

**Leicester Zoning Board of Appeals
Meeting Minutes**

Minutes of January 24, 2018

Hearing on the petition of Lynde Brook Plaza, LLC of 4 Olde English Road, Worcester, MA for a Variance to allow Reservoir Street to be considered the legal frontage for property to be accessed from 190 Main Street, Cherry Valley, MA

Members present: Vaughn Hathaway, Chair; Jim Buckley, Clerk Jim Reinke, David Kirwan, David Orth

Alternate members present: Dick Johnston

Meeting called to order at 7:30PM

Instructions given on hearing procedures

Voting at tonight's meeting: Jim Reinke, Jim Buckley, Vaughn Hathaway, David Kirwan and David Orth

Mr. Buckley read the Notice, Application and Finding of Facts into the record.

Submitted into evidence: Registered Plot Plan, green & white return receipts from the Certified Mailing to abutters, Exhibit A, B & C Registered Plot Plan, Exhibit D Planning Board Special Permit & Site plan Approval and an email letter from the Building Inspector to the applicant.

Correspondence received: Site Consideration from the Building Inspector and a memo from the Board of Health read into the record by Mr. Hathaway.

Mr. Hathaway opened discussion to the applicant to present their petition to the Board.

Mr. Damien Berthiaume, Attorney representing the applicant, made the presentation.

The property owner was not seeking to build anything new or to do anything new with the site or structures.

Exhibit A, submitted with the application, identifies a plan showing property originally approved having 28 acres of land. That included 159.87 feet of frontage along Main Street. Then the same parcel of land that includes 28 acres also runs north/south along Reservoir Street.

The plan is dated 1971 and the structures shown on the 1971 plan are the same structures shown on the current plan.

He explained the building inspector made comment that the plan submitted, didn't show any dimensions.

He sent an updated copy by email to Michelle Buck, the Town Planner and submitted paper copies to the Board tonight.

Subsequent to the 1971 plan where the structures are already existing, not much was done to the property until 2008. In 2008, the Lynde Brook Condominiums were created and the two condominiums units that exist are both located in Building A.

When the condominium units were created, they were created by way of a Site plan, rather than an ANR plan. Therefore, no plan ever came through the Planning Board or Zoning Board to effectively create a boundary between the condominiums and the remaining land that was not part of the condominiums.

Mr. Hathaway asked for an explanation to what an ANR plan was.

Mr. Berthiaume said ANR stands for Approval Not Required. It's a process by which land in Massachusetts is subdivided, in accordance to Chapter 41, section 81. A plan of the land being subdivided has to be drawn by a Registered Land Surveyor for approval.

The Planning Board makes a determination as to whether or not the lot has sufficient frontage along a public way and sufficient square footage to be considered a building lot. If the Board finds there is sufficient frontage and square footage, they endorse the plan.

In 2008, when the condo units were created, division of the lot didn't happen. They were left with a situation where there are these two condominiums, shown Exhibit B, and the only thing separating building A from building B & C was a hash mark line.

In his legal opinion, that was not accepted in terms of being a method of creating separate lots or dividing the property.

In order to address that concern, they had a ANR plan drawn delineating the property line between these two parcels. They felt this would solve the boundary problem between the owners of the condominiums and Lynde Brook Plaza, LLC.

What brings them before the ZBA now was for a definition on frontage. In the Bylaw the definition states, "A Street which provides the required lot frontage for a building and the primary access to the lot."

Along Reservoir Street, lot 1 has almost 1700ft of frontage, but the access to the property was through a right-of-way from Main Street. This is the way that lot has been accessed historically and that's the way they would like to have it remain.

In order to achieve that, was through a variance for a definition of enforcement on frontage. There is sufficient frontage along Reservoir Street, but they would prefer not to create a new access from Reservoir Street and continue to access the property through the right of way that comes in from Main Street. They were looking to preserve the historical access to the property.

Mr. Berthiaume reviewed Finding of Facts.

The soil & topography affecting this lot were different along Reservoir Street then the rest of the neighborhood. The Lynde Brook runs north/south along Reservoir Street and trying to access

the property from Reservoir Street would involve a wetland crossing, possible construction of a bridge and conservation issues with obstruction of major tributary river.

The property begins sloping significantly from Reservoir Street, down to that site, rendering access to the property very difficult. Due to the location of Lynde Brook and the topography, accessing the property from Reservoir Street would cause a substantial hardship.

There would be an economic and financial hardship based upon the additional cost associated with the engineering, the wetland crossings and construction of a bridge, in order to access the site.

Reservoir Street, being a residential neighborhood, it would not benefit the neighborhood to access from there. It would benefit the neighborhood more significantly to allow access to continue from Main Street.

The access reviewed for this property and the warehouse, was part of the allowed use through a special permit application approved by the Planning Board in 2011. The approval was to allow use of this property for a storage facility and that use will remain the same by the potential new owner.

The Planning Board, during their review, did take into consideration the overall impact to the neighborhood, in terms of traffic, as noted in the Special Permit Decision, *“The Board finds that the proposed use as storage will not impact traffic and that safe vehicular and pedestrian traffic has been addressed.”*

The buildings located on this site have been in existence, in excess of the 1971 plan. All they are looking to do was formalize what already exists on the ground. In doing that it would solve any boundary line concern, as well as providing additional parking to Eller’s Restaurant and Double Play Sports.

The Condo owners discussed entering into an easement agreement, to allow parking spaces within the common area (*spaces 38-58; 85-92 & 93-106 as shown on plan*) and allow access to the building in back from Main Street.

They formally want to create a new lot with frontage along Reservoir Street, except it’s not frontage that meets the definition of the Bylaw. Therefore, they are asking the Board to vary that definition for them, in order for the access to continue to come from Main Street.

Mr. Orth asked if nothing was changing in any of the buildings, why all of a sudden were they asking for this variance.

Mr. Berthiaume said Lynde Brook Plaza LLC has the opportunity to sell buildings B & C. As part of that sale, a title search was done and a zoning opinion was provided. It was determined that parcel lacks the legal description to be sold because of the condominium plan prepared in 2008.

Mr. Orth asked if the Board does not approve this, can the buildings still be sold.

Mr. Berthiaume said it would be significantly more difficult to sell those buildings, because an access would have to be created from Reservoir Street in order to do so. It is their position that would constitute a financial hardship because of the additional engineering, site work and construction work that would disrupt the neighborhood on Reservoir Street.

Mr. Hathaway asked if there was a written document stating access would continue to be provided from Main Street.

Mr. Berthiaume said as part of the sale process, three agreements would get executed.

1) Providing for an easement to lot 1 across the 20ft long right of way, would be included on the plan; 2) a boundary line agreement that would create a legal boundary between the two sites; 3) an easement that would provide parking for the existing condominium on part of the property that would be owned by the new entity.

He said if there was concern on whether that would actually happen, he suggested the Board vote favorably on the application and add conditions to the decision regarding the recording of the specific access easement, as well as a review on sufficient parking.

Mr. Hathaway agreed, if approved, adding conditions on access because he would not want this to come back before the Board because access was denied from Main Street.

Mr. Berthiaume felt if there were no access allowed from Main Street, then it would be necessary to put in an access point from Reservoir Street. At which point, there would be no need for a variance.

They do have an agreement, in principle, to provide access from Main Street, which has been the method of accessing the property for as long as anyone can remember.

If it was the desire of the Board that the easement be formalized, to make that a condition of the variance.

Mr. Hathaway asked if it would be agreeable to add a condition stating, access to the property would never come from Reservoir Street.

Mr. Berthiaume said that would not be an acceptable condition, because that would restrict any future development from ever using Reservoir Street for any other purpose.

If someone in the future wanted to buy the remaining 21 acres and get it permitted for something else, they should be able to come to the Board and make that proposal.

Mr. Hathaway said that would be the reason why he would accept that condition. Maybe now everyone would agree that wouldn't happen, but 20 years from now, with different owners, would have different goals.

Mr. Berthiaume said he would prefer that condition not be a part of the decision. If the Board approves the variance and the condition was a necessary part of the approval, he had no choice but to accept it.

Mr. Orth said it was already stated that accessing from Reservoir Street was prohibitively expensive, so he didn't understand the objection to that restriction because it was stated that it can't be done.

Mr. Berthiaume said it would be expensive and prohibitive.

Mr. Orth said it's being used as the hardship and topography, so that in itself, was making it restrictive. He didn't consider that condition a problem because it was being used as hardship on topography and soil conditions.

Mr. Hathaway agreed. He explained when someone requests a variance, he or she states what the hardship would be if not approved. What was being described, was accessing from Reservoir Street as the hardship. He asked what the hardship would be if the variance was not granted.

Mr. Berthiaume said if the variance was not granted the applicant would be left having to develop an access to the property from Reservoir Street. The cost in doing that would be significant and would cause a hardship.

The cost would involve engineering a wetland crossing, constructing a wetland crossing, and creating a new access point from that area, which would be economically difficult.

He wasn't sure whether if it would render the ability to access the property, but it would make it significantly more costly and difficult. The hardship was a financial hardship within the meaning of Bylaw.

Mr. Hathaway said the hardship doesn't seem related to fixing the definition of frontage. He asked by not fixing the definition of frontage for that parcel, how that creates a hardship.

Mr. Berthiaume said in addition to applying for a variance from the Zoning Board, it was also necessary to file with the Planning Board in order to create this as a separate lot.

In doing that, they go through the ANR approval process with the Planning Board and they are required to find that there was sufficient frontage and square footage.

Frontage, under the Town's Bylaw, would require them to have access from Reservoir Street. Frontage has to be on a street that provides access to the lot. If this Board did not vary that definition of frontage, then the Planning Board, looking at the ANR Plan, would say lot 1 has the square footage and enough square footage for frontage along Reservoir Street.

That was not frontage as defined within the Bylaw, because the frontage, according to the Bylaw, has to be the street from which the property was accessed. They were not accessing the property from Reservoir Street.

Mr. Hathaway said the variance was to allow the property to be accessed, but not from the lot's frontage.

He felt there were two requests within this application.

One, that the frontage be declared off of Reservoir Street and two, even though the Town's Bylaw states primary access to the lot is to be from the frontage, the request asks the Board to vary from the terms of the frontage definition, so access can come from other than the lot's frontage.

His concern was if the Board were to grant the variance, declaring Reservoir Street frontage by definition, access would have to come from Reservoir Street.

Mr. Berthiaume said they were trying to say there was plenty of border between this parcel and Reservoir Street and simply asking if they can access the lot from Main Street.

From the zoning definition, if a street provides the required lot frontage for a building, it has to be a street that provides primary access to the lot. They were saying, they didn't want that definition enforced. They want to be able to access the lot from Main Street, in spite of the fact that they have all this border along Reservoir Street.

Mr. Hathaway asked if the definition of frontage was what they were looking to vary. He understood the variance request was to name Reservoir Street as frontage.

He now understood that will become the definition of frontage and the variance was for allowing access from other than the frontage.

Mr. Berthiaume said yes and if Reservoir Street did not border this property and bordered land they didn't own, the lot would not have frontage on any street, which would create another problem. Here they have a street that they don't want to use as access and want to consider another street on which they have legal title access, as their access to the property.

Accessing the site from Reservoir Street would be disruptive to the neighborhood that would require extensive engineering and construction work in order to access the site.

They were looking to preserve the status quo by accessing the property the same way it has been historically accessed for years.

Mr. Hathaway asked if the variance was to allow the access from Main Street to continue.

Mr. Berthiaume said yes. This was a variance from the definition of lot frontage, so that the frontage considered on Reservoir Street, will not actually provide the access.

Mr. Orth said the request is not to have access from the frontage street because it would be prohibitively expensive. He asked if this could be considered a Use Variance because they were changing the use in the definition of frontage.

Mr. Hathaway felt it would not, because the use of the property was not changing. He explained use variances are for having a business in an area that was not zoned for business.

Mr. Kirwan said in separating building A and selling buildings B & C and the variance, if granted, will give a legal property line in which to affect that change.

He asked if the new owners of building B & C will also be buying all the land associated with those buildings.

Mr. Berthiaume said yes, it's labeled Lot 1 on the plan and includes the remaining 21 acres in back.

Mr. Kirwan questioned future development on the remaining 21 acres. He felt the Main Street access, could not support further development beyond what already exists.

Mr. Orth & Mr. Hathaway agreed.

Mr. Hathaway said that was his reason for wanting to add a condition not to allow access from Reservoir Street.

Mr. Berthiaume said his was a general objection to a condition that affects undeveloped property.

Mr. Hathaway noted someone could come back before the Board requesting a variance for that.

Mr. Berthiaume agreed, but someone in the future could also come back to develop from Reservoir and wouldn't need a variance. Although, he understood the purpose why the Board wanted to make a condition restricting future development & access to the site from Main Street.

Mr. Reinke asked if there was any common ownership between building A & building B & C.

Mr. Berthiaume said everything to the south of the hash-tag line was part of building A, owned by the Condo owners.

The original developer, Bruce Vartanian, created the Condominium units that included what exists to the south of building B & C. What Mr. Vartanian did, did not effectively separate the property.

As for common ownership, building A appears to be condominiums and building B & C appears to be owned by Lynde Brook Plaza, LLC.

Mr. Reinke asked who owned the parking lot.

Mr. Berthiaume said the parking lot to the south of the hash-tag line was owned by the Condominiums, north of that line was owned by Lynde Brook Plaza, LLC.

Mr. Reinke asked the owners of the Condominiums whether they felt this arrangement would be beneficial to them.

Mr. Michael Novia, Double Play Sports said if the Board approves the variance with the condition, an agreement was required on the easement with the parking lot, he agreed with that. He was confused with the talk about property lines. He asked if a property line existed between building A and buildings B & C.

Mr. Jeff Ellers, Eller's Restaurant, said he understood the hash tag lines would become the property line.

Mr. Reinke asked as it stands right now, what do the Condo owners own.

Mr. Novia said they weren't sure, no one knows where the property line really was.

Mr. Orth understood a property line didn't exist, because it was still one property.

Mr. Berthiaume explained the same person did not own everything. There was a discrepancy and disagreement on where that boundary line between the two buildings lies.

There were discussions between all parties on a boundary line agreement and he met with the attorneys for the buyers and the condo owners. They came to an agreement on an approximate spot for the boundary line.

In that agreement, the new owners would grant an easement for parking that would allow the condo units additional parking spots. In consideration of that, the unit owners would grant an easement to the new owners of the back building, access to the back lot from Main Street.

Mr. Hathaway explained in terms of what the Board was hearing tonight was whether to allow access from Main Street. The other concerns were not part of this hearing.

Mr. Reinke asked the square footage of the southern portion of the lot, where building A sits, and whether it met the zoning requirements.

Mr. Berthiaume said they are required to have 15,000 square feet and needed 159 frontage along Main Street. The lot rectangle measured approximately 36,000sf, which was well in excess of the 15,000 required. In terms of the setback requirements, they weren't changing anything in term of those.

Mr. Reinke said the issue being raised was not worrying about what's before us now, but worrying about what the next owner wants. Granting an easement to cross over a piece of property benefits everyone involved and he agreed putting a condition on access from Reservoir Stret.

Mr. Kirwan said the new owners may want to develop the remainder of property in back, but without limiting the variance for this particular request, it could become a cut through for whatever goes on in the future, and that wouldn't be a benefit to anyone.

Mr. Berthiaume agreed adding a condition that no further development on the site would be accessed from Main Street.

Mr. Buckley asked if there was a way the property line could be drawn that would provide access to Lot 1 and provide enough frontage.

Mr. Berthiaume said no, the requirement for this zone was 100 feet and there was 159.87 feet of frontage total along Main Street for this parcel.

Looking at the plan, it would not make sense having two parallel driveways coming in from Main Street, because it would cut off an entire row of parking spaces used by the condominiums.

Mr. Victor Taylor, 101 Reservoir Street said in the late 60s, the property owners at that time came before the ZBA requesting to extend the land in back an extra 200 feet and were approved. Then the owners were approved for another 1000 feet for two warehouse, identified as Building B & C.

The entire lot of 28 acres, before he bought his 7 acres, was one piece of land that had never been divided or surveyed. He felt the hash tag line shown on that plan, going across the parking lot, was arbitrary nonsense.

In addition, the owners also applied for a permit to access that property from Reservoir Street and were denied by the ZBA.

Mr. Hathaway explained the application request was to allow the frontage access to be off of Main Street and a decision will not be made on further development to that lot.

Mr. Taylor said when Cherry Valley Builders owned that property it was never subdivided. He considered the arbitrary dotted line across the parking lot interfered with those businesses and meant nothing.

Mr. Orth said the whole point of this variance was so the owner could legally subdivide the lot and not use Reservoir Street for the access.

He explained the restriction of never allowing access from Reservoir Street was because they were using the prohibitively expensive access from Reservoir Street as their hardship.

If the Board grants the variance, it would be a viable restriction not to allow access from Reservoir Street onto this property.

Mr. Taylor said that's an economic issue not an access issue. He would like to see it stated in writing in the Decision there be no access from Reservoir Street.

Mr. Kirwan asked whether they were considering carving out a third lot that would include the remainder of land in back.

Mr. Hathaway said the Board can add a condition which states, no part of the property beyond building A, could have access from Reservoir Street.

Mr. Berthiaume said a condition that stated no further development on the site be accessed from Main Street, would be agreeable.

Mr. Hathaway reviewed the request for Variance.

To allow access to the property be from other than what is defined as the frontage.

He then reviewed Conditions of Approval:

1) If property is subdivided by ANR process, an access easement from Main Street be formalized with existing establishments already part of the Condo agreement.

2) Even though frontage was being defined as Reservoir Street, no access to that parcel would come from Reservoir Street.

3) No Further development on the property that would create more traffic from Main Street

4) As part of the ANR review process, the Planning Board will determine there's sufficient parking for the establishments already part of the Condo agreement.

5) Division of the property would be, as shown, on approved Variance Plan and approved by the Planning Board as part of the ANR process.

Hearing no further discussion, Mr. Hathaway asked for a motion.

MOTION: Mr. Orth moved to grant the petition of Lynde Brook Plaza LLC of 4 Olde English Road, Worcester, MA for a variance to allow Reservoir Street to be considered the legal frontage for property to be accessed from 190 Main Street, Cherry Valley, MA with the following conditions: an access easement from Main Street be formalized with existing establishments; no access to that parcel would come from Reservoir; no further development on property that would create more traffic from Main Street; the Planning Board will determine sufficient parking for existing establishments

SECONDED: Mr. Kirwan – Discussion: added condition to motion, “division of property will be as shown on approved Variance plan dated 1/16/2018.”

VOTE: 4 in favor/1 opposed (Mr. Reinke)

FINDING OF FACTS:

David Orth voted in favor of the motion because he felt there was a hardship of property definition. The topography and soil conditions restricted access from Reservoir Street and strict interpretation of the Bylaw would create a hardship.

David Kirwan voted in favor of the motion because he felt it met all statutory criteria to grant a variance. Hardship was met, financial or otherwise. The conditions placed will guarantee public safety and ensure no further traffic from Main Street and ensure no further development of lot 1.

Vaughn Hathaway voted in favor of the motion because he felt providing access from Main Street with conditions specified, kept traffic from Reservoir Street. This met requirements for granting of a variance, in regards to soil conditions and topography of the property.

He felt there was a hardship to the petitioner, as well as the abutters, if Reservoir Street was used for access to the property.

Jim Buckley voted in favor of the motion because he felt it met criteria of the Leicester Zoning Bylaws for granting a variance. The conditions put in place will reserve status quo of the property.

Jim Reinke voted in opposition of the motion because he felt it was self-imposed hardship.

Instructions given on the appeal process and the filing of this decision with the Registry of Deeds.

MOTION: Mr. Kirwan moved to close the hearing

SECONDED: Mr. Orth – Discussion: None – VOTE: All in Favor

Meeting adjourned at 9:17PM

Respectfully submitted:

Barbara Knox

Barbara Knox