

ZONING BOARD OF REVIEW MINUTES

Tuesday, March 27, 2018 Meeting 7:00 pm

Town Council Chambers, Town Hall

125 Main Street, East Greenwich

Present: Richard Land, Chair; Renu Englehart, Vice-Chair; Ashley Cullion; Jody Sceery; Christopher Mulhearn; and Barry Golden (Alternate).

Absent: Melody Alger (Alternate)

Staff: Aaron Lindo, Planning Technician; Andrew Teitz, Legal Counsel (HDC); David D'Agostino, Legal Counsel (ZBR)

Mr. Land, Chair of the Board, called the meeting to order at 7:00 PM. He introduced the board members and staff present and summarized the Board's hearing procedures for the record.

Zoning Board of Review Hearings

- 1. Marshall Muir (Foreign Events LLC)** for property located at 205 Main Street; Map 85 A.P. 1 Lot 213 (Zoned Commercial Downtown, CD-1). The Applicant seeks Dimensional Variances under Chapter 260 of the Town Code, Zoning Ordinance, Article III, Section 260-8(J) Outside Storage & Dumpsters; Article VI, Off-Street Parking Regulations, Section 260-20 Required Off-Street Parking Spaces, and Section 260-24 Off-Street Loading Areas. Additionally relief is required from Table 2 of Chapter 260, Table of Dimensional Regulations for minimum frontage, lot coverage and side yard setbacks. The Dimensional Variances are required because the Applicant seeks to open a hookah bar at the subject property and the change of use necessitates relief since there is a lack of on-site parking and dimensional non-conformities already exist. **(This application was continued from the November 28, 2017 and January 23, 2018 meetings.)**

Motion to withdraw application without prejudice made by Ms. Cullion, seconded by Ms. Sceery. Motion passed unanimously.

- 2. Atmed Urgent Care** for property owned by 5750 Post Road Medical Offices, LLC and located at 5750 Post Road; Map 45 A.P. 11 Lot 62 Unit 0002 (Zoned Commercial Highway, CH). The Applicant requires a Dimensional Variance under Chapter 260 of the Town Code, Zoning Ordinance, Article VII Signs, Section 27(A) Definition of a Monument Sign. The Applicant seeks to add a

14' high sign which exceeds the 8' height limit and the total visible sign area will also exceed the allowance. Additionally, one freestanding sign is allowed per business per lot and the Applicant proposes two such signs. **(Continued from the January 23, 2018 meeting)**

Motion to withdraw application without prejudice made by Mr. Mulhearn, seconded by Ms. Englehart. Motion passed unanimously.

Zoning Board of Appeals Hearings

1. **Robert Berlyn and Sarah Francis** of 43 Rector Street are appealing an approval by the East Greenwich Historic District Commission of a fence proposed by **Julie Rocheleau** of 37 Rector Street; Assessor's Map 85, Plat 1, Lot 279. The fence was approved at the January 10, 2018 meeting of the Historic District Commission and the appellants are aggrieved by that decision. The appeal will be heard under Sections 260-66 and 260-90 of the Town's Zoning Code.

Ms. Sceery recused herself for this item. Mr. Golden replaced Ms. Sceery as a voting member.

Mr. D'Agostino explained the roles of both himself and Mr. Teitz. Mr. D'Agostino would be the legal counsel for the Zoning Board. Mr. Teitz would be the legal counsel on behalf of the HDC and would be advocating for their decision.

Attorney James Moretti, representing the appellants, addressed the Board. He argued that the appeal is based on the HDC not following their procedures and guidelines correctly and not operating within their purview.

In his argument, Mr. Moretti stated that the fence was erected without notice or application in the Historic District which resulted in a zoning code violation notice to Ms. Rocheleau. The notice directed her to file an application with the HDC. She filed the application but did not follow the HDC guidelines which state that an application for a fence along a common boundary line needs to have an abutter waiver form or a letter from the abutting property owner with the application. The guideline further states that the application will not be accepted without this documentation. The HDC determined that an abutter notification was not required because the fence was on Ms. Rocheleau's property and not on the common lot line. Mr. Moretti disagreed with the HDC's interpretation of the fence not being along the common lot line. The distinction between the words "along" and "on" in regards to the lot line was

emphasized. The abutting neighbors should have been notified and should have had a say about the fence along the common lot line. Mr. Moretti concluded his argument, stating that there has been a clear procedural error by the HDC and asked that the application be denied and the decision be reversed.

There was a discussion regarding abutter input as to the design of a fence. Mr. Moretti stated that the abutters should have had design input on the fence. Mr. Mulhearn countered that the issue of design was never raised before the HDC and is therefore waived and invalid in this appeal. The issue is whether or not the rules were followed regarding an abutter notification needing to be filed to complete the application. The question is a procedural one as no objection to the design was ever put in the original record, it is ineligible to be raised now.

Ms. Englehart asked if there were surveys for both properties. Mr. Moretti stated that both parties had a survey done but the lot line was not agreed upon. He continued, stating that his client has filed a lawsuit in superior court for adverse possession of the boundary line.

Ms. Cullion had a comment regarding the lot line and quoted the verbiage in the regulations: “For fences along common lot lines (excluding street frontages), a completed abutter waiver form (or letter) signed by each owner of abutting property sharing said lot line.” Sharing infers actually sharing the lot line and not along the lot line. The language is specific. In a historic district it is fairly common to have fences and walls along the common lot line. Following this point, Mr. Land asked Mr. Moretti what his interpretation of “along” a common lot line is. He replied that it is all relative to the size of the lot.

Regarding the assertion that the abutters should have had input for the design of the fence, Mr. D’Agostino referred to the zoning ordinance: Section 260-55; Purpose and intent of the Historic District. In this section, there is no reference to the consideration or input of the abutting property owners. He continued, stating that he did not see how the purpose and intent of the Historic District is served by the abutters input. Mr. Moretti retorted that it is served by being in harmony.

Ms. Cullion commented that the fence meets all HDC requirements and regulations (height, material, and type of screening) but it seems like the appellants do not like the fence based on their perception. Mr. Moretti replied that his clients cannot see out their windows on the first floor and that the fence could have been constructed without creating such an obstruction. The fence could have been a picket fence or another, smaller kind of fence.

Mr. Mulhearn reminded Mr. Moretti that the issue of the design of the fence has been waived and arguments pertaining to the design are invalid. Mr. Moretti conceded this point.

Mr. Land asked counsel if there is a different application process for administrative approval of fences versus Commission approval of fences. Mr. D'Agostino replied that the standards are the same regardless of who reviews that application (staff versus the full HDC).

Mr. Teitz, representing the HDC, addressed the board. First, the case brought before the zoning board is a property dispute masquerading as an administrative appeal. The HDC does not have jurisdiction over a property dispute and neither does the zoning board. Only the superior court can decide where a property line is. Second, the design issue was waived by not being raised before the HDC and cannot be considered. The one issue remaining is the claim regarding the abutter waiver.

There are three possible grounds for appeal: prejudicial/procedural error, clear error, and decisions not supported by sufficient weight of evidence in the record. It is neither a clear error nor is it unsupported by sufficient weight of evidence. The claim is that there has been a prejudicial and procedural error. Mr. Teitz argued that the HDC's decision is neither prejudicial nor procedural error. The appellants received all the due process they could get. No issue was raised regarding the design and the HDC listened to the appellants at the meeting about the waiver issue and arrived at a conclusion consistent with past practice. Therefore, there was no prejudicial error by the HDC.

There was also no procedural error made by the HDC. The words "along" and "sharing" were discussed. There is no clear definition for "along" in the regulation context, but sharing the lot line is clearly defined as the same lot line. Only when a fence is on a shared lot line is an abutter notification is required for a submission. In this particular case, it would be an absurd result to ask for a waiver from neighbors as the fence is wholly located on Ms. Rocheleau's property. It would also be an illegal delegation to the neighboring property owners that exists nowhere in Rhode Island. The fence is perfectly legal and Mr. Teitz urged the Board to uphold the decision of the HDC.

Attorney William Wynne, representing Ms. Rocheleau, addressed the Board. He joined Mr. Teitz and the HDC in the arguments as they have been explained. The HDC followed their guidelines and gave appropriate interpretations of the statutes to approve the fence.

Mr. Moretti had no further questions or comments. Mr. Mulhearn made a motion to affirm the decision of the HDC, seconded by Ms. Englehart, and unanimously affirmed.

VOTE: 5 – 0 in favor of affirming the decision of the HDC.

A motion to adjourn made by Ms. Cullion. Meeting adjourned at 7:53 PM.