



Hull Zoning Board of Appeals Minutes

Applicant: Gary R. Kelly

Property: 175 Atlantic Avenue, Hull, Massachusetts

Date: August 7, 21014

Time meeting began: 9:35 pm

Time meeting concluded: 10:35 pm

Place of meeting: Hull Town Hall, Main Meeting Room

Members present:	Alana Swiec, Chair	Sitting	Attending	Absent	Abstain
	Roger Atherton, Clerk	Sitting	Attending	Absent	Abstain
	Mark Einhorm, Member	Sitting	Attending	Absent	Abstain
	Patrick Finn, Associate	Sitting	Attending	Absent	Abstain
	Phillip Furman, Associate	Sitting	Attending	Absent	Abstain
	Jason McCann, Associate	Sitting	Attending	Absent	Abstain

In Attendance: Ellen Barone, Board Administrator
Bartley Kelly, Hull Building Inspector
Gary Kelly, Applicant and Trustee of property

General relief sought: Applicant requests a Special Permit and/or Variance to convert existing first floor business space into an apartment and add a second floor roof deck part of which is in the front setback area. The proposed conversion of existing business space (first floor) into an apartment requires a Use Variance as Business and Mixed use Residential Districts require not less than 30 % of gross floor area must be for Business use and the proposal will eliminate the business use. The proposed deck is to be constructed on an existing 14'x32' single-story section of the 2.5 story structure. The front six feet of that single-story section, which is pre-existing and non-conforming, are in the front setback. The addition of the deck on that portion requires a Special Permit.

General discussion: Ms. Swiec opened the hearing. Mr. Finn stated that this is a Use Variance which is related to the structure and layout of the building and the hardship must be related to the structure. He continued that it does not have to meet the usual criteria of a dimensional variance. Dr. Atherton read the Town Bylaw which doesn't appear to differentiate between the two and seems to require the same criteria be used. He added he had done some research into other Use Variance cases and found that one lawyer had introduced the Powers Test for use variances. He

had further checked with Mr. Duffy, a lawyer and earlier ZBA Chair for many years, who had sent to him additional material regarding the three criteria and their utilization regarding Use Variances. These criteria are:

- 1) Does the use reflect the nature and purpose of the nonconforming use prevailing when the zoning took effect?
- 2) Is there a difference in the quality or character and/or degree, of the resulting use?
- 3) Is the current use different in kind in its effect upon the neighborhood?

An affirmative answer to one or more of these questions result in the loss of the nonconforming protection previously enjoyed by the use (Vested Rights and Nonconforming Uses and Structures, page 42). The Board further discussed both sets of criteria and decided that the Powers test seemed more appropriate and that the appeal met the criteria.

Dr. Atherton raised the issue of whether this is a Business District or a Single-family district? The plan provided the Board by the applicant by Nantasket Engineering indicated it is a SF-A Zone. He added that two copies of zoning plans given him when he joined the Board show the property as being SF-A. The building Department that has responsibility for zoning and zoning maps claims it is a Business Zone. Dr. Atherton researched other variances that had been granted this property and two of them referred to the property as being in a Business District (Variances dated 1975 and 1979).

Mr. Finn stated he said he believes the BC's decision is the one the Board should use. Ms. Swiec pointed out that the technology used to create these maps was less accurate than the ones available today. Mr. B. Kelly explained that there was a mistake made when they updated the maps in 1992 showing the property as SF when it was and still is a Business zone. Ms. Swiec commented that the property has had a continuous mixed use for many years. The consensus was that the property is in a Business district.

Dr. Atherton explained that a Variance requesting a second apartment was denied in 1972. In 1975 a variance was granted for second apartment but with many specific conditions that were never implemented and the variance lapsed. In 1979 a Variance was granted for the second apartment. He then asked Mr. Kelly how the structure could have three apartments as shown on the submitted plans. Mr. Kelly explained the drawing submitted was wrong as the third floor rooms shown are not a separate apartment but an integral part of an apartment on the second floor. He was asked to correct the drawing and initial it, and he did so.

Dr. Atherton then explained that Town bylaws restrict apartments to no more than four rooms, no more than two of which may be bedrooms. From what appears on the plans neither of the existing apartments qualify as both have too many rooms and too many bedrooms; and the proposed apartment has three bedrooms, which does not meet the zoning requirements. Mr. Kelly responded that the existing were pre-existing non-conforming and grandfathered. He further agreed to change the third bedroom to a home office. He marked up the plan and signed it to show the revision.

Ms. Connors, 7 Montana, asked about the parking. Dr. Atherton explained there was a parking plan submitted. Mr. Kelly responded that there are 6 spaces, most of which are across the street on property owned by the same Trust (179 Atlantic). There are also two on the street that are

restricted to their use and one on the property itself. Mr. Stacey, 5 Montana, asked what would happen if they were to sell the property at 179 Atlantic, then there would be very limited parking for 175 Atlantic. Mr. Furman suggested there should be some kind of deed restriction to prevent that. Mr. Kelly proposed that a condition of the decision could be an easement granted to the other property to provide necessary parking. Mr. Finn suggested making the variance conditional on the parking plan as presented and if those conditions change, then the Variance would no longer apply, and the Trust would have to return to the ZBA. Mr. Finn added that since these two properties are in the same Trust, that selling the property would create problems and nullify the variance. After discussion, and at the request of Ms. Swiec, Mr. Kelly agreed to designate the 3 guest spaces across the street as restricted to 175 Atlantic parking. Ms. Connor opined that the parking, as revised, looked reasonable and the additions they are making will be an improvements to the neighborhood.

Mr. Bornheim, 117 Samoset, spoke in favor of the applicant's proposal. He added that this is a much improved solution to what was there before. He explained that he sees this as an example of what should be an option for many of the mixed use Business District buildings that have been vacated in Town, where business opportunities are limited, and there is an increasing need for residential apartments and senior living.

There was then discussion of the Special Permit (SP) for the front deck. Mr. Kelly explained that they could build the deck on the existing structure and put the railing six feet back from the front and conform to zoning, but they are asking for a SP to move it forward to the front of the structure, which would not be, in their opinion, more detrimental to the neighborhood than the existing non-conformity.

Ms. Swiec stated that it was time to vote. Dr. Atherton asked if we could review the criteria for a Variance, the consensus was that the Board had done that when deciding it met the Powers Test. Ms. Swiec decided that we should vote the SP, the Variance, and then the overall project.

Action taken, if any: Mr. Furman made a motion to approve the SP for the deck extension into the front setback. Ms. Swiec seconded - the vote was unanimous in support. Ms. Swiec made a motion to grant the Variance request based on the Powers Test for the change in use from mixed business/residential to all residential. Mr. Furman seconded the motion - the vote was unanimous in favor. Ms. Swiec made a motion to approve the application as presented with the revised parking plan dedicating the visiting parking spaces at 179 Atlantic to 175 Atlantic and a revised floor plan changing the proposed third bedroom to a home office. Mr. Furman seconded the motion – the vote was unanimous in favor.

Was final vote taken? **Yes** No

Final Vote:	Alana Swiec	Yes	No
	Roger Atherton	Yes	No
	Phil Furman	Yes	No

Recorded by: Roger Atherton

Minutes Approved: _____