

WEST TISBURY ZONING BOARD OF APPEALS
MINUTES DECEMBER 16, 2009
1ST and 2ND FLOOR TOWN HALL 5 PM

DRAFT COPY

PRESENT: Eric Whitman, Tucker Hubbell, Tony Higgins, Bob Schwier, Toni Cohen, Larry Schubert, Nancy Cole

ALSO PRESENT for All or Part of the Meeting: Alex Gamota, Ken Spigel, Ginny Jones, Prudy Burt, Susan Silk, Jonathan Revere, Glenn Hearn, Richard Knabel

BUSINESS

- The minutes of December 2 were approved with corrections.
- The FY 2011 budget was approved.

After the Selectmen adjourned and left the 2nd floor meeting room, the ZBA resumed their 1st floor meeting upstairs.

DISCUSSION

- A look at a John Early plan for adding on a hot tub to pool at Ziff's: Does it need an amendment to a Special Permit or not?: The Board concluded that hot tubs in general should not be subject to a Special Permit.
- American Tower application. Letter from Alex Gamota and response from Richard Knabel on file in ZBA office:

Eric said that in response to the recent letter from American Tower Corporation, they would discuss whether it is the Zoning Board that would be hearing an application for a DAS in West Tisbury, or the Selectmen whom the letter stated would be the correct entity. Tucker asked to begin addressing the issue by reading some notes he prepared. He respectfully disagrees with ATC's stance, referring to Section 8.8-2 wherein all WCF's are required to be by Special Permit. Referring to ATC's stance that Atty Mark Bobrowski and Consultant Dave Maxson had agreed with them, Tucker said that in September of '08 Richard Knabel had asked the ZBA if Zoning would cover a DAS application. At the time the DAS proposal was to put whip antennas on existing poles, a different proposition from that before the Town now as it now involves new and replacement poles. Bobrowski and Maxson responses addressed using the existing poles only.

Tucker said that since our Zoning Bylaw doesn't specifically address DAS, he finds that Section 8.8-6C would be the section under which an application could be heard, that is, "Modification or installation on an existing or newly permitted tower or structure". Sub-section #5 mentions "repeaters" and Tucker quoted Dave Maxson's early analysis finding that hearing a DAS application as a repeater application might be a defensible interpretation of the Bylaw. Tucker said that the RFP was a tri-town one, and ATC went through Special Permit processes with Aquinnah and Chilmark and should do so with West Tisbury. He understands Chilmark had needed the Special Permit for the "hotel". It's not fair to the public process he said if they don't. If the other members of the Board agree, he'd like to ask that ATC rescind their letter and apply to the Zoning Board.

Larry asked if there had to be a choice between a permit # 1 or # 2. The conclusion was yes. He asked if the Selectmen could condition an application to their Board? Alex said in his experience Selectmen in Massachusetts have placed restrictions and conditions on DAS. Nancy asked if the Selectmen would send out notification to abutters? Yes. Alex said the Selectmen have jurisdiction over certain things. It might be that they would come back to the ZBA for some sites, and to MA Highway for others. Richard Knabel said, so you are prepared to go through three processes? Alex said that in his experience he's ended up going through 3 different processes for permitting, yes. He said the recent letter they sent didn't focus on the possible private property along Lambert's Cove Rd and Indian Hill Rd. Alex said Zoning does not reach putting something in the public right of way. It is clear from previous ZBA minutes that the Board wants a public process. The Selectmen can provide that with written notice and the public in attendance. He ceded that the abutter notification radius was less than the 300' required for zoning hearings. He does not know what the State Highway public notification process is. Ken Spigel and Alex Gamota said that although Lambert's Cove Road and Indian Hill Road and Middle Road were never accepted as public ways at a Town Meeting, they can become a public way by prescription after 20 years of continuous use. Town maintenance of the roads may be an element. If it is concluded they are not public ways, the antenna and equipment might be subject to zoning. The ATC people said they were glad to hear it be proposed that an application would be for a #2 Special Permit, but they still feel they need a grant of location from the Board of Selectmen.

Richard Knabel said 4 poles would lie along Town Roads; the Selectmen could grant these. They previously had granted 2 NStar poles along Lamberts Cove Rd through a public hearing. There's no record of the Town ever accepting a layout for LCR, IHR, and Middle Rd.; all these poles are on private property. The ZBA would have jurisdiction. MA highway has their own process. It would be a fractured process to use 3 entities. Ginny Jones said if ATC uses the public way there should be a fair and reasonable compensation.

Larry reiterated the Board's stand that ATC should apply to them under Section 8.8-2, quoting "...or installed". Ken Spigel said, if you are convinced you have the authority to put the zoning process on things in the public rights of way, consider getting outside counsel on this. His letter leads with his interpretation of the issues. He asked the ZBA to not make a determination until they had spoken with their consultants. (Mark Bobrowski and Dave Maxson are used by the ZBA for wireless communication questions and reports). The Board asked wouldn't it be easier to just make one application to the Zoning Board and then go the MA highway and BoS? Ken said he wants to do it his way: It's his conclusion that the ZBA does not have the authority to zone the public way any more than they have the authority to zone the Town of Needham, say. He'd rather fracture the process and doesn't think a Special Permit from the ZBA would help in permitting from BoS and MA Hwy.

Tucker asked, so why did you go to Chilmark and Aquinnah for Special Permits? Ken replied that he hadn't had the research done until they "came" to West Tisbury. American Tower hadn't looked at the West Tisbury process for a year and a half. They thought West Tisbury (the ZBA) had originally said no Special Permit was needed. (due to the original Bobrowski interpretation given at the time when equipment was to be put on existing NStar poles). They had an informational open house in May. It still wasn't clear then. He is not trying to not do a public process. He said as a general principle Boards make good decisions; The BoS take an interest in the proposals, not so much MA Hwy. The BoS can say that ATC can't build without

signed up customers, or only putting in a system in where there is no coverage. Bob asked if they had to go back to Aquinnah and Chilmark for more permits. Yes, for Right of Way and Highway.

At this point, Nancy moved that the ZBA seek counsel from Atty Mark Bobrowski. If they are advised that they do not have jurisdiction, that the BoS does, fine, but let's make sure we're doing the right process. Richard Knabel said this would be new territory for the Selectmen, they would need to know the limits of their authority. They would cast a wide net, to get as many of the abutters and public as possible. The Board voted to have Mark Bobrowski give counsel on the many issues brought up, including whether a Special Permit #2 would be the correct permit.

CORRESPONDENCE

Alexander Gamota, American Tower Corporation, December 14, 09
Richard Knabel to Alex Gamota, copy

The meeting was adjourned at 6:55 PM.
Respectfully submitted, Julie Keefe