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**DECISION 11-14**

TOWN CLERK, ACTON

**DECISION ON THE PETITION OF OLD MILL DEVELOPMENT TRUST, 40 SUDBURY ROAD (AKA 65 POWDER MILL ROAD)**

A public hearing of the Acton Board of Appeals was held on Monday, November 7, 2011 at 7:30 PM in Room 126 of the Acton Town Hall on the petition of Old Mill Development Trust for VARIANCES from Section 1.3.1 and Section 5 Table of Standard Dimensional Regulations of the Zoning Bylaw to allow the building on the property access from the rear of 65 Powder Mill Road by way of an easement. The subject property is located at 65 Powder Mill Road. Map J3/Parcel 59 and 59-5.

Present at the hearing were Marilyn Peterson, Member; Richard Fallon, Alternate Member; Francis Mastroianni, Alternate Member; Scott Mutch, Zoning Enforcement Officer; and Cheryl Frazier, Board of Appeals Secretary. Also present at the hearing were the petitioner, Leo Bertolami along with his Attorney Richard Nylén, and his Engineer Mark Donohue of Acton Survey and Engineering.

Marilyn Peterson opened the hearing and read the contents of the file. Included in the file was a memo from Roland Bartl, Town Planner, described the history of this particular parcel and its uniqueness in regard to its buildability.

Attorney Nylén said that his client, Mr. Bertolami, is seeking a waiver from the frontage and access requirements of the zoning bylaw on the aforementioned property. Mr. Bertolami currently has a Site Plan Special Permit application pending before the Board of Selectmen for a building in the high southeast corner of the parcel with access via an easement from Sudbury Road. The site plan hearing was continued to December 19, 2011 to await the outcome of the Variance petition. The petitioner is requesting two variances, one from Section 1.3.1 to seek relief from frontage access requirements and the other is from the requirement of Section 5 Table of Standards that there has to be 200 feet of frontage. A site plan special permit was granted in 1999 for essentially the same kind of building in the same location. It was renewed and amended in early 2004 but was not exercised within the 2-year permitted time.

Attorney Nylén said that when discussions began prior to the Site Plan review, Scott Mutch, Zoning Enforcement Officer, and Roland Bartl, Town Planner, pointed out that the entire area in front of the lot is wetlands and therefore inaccessible to the site. Attorney Nylén said that this created a hardship which was supported in a memo from Mr. Bartl. It is the only lot on Powder Mill Road that bans the owner from entering from Powder Mill Road. He added that in terms of it being consistent with

zoning, it's a commercial building and they meet all other requirements. He said that it would not derogate from the public good.

Mark Donohoe of Acton Survey and Engineering said part of the reason they stopped site work after the last site plan approval was due to a neighbor dumping water on the site which caused extreme erosion. Mr. Donohoe recommended at that time that Mr. Bertolami not go forward with his building plans until that issue was resolved. It has now been resolved. Mr. Fallon asked what the building would be used for. Mr. Nysten said it would be a principal use. The Site Plan with the Selectmen is on hold to await the outcome of the variance petition. The continued hearing will be held on December 19, 2011.

Scott Mutch, Zoning Enforcement Officer stated that Mr. Nysten explained it well. It's the only buildable part of the site and he thinks it's warranted. Mr. Nysten added that in their earlier special permit they provided a guarantee to the Conservation Commission that the wetlands would be protected. They built the canoe landing for the town. Mr. Fallon said the building is so far away it won't impact the canoe landing. The improvements would be in the purview of the Site Plan.

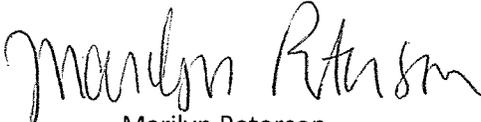
The Board of Appeals, after considering the materials submitted with the Petition, together with the information developed at the hearing, finds that:

1. The Petitioner seeks a VARIANCE from the requirements of Section 1.3.1 of the Acton Zoning Bylaws requiring access through legal frontage. The Petitioner seeks relief from the Bylaw in order to build an access road to the site through an easement from Sudbury Road.
2. The Petitioner seeks a VARIANCE from the requirements of Section 5 Table of Standard Dimensional Regulations for 200 feet of frontage in the Powder Mill District on Powder Mill Road. The Petitioner seeks relief from the Bylaw in order to build an access road to the site through an easement from Sudbury Road.
3. An easement was granted to Old Mill Development Trust in 1978 that provides alternative access to the parcel through Sudbury Road without filling of the wetlands.
4. The lot is affected by shape, topography, and soil conditions in a way that is unique among properties in the Powder Mill (PM) zoning district. Along the Assabet River many properties are affected by the river's flood plain. However, no other property in the PM has such a wide swath of wetland separating the frontage from the buildable portion of the lot that prohibits access. Therefore, a literal enforcement of the Zoning Bylaw would involve substantial hardship to the Petitioner.
5. The VARIANCES may be granted without substantial detriment to the public good.
6. The VARIANCES may be granted without nullifying or substantially derogating from the intent and purpose of the Zoning Bylaw.

Therefore, after reviewing the available materials and based upon the above findings, the Board voted unanimously **3-0** to **GRANT** the **VARIANCES**.

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws, Chapter 40A, Section 17, within 20 days after this decision is filed with the Acton Town Clerk.

**TOWN OF ACTION BOARD OF APPEALS**

  
Marilyn Peterson

  
Richard Fallon

  
Francis Mastroianni

Effective Date of Variance: No Variance or any modification, extension or renewal thereof shall take effect until a copy of this decision has been recorded in the Middlesex County South District Registry of Deeds. Such a decision shall bear the certification of the Town Clerk that 20 days have elapsed after the decision has been filed in the Office of the town Clerk, and that no appeal has been filed, or that if such an appeal has been filed, it has been dismissed or denied.

Expiration of Date of Variance: In accordance with Massachusetts General Laws Chapter 40A, Section 10, if the rights granted by this Variance are not exercised within one year from its date, the Variance will lapse. A six-month extension of the rights under this variance may be applied for by filing a written application for an extension before the expiration of the one-year period.

Dated:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on December 8, 2011.



Cheryl Frazier, Administrative Assistant, Board of Appeals