the land that this lot would never be built on. Now getting back to here assuming he can cross the brook to build his home he has not proven his right to pass and repass. Those deeds show it's in here. My suggestion is buy a helicopter. This is a self imposed hardship. It wasn't something that was done by mistake. They said let me chop it off and maybe someday the town will make it a road. Shame on them. Whoever they got title insurance from, file the claim. Whoever they bought it from, sue them. They didn't do their due diligence. If this is allowed you will create havoc in this town. They never paid for the plowing or the maintenance. There was a threat made the last time which I think the attorney has taken care of it about they were going to plow the front of their houses. RI general law 34-71, adverse possession. These people have owned their homes for over 20 years and deserve to live in peace and not have threats made against them about the frontage. One more thing I want to enter into evidence, R5. This is from the Planner Jenny Paquette. She has said these are illegal lots. Once something is illegal it remains illegal. The Supreme Court has looked on zoning numerous times. In a 2001 case, the self created hardship rule which includes a zoning variance when the alleged hardship results from a prior action of the applicant. Here it's a result of a prior action of the applicant. He and his predecessors have chosen to lop off lots that you can't get to from here. Now your zoning ordinance by state law gives you a lot of power in granting variances. RI general law 45-24-41, in granting a variance the zoning board of review requires that evidence to the satisfaction of the following standard is entered into the record those unique characteristics of the subject land. There is no unique characteristic, this is just illegal. The hardship is not a result of any prior action of the applicant. This is just financial gain. You are precluded from giving a variance based on that standing. That's a state law in your ordinance. We have rules and regulations. My suggestion is they go to the people that own lots 1, 2, 3 and 4 and deed it back to them. This is not a need basis application, its greed. Also, this subdivision map is entered into evidence, R1. As far as any continuance, they were told the last time what was expected of them and they are not here with that. I think you close the hearing and vote on it. These people can't afford to have me come back here time and time again.

Attorney Wallin responded I appreciate the thoughts and I wouldn't ask for the continuance, but I just became involved. My client didn't think that this was going to be as exciting as it is. Attorney Brunero made a couple of statements that I have to agree with. The ownership interest in Arthur Richmond Rd. is divided between all the owners so there is no question; no one is going to bulldoze anyone's yard. As far as a self created hardship I think it will be useful to have testimony of the surveyor. I understand why he has to make the argument that this is self created hardship but it's the topography of the land that makes the hardship. What we are trying to fix here is a situation where, yes we have illegal lots and we have a piece of land that is marked non buildable. That was marked on there because it was s a condition of the Zoning regulations at the time. In order to do this subdivision it did not require Planning Board approval. If you had a piece of land that did not have frontage you had to mark it that. With this subdivision I don't believe that was a covenant. I believe that was a condition of zoning at the time. Not withstanding whether or not it's a covenant, if we combine the lots the covenant does not apply to those four lots. The question of access is one of title, its not really one of the Board. What we are here to ask for is a dimensional variance as to frontage. We believe if we can combine the lots at Planning and Planning has given us the ok provided we can get that frontage, if you are willing to give us the dimensional variance on frontage we can create one lot and make it productive land. Not for financial gain. We are talking about one house on 28 acres. This isn't something anyone should object to. Obviously we are going to need our surveyor and I apologize for the cost. It's not intentional.

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Attorney Brunero countered that even with the surveyor he cannot create a right of way to a landlocked piece of land. The Planner said it was illegal.

Attorney Wallin replied I disagree. By joining the lot that does have access to the lots that don't and creating one lot, we have access.

Board Member Fish asked Town Solicitor Ursillo if it makes a difference if the developer or the Planner marked this lot non buildable. Town Solicitor Ursillo replied yes that does make a difference and suggested to continue this after speaking with the Town Planner. Have the Town Planner do some more research on that.

Attorney Brunero commented that this was created by the developer and they put the non buildable lot and we have the right to rely on that.

Chairman Jones stated based on R5 the subdivision wasn't reviewed by Planning Board. Developer created access to parcel 4-1 at the time. Lets assume that it is non buildable. These 13.83 acres, who owns that piece? Both attorneys responded Gary Malikowski.

Chairman Jones declared that there was some concern from the last meeting and that was why we wanted your land surveyor to locate the road so we could see exactly where the road was on the map. So we know how much property is between these existing lines. We were looking to deed that property over to these folks so they would gain land. We were trying to find out who owned the road so if we gave approval to build here I think it's going to be tough to get anything on this non buildable piece. I would think about if you deed this property to these folks so that they own and control that property. We were going to have your land surveyor give us that info. That was some of the home work your client was sent home with. Now he has an attorney to get these things together for him.

Attorney Wallin said I would think that it would be in your client's interest to get that matter settled. Attorney Brunero responded that we don't care on that matter. We don't need anything from your client on that regard. We are not worried about that issue whatsoever. This is a legal issue of you can't get there from here. You can get all the surveyors in the world. Attorney Wallin asserted again that once we combine the lots we own a 1/12 interest and its subject to the right to pass and repass. So when we merge that title we have that access. So at the Planning Board we are going to create a single lot but in order to develop it we need a variance as to road frontage. One house on 28 acres. Attorney Brunero responded here's the law on easements, in case of doubt a reservation of an easement is to be construed favorably to the grantees that develop this property and the right of way so created is limited to what is expressly reserved. We are creating an additional burden on this right of way to get to here. If you give me a right of way to go over your property I cant give another person a right of way to go to the next piece of property. That's what you are doing here.

Attorney Wallin said the deed, R2, earlier you heard testimony about a couple of crossings over the stream there. I'm trying to find where these grants were subject to right of way. Attorney Brunero said I believe I highlighted it on page 935. Attorney Wallin read said parcel may be subject to driveway rights

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of others. The crossings over here are ancient, but there may have been access. Attorney Brunero responded there may have been but it was illegal. The burden is it's an illegal division of land. Attorney Wallin said the point of going to the Planning Board is to make them legal. Attorney Brunero stated I thought the Planning Board does not have jurisdiction to make this legal. Attorney Wallin said actually they do. Attorney Brunero said you didn't have a hearing, there was no public notice. I think it should be remanded to the Planning Board, that the Planning Board sees this non buildable lot and give you a proper recommendation. Attorney Wallin stated we do need to go back to Planning Board for final approval once we get the variance. At which point the issues that you're raising will have been worked out. Attorney Brunero said I was at Planning and I don't think the Planning Board was aware of this non buildable lot. The Planning Board deserves to look at that. Mr. Dodson said yes I think they do know because Jenny has already looked at this. Attorney Brunero said and you didn't tell Planning Board that you were going to build on non buildable lot. Mr. Dodson replied yes I did. Attorney Wallin said the tax map has non buildable on it and the Planner has addressed the issue.

Town Solicitor Ursillo stated that this board does not have jurisdiction to decide right of way. That's a legal decision that this Board is not going to make. Attorney Brunero replied exactly, but this Board has to have some evidence that they do have the rights that they are giving a variance. Town Solicitor Ursillo stated that the applicant has the burden of proof. Attorney Brunero said which I believe he has not met.

Board Member Fish stated that they are requesting a frontage variance and they said they own frontage of 54.85 feet on Falls River Rd. But, that is Arthur Richmond Rd. If they only own 1/12 of that, then every person owns 1/12 of Arthur Richmond Rd. So doesn't that make the application void because if every applicant owns a 1/12 then they don't have the frontage? They don't all own the 54.85 feet of frontage as one owner. Attorney Brunero stated it's like 12 people owning a piece of land, if all 12 don't agree then nothings going to happen. Town Solicitor Ursillo stated I think you need to allow Council to address that issue.

Attorney Brunero said just to follow up about the top of the road, each of said lots 6-16 inclusive on said recorded subdivision as further described are conveyed together with a 1/12 undivided in and to the parcel of land described as Arthur Richmond Rd. Not a right of way. There are 12 people that own the road.

Chairman Jones said I think we should let Council research this.

Town Solicitor Ursillo informed the members of Zoning Board that the next meeting will be November 18, 2014 and they all need to be present.

Chairman Jones made MOTION TO CONTINUE to November 18, 2014.

Board Member Fish Seconded.

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Charlotte Jolls (aye), Gilbert Rathbun (aye)

September 16, 2014~ APPROVED

Chairman Jones: made Motion to approve minutes from the previous meeting.

Seconded by Board Member Fish.

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Charlotte Jolls (aye), Gilbert Rathbun (aye)

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Chairman Jones: made Motion to Adjourn.

Board Member Fish Seconded

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Charlotte Jolls (aye), Gilbert Rathbun (aye)

Meeting Adjourned 8:30 p.m.

Barbara Sweet, Clerk

West Greenwich Zoning Board of Review