

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION NO. 02-3071

M. HANIF BUTT,)
)
Plaintiff,)
)
v.)
)
ZONING BOARD OF APPEALS OF THE CITY)
OF SOMERVILLE, PHILIP J. ERCOLINI,)
GERALD MCCUE, HERBERT F. FOSTER, JR.,)
MARYANN HEUSTON, MARY JEKA, ESQ.,)
RICHARD J. DALEY, JR. and STUART J.L.)
GARDNER, as they are members of the ZONING)
BOARD OF APPEALS OF THE CITY OF)
SOMERVILLE, MASSACHUSETTS BAY)
TRANSPORTATION AUTHORITY and)
EMERALD DEVELOPMENT GROUP, INC.,)
Defendants.)

PLAINTIFF’S MEMORANDUM IN OPPOSITION
TO DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON THE ISSUE OF REAR SET BACK

In this action pursuant to General Laws Chapter 40A, Section 17, an abutter, Plaintiff, M. Hanif Butt (“Dr. Butt”) seeks to annul a decision (the “Decision”) by the Zoning Board of Appeals of the City of Somerville (“the Board”). The Decision granted to defendant Emerald Development Group, Inc. (“Emerald”) a special permit with site plan review, with conditions, to construct a new, 14-unit condominium complex at 343-349 Summer Street, Somerville, Massachusetts (“the Site”).

FACTS

Dr. Butt owns, resides and conducts his profession at 341 Summer Street, Somerville, Massachusetts, directly abutting the proposed project along the Site’s easterly side and rear lot lines. Butt Aff. ¶ 1; Morris Tr. 28, 65. The Complaint (par. 35) specifically alleged that “the minutes do not reflect any consideration of rear yard setback issues” and (par. 51) that “The

Board erred by failing to require that the Project obtain a rear yard variance.”

As developed in the pre-trial discussions and filings^{1/} in this case, the “rear setback issues” involve two distinct provisions of the Somerville Zoning Ordinance – only one of which Emerald has addressed in its motion. Those provisions are:

- Section 8.6.20 of the Ordinance, which states that, “[w]here a lot abuts an RA, RB or RC zoning district line, any structure (or portion of a structure) within thirty (30) feet of said district line shall be limited to three (3) stories and forty (40) feet in height.”
- Section 8.5 of the Ordinance, requiring a rear yard setback of 10 feet plus two feet for each above-ground story of the proposed building in the CBD District.

The former provision remains for litigation at trial, as Emerald has not addressed it and therefore cannot obtain summary judgment on it. Cf. Mass. R. Civ. P. 56 (burden on moving party to show that there are no disputed material facts and that it is entitled to judgment as a matter of law).

The only issue before the Court, therefore, is the application of Section 8.5's rear yard setback provision. If applied to the Project, this requires a rear yard setback of 18 feet: ten feet plus two feet for each of the four proposed stories of the building. Dr. Butt shows that the 42-foot northerly boundary line where the Site adjoins the plaintiff's property meets the definition of a rear yard under the Ordinance. See discussion below, quoting § 2.2.94 of the Ordinance.

The Project

Emerald applied for a Special Permit/Finding under Section 7.11.1.c of the Ordinance in order to construct a four-story apartment building with 16 units. Butt Aff. ¶ 6. Morris Ex. 12. The Site is in the CBD District under the Ordinance. Morris Ex. 12. It consists of “the assemblage of three contiguous, vacant parcels of land identified as 343, 345 and 349 Summer

^{1/} See Opposition to Motion for Partial Remand, pp. 4-5.

Street in Somerville and containing approximately 4,000± square feet, 6,250± square feet and 6,550± square feet, respectively, for a total of approximately 16,800± square feet. . . and is identified on the Somerville Assessors' plans as Lots 25-D-33, 34 and 35." Morris Ex. 10, p. 3. "Each of the three lots comprising the Property is rectangular. Assembled together, the Property is roughly rectangular in shape with the exception of the rear corner of lot 343." Id. The lots were acquired by the MBTA in the 1980's as part of a project to extend the Red Line rapid transit system to the Alewife Station. See MBTA Order of Taking #107, dated November 14, 1978, recorded in the Middlesex Registry (Southern District) at Book 13544, Page 185. Id., p. 4. The rear lot lines of each of the three lots run virtually parallel to the front lot line in three segments of 44', 42' and 42', respectively. Id.

The Project provides for less than 10 feet of setback between the proposed building and the rear lot line abutting the plaintiff's property. Morris Ex. 1.

On June 26, 2002, the Board voted to approve, with conditions the requested Special Permit/Finding with conditions. Complaint, Ex. A. On July 9, 2002, the Board filed the Decision with the Somerville City Clerk. The terms of the Decision are discussed in more detail below.

ARGUMENT

Emerald has the burden of proof at trial. Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618, 624 (1986)(as to applicant's burden of proof in a zoning appeal); Knott v. Board of Appeals of Natick, 12 Mass. App. Ct. 1002, 1004 (1981) (rescript) (same).

The proposal leaves only a 10' setback from Dr. Butt's property line at the rear, instead of the 18' required for a rear lot use. In this regard, Emerald repeatedly claims that the lot line running parallel to the street along Dr. Butt's property is not a rear lot line. That lot line is shown

on Exhibit A to Dr. Butt's affidavit (see Morris Exs. 1 and 2) as a 42.00 foot line running at a course of S61'54'32"E. As shown on that same plan, the Street runs N61'38'09"W – *i.e.*, essentially parallel. Morris Tr. 97, 126-127. This meets the definition of a “rear lot line” in the Somerville Zoning Ordinance, because Section 2.2.94 of the Ordinance defines a rear lot line as follows:

2.2.94. LOT LINE, REAR . *Any lot line which is parallel to or within forty five (45) degrees of being parallel to a front lot line, except for a lot line that is itself a front lot line. In the case of a lot having no street frontage or a lot of odd shape, only the one lot line furthest from any street shall be considered a rear lot line.*
NOTE See Figure 2H. (Emphasis added).

See Butt Aff., Exhibit C.

The ordinance's definition, by its plain language, applies to a line that is parallel to the “front lot line.” That definition is met here by the 42' boundary running north-south between the Site and Dr. Butt's property. The definition does grant special treatment in the case of a lot “of odd shape.” Emerald relies upon this exception in this case (Morris Tr. 126-127), but it does not apply for two reasons.

In the first case, Emerald's lot is not of odd shape. It is “roughly rectangular in shape with the exception of the rear corner of Lot 343.” Morris Ex. 10, p. 3; see Morris Tr. 96-97. Treating such a lot as a lot “of odd shape” is inconsistent with the plain language of that phrase, since a lot that is nearly rectangular is common, and is in no sense odd. Even the plaintiff's lot would be a lot of odd shape by Emerald's definition (Morris Tr. 132).

The Plaintiff agrees with Emerald's starting point: words in zoning ordinances should be given their ordinary meaning. Needham Pastoral Counseling Center, Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 33 (1990). See Murray v. Board of Appeals, 22 Mass. App. Ct. 473, 478 (The ordinance's meaning “is to be ascertained from all its terms and parts as well as

the subject matter to which it relates.”). Words are not to be plucked from their context, because “[a] general term in a statute or ordinance takes meaning from the setting in which it is employed. The literal meaning of a general term in an enactment must be limited so as not to include matters that, although within the letter of the enactment, do not fairly come within its spirit and intent.” Kenney v. Building Commission of Melrose., 315 Mass. 291, 295 (1943).

Having cited this principle, Emerald, surprisingly, does not refer to any definition of “odd” to support its position that its parcel is “of odd shape.” “Odd” means “[d]eviating from what is ordinary, usual, or expected; strange or peculiar.” The American Heritage College Dictionary (3d Ed. 1993). There is nothing “odd” about a mostly rectangular parcel, consisting of 3 smaller, rectangular lots. Nor is it odd to have a parcel with six sides, all at approximate right angles. Indeed, both the Plaintiff’s and Emerald’s parcel fit that description.

Emerald tries to equate “odd shape” with an “irregularly shaped lot.” The two concepts are different. An irregular lot is not odd if it is not strange or peculiar. For instance, a lot that is basically rectangular, with one exception, is not unusual. Even one case cited by Emerald (albeit on the inapposite question of “irregular” shape) appears to reflect one zoning board member’s view that the “usual” lot need not be perfectly rectangular, but may be “roughly rectangular”. Bell v. Zoning Board of Cohasset, 14 Mass. App. Ct. 97, 99 (1982). The lots at issue here are not “odd”.

The second flaw in Emerald’s argument is that it ignores the focus of the “odd shape” provision: to specify that “only the *one lot line furthest from any street* shall be considered a rear lot line.” The provision is designed to address the situation where the lot’s shape may make it unclear or ambiguous which line is to be treated as the rear line – for instance, if the lot doubles

back on itself so that there are two or more lot lines (other than the front lot line) parallel to the street. In such a case, the rear lot line is the one lot line furthest from a street.

To accept Emerald's position would permit absurd results, which must be avoided. See Marinelli v. Board of Appeals of Stoughton, 440 Mass. 255, ___ (2003)(rejecting an inequitable and irregular result where the Legislature had not clearly prescribed that result). If Emerald is correct, then a six-sided lot could have virtually no rear lot line, as long as one small side was farther away from (and parallel to) the street than the rest of the lines. On such a lot, the neighbors would be subjected to intrusion from buildings and structures, without restriction, except on that one small side. A clever developer might even be able to create such a lot, by subdivision or purchase, so as to evade the Ordinance. Such a self-defeating construction of the Ordinance must not be adopted.

Moreover, the facts of this case show how far Emerald's argument is removed from the Ordinance's purpose and intended application. None of the three original lots making up Emerald's parcel is even arguably of "odd shape." Each has a rear lot line, including the lot (343 Summer Street) adjacent to Dr. Butt's property. It cannot be disputed under the Ordinance that each lot had a "rear lot line" prior to being conveyed to Emerald and that any building on those lots would have to comply with the rear yard setback, including the rear yard setback from Dr. Butt's property. The purposes of the ordinance's rear lot line provisions, to limit the density of development, allow light, air and some rear yard area, were served.^{2/} To hold that a mostly

^{2/}Among the purposes of the Zoning Act are securing safety from fire, panic and other dangers and preventing overcrowding of land. See Cross v. Planning Board of Chelmsford, 345 Mass. 618 (1963). Setback requirements serve these purposes. Brett v. Building Commissioner of Brookline, 250 Mass. 73, 78 (1924). Setbacks address impacts to abutters such as fire safety, view, avoidance of undue crowding, preservation of open space between buildings, light, etc. Id. at 78. These are the very reasons that courts have long upheld zoning regulations prescribing setbacks in the front, sides and rear of a dwelling. Id.; Wood v. Building Commissioner of

rectangular parcel, consisting of former rectangular lots, is “odd” would defeat all these purposes. Nothing in the language or purpose of the Zoning Ordinance permits eliminating a rear lot line simply by combining lots.

Indeed, the three lots making up Emerald’s parcel should be treated as separate lots for purposes of construing the rear lot line provision. The definitions in the Somerville zoning ordinance are clear on the point. A lot line is “[a] line that divides one (1) lot from another, or from a street or other public space.” Ordinance, section 2.2.92. A “lot” is :

A single parcel of land under one ownership and undivided by a street or public way, with definite boundaries as indicated by recorded deed or plan and used or set aside and available for use as the site of one or more principal and accessory uses. . . .

Ordinance, section 2.2.85. In this case, the MBTA’s Order of Taking and associated plan meets the requirement and shows 343, 345 and 349 Summer Street as separate lots. A Parcel is defined as “A part or portion of land.” Ordinance, section 2.2.114.^{3/}

Finally, Emerald’s attempt to cite the diagram in the Ordinance accompanying the definition in Section 2.2.94 does not help it at all. Emerald has admitted that drawing does not illustrate the configuration of its lot in this case (Morris Tr. 130).^{4/} On the diagram in the

Boston, 256 Mass. 238 (1926); Siegemund v. Building Commissioner of Boston, 259 Mass. 329; Slack v. Inspector of Buildings of Wellesley, 262 Mass. 404. See Gorieb v. Fox, 274 U.S. 603 (1927).

^{3/} These definitions apply “[f]or the purpose of this Ordinance and unless the context of usage clearly indicates another meaning” The context of the word “lot” does not otherwise require; indeed, “the words ‘lot,’ ‘land,’ or ‘premises,’ shall be construed as though followed by the words ‘or any portion thereof’ Lot 343 is a “portion” of the site even if considered as a whole and therefore, as a rectangular lot or portion thereof, it is not of odd shape.

^{4/} The drawing more closely resembles Dr. Butt’s property, which has two lot lines parallel *to each other* and to the front lot line, in which case, only the parallel line farthest from the street is a rear lot line. That is what the Ordinance means to address, not the situation where the two rear lines are parallel to the front line, but not to each other, as on Emerald’s lot.

Ordinance, the only lot line that is parallel to a front lot line is listed as a “rear lot line.” Presumably, Emerald relies upon a “side” lot line shown on that drawing that is parallel to a street, *but not to the lot’s front lot line*. In this case, by contrast, the contested rear lot line is parallel to Emerald’s front lot line. The critical distinction between this case and the drawing is that, in the drawing, the “side” lot line is not parallel to the “front lot line.”

Put more simply, the Ordinance’s drawing shows a “side” lot line only where there is a “rear” lot line behind it. This is understandable, for it makes no sense to call something a rear lot line when there is already a rear lot line behind it. In Emerald’s case, however, there is no rear lot line behind the 42' north-south boundary. That boundary is a true “rear” lot line

In short, the case law supports vacating a special permit where necessary variances have not been obtained. Cox v. Board of Appeals of Carver, 42 Mass. App. Ct. 422 (1997); Guiragossian v. Board of Appeals of Watertown, 21 Mass. App. Ct. 111 (1985), rev. denied, 396 Mass. 1105 (1986). Thus, Emerald’s Special Permit should have been denied. Its motion for summary judgment should also be denied.

CONCLUSION

For the above reasons, the motion for summary judgment should be denied.

M. HANIF BUTT,

By his attorneys,

Arthur P. Kreiger, BBO #279870
Douglas H. Wilkins, BBO #528000
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge, MA 02141
(617) 252-6575

Dated: February 26, 2004
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CERTIFICATE OF SERVICE

I, Douglas H. Wilkins hereby certify that I served Plaintiff's Trial Memorandum by causing a copy to be mailed to counsel listed below by first-class mail on this ___th day of July, 2003:

Mark A. White, Esq.
O'Brien & White, P.C.
50 Congress Street, Suite 936
Boston, MA 02109

Francis X. Wright, Jr., Esq.
Assistant City Solicitor
City Hall, Law Department
93 Highland Avenue
Somerville, MA 02143

Douglas H. Wilkins