

IN RE: APPEAL OF WELOVENEWPORT, LLC

APPELLANT'S REPLY MEMORANDUM

FACTS

The owner of 1 Harbor View Drive received zoning approval for the garage addition on October 28, 2016. The Appellant purchased the real estate at 2 Harbor View Drive on April 19, 2018 and had no knowledge of the previously approved zoning relief.¹

Soon after the garage foundation was poured and structure was framed, Appellant began investigating the zoning approval for 1 Harbor View. The investigation uncovered several prior zoning applications. A 2007 zoning application described the Deutsch lot as 52,082 square feet. (See Exhibit "B" to Appellant's Memorandum.) A 2013 zoning application described the property as being 66,660.00 square feet. The present application described the site as 49,371 square feet. The Appellant also questioned the existing and proposed building footprints on the 2016 petition. Appellant filed the instant appeal after determining that all of the above applications misstated the actual size of the 1 Harbor View Drive and the 2016 petition understated existing and proposed lot coverage.

Mr. Deutsch now challenges the timing of this appeal.

Issue on Appeal

Did Appellant timely file its appeal.

Argument

1. Appellant timely filed its appeal.

An appeal to the zoning board of review from a decision of any other zoning enforcement agency or officer may be taken by an aggrieved party. The appeal shall be taken within a reasonable time of the date of the recording of the decision by the zoning enforcement officer or agency by filing with the officer or agency from whom the appeal is taken and with the zoning

¹ This Board's May 28, 2019 extension was granted without notice to abutters.

board of review a notice of appeal specifying the ground of the appeal. §45-24-64, G.L.R.I. A reasonable time, as contemplated in the statute, begins to run against an appellant only at such time as he becomes chargeable with knowledge of the decision from which he seeks to appeal. Hardy v. Zoning Bd. of Rev. of Town of Coventry, 113 R.I. 375, 379, 321 A.2d 289, 291 (1974). The time to appeal the grant of a building permit does not necessarily begin to run the moment the permit is issued or the construction commenced. Zeilstra v. Barrington Zoning Bd. of Rev., 417 A.2d 303, 308 (R.I. 1980). The ten (10) day filing requirement in §17.116.010 of the Newport Zoning Ordinance is limited to appeals from the Planning Board, Historic District Commission and decisions of the zoning officer. It does not apply to building permit appeals. The reasonable time for taking the appeal begins to run when Appellant becomes chargeable with knowledge that the Board's 2016 zoning approval was insufficient due to the landowner's failure to obtain a variance for lot coverage.

Mr. Deutsch's building permit was issued on October 24, 2019. The Appellant cannot state with certainty when construction commenced; however, the extent of the construction was not apparent until late December, 2019, when Appellant could see the framing of the structure and roof lines. Once Appellant noticed that a large structure was being built, it began investigating the basis for the construction. The initial review of the 2016 application raised questions about whether the landowner correctly calculated lot coverage and stated the correct lot size. Before filing its appeal, Appellants reviewed the zoning file for 1 Harbor View Drive. During the review it discovered the conflicting lot sizes. As a result of its investigation, Appellant concluded that the landowner may not have included structure overhangs in the lot coverage calculations. Appellant also reviewed the Newport Land Evidence. That research indicated the landowner misstated his correct lot size,² Appellant then filed its appeal. The timing of the appeal was reasonable based upon the complexities of the issues and erroneous information in the application.

Mr. Deutsch argues that the appeal is untimely and that Appellant is guilty of laches. This Board should not consider the landowner's laches argument for several reasons. The first is that laches is an equitable defense. This Board does not have equitable powers. Secondly, because

² Appellant's concerns about the landowner's misstating the building footprint was confirmed by the landowner's engineer.

laches is an equitable defense, it is limited to situations in which the party seeking this remedy presents itself to the court with ‘clean hands’. Sloat v. City of Newport ex rel. Sitrin, 19 A.3d 1217, 1222 (R.I. 2011). In this case, the landowner does not come before this Board with “clean hands”. The landowner acknowledges that it failed to include roof overhangs in his 2016 zoning petition. His failure to provide correct information on the application prohibits him from alleging he was damaged by the timing of the appeal.

Mr. Deutsch’s affidavit claims that by December 31, 2017 (sic), he was billed \$238,390.00 for the project. It is unreasonable to believe that he paid \$283,390.00 for the foundation and framing before the appeal was filed. Further, Mr. Deutsch’s actions after the filing of the appeal demonstrates he was not concerned about costs. On January 23, 2020, Mr. Weston notified the landowner of the appeal. Mr. Weston referenced Section 17.116.040 of the Newport Zoning Ordinance, which states:

“An appeal shall stay all proceedings in furtherance of the action appealed from, unless the zoning officer or the agency from whom the appeal is taken certifies to the zoning board of review, after an appeal shall have been duly filed, that by reason of facts stated in the certificate a stay would in the zoning officer's or the agency's opinion cause imminent peril to life of property. In that case, proceedings shall not be stayed other than by a restraining order, which may be granted by a court of competent jurisdiction on application thereof and upon notice to the official or agency from whom the appeal is taken on due cause shown.”

Mr. Weston’s notice advised Mr. Deutsch that further construction was stayed during the pendency of the appeal. Mr. Deutsch never sought a certificate from Mr. Weston or the Building Official that the stay would cause imminent harm to life of property, nor did he seek a restraining order in Superior Court. Mr. Deutsch, though his attorney, informed Mr. Weston that he was proceeding with further construction at his peril. Mr. Deutsch knowingly and intentional disregarded the stay and continued with construction. He cannot now claim that he suffered financial hardship due to the timing of the appeal.

Conclusion

The pending appeal was timely filed. It was filed within a reasonable time after Appellant discovered the size of the garage, investigated the 2016 zoning petition and approvals and reviewed the Newport Land Evidence records to ascertain the correct lot size. The landowner’s inaccuracies on the petition contributed to the appeal being filed in January

2020. Appellant needed to review and research the inconsistencies in prior application before reaching an educated understanding of the issues and filing a goof faith appeal. Appellant requests this Board reject the argument that the appeal is not timely.

WELOVENEWPORT, LLC.
By its attorneys,

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Certificate of Service

I certify that I caused to serve the above Memorandum, by electronic transmission, to the following parties:

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