



# *Zoning Board of Appeals*

February 28, 2013 – **Minutes**  
City Hall, 133 William Street, Room 314

**\*\*View Agenda\*\***

## **Board Members Present:**

Ian Comerford, Chairman  
Jennifer Smith, Vice Chair  
Allen Decker, Clerk  
Donald Gomes

## **Board Members Absent:**

James Mathes  
Debra Raffa Trahan  
Michael Amaral  
Horacio Tavares

## **City Staff:**

Danny D. Romanowicz, Commissioner of Buildings & Inspectional Services

## **Cases Heard:**

#4086

The meeting was called to order at 6:10 p.m.

Mr. Comerford read the opening remarks along with the general requirements for granting a Special Permit/Variance.

## **Scheduled Hearings:**

### **Appeal # 4086**

Notice is given that a public hearing on the Petition of: Kevin Perry, Three Norton Court, New Bedford MA 02740 and Attorney Philip N. Beauregard, of Beauregard, Burke & Franco, 32 William Street New Bedford, MA 02740 who petitioned the Zoning Board of Appeals for an Administrative Appeal under MGL Chapter 40A Subsection 8, relative to property located at 253 Cedar Street, Assessor's Map Plot 64, Lot 38 and Lot 295 in a Residential B Zoned District. The petitioners are appealing the Commissioner of Buildings and Inspectional Services' Letter dated December 20, 2012 in which he refuses to take enforcement action on their request for a cease and desist order regarding the manufacturing operation at 253 Cedar Street.

Mr. Decker read and motioned to receive and place on file communication from Danny D. Romanowicz; Commissioner of Buildings & Inspectional Services dated December 20, 2012. Motion seconded by Mr. Gomes. With all in favor, the motion carried.

Mr. Decker read and motioned that the appeal be received and placed on file. Motion seconded by Mr. Gomes. With all in favor, the motion carried.

Mr. Decker motioned that the owners of the lots as indicated are the ones deemed by the Board to be affected. Motion seconded by Mr. Gomes. With all in favor, the motion carried.

Mr. Decker motioned that the action of the Clerk in giving notice of a hearing as stated be and it hereby is ratified. Motion seconded by Mr. Gomes. With all in favor, the motion carried.

Chairman Comerford declared the hearing open.

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Attorney Philip Beauregard of Beauregard, Burke & Franco, located at 32 William Street, New Bedford, MA 02740 approached the podium to represent his client Mr. Kevin Perry who is the petitioner and direct abutter of the addition in result of a Variance granted back in 1994. According to Atty. Beauregard, the problem is that the addition is in the middle of a residential neighborhood on Cedar Street and Parker Street. His client Mr. Perry lives on Norton Court.

It's a Residential B Zoned District and the problem is that the addition in question is operating in a very heavy industrial manner; pounding and stamping metal, fabricating metal, and sheet metal which are very good for the economy in the City of New Bedford and for Norris H. Tripp & Co. but not good for Mr. Perry who suffers the problem being next to an abrasive and disturbing presence said Atty. Beauregard.

Atty. Beauregard stated that the Variance was granted back in 1994 and it was not a problem in the beginning and that is understandable why that wasn't a problem and that has to do with not only the Variance wording that was recorded at the Registry of Deeds but also the presentation made by Attorney John Hollaran on behalf of Mr. Teser and Norris Tripp back in the time the Variance was acted upon favorably by this Board. The problem has come up more recently. The wording in the Variance says to erect a 22x51 ft. 4 in. addition to the existing structure which would be in Violation of Article 2 Chapter 9 Section 9-218 Uses of the City Code to erect a 22x51 ft. addition. Indeed, the addition was erected. What was the addition for? Well, it didn't say so on the Variance according to Atty. Beauregard. However, it says so very explicitly in the Zoning Board of Appeals, Minutes, in a presentation by Attorney Howard on behalf of the applicant. Atty. Beauregard quoted, as the petitioner requested, he basically just wants to clean up the property, which at the time it was vacant and didn't have an addition. It had a building which Mr. Tripp had nonconforming use but for the rest of the building they had industrial operations. But why they wanted this addition back in 1994 exclaimed Atty. Beauregard, he quoted again; he basically just wants to clean up the property by removing storage trailers by building this addition. That is what was presented to the Board. It's what the Board voted on plus the other things lawyers' say.

The part that indicates the purpose of the addition is right there said Atty. Beauregard. It had to do with in the text of the decision made by the Board Members at that time spoke in favor of that petition and said that because of the presentation one could infer was that Murray Goldberg stated that; I'm looking at the plan and sat here for the other two cases I think this would be an addition for the property and look a lot better than the trailers. Atty. Beauregard stated that it's going to take an awfully, unreal, and illegitimate stretch to take this Variance and to say that over the course of the years you can go from a storage addition, granted it was attached to an industrial operation that was okay that was there between 1915 & 1920, there was a need for a Variance, once you got a nonconforming use that doesn't mean you can take space attached to it and extend the operation through that. They needed a Variance and they knew that in 1994 and that's why they came before the Board so what they asked the Board for and what they got was permission to put an addition up for storage of trailers. Atty. Beauregard stated, since then, it has become altogether something else to the point that it has caused cracks over the years at Mr. Perry's house, on Norton Court on the foundation. It has been substantiated by an

engineer. There are leaks, pictures that fall off walls and Atty. Beauregard further stated that this isn't a theoretical appeal here; this is a real appeal. Mr. Perry has lived there since 1989 and his dad bought that house and then it went over to Mr. Perry. His father was not opposed to the Variance that was granted because it was ok to put an addition up and cooperate with that neighbor and let that neighbor have a place to store trailers and may have the Perry property look better because there wouldn't be trailers just sitting out at the backyard. Now there's an attractive steel building that houses the trailers. Mr. Teser and his business have gone far beyond than what was permitted by the Variance. Attorney Beauregard stated that he filed with the Building Commissioner.

The Building Commissioner and Eric Cohen, City Solicitor, takes issue with wording of his appeal or his reasoning speaking on nonconforming use of zoning but Atty. Beauregard stated that this is not what it's about. It's whether a variance has been legitimately used, not nonconforming use. Mr. Cohen is actually right and Atty. Beauregard was not speaking on nonconforming use. He is talking on the extent on which this Variance can be utilized. This Variance for the purpose of what it's gone into over the years. Atty. Beauregard stated that he doesn't expect Mr. Cohen to reverse his opinion; but he would submit that when he stands before the Board and states it's the use that has carried over that the Board looks at the term Variance for use to extend a structure that did not give Mr. Teser the right to start pounding metal and causing extreme vibrations within the building to the point it caused damages to Mr. Perry's house. Atty. Beauregard asked the Board to review the website for Norris H. Tripp Co. Inc. which is Mr. Teser's business that he submitted to see the type of industrial services and products they provide. Atty. Beauregard referred to the law and said one would say that what he's doing is ambiguous the words there as far as use and what it means. Does it mean storage or back in Murray Goldberg's time did it mean it was okay to expand the pounding and fabricating of metal in that addition. Attorney Beauregard said to just read the decision and you'll know that's not the case.

Attorney Beauregard suggested that the losing party will be going to the Superior Court and referred to the Case Law in MA and read the following: "Where there is ambiguity on the face of a Variance decision, it should be resolved against the holder of the Variance". The holder of the Variance is the one that is trying to justify his use based on the language recorded at the Registry of Deeds. Atty. Beauregard stated that this use is going to be stopped and he challenges this Board to make the right decision.

Mr. Kevin Perry, 3 Norton Court, approached the podium to make his statements. He is the abutter to Norris Tripp. In the beginning, Ron was a great neighbor. Mr. Perry had water runoff to his property and he approached Ron to do something about it and he was fine with that. Then the addition went up and it is so loud. His tenants complain and his foundation is cracked so badly that there's water behind his walls. It's a finished basement but he had to put a space between the slab and the finished floor. He has been pointing and re-pointing his concrete for years. He stated that he approached Ron about 10 years ago and told him that his house is getting destroyed and to look at his foundation. Ron told him to not worry about it, and that he would buy the house off of him. Mr. Perry said okay; and he would let it go then. Mr. Teser later told him that he was going through a divorce; and he couldn't do it now. In the meanwhile, his house was getting worse and he was doing constant repairs. Mr. Perry said that if he sells his house he has to expose this information and it would affect the resale value of his home and further stated that he has a house with a finished basement that is so beautiful and he can't live in it because of floods everywhere. Mr. Perry then showed a DVD for the Board to review the noise, vibrations, and damages. Mr. Perry stated that he is pro-business but he doesn't want to pay for Mr. Teser's business with his house. It used to be a quiet dead end street but it isn't anymore. His second floor (that he rents) is worse than his first floor and he has a hard time keeping tenants.

Mr. Comerford asked if there is anyone else in favor.

Mr. Primo Tarini, 94 Parker Street, approached the podium. He said that he has had trouble with Ron Teser because every time he had a complaint, Mr. Teser would say okay and nothing happens. He turned in to the Board a picture from the 1970s of his house before he bought it. A motion was made to receive and place on file by Mr. Gomes and seconded by Mr. Decker. With all in favor, the motion passed.

Mr. Comerford asked if there is anyone else in favor. No other favorable testimony heard.

Then, Mr. Comerford asked if anyone was present in opposition.

Attorney Eric Cohen, City Solicitors Office, approached to make his statements. He wanted to clarify the issue. The only issue in this forum is the intent of the Variance that was granted to Mr. Teser in 1994. Dealing with intent, there's no more telling indication of intent than what lies within the document itself including Variances. It's necessary to work within a document itself so if you take a minute and look at the Variance itself and what lies within the four corners of the Variance, you would see that in 1994 the Zoning Board presented a Variance that is clear and expressed Mr. Teser the authority to erect a structure that would be in violation of Article II, Chapter 9, Section 9-218. If you read Section 9-218, you would find that these specifically types of zoning areas, the area of Mr. Teser's property, the area he's speaking to prohibits certain types of uses. These uses are classified as trade, business, manufacturing, industrial, commercial type uses. Clearly sheet metal operations would fall under this Section.

With that said, if you go back to the Variance, Mr. Teser was granted by the Zoning Board, the authority to erect a structure that would be in violation of this Section. But for the Variance that was granted, Mr. Teser would not be able to operate sheet metal operations. However, the Variance was granted and the Variance was clear. The Variance provided authorization to Mr. Teser to act now in accordance to use of that described manufacturing, uses that describe commercial, trade, business, etc. Therefore, Mr. Teser did not exceed the scope that's stated in the Variance. In fact, he is acting within authorization that was granted by the Zoning Board.

Attorney Cohen stated that if there is any intent to restrict, you would find a sentence, two, or three on the face of the Variance that the sole purpose is to restrict the use. There's no such language on this Variance itself that serves to restrict. Mr. Teser petitioned the Zoning Board in 1994, the Zoning Board saw Mr. Teser as having a successful business within the City. The Zoning Board said they wanted to assist Mr. Teser extend that business not only for Mr. Teser but for the City itself to have a successful business operating within the City boundaries and that was clearly identified within the language in the Variance that was granted said Atty. Cohen.

Attorney Cohen continued to say that Atty. Beauregard referenced minutes and referenced the application itself. If you go through the minutes and the application, there is language that speaks to storage but the fact is that the minutes are merely a conversation and nothing more.

There's nothing in the minutes and nothing in the application that automatically transfers to the Variance that the Zoning Board granted. The Variance is clear and is not ambiguous. The argument made as to use; the use is clear all it requires is for one to pull the 1994 City Code and look up Article II, Chapter 9, Section 9-218 that's where your answer is and there's no question.

Hypothetically speaking, if the minutes did say limited only to storage purposes which it did not say; it speaks to storage but nothing limits only to storage. But if it did say, even then the Zoning Board would not be confined to what the minutes say. The Variance speaks for itself. The Zoning Board is not confined or restricted. They often make their decisions based upon the totality of circumstances.

If there is an issue as to trespassing, nuisance or sound vibrations, that's not for this forum to address. That requires the proper forum and the proper oversight. This is the Zoning Board of Appeals. We are here to interpret the intent of the 1994 Variance stated Atty. Cohen.

Mr. Gomes asked Atty. Cohen in his interpretation of that Variance that under Section 9-218, it would be in violation of Section 9-218 to erect a structure which if you go further it authorizes now under this Variance that Mr. Teser can act now in those particular uses that at one time were prohibited by the statute but through the Variance are no longer prohibited through those uses, such as sheet metal operations which are under these

uses. Then, Mr. Gomes asked how much bearing the language in the minutes had on the decision that the Zoning Board of Appeals made back in 1994. Attorney Cohen stated that in this particular circumstance, very little weight because of the fact that the Variance itself had no ambiguity to it. It's a very straight forward Variance and there's no language that restricts.

Mr. Comerford asked if anyone else was present in opposition.

Attorney Michael Harrington, 190 William St., N.B., approached the podium, said he's opposed to Atty. Beaugard's position, and said he was there on behalf of Ron Teser, President of Norris H. Tripp Co. and this company has been in the same location since 1915 and has expanded. In 1994, when the Variance was granted, they had to build a building and came to the Building & Inspectional Services Dept. to get a permit and had to get permits for everything else continuously for the last 20 years for this property. Atty. Harrington stated to come here now and say that they didn't know that it was going to be used for the same condition of sheet metal work is absurd. The City has known and Mr. Teser has pulled every single permit. Mr. Teser is not putting anything out there illegally. Mr. Teser is conformal with a Variance in a business and in a business by rules and terms by the City in which they have to comply. Atty. Harrington asked the Board to deny Atty. Beaugard's petition and let Mr. Teser continue his work in accordance with the paperwork allowed since 1994.

Mr. Comerford declared a five minute rebuttal.

Attorney Beaugard stated that this Board has a challenge before it and they need four votes. He stated that they ended up with an opinion from the City Solicitor's Office which in best is ambiguous and brings it down a certain way. Atty. Beaugard stated that he heard Mr. Cohen and Mr. Harrington, who is an extremely talented advocate and knows that the more things change, the more they don't change. Atty. Beaugard read a statement "Request to the ZBA, to erect a 22'x51'4 in. addition to the existing structure". Then, he said not to expand the industrial use, otherwise, can't be operating on that part of the lot. Atty. Beaugard stated that one way or another, this will go to Superior Court and for the Board to do their duty, and do it responsibly and honestly.

Attorney Cohen stated that we had a decision by the Building Commissioner which a lot of times gets referred to the City Solicitor's Office for purposes to provide some insight and guidance. However, the purpose of his presentation was to reflect or orientate the Building Commissioner's ultimate decision.

Mr. Comerford declared the hearing closed.

Ms. Smith motioned to uphold the decision of the Commissioner of Building and Inspectional Services to not issue a cease and desist order in a letter dated December 20, 2012. Mr. Gomes seconded the motion. With all in favor, the motion passed.

Roll Call Vote:

Jennifer Smith – yes

Donald Gomes – yes

Allen Decker – yes

Ian Comerford – yes

**Tally 4-0, motion passed**

**Old and New Business:**

**Approval of Meeting Minutes from January 24, 2013**

Mr. Gomes motioned to approve the Meeting Minutes from January 24, 2013 in which the following cases were heard and decided upon: Appeal # 4082, 4020B, 4083, 4084, 4085. Mr. Decker seconded the motion. With all in favor, the motion passed.

**Next Zoning Board Meeting, Thursday, March 28, 2013 at 6:00 P.M.**

**Adjournment:** There being no further business, the meeting was adjourned at 7:28 P.M.

Respectfully submitted

Kathy Sousa

**CERTIFICATE AS TO MINUTES OF MEETING OF ZONING BOARD OF APPEALS**

I, Allen Decker, Clerk for the City of New Bedford Zoning Board of Appeals, certify that the above is a true and correct transcript from the minutes of the meeting of Board of Appeals, for the City of New Bedford held at 6:00 pm on February 28, 2013, and that the meeting was duly called and held in all respects in accordance with the laws of the State of Massachusetts and bylaws of the City of New Bedford and that a quorum was present.

I further certify that the votes and resolutions of the Zoning Board of Appeals for the City of New Bedford at the meeting are operative and in full force and effect and have not been annulled or modified by any vote or resolution passed or adopted by the Board since that meeting.

*Allen Decker, Clerk*