

BOARD OF ZONING APPEALS

MEETING MINUTES

Monday, January 16, 2020

Town Office

6:00 p.m.

I. CALL TO ORDER

Chairman William Harvey convened the meeting of the St. Michaels Board of Appeals (BOZA) at 6:05 p.m. in the meeting room of the Edgar M. Bosley, Jr. Municipal Building, 300 Mill Street, St. Michaels, Maryland. Also present were board members John Hunnicutt and Douglas Rollow, and Zoning Officer Kymberly Kudla. Chairman Harvey said that this meeting was a continuation of the December 13th meeting, and the first order of business was approval of minutes for the December 9, 2019 meeting of the St. Michaels Board of Appeals.

II. APPROVAL OF MINUTES – December 9, 2019

As there were no changes or comments, Chairman Harvey called for a motion to approve the minutes. Member Hunnicutt made the motion to approve the December 9, 2019 minutes. Member Rollow seconded it, and the motion passed on a voice vote of 3-0 in favor.

III. ELECTION OF OFFICERS

Chairman Harvey said now that John Hunnicutt had been appointed for another three-year term, the board would elect officers. Member Rollow made a motion that the current slate of officers remain in office unless members thought otherwise. Member Hunnicutt said he agreed with Member Rollow that the current officers remain – William Harvey as Chairman and Doug Rollow as Vice President. Member Hunnicutt then seconded the motion, which passed on a voice vote of 3-0 in favor.

IV. NEW BUSINESS

BOZA 598-20: Appeal by property owner Thomas Byrne of the determination of the Zoning Inspector, per Section 340-108 of the Code, that a duplex is not permitted as proposed at 102 Locust Street

Chairman Harvey explained that this matter was an appeal and not a request for a variance or special exception, and that the order of presentation for hearings is specific. Chairman Harvey said seven points would be addressed – case introduction, followed by the appellant's testimony and evidence, including witnesses, followed by the Town Zoning Inspector's testimony and evidence including incorporation of the file and record, followed by any other testimony or evidence by any person or entity whose rights are impacted by this appeal. Chairman Harvey noted that there will then be time for summary statements by all parties, after which the public hearing will be closed, and the Board will begin its deliberations.

Member Rollow noted for the record that Attorney Parker had represented him in the distant past, but does not currently represent him, nor does any member of Mr. Parker's firm represent him. There were no other disclosures.

Chairman Harvey said this proceeding would follow the Rules of Procedure adopted by the Board of Appeals on December 22, 2008 and any issues not raised under those rules would be cited under Roberts Rules of Order, and as Chairman he would decide all points of order, objections or procedure, subject to the Board's Rules of Procedure unless otherwise directed by a majority of the Board members present. Chairman Harvey said the exhibits to be entered into the record were Exhibits 1-14, plus the sign-up sheet as Exhibit 15, and the exhibits are incorporated into the record by the Chairman's reference. Attorney Parker asked that the Appellant's Memorandum of Law he had submitted be included as an exhibit in the record. Chairman Harvey noted the Appellant's Memorandum of Law as Exhibit 16. Chairman Harvey then swore in all those present who wished to testify, including Zoning Officer Kymberly Kudla, Thomas Byrne, Marie Martin, Jim Fulton, John Dietrich, and Jefferson Knapp. Chairman Harvey asked all witnesses to state their full name and mailing address for the record when testifying. Chairman Harvey said this meeting was a public meeting, in accordance with the Maryland Open Meetings Act and was being recorded. He asked that those testifying wait to be recognized and avoid talking over each other to facilitate any subsequent transcription.

Chairman Harvey also stated other rules of procedure under Chapter 340-73 and noted that the hearing was quasi-judicial. Chairman Harvey then stated Case No. 598-20 involves an appeal of the Zoning Inspector's interpretation that the appellant's property located at 102 Locust Street does not meet the definition of dwelling, duplex found in 340-108 of the Town Code. Chairman Harvey called upon the appellant's attorney, Burry Parker of Parker Counts in Easton. Mr. Parker said there is nothing in the Code that says side-by-side dwellings must face the same street and does say that side-by-side dwellings can share a "party" wall. Mr. Parker said Mr. Byrne's proposed units share a party wall. Mr. Parker then introduced Mr. Thomas Byrne. Mr. Byrne identified a current photo of his property and submitted it to Chairman Harvey for inclusion in the exhibits of record. Mr. Byrne gave a history of his work on historic homes in St. Michaels and decided to buy 102 Locust Street to restore it as a duplex. Mr. Byrne said he met with the Town's former Zoning Inspector, who concluded she saw no problem with his restoring the property as a duplex. Mr. Byrne said on the basis of that meeting, he made a purchase offer on the property. Mr. Byrne said work began in 2018 and continued through mid-2019, at which time he received an email from the former Zoning Inspector's successor, Kymberly Kudla, saying that she did not think a duplex was allowed on the property. Mr. Byrne said that work has stopped and he has not moved forward with an application for special exception until this appeal is resolved. Mr. Byrne said his units have ground floor entrances, with front and rear sections that are two and a half stories tall, and a single story that joins the two sections. Mr. Byrne added that the party wall was in the middle of the single-story adjoining section. Mr. Byrne said the property had appropriate parking for two dwellings and density was adequate for the square footage. Mr. Byrne concluded by saying that if the former Zoning Inspector had said "no" or "maybe" in his conversation with her, he would not have proceeded.

Mr. Parker said he had no other questions for Mr. Byrne and no other direct witnesses at this time, but he intended to cross-examine Ms. Kudla later in the proceeding. Member Rollow had a question on a 3 ½ ft. measurement he saw on the plat, and Mr. Byrne said that was the setback of the property as it fronts on Locust Street. Member Hunnicutt asked Attorney Parker what he thought the Code allowed or prohibited regarding duplex dwelling units. Attorney Parker said it allows duplex dwelling units adjoined by a common/party wall running ground to roof, which he

said constitutes the meaning of “side-by-side.” Attorney Parker also said the code permits, unlike other jurisdictions, dwelling units one on top of the other separated by a common ceiling/floor division. Attorney Parker said he didn’t think the code prohibits anything, as long as the two units are separated by a common wall or ceiling, and there is nothing in the code that says how the entrances to the two units must be configured. There were no further questions.

Chairman Harvey asked Ms. Kudla if she had any comments. Ms. Kudla said she had no other comments beyond her written staff report she had submitted.

Chairman Harvey then called for any other testimony. Jefferson Knapp of Miles Avenue said he was representing the Planning Commission. Mr. Knapp said it was the Planning Commission’s position that front-to-back duplexes don’t meet the standards for trash removal and emergency vehicle access and quality of life in that there is no back yard for one of the units. Mr. Knapp said that while the code does not specifically say you can’t do front-to-back units, it is the Planning Commission’s opinion they are not allowed and will not be allowed in the revised code. Mr. Knapp said that the Planning Commission only had a plat for review of the project, and there were no house plans that indicated a front- to-back duplex dwelling unit was planned. Chairman Knapp said that if this project came back to the Planning Commission for review as a special exception, it was his opinion that it would not be favorably received. Chairman Harvey clarified Mr. Knapp’s comments and noted that no application for special exception has been filed at this point, which Mr. Knapp acknowledged. Mr. Fulton of Cherry Street said his property adjoins 102 Locust Street, and while acknowledging Mr. Byrne’s work on other properties in town, he did not believe that two units at 102 Locust Street would be a welcome change for a primarily single-family neighborhood. Mr. Fulton said he also thought that such re-engineering of historic buildings would set a precedent and take the town in an undesirable direction from a development point of view. Marie Martin of Cherry Street said her back yard adjoins 102 Locust Street and that she agreed with Mr. Fulton’s comments. Ms. Martin said that she did not favor historic buildings being turned into duplexes and that it would be detrimental to the atmosphere of the Town. Mr. John Dietrich of 104 Locust Street said he was the next-door neighbor to the property and he commended Mr. Byrne for the work he has put into the property, that he had been properly and continuously notified of the work being done and was well aware from the beginning that the structure would be a duplex. He said he supported the restoration and the rest of the property was extremely attractive. He added that this property would never have been purchased or renovated unless it could be made into a duplex and he looked forward to having two new families in Town as neighbors. There were no questions.

Chairman Harvey read for the record comments from other neighbors not present or parties to the hearing. He said that Phil Kennedy of Cherry Street, Missy and John Blevins, John Voss, Gracie Derrick, and Jennifer Healy had written in support of the duplex project. As there were no other comments, Chairman Harvey called for cross-examination, beginning with the Appellant. Attorney Parker asked Ms. Kudla if she had had any other occasion other than this case to interpret or apply the definition of a duplex dwelling in the town. Ms. Kudla said no, she had not. Mr. Parker asked what materials Ms. Kudla had used to assist in making a determination, and did she consult material beyond the Code itself. Ms. Kudla said her reference was only the Code. Mr. Parker asked if Ms. Kudla could cite any section of the Code that require the two duplex units on the same level to face the same lot line or street. Ms. Kudla

responded no. Mr. Parker asked if a duplex in St. Michaels under Ms. Kudla's definition be allowed on a corner lot with one facing one street and one facing another street. Ms. Kudla responded that her determination would be based on the front and rear location of the unit. Mr. Parker asked whether there was any requirement in the Code that one-over-the other duplexes face the same direction. Ms. Kudla said based on the Code, no. Mr. Parker asked if the rules change for units separated by a party wall facing the same direction. Ms. Kudla answered yes. Mr. Parker referenced the exhibits, noting that there was a floor plan of Mr. Byrne's property labeled front unit/rear unit and did that have any significance for the Zoning Inspector. Ms. Kudla said that that exhibit was noted a couple of days ago, and not at the time of her determination and she did not know who labeled the units. Mr. Parker asked if it was Ms. Kudla's position that units in a duplex structure, divided by a common wall and running ground to roof cannot be side-by-side. Ms. Kudla said they would have to be side-by-side. Mr. Parker said he had nothing further.

Chairman Harvey said that Ms. Kudla now had the right to cross-examination. Ms. Kudla had no cross-examination. Chairman Harvey asked Mr. Knapp if he had any cross-examination for either party. He responded no. Chairman Harvey asked the same question of the other parties. Mr. Fulton, Ms. Martin, and Mr. Dietrich all responded that they had no cross-examinations.

Chairman Harvey then called for summary statements. Member Rollow had a question for Attorney Parker, asking what, in his view, was the standard of review here. Mr. Parker said in this case, the decision was in error under the law and not consistent with the statute; it is a question of interpretation of the law. Attorney Parker had a statement in rebuttal for statements made by Jeff Knapp. Attorney Parker referenced Mr. Knapp's statements regarding property access for trash and emergency vehicles. Mr. Byrne showed photographs showing appropriate access for both units from the assigned driveways, and access for emergency vehicles was the same as for the building prior to his purchase of it. In response to a question from Member Rollow, Mr. Byrne said the footprint of the structures had remained the same.

Mr. Parker then made his summary remarks, stating that the Zoning Inspector has made a determination in error that is not consistent with the purpose, intent or the language of the statute, looking not only at the language of the definitions of duplexes, but also at the other section of the Code dealing with duplexes as well as some of the provisions of the Code dealing with lot orientation, which has nothing to do with structure orientation. Mr. Parker said the key here is understanding that the term "side-by-side" in common English and as used in this case along with the phrase "side by side or one above the other" tells us that side by side means joined at the same level alongside or connected by the party wall as we've described. Other jurisdictions went on to deal with orientation, but St. Michaels did not do that. He continued that the Zoning Inspector could not add on language to the ordinance that the Town Commissioners didn't intend and didn't put in there. If the Town wants to re-write the definition of duplex dwelling, they can do that, but that it is not in the Code now. Mr. Parker said the Zoning Inspector cannot rely on definitions that don't exist. Ms. Kudla said she had no summary statement. Mr. Knapp had no summary statement. Mr. Fulton said he hoped that the Board would consider the precedent being set for the Town and what happens the next time someone wants to subdivide a single-family home. Mr. Dietrich said if the decision sets an undesirable precedent, then it is up to the Town to re-write the law, and in this case, Mr. Byrne should not be penalized for an omission in

the law. Mr. Dietrich concluded that both units are more than adequate as single family dwellings. As there were no additional comments, Chairman Harvey closed the public portion of the hearing and opened deliberation of the members with questions, beginning with Member Hunnicutt. Member Hunnicutt asked Attorney Parker to reaffirm for him that the Code is vague in this area, as to what is prohibited or permitted. Mr. Parker said he doesn't believe the law is vague or ambiguous. He said he believed that the definition of side by side means "divided by a common wall and nothing more – it doesn't say orientation, or which direction each unit has to face, and the Code does say you can have duplexes that are on different levels, i.e., "or one above the other," in St. Michaels. He said he doesn't think that is ambiguous. Member Hunnicutt asked Mr. Parker if, in his view, the ordinance prohibits anything in particular. Mr. Parker said the ordinance says nothing other than what it does allow, and not what is prohibited. Member Rollow questioned Mr. Parker's choice of case law. Mr. Parker said the definition of "side-by-side" does not extend beyond that and does not address orientation.

Chairman Harvey addressed the door in the photo noted as Exhibit 17. Mr. Byrne identified the door as the front door of the unit facing Locust Street and its side entrances, and he also identified the front door and side entrances of the back unit. Chairman Harvey had questions regarding the lot lines on the three plats identified in the exhibits. Chairman Harvey then asked how Mr. Byrne was harmed by the Zoning Inspector's determination the subject property does not meet the Town's definition of a duplex. Mr. Byrne replied that he would not have purchased the property or done the renovation project if he knew that the rules would change mid-stream. Mr. Byrne agreed that "economic waste" would be a harm. Chairman Harvey asked what Mr. Byrne's intent was for the property. Mr. Byrne said he intended long term rental of two units, which he believed was a better fit for the neighborhood and its culture than one massive unit. Chairman Harvey asked if the Zoning Officer's interpretation of duplex had deprived him of all economic use of the subject property. Mr. Byrne's answer was no, and he confirmed for Chairman Harvey that he would have to rent the property as one giant unit. Chairman Harvey said he had no further questions, and there were no additional questions from the other members.

Chairman Harvey asked if the members had a motion prior to deliberations. Member Rollow made a motion that the Board reverse the decision of the Zoning Inspector. Member Hunnicutt seconded it, which was followed by discussion. Member Hunnicutt said he thought the Code is ambiguous and the applicant had an understanding, whether unfounded or not, and Member Hunnicutt said he believed that the Board doesn't have a basis to affirm the decision of the inspector because there is no explicit prohibition in the language of the Code. He mentioned "vagueness" again, and noted he is not unsympathetic to the Planning Commission and other testimony, but he was not sure there were grounds for the board, given the language of the Code, to do anything but support Member Rollow's motion. Member Rollow said the Board had listened to opinions on both sides of this issue, and what the Zoning Inspector did or did not do is not an error standard, but rather a question of interpretation of the law, which he thought means that her decision could be reasonable but not necessarily one that the board would reach. Member Rollow said that given the public sensitivity, he thought the case should get the ventilation it should have by going to the Planning Commission for ruling on special exception.

Chairman Harvey said he opposed the motion citing Maryland case law, concluding, in his opinion, the definition of a duplex as set forth in St. Michaels Code Section 340-108 is clear and

unambiguous, and that the decision of the Zoning Inspector was reasonable, does not conflict with the terms of the Code, and entitled to deference. Chairman Harvey said the appellant’s plan to convert the structure at 102 Locust Street into a front and rear unit does not conform to the duplex definition in Section 340-108, and the appeal should be denied and the motion should be defeated in keeping with the language in Section 340-108.

Member Hunnicutt observed that the ordinance says “may”; it may be side-by-side or one-above-the-other; “may” means preferred but not prohibited, it “may” be something else, and thus the ordinance does not conform precisely with Chairman Harvey’s argument.

Member Rollow complimented Chairman Harvey on his logic and his scholarship. Chairman Harvey asked for any further discussion on the pending motion. There being none, Chairman Harvey called for a vote. The motion passed on a voice vote of 2-1 in favor, as follows:

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| Douglas Rollow | Aye |
| John Hunnicutt | Aye |
| William Harvey | Nay |

Chairman Harvey said the motion carries, and the Zoning Inspector’s determination of duplex has been reversed. Chairman Harvey then closed the case.

V. Adjournment

The meeting was adjourned at 7:40 p.m.

Minutes approved by 3:0 vote in favor on 18th day of May 2020.

William C. Harvey II, Chairman