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1 of 100 DOCUMENTS

JPSJB REALTY TRUST II, LLC v. CITY OF NEWBURYPORT and LELA WRIGHT, DUNCAN LaBAY, EDWARD RAMSDELL, CHARLES CIOVACCO, ROBERT CIAMPITTI, WILLIAM LADAS, and JAMES PENNINGTON, as they are Members of the NEWBURYPORT ZONING BOARD OF APPEALS

08 MISC 388816

MASSACHUSETTS LAND COURT

18 LCR 80; 2010 Mass. LCR LEXIS 11

January 29, 2010, Decided

HEADNOTES*Lot Width-Dimensional Table***SYLLABUS**

[**1]

A lot-width minimum that appeared in the definition of "lot width" in the Newburyport ordinance but not in the dimensional table could not be construed as a dimensional requirement, and the City wrongfully applied this criterion to the Plaintiff's lot. Justice Alexander H. Sands III went on to hold that the lot would have met the lot-width requirement in any event since the Board's manner of calculating the midpoint of the lot was flawed.

COUNSEL: John Connolly, Jr., Esq., Connolly Law Offices, LLC for the Plaintiff.

Patricia A. Cantor, Esq., Kopelman and Paige, P.C. for the Defendant.

JUDGES: Alexander H. Sands III, Justice.

OPINION BY: SANDS III**OPINION**[*80] **DECISION**

Plaintiff filed its unverified Complaint on December 8, 2008, appealing pursuant to *G. L. c. 40A, § 17*, a decision of Defendant Newburyport Zoning Board of Appeals ("ZBA") (together with Defendant City of Newburyport (the "City"), "Defendants") which upheld an opinion of the Newburyport Building Commissioner that property owned by Plaintiff and located at Lot 2, Jefferson Court, Newburyport ("Locus") required a variance.¹ A case management conference was held on February 11, 2009, where Defendants threatened to file a Motion to Dismiss the Complaint due to the timeliness [**2] of the appeal.² At the request of the parties, a Remand Order was issued by this court on April 7, 2009, ordering the ZBA to consider whether Locus met the requirements of *G. L. c. 40A, § 6*, and, if so, whether Locus met the minimum lot width requirements of the Ordinance. By decision filed with the City Clerk on July 6, 2009, the ZBA found that Locus did not satisfy the requirements of *G. L. c. 40A, § 6*. At an August 25, 2009, status conference Plaintiff represented that it was not appealing the ZBA's remand decision, but wished to proceed on the issues raised in its original Complaint.

¹ A First Amended Complaint was filed on March 4, 2009, adding three counts pursuant to *G. L. c. 240, § 14A*, challenging provisions of the Newburyport Zoning Ordinance (the

"Ordinance").

2 By letter dated February 26, 2009, Defendants indicated that they would not file the Motion to Dismiss.

Plaintiff filed its Motion for Summary Judgment on September 18, 2009, together with supporting memorandum, Statement of Material Facts, and Affidavits of Kevin P. Geaney and James Scali. On October 26, 2009, Defendants filed their Response and Statement of Additional Material Facts, in addition to their Motion to [**3] Partially Strike Affidavit of Kevin P. Geaney and Motion to Strike Exhibit 1 of Affidavit. A hearing was held on all motions on December 21, 2009, at which time all motions were taken under advisement.³

3 A summary judgment hearing was initially scheduled for June 1, 2009, and then rescheduled for February 10, 2010. The hearing was ultimately held on December 21, 2009.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. *See Cassesso v. Comm'r. of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l. Bank v. Dawes*, 369 Mass. 550, 553 (1976); *Mass. R. Civ. P. 56(c)*.

This court finds that the following facts are not in dispute:

1. Locus is vacant land shown as Lot 2 on a plan titled "Plan of Land in Newburyport, Massachusetts Owner Roberta W. Britton (Formerly Roberta W. Corcoran)" dated April 6, 2004, and prepared by Port Engineering Associates, Inc. (the "ANR Plan").⁴ The ANR Plan was endorsed on April 21, 2004, by the Newburyport Planning Board as an Approval Not Required Plan pursuant to *G. L. c. 41, § 81P*, and recorded at the Essex County South District Registry of [**4] Deeds (the "Registry") in Plan Book 377, Plan 25.

4 The ANR Plan is attached to this Decision for reference.

2. Locus is located in an R-1 zoning district. Locus contains 20,125 square feet and has 127.95 feet of lineal frontage along Jefferson Court, a public way.⁵ Section VI-A (General regulations) of the Ordinance, along with the Ordinance's Table of Dimensional Requirements, require a minimum lot area of 20,000 square feet and a

minimum street frontage of 125 feet in an R-1 zoning district.

5 Locus's unique shape results, effectively, in two rear lot lines, one of which is shown as thirty-five feet long along Locus's westerly boundary with Lot 3 ("Lot 3"), as shown on the ANR Plan. The second rear lot line is sixty feet long along Locus's westerly boundary with Lancey Court.

3. Plaintiff purchased Locus by deed from Roberta W. Britton dated April 7, 2006, which was recorded at the Registry in Book 25546, Page 455. By letter dated September 26, 2007, Plaintiff requested the opinion of the Building Commissioner as to [*81] whether Locus met the minimum dimensional requirements of the Ordinance and whether Locus was a buildable lot. On October 15, 2007 (confirmed May 28, 2008), the Building [**5] Commissioner denied a building permit for Locus based on the noncompliance with the lot width provision of the Ordinance.

4. Plaintiff appealed the decision of the Building Commissioner to the ZBA on May 23, 2008. On November 19, 2008, the ZBA voted to uphold the Building Commissioner (the "ZBA Decision").

5. Section II (Definitions), subsection A (General), of the Ordinance states,

The intent of this section is to provide definitions for certain terms, words and/or series of words which are to be utilized in the interpretation of this ordinance whether or not the definition stated herein is contrary to common usage or contrary as quoted in a dictionary, except as may be otherwise defined. . . .

Terms or words not defined herein but defined in the state building code shall have meanings given therein, unless a contrary intention clearly appears, otherwise as the meaning quoted in the most recent edition of Webster's Unabridged Dictionary.⁶

6 The parties failed to refer to either of these

sources in their summary judgment briefs. The terms "lot width minimum" and "lot width" are not defined in the State building code's definition section. *See* 780 Code Mass. Regs. § 202 (2008). These terms [**6] are also not defined in the Merriam-Webster dictionary, found online at <http://www.merriam-webster.com>.

6. The Ordinance's definition of the term "lot width minimum," found in Section II-B(28), states:

The lot width minimum shall be equal to or greater than the frontage required for the zoning district for a distance measured from the front lot line of the right-of-way to the midpoint of the lot. Such midpoint shall be located on a line ninety (90) degrees extending from the center of the front lot line to the rear lot line. The distance between the side lot lines along a line parallel to the front property line shall represent the lot width minimum.^{7, 8}

⁷ This definition was amended effective August 23, 2004. The prior definition of the term "lot width minimum" stated: "[t]he horizontal distance measured between opposite side lot lines, which distance, shall, from the front lot line to the front yard setback line, as required by this bylaw, be equal to the required frontage for the lot."

⁸ The Ordinance does not define the term "rear lot line."

7. Section VI (Dimensional Controls) of the Ordinance states, in part, that

[a]ny structure hereafter altered, constructed, erected, placed or converted [**7] for any use in any district shall be located on a lot only in conformance with the minimum requirements listed on the dimensional controls table unless specifically allowed by the board of appeals under a variance procedure or unless specifically changed by the general intensity regulations in sections [section] VI-B.

Minimum lot area, street frontage,

setbacks, heights, lot coverage, and useable open space shall be as set forth in Table of Dimensional requirements, which is hereby made a part of this ordinance.

* * *

As an initial matter, this court must address Defendants' Motion to Partially Strike Affidavit of Kevin P. Geaney (paragraph 4) and Motion to Strike Exhibit 1 of Affidavit. Both of these motions address statements made by the Building Commissioner at the public hearing before the ZBA. The matter before this court is a trial *de novo* and any statements made by the Building Commissioner at the public hearing are hearsay and, thus, inadmissible. As such, I ALLOW Defendants' Motion to Partially Strike Affidavit of Kevin P. Geaney (paragraph 4) and Motion to Strike Exhibit 1 of Affidavit.

The main issue before this court on summary judgment is whether the Ordinance's definition [**8] of the term "lot width minimum" applies to Locus as a dimensional requirement, and, if so, whether Locus meets the requirements of the term.⁹ Plaintiff, as the party appealing pursuant to *G. L. c. 40A, § 17*, has the burden of showing that the ZBA Decision "was based on a legally untenable ground, or [was] unreasonable, whimsical, capricious or arbitrary." *Britton v. Zoning Board of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003) (citing *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 635, 639 (1970)). Plaintiff first argues that the term "lot width minimum" is only in the definition section of the Ordinance and is not one of the dimensional requirements of the Ordinance.¹⁰ Plaintiff asserts that even if such term applies to Locus's buildability, Locus's dimensions comply with the Ordinance's requirement. Defendants claim that the term "lot width minimum" applies to the dimensional requirements of Locus, as such application is consistent with the stated purpose of the Ordinance, and assert that the ZBA's determination of Locus's rear lot line as Lancy Court is reasonable as a matter of fact.

⁹ In its Complaint, Plaintiff argued the ANR Plan precluded the ZBA Decision. However, [**9] Plaintiff did not argue this issue in its motion for summary judgment and, as a result, this court shall not rule on that issue. Even so, it would appear that the ANR Plan did not determine that Locus was a buildable lot, rather,

through the ANR Plan, the Planning Board made a limited determination as to the sufficiency of Locus's lineal frontage and the status of Jefferson Court.

10 The parties failed to provide this court with a full and complete copy of the Ordinance; rather, selected sections of the Ordinance were attached to Plaintiff's motion and Defendants' response. Specifically, with respect to the Ordinance, the record consists of Sections I, II, and VI. (It is unclear whether such sections, themselves, are complete or portions.)

To review, Section II-A of the Ordinance states that the intent of the "Definitions" section is "to provide definitions. . . which are to be utilized in the interpretation of this ordinance. . . ." Section VI of the Ordinance, governing Dimensional Controls, states that "any structure. . . shall be located on a lot only in conformance with the minimum requirements *listed on the dimensional controls table* unless specifically allowed by the board of appeals [**10] under a variance procedure." (Emphasis supplied.) Because "lot width minimum" is not a listed criterion in the dimensional requirements section of the Ordinance, this court is not persuaded that Locus is subject to such requirement.¹¹ As such, I find that, as applied to Locus, "lot width minimum" is not a dimensional requirement under the Ordinance.

11 This court was unable to locate (and neither party claimed) that the term "lot width minimum" was even used in Section VI. The City can easily address this omission, if it chooses, by amending the Ordinance to integrate a "lot width minimum" requirement as part of Section VI.

[*82] Moreover, even if this court were to find that the Ordinance's definition of "lot width minimum" applies to Locus as a dimensional requirement, the ZBA's interpretation of such term is not reasonable. In addition to cross referencing a lot's minimum width with the lot's frontage requirement, Section II-B(28) provides guidance in determining such width. This section states that a lot's minimum width is calculated "from the front lot line," here, Jefferson Court, "to the midpoint of the lot." Such midpoint is "located on a line ninety (90) degrees extending from the [**11] center of the front lot line to the rear lot line."¹² The Ordinance does not define the term "rear lot line."

12 Section II-B(28) ends with the following direction: "[t]he distance between the side lot lines along a line parallel to the front property line shall represent the lot width minimum."

The plain language of the definition requires that Locus's midpoint be calculated on a line ninety degrees from the center of its frontage along Jefferson Court. Plaintiff argues, and this court agrees, that when a line is drawn ninety degrees from Locus's midpoint of frontage, the resulting line terminates at Locus's lot line along Lot 3. The lot width at the midpoint of this line is greater than Locus's frontage.¹³ Contrastingly, in its interpretation, the ZBA did not utilize a ninety degree line from Jefferson Court, but rather drew a bisecting line from the center of Locus's frontage to the center of Locus's lot line along Lancey Court.¹⁴ Such interpretation is contrary to the plain language of Section II-B(28). As such, although a local board is entitled to all rational presumptions in favor of its interpretation of its own by-law, *see, e.g., Fafard v. Conservation Commission of Reading, 41 Mass. App. Ct. 565, 572 (1996)*, [**12] this court shall not give judicial deference to the ZBA's flawed interpretation of the Ordinance. In light of the above, I find that Locus would meet the Ordinance's definition of "lot width minimum," even if such definition applied.

13 Another possible interpretation that the ZBA failed to employ involves drawing a straight line between the intersection of the two side lines with the frontage road, determining the center point of that line, and then drawing a ninety degree line. This method would also result in an intersecting line closer to the rear line along Lot 3 than the rear line along Lancey Court and, accordingly, a line drawn at a right angle would produce a lot width minimum which exceeds the frontage.

14 Given the unique shape of Locus, particularly its curved frontage along Jefferson Court, it appears that it is impossible to draw a perpendicular line from Locus's midpoint of frontage to Lancey Court.

As a result of the foregoing, I find that the ZBA Decision is legally untenable, arbitrary, and capricious. I ALLOW Plaintiff's Motion for Summary Judgment.

Judgment to enter accordingly.

GET SKETCH 1 OF 1

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