

**Zoning Board of Appeals Minutes
April 25, 2018**

Attendees:

Present: Anthony Aveni, Chairman; Gerry Chipman, Member; Brian Heath, Member; Michael Mainvielle, Member; and Anna Klimas, Associate Member

Lyman Place/Off Bedford Street – Appeal of Building Inspector’s Decision

Mr. Anthony Aveni read the public hearing notice into the record, it stated the following: The Zoning Board of Appeals will hold a public hearing on April 25, 2018 at 7:00pm in the Council Chambers located on the second floor of the Municipal Office Building, 66 Central Square, Bridgewater on an application filed by Lawrence P. Silva (Representative), Silva Engineering Associates, P.C., 1615 Bedford Street, Bridgewater, MA 02324 seeking to appeal the Building Inspector’s decision that the Use Variance granted under § 6.30.A.1 in a decision letter filed with the Town Clerk’s Office on September 21, 2016 has expired. Said property is owned by JZ Realty Trust/Saw Realty Trust and is located at Lyman Place and Off Bedford Street, Bridgewater, MA as shown on Assessor’s Map 111, Parcel 39, 15; Map 112, Parcel 2. Area is currently zoned Residential A/B and South Business District. Board members present, and voting were Anthony Aveni, Chairman; Brian Heath, Member, and Gerald Chipman, Member. Associate Members, Michael Mainvielle and Anna Klimas were sitting but not voting. Mr. Anthony Aveni, Chairman, opened the hearing with a reading of the public notice and the following information was given:

The application was filed with the Town Clerk on March 29, 2018. The abutter’s listing is public record, therefore, Gerald Chipman, Member, motioned to waive the reading of the abutters list and Gerald Chipman, Member, second the motion. The vote was unanimous.

An email dated March 6, 2017 from Mr. Steven Solari, Inspector of Buildings/Zoning Enforcement Officer to Ms. Jennifer Burke, Director of Community and Economic Development, was reviewed by the Board and read into the record. It stated the following: *“I reviewed the letter from Silva Engineering pertaining to Crimson Heights subdivision, that was received on February 28, 2018. The use variance was granted on September 2016 with conditions. The use variance was not exercised within the one-year requirement. The activities listed in the letter and lack of permitting do not meet the requirements needed to exercise the use variance. It is the decision of the Building Commissioner that use variance has expired. If you have any questions, please contact me. Thank you.”*

A letter dated February 26, 2017 from Lawrence P. Silva, P.E., President, Silva Engineering Associates, P.C., Mr. Patrick Driscoll, Chairman, Planning Board, was reviewed by the Board and read into the record. It stated the following: *“At the Planning Board’s public hearing for the subject project, a question was raised about whether the use variance that was granted to allow for a residential subdivision to be constructed partially within the limits of the South Business District was valid. Below is a summary of the activities completed since the variance was granted, which clearly shows that the use variance has been “exercised”. The variance that was granted in September 2016 was based upon a conceptual layout and area description that would allow for the single-family development to proceed. Subsequent to the granting of the variance, the decision was recorded at the Plymouth County Registry of Deeds and work then began in earnest to secure the necessary permits from the Town Boards and Land Court. During the fall of 2016, the Land Court reconfiguration was initiated, and an existing condition survey including the location of wetland flags was completed. Subsequently, the wetland line was submitted to the Conservation Commission for approval and percolation testing of the proposed house lots was completed and witnessed by the Board of Health agent. Early in 2017, the definitive subdivision design was initiated and efforts to satisfy Land Court intensified. In April 2017, two new Land Court bounds were installed and test pits within the proposed drainage basin were completed and witnessed by the Town Engineer. Once all field data was secured, engineering design was completed, and the subdivision plans were submitted to the Planning Board in January of this year. The public hearing was opened on February 21, 2018. It is my professional opinion that the activities that have occurred since September 2016, constitute substantial work related to the residential use, and clearly demonstrate that the variance is in force. For reference, I have included documentation that confirms the timeline above. In addition, zoning cases such as Grady versus the Town of Peabody (465 Mass 725) found that even recording a variance after one year did not negate the approval, because the steps taken to eventually reach application for a building permit were based upon receiving the variance. Similarly, in this case, every activity that has taken place after the use variance was granted, was a step in the direction of constructing the subdivision road and homes on the parcel. My client is well within his rights to move forward with approval of the subdivision and construction of residential homes. I trust that the information provided answers the question raised at the public hearing.”*

A letter dated April 25, 2018 from Lawrence P. Silva, P.E., President, Silva Engineering Associates, P.C., Mr. Patrick Driscoll, Chairman, Planning Board, was reviewed by the Board and read into the record. It stated the following: *"This office has reviewed the use variance opinion petition of Lawrence P. Silva of Silva Engineering Associates, P.C. filed on behalf of JZ Realty Trust/Saw Realty Trust, the owner(s) of the lands referenced herein above. The petitioner is seeking to have the Board overturn the opinion of the Building Inspector/Zoning Enforcement Officer regarding the expiration and lack of exercise by the landowner, of the Use Variance granted by the Board in September of 2016. At issue is whether the activities undertaken since the grant of the 'use variance' by the Board rise to the level that would constitute exercise of the 'use variance'. After an in-depth review of the relevant facts, including the information contained in the Board's grant of the 'use variance', the written opinion of the Building Inspector/Zoning Enforcement Officer, and the information submitted by the petitioner as proof of exercise of the 'use variance', this office concurs with the opinion of the Building Inspector/Zoning Enforcement Officer that the reasons and information provided by the petitioner as evidence of exercise of the 'use variance' do not constitute sufficient and prima facie evidence demonstrating exercise of the 'use variance' for the following reason: wetlands delineation, land surveying, percolation testing and evaluation of soils, and similar activities are not unique to home construction; in other words, these activities would be required for construction and development of uses in both residential and non-residential zoning districts. If the Board had not granted the 'use variance', the petitioner would still perform engineering and surveying work, percolation tests, wetlands delineation for development of 'uses' allowed in the business district. The applicant would have had to obtain a building permit, or a preliminary or definitive subdivision plan approval from the Planning Board for a residential subdivision prior to the expiration of the 'use variance', in order to demonstrate adequate exercise of the variance during the valid life of the variance. The petitioner could have also filed for an extension of the expiration date of the variance before it lapsed. The reference case: 'Grady versus the Town of Peabody (465 Mass 725)' provided by the petitioner, corroborates the finding of the Building Inspector/Zoning Enforcement Officer in the instant matter before the Board and not the contrary. In the 'Grady versus the Town of Peabody' case, the Plaintiff (Grady) sought to have the Town revoke the building permit that was properly issued to Stefanidis (landowner) within the valid life of a variance. Grady's complaint was solely based on the fact the variance was not recorded at the Registry within one year. However, the Courts found that the variance was substantially exercised because a building permit for the specific 'use' for which the variance was granted had been properly granted and construction had started, and non-recording of the variance within one year was not a sufficient cause to vacate the building permit and the variance. In the instant matter before the Board, the proper vehicle at this juncture is for the petitioner to file for a new 'Use Variance' with your Board or a zoning boundary change ordinance with the Town Council. Incidentally, the petitioner has also initiated a zoning boundary change protocol with the Town Council and enjoys the full support of the Town. While we fully support the proposed use, we find the appeal of the decision/opinion of the Building Inspector/Zoning Enforcement Officer is ill-advised and this office urges the Board to affirm the decision/opinion of the Building Inspector/Zoning Enforcement Officer. Please do not hesitate to contact this office should you have any questions or require additional information."*

Mr. Lawrence Silva provide the Board with a supplemental documentation that outlined the chronological history of what had transpired since the variance was granted and discussed it in detail with the Board.

Mr. Anthony Aveni noted that the original variance was granted due to the lack of access through Bedford Street.

Mr. Anthony Aveni suggested that the applicant refile for the use variance, as opposed to appealing the decision of the zoning enforcement officer will probably be a quicker process. The Board stated that initially there was a good reason that we gave the use variance. Mr. Aveni stated that there is some clarification needed as to what constitutes "exercising the rights" to a variance that was granted. Mr. Aveni stated that he likes the project, and was on the Board originally when it approved, and he didn't see a reason why we wouldn't do it again. Mr. Aveni stated that he did have a little trouble trying to overturn what is being said by the Zoning enforcement officer and some of the other people working for the town because that is their full-time job and what they do. We are just here to interpret what is presented in front of us. Mr. Aveni opened it to further Board Comments. Mr. Aveni stated that work stopped for six months. Mr. Silva argued that if he thought that the variance had lapsed then he would have filed for an extension; however, he thought he was still in compliance and within his rights to use the variance.

Mr. Gerald Chipman asked what the guidelines were to 'exercising the rights to' a variance and / or special permit. The Board discussed and debated what constituted exercising the rights to a variance and decided to seek advice from Town Council.

Mr. Brian Heath, Member, made a motion to continue the hearing until May 9, 2018 to allow sufficient time to seek advice from the Town Council on exercising zoning rights. Mr. Gerald Chipman, Member, seconded the motion. All in favor, none opposed.

Curve Street – Duxburrow Estates 40B

Mr. Anthony Aveni, Chairman, opened the continued hearing from the March 14, 2018 meeting, and read into the record a letter dated April 20, 2018 from Silva Engineering Associates. It stated the following:

“On behalf of our client, Silva Engineering Associates (SEA) respectfully requests a continuance from your April 25th hearing date to your scheduled meeting on May 23, 2018. The continuation will allow for conservation to close and approve the wetland line, allow for revised design plans to be completed as well as coordination with the water and sewer department. Sincerely, Lawrence P. Silva, P.E., S.E. President”

Mr. Brian Heath, Member, made a motion to accept the applicant's request to continue the hearing to May 23, 2018 at 7:30pm. Mr. Gerald Chipman, Member, seconded the motion. All in favor, none opposed.

Zoning Board of Appeals Business

No other Board business for discussion.

Mr. Brian Heath, Member, made a motion to adjourn the regular meeting at 8:16pm. Mr. Gerald Chipman, Member, seconded the motion. VOTE: All in favor, none opposed. Chairman Anthony Aveni closed the meeting. Next Zoning Board of Appeals meeting will be held on May 9, 2018 at 7:00pm in the Council Chambers located on the second floor of the Municipal Office Building, 66 Central Square, Bridgewater.

Respectfully submitted,



Jane K. Brown
Administrative Assistant