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By Karen Wilber/Assistant Town Clerk at 11:16 am, Mar 07, 2023



# TOWN OF NORTHBOROUGH Zoning Board of Appeals

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## Northborough Zoning Board of Appeals

### Zoom Meeting Minutes

December 2, 2022

Approved February 28, 2023

In accordance with the provisions of MGL Chapter 40A, Section 9, the Northborough Zoning Board of Appeals held a public meeting on Friday, December 2, 2022 at 9:00am for discussion of David Cooley's request to withdraw his application without prejudice for a Variance for reconstruction of the single family structure on the property located at 80 Main Street, Map 64, Parcel 23, in the Main Street Residential Zoning District. Pursuant to Chapter 22 of the Acts of 2022, An Act Relative to Extending Certain COVID-19 Measures Adopted During the State of Emergency, signed into law on July 16, 2022, this meeting was conducted via remote participation. No in-person attendance by members of the public was permitted.

**Members (Remotely):** Paul Tagliaferri, Chair; Fran Bakstran, Mark Rutan, Brad Blanchette, Suzy Cieslica; Alternates Jeff Leland and Jeff Gribouski

**Staff (Remotely):** Laurie Connors, Planning Director

The meeting opened at 9:02am.

Chair Tagliaferri explained that at last week's ZBA meeting, the board made a decision with regard to 80 Main Street. The next day, the Applicant requested to withdraw the application without prejudice, which the Chair understood must be done during a public hearing. Unless a written decision is filed within 14 days, the application is deemed approved with constructive approval. Town Council's opinion was that logistics made that difficult with the deadline approaching. Because of that, this board has two options: they can proceed as they were and not grant the request of withdrawal or they can begin the process for a new public hearing. The Applicant would need to agree to an extension and a new public hearing would need to occur. By not reversing their process, they leave themselves open to interpretation that the legally binding decision was not made on time. If they allow the withdrawal, the board is essentially saying this withdrawal supersedes the legally binding decision made last Tuesday, which the Chair does not agree with. Town Council said this is an uncommon occurrence which leaves a lot of gray area; to reduce that ambiguity, the proper process is to proceed backwards.

Chair Tagliaferri continued. As a reminder, the framework for making a decision with regards to withdrawal does not exist within Chapter 40A; there is no criteria that exists for granting or not granting this request; unlike a variance or special permit where there are multiple criteria, their decision is based solely on the board's judgment. He felt the board should continue on the current path and not allow withdrawal. This case has been before the board since October, the Applicant requested the hearing be closed after the initial October hearing. There is an opportunity for appeal once the decision has been filed.

Mr. Rutan said he respectfully disagreed about the complexity of the withdrawal. They have handled withdrawals in the past although it was unusual to do so after a decision has been reached. He believed that the Applicant was in agreement to not take it further, that this is a withdrawal. That being said, he

wasn't sure the Applicant would get a different decision but he didn't want to prejudice themselves to not allow withdrawals because of the requirement (that they hold the hearing, unwind their decision and so on), if they want to do a withdrawal, they should just simply make it a withdrawal, vote on it, and have that supersede the previous decision.

Ms. Bakstran wished to give the Applicant an opportunity to see if he could meet the additional criteria that was brought up after the closing of the public hearing. She didn't want him to have to wait two years, but, to Mr. Rutan's point, there's no guarantee that the decision would not be the same. She was amenable to taking the necessary steps in order to withdraw the decision without prejudice.

Mr. Leland said, following Mr. Rutan and Ms. Bakstran, he agreed, he knew of two similar instances in the past, and in both of those cases, he didn't believe the Applicant returned, but that it allows them that opportunity. He'd been under the impression that this application was heading to an approval, and he was surprised with the outcome. He was in favor of granting the withdrawal.

Ms. Cieslica said she wasn't a voting member of this board until recently and would have voted against any withdrawal after a decision has been made; there is an appeals process if the Applicant does not agree with the decision made. She said that ignorance of the law is not an excuse in any area of the law, the Town's bylaws are easily accessible. She understood the purpose of going through a draft decision but didn't think that dictated how they were to vote.

Ms. Connors explained 'constructive approval' at Mr. Blanchette's request. A vote can be taken to allow withdrawal without prejudice and instead of a decision, a withdrawal letter would be filed with the Town Clerk and the application would not be constructively approved. Filing a withdrawal enables them to refile within the two-year window. Voting 'no' would not allow the Applicant to withdraw, the decision would be filed, his recourse would be to either appeal the decision or to wait the two-year period of time, refile the same application or he could file a substantially different application within the two-year window. It then would have to go to the Planning Board to determine that it wasn't a duplicate application and if so, it could then be filed with the ZBA.

Mr. Leland thought that Northborough was getting very litigious. He agreed with Ms. Cieslica that they need to follow the right formula. He wasn't sure that he would vote differently on the same application but thought that not allowing this could set them up for further appeal and he hoped to avoid it if possible.

Ms. Bakstran said that it was simple, do they want to give him an opportunity within the next two years to try again and maybe meet the criteria or not, it is just giving him another opportunity without having to wait a lengthy process. Town Council provided advice that they are allowed to go this route.

Ms. Cieslica felt that doing so would set a precedent.

Chair Tagliaferri said there is a gray area where they have this legally binding decision and the 14-day deadline to file it by, now they are making a judgment that the withdrawal that would occur in between the time between making a decision and when it is filed supersedes that of their legally binding decision; that is the part he disagrees with. To Mr. Leland's point about the Applicant having to wait the two years to refile, yes, to refile the same application, he would have to do so but if he makes material changes to the application, he can file within that two-year time frame.

Ms. Bakstran said this board has the authority to grant a legally binding decision to allow him to withdraw without prejudice, it is the opinion of Town Council that it is permissible for this board to do that; gray area exists in the law. They are simply providing this applicant an opportunity to try again within a two-year period...it's allowed and in this case, she believed they should allow it.

Mr. Leland said that if the board grants the withdrawal and the Applicant comes back with substantially the same thing without some material changes, the decision is going to be the same and it would be a waste of his time and theirs. He said that he has doubts whether or not the Applicant can overcome the hurdles with the existing plan but he agreed with the comments made by Ms. Bakstran.

Mr. Rutan said this board has had long discussions when a proposal has come forward, and by granting him a withdrawal, it cleans up the issue. He didn't see that the Applicant would come forward with the same proposal, they don't have to have him legally challenge their decision, he was in favor of withdrawal.

Mr. Leland asked Ms. Connors about her comment that an application would have to go in front of the Planning Board to determine whether it's substantially different, and asked if she would explain.

Ms. Connors explained the 'Repetitive Petition Procedure', specified in Chapter 40A. The Applicant would have to file both the original and new applications with the Planning Board, which would then determine whether it qualified as such or if it was a substantially different application. If it was determined that it was not a repetitive petition, the ZBA could accept the new filing despite being within the two-year period.

Ms. Connors clarified the next steps. Essentially what is being voted on today is whether the Applicant will be allowed to withdraw his application. In order to be within the context of the public hearing, an extension would be needed from the Applicant allowing this board to go beyond the 14 days to file a decision and the 100 day limit for filing that decision. Relief would be needed from both of those deadlines as it is impossible within that time frame to meet the advertising deadline. If the board decided to vote on the withdrawal today, that is also an option. She would file the letter submitted by the Applicant with the Town Clerk which would stop the clock and there would be no constructive approval.

Ms. Cieslica asked if, otherwise, they can just not vote on it and let their decision stand? Ms. Connors said that they could vote no on the request to withdraw without prejudice. After the decision was signed by the Chair, it would be filed with the Town Clerk, then the Applicant has 20 days to appeal.

Mr. Rutan made a motion to allow the Applicant to withdraw his application without prejudice for the property at 80 Main Street. Ms. Bakstran seconded the motion. Roll call vote was as follows: Mr. Rutan—aye; Ms. Bakstran—aye; Ms. Cieslica—nay; Mr. Blanchette—aye; Chair Tagliaferri—nay. Major vote passed in favor of withdrawal of the application without prejudice.

Mr. Leland said he appreciated the hard work and willingness on the members' behalf to be able to have such discussions even if they are of differing opinions.

Ms. Bakstran made a motion to adjourn. Mr. Rutan seconded the motion. All were in favor.

Meeting adjourned at 9:37am.

Respectfully Submitted by

Michelle Cilley, ZBA Board Secretary