

TO PHIL MURPHY
FROM BOB MURPHY

DECISION
3/25/99
PMW

THE COMMONWEALTH OF MASSACHUSETTS

TOWN OF WEST TISBURY

BOARD OF APPEALS

Decision of the Board of Appeals on the petition of Robert J Murphy

FINDINGS AND DECISION

RE: Administrative Appeal of Robert J. Murphy

DATE: March 17, 1999

PROCEDURAL HISTORY

1. On or about August 26, 1998, Robert J. Murphy, of RR1, Box 768-W, Vineyard Haven, MA (hereinafter, the applicant, the appellant, or Murphy), applied for a building permit to construct a single family residence in Pine Lane Estates, on Assessors Map 10, Lot 268 (hereinafter, the subject property).
2. The Building Inspector denied the application on or about August 31, 1998, stating as grounds therefor that the subject property was "not a buildable lot" (hereinafter, the decision).
3. On or about September 30, 1998, Murphy appealed the decision.
4. A public hearing was held on November 18, 1998, continued from time to time, and terminated on March 17, 1999.

FINDINGS

5. The subject property contains 61, 380 square feet and is located in the Pine Lane Subdivision, as shown on a plan entitled "Revised Subdivision, Plan of Land in West Tisbury - Mass. for Robert J. Murphy," prepared by John F. Doyle, dated December 7, 1973.
6. The subject property is clearly labeled "Recreation Area" on said plan.
7. At the public hearing of November 18, 1998, the appellant stated that the subject property was "his recreation area" and that he planned to move horses into the recreation area.

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8. At the various sessions of the public hearing, there was conflicting testimony as to whether the subject property had been represented to be a recreation area in the course of appellant's marketing and selling of lots in the Pine Lane Subdivision.

DECISION

Pursuant to G.L. c. 40A, s. 15, the Board of Appeals of West Tisbury, after public hearing and findings of fact, hereby upholds the decision of the building inspector denying a building permit for the subject property.

G.L. c. 41, s. 81U indicates that a planning board may require a subdivider to set aside suitable land for recreational purposes for a period not to exceed three years. In the instant matter, the subject property was clearly labeled "recreation area" on the endorsed definitive plan; however, there is no limitation as to the time of this condition.

The appellant has subsequently admitted that he intended the subject property to be used for recreational purposes. While he cautioned that he never intended the parcel to be for public use, this is not dispositive. G.L. c. 41, s. 81U does not require recreational land to be set aside for use by the public.

Under the circumstances, this matter is analogous to decisions in which a landowner accepts a condition as the price of endorsement, and allows the appeal period to expire without action. See, e.g., *Campanelli v. Planning Bd. of Ipswich*, 358 Mass. 798 (1970) ("The owner's acceptance of its terms involved the owner's acquiescence in the board's failure to approve the plan unconditionally [even if the conditions imposed in the agreement could be said not to have been authorized by the subdivision control law]; *Stoneham v. Savello*, 341 Mass. 456 (1960) (condition requiring upgrading of way between subdivision and public way, even where developer does not own such way, enforceable if not appealed).

The board specifically finds that this matter is not analogous to the facts set forth in *Young v. Planning Bd. of Chilmark*, 402 Mass. 841, 844-845 (1988). In *Young*, the Appeals Court ruled that where board failed to state the condition of a voluntary gift of land in its decision, revocation of the oral promise by the developer was not a proper ground for rescission of the plan's approval. Here, however, the condition is clearly stated on the plan.

The two members of the board upholding the denial of the building inspector find this matter more closely related to the Appeal Court's holding in *DiGiovanni v. Board of Appeals of Rockport*, 19 Mass. App. Ct. 339 (1985). The Appeals Court ruled

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that where a variance petition is accompanied by plans or specifications detailing the work to be undertaken, the plans and specifications become conditions of the issuance of the variance. Finally, the two dissenting members find that the Appeal Court's ruling in *Patel v. Planning Board of North Andover*, 27 Mass. App. Ct. 477, 480 (1989), cited by the appellant, is not on point. In *Patel*, the court ruled that "mere approval and recording of a subdivision plan which refers to a roadway does not convey an easement in favor either of those owning property abutting the subdivision or the public generally." In the instant matter, the restriction is not an easement or a covenant; it is a condition of the planning board's endorsement in 1973. Such conditions need not conform with the formalities required for an easement or a covenant.

RECORD OF VOTE

The following members of the Board of Appeals vote to reverse the decision of the building inspector dated August 31, 1998:

A.J. [Signature]
Eric White

[Signature]
[Signature]

The following members of the Board of Appeals vote to uphold the decision of the building inspector dated August 31, 1998:

[Signature]

[Signature]

Filed with the Town Clerk on March 25, 1999.
[Signature]
Town Clerk

Copy of Findings and Decision mailed to: