Town of Milford
Zoning Board of Adjustment
Case #2016-01
January 21, 2016
Douglas Nye
Variance

Present: Kevin Johnson, Chairman
Fletcher Seagroves, Vice Chairman
Joan Dargie
Michael Thornton

Excused: Len Harten
Katherine Bauer – Board of Selectmen's representative

Secretary: Peg Ouellette

The applicant, Douglas Nye, owner of Map 29, Lot 117, located at 50 Oak St. in the Residence "A" District, is requesting a Variance from Article V, Section 5.02.1, to change a single family dwelling into a two-family dwelling.

Minutes Approved on May 19, 2016

K. Johnson opened the meeting and introduced the board members. He informed all of the procedures and stated there was one case on the agenda and other business. He said this was a re-hearing of a case, so considered a new case. He read the Notice of Hearing. List of abutters was same as in original case. Only audience members present were the applicant, Douglas Nye, and abutter Harold Clark.
K. Johnson invited the applicant's representative forward to present the case.
K. Johnson made a change to the notice, saying in addition to Sec. 5.02.1, the Board is also required to consider Sec. 2.03.1 on Nonconforming Uses and Structures, since this was a prior nonconforming use.
Michael Klass of Bernstein, Shur law firm represented the applicant. He provided a supplement to the Board members. Original application was brought forward, with a new case number (2016-01). Supplement had all substance of the application but not exact copy of what applicant submitted originally.
M. Klass said the application was to allow two-family in Res. A and the ordinance doesn't allow. In October, original variance was filed and vote was 2 to 1 in favor; result was denial. Rehearing request was granted at Dec. 17 meeting. As practical matter this is rehearing with new case number, new case.

Property is on map at corner of Oak St. and Dean in Res. A District, .36 acre in size and has several unique parts. It was constructed in 1870, historic house. Originally as a two-family house this is reflected in the floor plan. One of the attachments provided was a sketch by applicant showing it was a 2 bedroom, 1 bath, living room/kitchen on each level. Main stairway to second floor and emergency egress from the second floor. In Res. A which is primarily residential but some mixed uses – auto service shop on same block, granite business, some houses down Oak and, according to Google Maps, another shop. In the packet a list of 24 two- and multi-family homes in neighborhood. This would get to character of neighborhood. The size and architecture and design consistent with neighboring houses.
This has been part of fabric of neighborhood for decades. Prior owner, Elizabeth Paradis, passed away in 2012. Estate was probated, which finally concluded in June, 2015. Because it was vacant for more than one year, this is where you get into Sec. 2.03, the Building Administrator's decision that because it was abandoned for more than one year the nonconforming use was lost.
F. Seagroves asked if prior owner died in 2012 – nobody lived in it from 2012?
M. Klass didn't know specifics. She died in 2012. Probate closed in 2015. Town said because it was unoccupied for more than a year they lost that determination. He didn't exactly know when somebody stopped living there. It was at least a year.
J. Dargie asked if prior owner was using it as a two-family.
M. Klass didn't know the facts, rental history.
J. Dargie was pretty sure. She's been in the neighborhood.
M. Klass said no way to know those facts. The precipitating factor for hearing was determination by the zoning official.
J. Dargie said it was on corner of Dean St., but he was saying it was across the street.
M. Klass said it wasn't on Dean, it was on Oak Street at confluence of Oak and Dean. Just used that as reference for location. He had attached a screen shot from the GIS, and Dean St. didn't show up on it. Address is 50. Given idea of the location, can cross reference list of two-family and multi-family homes – cluster of them on Lincoln and Smith, George and Ford Streets. Aerial view gives view of size of structures. They weren't looking to put in a multi-family house. House has been in existence for centuries. That is depicted well on GIS. They are trying to re-establish 50 Oak as two-family and need to satisfy five criteria. Would discuss all, make conclusions at end. Any question at any time, interrupt him.
1. <u>Not contrary to public interest.</u> Courts have talked about it and said it must unduly and to a marked degree conflict with the ordinance such that it violates the basic zoning objectives. There are two main provisions. Sec. 1.01 preserving general health, safety and welfare. 5.02.1 talks about intent of Res. A District which is to provide low density or low intensity uses primarily single family residential or individual uses. Given this particular set of facts and this property, this didn't conflict unduly or to a marked degree. This use is historic.
K. Johnson said courts have stated criteria 1 and 2 frequently go hand in hand.
M. Klass agreed. Subject home relatively modest in size – two bedroom with bath. Less intense than some uses allowed by right by Special Exception. He could put in a day care facility, church, school, etc. This was less intensive. Re density, there are 24 two-families in the area. Won't change character of neighborhood or alter essential essence. Architecturally consistent in size with neighborhood; density consistent with neighborhood. Request consistent with ordinance overriding purpose to promote health, safety and welfare, which was reflected in its historic use. The neighborhood contains 24 other two- or multi-family dwellings. Conclusion: Request does not conflict with purpose of the ordinance and will not be contrary to the public interest.
2. <u>Spirit of the ordinance is observed.</u> As pointed out, this often dovetails with the first criteria. Re health, safety, general welfare and re density and intensity. General welfare is protected. Not inconsistent with low density and low intensity uses. Makes sense to reference 2.03 re nonconforming uses and structures. This wasn't a case where somebody altered a structure. This use had been in existence for a long time. Not a case where somebody was changing it to a more dense structure. Simply a fact of prior owner aging, passed away and during estate process it was unoccupied. Re abandonment, this provision

didn't require showing of intent to be discontinued. That can result in overarching application. For instance, if owner was in hospital for a year, by language of the bylaw that use would evaporate. This wasn't quite the same but he didn't think spirit of the ordinance would be that abandonment would alter. Conclusion: Proposed use as two-family observes spirit and request should be granted.
3. Substantial justice. When thinking about substantial justice, he thinks about balancing, weighing loss to applicant to potential gain to the public. Requested a variance would not result in appreciable gain to the public. This was used as a two-family since well before enactment of zoning and this request sought to continue use started in 1870's. It was consistent with other uses in neighborhood. Wouldn't threaten health, safety, etc. Variance necessary through no fault of applicant or prior owner -substantial justice would be done. Denying would result in loss to applicant. Prevent reasonable use of property that was designed and built for this use. Given the floor plan, the internal walls were load bearing and to convert to single family would require moving and manipulating those walls would require structural analysis– not a simple fix. In that context there is tangible loss to the applicant to support finding of substantial justice by granting. Conclusion: This balancing test supports it would do substantial justice because potential loss to the applicant exceeded public gain.
4. Value of surrounding properties would not be diminished. Variance won't diminish character of neighborhood, which contains 24 two- and multi-family homes. Proposed use was same for which it was designed. Property needed love and attention. Mr. Nye already started that process, and it looked much different than it did. Improving appearance would actually increase values, not decrease them. Conclusion: Granting would not damage surrounding property values.
5. Owing to the special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because no fair and substantial relationship exists between the general public purposes of the ordinance provisions and the specific application of that provision to the property. Re special conditions of this property - this house was built in 1870 as a two-family and used in that manner. Structure hasn't changed. Use changed recently with determination by the zoning official and was allowed as a pre-existing nonconforming use. Because of situation with prior owner and the probate it was determined to be nonconforming. As noted, this variance is required – unique set of circumstances. Purpose of the ordinance – the general welfare, safety and public health are protected in this application and Sec. 5.02 re lower density and lower intensity uses was satisfied because property is relatively modest in size, use not overly intensive, consistent with others in the neighborhood. When those factors are applied, it was clear that restricting to single-family was not necessary to insure property's appropriate use and not necessary to insure spirit and purpose of the ordinance. Evidence of strict application of the ordinance didn't advance zoning purposes in fair and substantial way because of special conditions of the property.
The proposed use is reasonable. It is reasonable. It is historic home. It is a use it was always intended for and won't alter character of neighborhood. Conclusion: Give history and facts of the property, to reinstate use since 1870 is to satisfy criteria.
K. Johnson asked for questions.
J. Dargie asked about lot size and parking for a two-family.
M. Klass said property plan in packet gave size of structure. GIS map showed lot at the T of Dean St.
J. Dargie asked exact dimension.
Brief discussion between J. Dargie and M. Klass re adequate room for parking in rear, parking at other houses in area.
M. Klass felt there was plenty of room in rear.
J. Dargie said it hadn't been determined yet; did it have to go to Planning Board?
M. Klass didn't believe so.
J. Dargie said in 1870 they had horses and buggies, she assumed that wasn't a big deal then. They could have three or four cars per family, with two adults and two teens.
M. Klass said they were before Board for usage.

J. Dargie said location of parking was safety factor. Reason for zoning was to limit density in these residential neighborhoods, not make it worse. Reason for that one-year clause was to give relief to those already existing. Once you abandoned that use, that use went away. She lived in that general area. A little skeptical that it was used as two-family five or ten years ago. Part of her knowledge of the structure was it purchased as a two-family? Did real estate office sell it as a two-family?
M. Klass didn't know.
J. Dargie said, looking at hardship, whether more loss to the person vs. public, when he purchased it thinking it was a two-family and then all of a sudden it wasn't. Different than if you bought it knowing you would have to convert it.
M. Klass said re parking, Mr. Nye worked in construction business and believed this was enough to allow. Mr. Nye will have to pull all applicable permits. Believed it could provide for a safe two-family.
F. Seagroves said tax card said it was on deed.
M. Klass agreed. In assessor's record it was still a two-family. Understood that wasn't the town's position. That was how recently this happened. Re Joan's question of knowledge of purchaser, he looked at case law. Having knowledge of purchaser with knowledge it falls in line with self-created hardship. Variance comes from the land, not the owner. In past, jurisdictions have said if you buy knowing something, it cuts you off. But that isn't the case anymore. Knowledge is not particularly relevant to hardship because it flows from the land itself.
J. Dargie understood. Would have been nice to know how parking would be because, would that affect character of the neighborhood.
Mr. Nye said no one would see any cars from the road.
J. Dargie's concern was neighbors sitting in their back yards. In her view, seeing cars parked next to her back yard affected character.
F. Seagroves asked if property had town water and sewer.
M. Klass said yes.
K. Johnson asked for any other questions. There were none. He opened meeting for public comment.
Harold Clark of 53 Oak St. almost directly across the street said he was there to support efforts to beautify the neighborhood as he saw it. Purely aesthetically, he was tired of looking at an old property. Whatever efforts put forth will help neighborhood and increase property values. At least, he thought so.
K. Johnson said Office of Community Development comments on this case they noted the history of the property re the nature of the lack of use.
K. Johnson asked for more questions. There were none. He closed the public portion of the hearing.
He stated it was time to read the application into the record; since, in essence, that was done by M. Klass addressing the five criteria, he asked him to read the preamble of the application into the record.

M. Klass read:

Section 1 – Application for Variance

A. A variance is requested from Article V Section 5.02.1 of the Zoning Ordinance to permit restoration to 2 family status.

K. Johnson noted that it also required variance of 2.03.1B, which they would be discussing, which is discontinued use of a pre-existing nonconforming use.
M. Klass thought the variance would supersede that. He was fine with asking for more.
K. Johnson said he would explain when they got there.
Discussion of criteria:

1. Would granting the variance not be contrary to the public interest?

M. Thornton – no. It was not contrary to the public interest. Saw nothing that would complicate matters for the public. They have promise at least of cosmetic improvements to the property.

J. Dargie – She guessed that the fact there was no abutters coming, but it is general public. It would not be contrary to public interest.

F. Seagroves – would not be contrary, didn't see public benefit if denied. Building is there. Only difference would be as Joan said, there may be a couple of extra cars. No one would know if there were one family there or two.

K. Johnson – agreed it could be granted without being contrary to the public interest. He referred to Handbook "*For a variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public?"* Per public testimony, he didn't see safety issue with granting, nor would restoring it to its previous condition change the essential character of the neighborhood since there are other 2-family and mixed uses in the neighborhood. Doesn't threaten character or threaten general welfare.

2. Could the variance be granted without violating the spirit of the ordinance?

J. Dargie – spirit of the ordinance – reason for 2.03.1 is to try to reduce number of nonconforming uses and bring things back into conformance to the zoning. The ordinance says if it is discontinued use for more than a year for any reason, its use shall not thereafter be reestablished and future use of the property shall be in conformity. They put that there for a reason. If they always gave variances to everyone who came through – that was what she was running into a little. But then, looking at none of the abutters or neighbors had come out, and house was in disrepair. Spirit of the ordinance is to allow for variances to the ordinance.

K. Johnson said it went back to original application. He read from Sec. 2.03, "*Nonconforming Use and Structures – Continuance, Discontinuance, or Change Intent – The interest of this section is to allow for the lawful continuance of non-conforming uses and/or structures and to allow a certain reasonable level of alteration, expansion or change that will not change the nature of the use and unduly impact the neighborhood*." And Paragraph B "*Discontinued use: Whenever a non-conforming use has been discontinued for more than one (1) year for any reason, such non-conforming use shall not thereafter be reestablished; and the future use of the property shall be in conformity with the provisions of this Ordinance."* Going to the Handbook, it says "*However, when the ordinance contains a restriction against a particular use, the Board of Adjustment would violate the spirit and intent of the ordinance by allowing that use. The Board cannot change the ordinance."* In the ordinance they have specific prohibition against continuing nonconforming uses after they have been discontinued for a year. However, since this particular application was made the Board has learned that the Handbook is in error. Board must balance the degree of violation of the spirit in making their determination. Even though there is specific statement "shall not be reestablished" the Board can balance that against general provisions of the entire ordinance and make a determination whether a specific grant would violate spirit of the overall ordinance. In this case, he didn't believe it would violate to return a pre-existing two-family to that even though it lost its nonconforming use. Granting variance to return to that use would not severely violate spirit of the ordinance.

F. Seagroves – re Handbook, #2, didn't see any health, safety or general welfare of the community problem. Only thing he saw was extra vehicles in the yard. Didn't see health or safety problem.

K. Johnson commented re issue of parking, that was always a fairly fluid thing. He owns a single-family home in Res. R and has two vehicles for two of them, and frequently has family and friends visiting. Could end up with multiple vehicles for three or four days. Didn't believe that in and of itself was unsafe as long as the design parameters were there to allow for entrance and egress.

M. Thornton – didn't' see use was contrary to the spirit - same argument on 2 and 5. Because reconfiguring that would need to be done to the house would far outweigh any realization of profit or ability to sell house without a loss. Saw no increased benefit to the community.

K. Johnson asked J. Dargie if she had anything else.

J. Dargie said not on that. She thought they hit all five in that one question.

3. Would granting the variance do substantial justice?

F. Seagroves – yes. As in Handbook "*Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice."* He didn't see the general public would gain anything by denying.

M. Thornton – saw no benefit to the community to prohibit this being used as dual family dwelling.

J. Dargie – granting would do substantial justice.

K. Johnson – as Fletcher said, the loss to the individual outweighed by gain to the general public. In this case, holding the property to the elimination of nonconforming use and creating a single family use would have small gain to the public by the even application of the provisions of the ordinance and the reduction in density which is the nature of the Residential A. However, this was not a pre-existing multi-family which was converted to that. It was originally designed as such. Therefore, loss to the individual to create a single family out of it would outweigh gain to the general public.

4. Could the variance be granted without diminishing the value of abutting property?

F. Seagroves – yes – it can be granted without diminishing value of surrounding properties, It has been there since 1870. It will look much better if fixed up and didn't see any diminishment of abutting property.

J. Dargie – agreed. Fixing up will help neighborhood and not diminish values. Only concern being a good neighbor and working with abutters to see if making parking lot in the back will affect their properties and how they sit out in the yard and whether they have pets. Her biggest concern is whether you have six vehicles, which is more than a single family. Felt it would not diminish, given current status of the house.

M. Thornton – didn't see reason it would diminish surrounding property values. Gentleman from #53 hoped it would increase values by restoration of the property.

K. Johnson didn't see case where refurbishing and having people in property, whether one or two families, would have any effect on values of abutting properties. As abutter who testified said, they were hoping to alleviate an eyesore from the neighborhood and hoped it would actually help values.

5. Would denial of the variance result in unnecessary hardship taking the following into consideration:

A) i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;

ii. The proposed use is a reasonable one.

B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

M. Thornton – Denial of the variance would result in unnecessary hardship because they would be in his case demanding that a two family be converted, against the timbres of its being, into a single family dwelling. Would be quite expensive and unprofitable.

F. Seagroves – Denying would be a hardship. Use is reasonable one. They didn't really know how long this has not be a two family, Part of it being held up by probate, he believed, should not be considered time. They couldn't sell the house, couldn't rent it. They don't know. By denying, the cost to turn it into a single family would outweigh benefit of denying.

J. Dargie – will go to b - property has special conditions. If this property came to them all fixed up, neighbors would feel differently. Yes, because of its special conditions, being that it was pretty much neglected and abandoned for at least ten years, maybe more. That was special condition. If that house were perfect and neighborhood was fine and house not being used for a two family, and it needed was a set of stairs, and they came in and said it wasn't a two story because it hadn't been used as one, but it didn't look like it did, she thought people would be a little more against allowing the nonconformity to continue. Because of condition, its special condition – looks like it's going to fall over, and thought there have been critters living in it - that made everybody want it fixed, whether single family or two family.

So, yes due to special conditions.
K. Johnson – as applicant testified, there are many similar properties within this neighborhood. Handbook: *"For purposes of this subparagraph [#5}, 'unnecessary hardship' means that, owing other special conditions of the property that distinguish it from other properties in the area:"* Evidence it is one of 14; it is not unique in that. However, he agreed with Joan that the vacant situation and potential for further deterioration of the property was what made it unique among similar properties existing within that neighborhood and therefore hardship would clearly be there if the variance were denied. It was reasonable to take a house designed as a two family and allow it to be used as a two family.
K. Johnson asked for any other questions.
J. Dargie said her only concern was that he work with the neighbors. It is a small lot. She did Google Map and basically couldn't see house because of overgrowth. Important thing is people who are adjacent.

Vote on criteria:
1. Would granting the variance not be contrary to public interest?
F. Seagroves – yes; M. Thornton – yes; J. Dargie – yes; K. Johnson – yes
2. Could the variance be granted without violating the spirit of the ordinance?
M. Thornton – yes; J. Dargie – yes; F. Seagroves – yes; K. Johnson – yes
3. Would granting the variance do substantial justice?
J. Dargie – yes; F. Seagroves – yes; M. Thornton – yes; K. Johnson – yes
4. Could the variance be granted without diminishing the value of surrounding property?
F. Seagroves – yes; J. Dargie – yes; M. Thornton – yes; K. Johnson - yes
5. Would denial of the variance result in unnecessary hardship?
J. Dargie – yes; M. Thornton – yes; F. Seagroves – yes; K. Johnson – yes
K. Johnson asked for a motion to approve Case #2016-01.
J. Dargie made motion to approve Case #2016-01.
M. Thornton seconded.
Final Vote:
F. Seagroves -yes
M. Thornton – yes
J. Dargie - yes
K. Johnson – yes
Case #2016-01 approved by 4 to 0 votes.
K. Johnson informed applicant he was approved and reminded him of the 30-day appeal period. Office would send him letter saying there is 30 day appeal period if he wanted to start now and take risk that someone filed appeal and he would have to stop. Approval is valid for two years. If applicant is unable to proceed within that time, there is a six-month extension he can request.