

Town of Norfolk  
Zoning Board of Appeals  
One Liberty Lane  
Norfolk, MA 02056

March 7, 2018

Zoning Board Members	Others
Michael Kulesza –Chairman ----- Present	Devin Howe - Associate Member --- Present
Robert Luciano –Vice Chairman --- Present	Medora Champagne – Assoc. Member --- Present
Christopher Wider – Clerk ----- Present	Amy Brady – Administrative Asst. - Present
Joseph Sebastiano –Full Member --- Present	
Donald Hanssen – Full Member ---- Present	

The duly posted meeting of the Zoning Board of Appeals convened at 7:09 P.M. in Room 124 of the Norfolk Town Hall. Mr. Wider announced that the meeting was being audio and video recorded.

**PUBLIC HEARINGS:**

**144 Seekonk Street, Appeal** (cont'd from 2/7/18)

*Mr. Kulesza made a motion to continue the public hearing for the 144 Seekonk Street appeal to April 4, 2018, at 7:00 P.M.; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.*

**43 Rockwood Road, Appeal** (cont'd from 2/7/18)

At 7:15 P.M., Mr. Wider called the continued public hearing to order. Present were Bruce & Marie Simpson, appellants; Joanna Hilvert, Macchi & Macchi LLC, (M&M), attorney for appellants; James Lorusso, LOBO Realty, property owner; Thomas Nannicelli, Esquire, attorney for property owner.

Plans and documents presented and referred to were: Letter from Macchi & Macchi, dated November 15, 2017, to Norfolk Zoning Board of Appeals (ZBA), Re: 43 Rockwood Road, with attachments; letter from Macchi & Macchi, dated February 7, 2018, to Norfolk Zoning Board of Appeals (ZBA), Re: 43 Rockwood Road; Termination of Nonconforming Use; “Bartlett v. Board of Appeals of Lakeville, MA,” (“Bartlett”) submitted by Atty. Nannicelli.; 2 additional affidavits (Robert Anderson & Linda Bois) submitted by appellants; pages from Mr. Lorusso’s check register dated April & May of 2016, showing rents received from tenants during that time.

Atty. Hilvert began by recapping the appellants’ arguments detailed in the letter from Macchi & Macchi dated 2/7/15: 1) Change of Nonconforming Use to Conforming Use; 2) Discontinuation of Nonconforming Use; 3) Lapse of Special Permit. Atty. Hilvert also mentioned the ZBA Special Permit issued October 12, 1972, noting that it stated “since the new use is allowed by law,” and the memo dated April 27, 2011, from ZBA to Town Counsel, which stated “The house has remained vacant and boarded up for the last 6-8 years. The nonconforming office building has also remained vacant, although the new property owner has attached a real estate sign over the Prudential Page sign at the front of the property for the last year.” (Both of these documents were attachments to the M&M memo of 11/15/17.)

Mr. Sebastiano asked for clarification on the timeline of occupants of the subject property. Ms. Simpson replied that John Cahalane [who was leasing the property as a real estate office from the owner, Richard Boomer] moved his business, Prudential Page Realty, to a new location in 2001; at this time, Mr. Boomer offered the property for sale to the appellants; the property was finally sold to Kevin O’Loughlin in 2007.

Mr. Sebastiano asked when the most recent tenants, Green Trees Arbor Care, were there; Ms. Simpson replied that it was in April or May of 2011, and they left in March of 2014.

Mr. Luciano asked if the property owner disputed that the property nonconforming use had been discontinued at any point. Atty. Hilvert noted that whether the nonconforming use had been changed to conforming at any point was also a question. Discussion ensued regarding conformity vs. nonconformity with regard to occupancy of the main residence at this address.

Atty. Nannicelli disputed Atty. Hilvert's interpretation of the 1972 Special Permit, as he said the permit clearly states "Since Mr. Boomer has specified that the building use will be for office space only ... the Board ... voted to allow the Special Permit." His argument is that the Special Permit allowed a nonconforming use to be changed to another, less-nonconforming use, but it never lost the nonconformity it had since before Zoning Bylaws were established. Atty. Nannicelli referred to three instances of MGL 40A which prohibit the local Zoning Enforcement body from taking action against uses that may have been in violation at one time, but there is a six year period and a ten year period, after which no enforcement argument can be maintained. [citation needed]. Atty. Nannicelli referred to rent checks received up until May of 2016, indicating tenancy until that time, and noted that Mr. Lorusso has been actively marketing the property since that time (except during this appeal period, as instructed by his lawyer,) but has not discontinued use. Atty. Nannicelli referred again to the "Bartlett v. Board of Appeals of Lakeville, MA," stating his belief that that case would disallow the argument of the Special Permit lapsing for one year, and the nonconformity statute of a two year lapse would apply.

Mr. Hanssen asked if Atty. Nannicelli's argument was that the instances in 40A regarding prohibition of action being taken after six or ten years, nullified the Zoning Law that the use was discontinued for a period of more than two years. Atty. Nannicelli answered that he was not saying it nullified that, but that what happened between 2002 and 2007 is so long ago that it would be inequitable to enforce this against the owner who bought the property in 2007; in support of this, Atty. Nannicelli referred to the legal argument of laches, which says if someone has a legal right, and they do not enforce that right, after a certain period of time they are barred from exercising that right to the detriment of another person.

Mr. Hanssen noted that since laches ordinarily applied only to claims for equitable relief, such as injunctions, and not claims for legal relief, he does not see how it applies to this case. Atty. Nannicelli said that is no longer true, and wondered if Town Counsel had weighed in. Mr. Wider responded that Town Counsel had, and felt this was an issue of fact as regards continuous use since 2002. In response to Atty. Nannicelli's inquiry as to why 2002 was chosen, Mr. Wider stated that it was because that was when the property changed hands, and there was documentation as to the property being vacant; Atty. Nannicelli responded that he didn't feel the 4/27/11 memo from the ZBA, written by the acting Administrative Assistant at that time, could be counted as evidence.

Ms. Champagne asked if Atty. Nannicelli had any case studies or other evidence showing the standards for laches had been modified; he did not. Ms. Champagne asked if laches would be employed had the property not changed hands, and Atty. Nannicelli answered that it would not, indicating that it is the change in ownership, but not the time lapse that is being argued. Ms. Champagne asked for clarification on the current business use of the property, since being vacated in 2016; Atty. Nannicelli answered that painting, plumbing and other maintenance has been done, and marketing has been done.

Mr. Kulesza asked if the client felt he had done his due diligence on what the building could be used for before he bought it. Mr. Lorusso responded that he had spoken to Mr. Bullock at the time, and was told that it had to be used for office use, and he understood the 2 year non-use bylaw.

Mr. Wider said that the Board had asked for proof of continued use of the property, and Atty. Nannicelli asked if that meant that the Board did not believe his client's testimony. Mr. Wider said it simply meant they were looking for evidence, such as utility bills, etc.

Atty. Hilvert stated her opinion that a defense of laches is something that should be brought in court. For instance, if the ZBA decided in the appellants' favor and the property owner disagreed, he could bring that to court, but she felt it was not appropriate to bring it before this Board without any case law. Atty. Hilvert disagreed with Atty. Nannicelli's assessment of the memo from the 4/27/11 memo from the ZBA, noting that it is on letterhead, and the Administrative Assistant's name is on the line underneath "Zoning Board of Appeals" in the "FROM:" section, and it is already part of the public record. It is the appellants' opinion that it is clear that the building was not in use at least between 2001 and 2007, and there have been several submittals supporting this point. Atty. Hilvert stated that with regard to equity, the abutters in a residential zone have a right to have the zoning laws enforced. Atty. Hilvert also mentioned that the Ms. Simpson did bring this up to the Building Inspector more than once, but no action was taken.

Mr. Wider opened the meeting to public comment. Robert Anderson, 37 Rockwood Road, stated that as a longtime resident, he has seen many people come and go to this property, but not in the last several years, and he didn't recognize Mr. Lorusso. He also noted a period in 2007 when then-owner Kevin O'Loughlin had a sign up, and planned to take down the office building and build a new house. With no more questions forthcoming,

***Mr. Kulesza made a motion to close the public hearing; Mr. Hanssen seconded the motion; the vote on the motion was unanimous.***

#### **60 River Road, Variance** (cont'd from 2/7/18)

*At 8:08 P.M. Mr. Kulesza made a motion to continue the public hearing for the 60 River Road Variance Request to April 4, 2018, at 7:15 P.M. in Room 124 of the Norfolk Town Hall; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.*

#### **113 North Street, Special Permit**

At 8:10 P.M. Mr. Wider opened the public hearing for 113 North Street Special Permit request and announced that a request for continuance had been received from the applicant.

***Mr. Hanssen made a motion to continue the public hearing for the 113 North Street Special Permit Request to April 4, 2018, at 7:30 P.M. in Room 124 of the Norfolk Town Hall; Mr. Sebastiano seconded the motion; the vote on the motion was unanimous.***

#### **DELIBERATIONS:**

At 8:15 P.M., the Board entered into deliberations for 113 North Street Special Permit.

#### **FINDINGS OF FACT:**

1. The property that is the subject of this APPEAL is located at 43 Rockwood Road, in the R-1 zoning District. It consisted of a residential home (1,123 sq.ft.) and an accessory building (1,740 sq.ft.)
2. The Applicants appealed pursuant to M.G.L. c.40A §8 as amended, the Building Inspector/Enforcement Officer's determination that the office use of a building located at 43 Rockwood Road is a lawfully nonconforming use. The property is currently owned by Mr. James B. Lorusso, Trustee of LOBO Realty Trust.
3. In 1972, a special permit was granted by the Norfolk Zoning Board to change an existing non-conforming use (restaurant) into another non-conforming use (office space). This space was occupied from 1972 thru 2002 first by Boomer Real Estate and later Prudential Page Real estate. Prudential Page moved out in 2002.
4. The Applicant has presented affidavits (three) from the Abutters, Bruce and Marie Simpson, 36 Rockwood Road, Richard Anderson, 37 Rockwood Road and Lynn Bois, 46 Boardman Street,

Norfolk, MA which stated that from 2002 to at least 2007 that the property located at 43 Rockwood Road remained vacant. Mr Anderson also testified at the hearing, that the property had not been used by either of the past two owners until 2011. The home located on this lot had be demolished in December 2017 after being condemned and vacant for a period of 20 plus years.

5. The property, 43 Rockwood Road, was sold by Richard Boomer in 2007 to Kevin O'Loughlin and he then in turn sold the property to Mr. James Lorusso, Lobo realty Trust three (3) months later. There is no quantifiable evidence provided by the current owner, Lobo realty trust, that the property was being used for office use. Mr Lorusso, by his attorney (E. Nannicelli) stated that he used the office "as his office" from 2007 until 2011 but failed to provide the ZBA with any evidence to this fact to back up this statement. From 2011 until 2016 the building was occupied by a tree company and asphalt sealing company. The building again was vacant from June 2016 until the First public hearing in December 2017. at which time it was taken off the market.
6. A memo on ZBA letterhead dated April 27, 2011, at the time when a special permit application was being filed for the property by the Tree service and asphalt company, stated that "The house has remained vacant and boarded up for the last 6-8 years. The non-conforming office building has also remained vacant although the new property owner has attached a real estate sign over the Prudential Page sign at the front of the property for the last year." This application was withdrawn without reasons given.
7. The Building Commissioner Bob Bullock testified that for the 16 years he has been Building Commissioner, he felt that the building was in use. This is also stated in his letter to the Simpsons dated September 6, 2017
8. There was no enforcement by the Zoning Officer since 2002, even after he was notified by the abutter (and appellant) Marie Simpson.
9. The current owner, James Lorusso, provided a check register for two (2) months in 2016 as evidence of Office use rents he received since his ownership in 2007.
10. Attorney Nannicelli offered the doctrine of Latches as a defense for his client, Lobo Realty Trust.

#### **DECISION:**

*The board discussed and agreed that the Special Permit had expired pursuant to Norfolk zoning bylaw G.4. and that an argument could be made that the property became conforming in 1972, by right, since a real estate office was an allowed use based on Norfolk's 1968 zoning by laws.*

*The board, however, focused its discussion on the periods of time when the property was not in use. There was no evidence that the nonconforming use was continuous without a 2 year period of discontinued use from 2002-2011 and again from 2016 to present, in accordance with Norfolk zoning bylaw F.3.b. Neither the owner, Lobo Realty Trust nor the Building Commissioner provided sufficient evidence to support that the property had been used "for office use" continuously. This weighed heavily on the board's decision that the property cannot be used for commercial purposes any longer.*

**Mr. Kulesza made a motion to grant the appeal** by Bruce and Marie Simpson of the Building Commissioner's decision of September 6, 2017; **Mr. Hanssen seconded the motion**; after further discussion of facts, **the Board voted unanimously to GRANT** as follows:

Christopher Wider	–	yes to grant
Michael Kulesza	–	yes to grant
Robert Luciano	–	yes to grant
Joseph Sebastiano	–	yes to grant
Donald Hanssen	–	yes to grant

At 8:45 P.M. **Mr. Sebastiano made a motion to adjourn the meeting; Mr. Hanssen seconded the motion; the vote on the motion was unanimous.**

The meeting was adjourned at 8:45 P.M



Mr. Joseph Sebastiano, Clerk

In accordance with the requirements of G.L. 30 § 22, approval of these minutes by the Board constitutes its certification of the date, time and place of the meeting, the members present and absent, the matters discussed, and the action taken by the Board with regard to those matters (if any). Any other information contained in these minutes is included for context only. Notes memorializing deliberation or discussion of any matter are in the summary form and may include inaccuracies or omissions. Where proof of the content of a statement is required, a tape recording or transcript should be consulted, if available.