

## **WEST TISBURY PLANNING BOARD MINUTES January 7, 2019 5:30 PM**

**PRESENT:** Ginny Jones, Bea Phear, Leah Smith, Matt Merry, Henry Geller.

**ABSENT:** Susan Silva

**ALSO PRESENT:** David Rintel, Victoria Rintel, Myron Garfinkle, Bill Veno, Scott Caskey, Charlotte Caskey, Jay Theise, Counsel, George Sourati, Omar Johnson, Mark Nicotera, Greg Milne, John Abrams, Jane Rossi.

Ginny opened the meeting at 5:30 pm.

### **Site Plan Review application from Greg Milne on behalf of Tom and Christina Shropshire for a house over 3000 square feet on the property located on Assessor's Map 39, Lot 2.1, 147 Middlepoint Road:**

Greg Milne pointed out that the board had already reviewed the property and determined it was a wooded lot so the height of the house could be up to 24 feet. He explained that the house will be a 3290 square foot single family two story dwelling. It will be completely off the grid so there will be solar panels placed on the property, as well as a small lap pool. There will be five bedrooms, two of which will be on the second floor, (one for each daughter) and a common area. Greg said they will clear as few trees as possible. Leah asked if the square footage included the deck and Greg said it did not. Greg said there will also be an open car port on the property. Matt asked if the septic had to be a denitrification system. John Abrams said it was not a requirement. Matt said he was concerned with that. John said that the Board of Health has not seen the plan yet. Greg said the exterior of the house will be shingled. Leah stated that the plan looks well situated. Leah reminded Greg and John about the board's suggested conditions list regarding native plantings, downward lighting and chemical free fertilizers.

*Matt moved and Leah seconded the motion to approve the plan. The vote was unanimous.*

### **Site Plan Review application from Mark Nicotera on behalf of 49 Runner Road LLC, to install a sink in a garage/studio on the property located at Assessor's Map 32, Lot 76, 49 Runner Road:**

Mark Nicotera explained that Max Celeste and Rachael Fox, owners of the property, propose to place a sink in their accessory structure for hand washing purposes. The structure will be a stand-alone 36 x 36 shop used for storage and a workshop.

*Bea moved and Leah seconded the motion. The vote was unanimous.*

### **Report from Bea Phear on the CPC Committee:**

Bea reported that CPC funds they are recommending:

- West Tisbury Church for accessibility.
- Eidelberg 3: To build a new structure in Oak Bluffs.
- Harbor Homes: For a housing project. They are a new organization that will provide a homeless shelter. They haven't located a site yet. They will receive \$43,000.00 when approved.
- DCRHA: Rental subsidy.
- Debt Service for Scott's Grove.

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- Water shed management plan at Mill Brook.
- Landscape between the library and the Maley field (\$30,000.00).

### **Not Recommended:**

- Ag Society fence.
- IHT: Money for the Hanover house. Funding can't go to housing for a specific entity.

Leah asked if the Complete Streets Committee appeared before the CPC requesting money? Bea said they had not. Leah mentioned that she had just attended the Capital Improvements meeting and it was mentioned that the Complete Streets Committee was looking for money to pay for an engineer to add shared use paths on Old County Road. She asked Bea if the request would qualify for CPC funding. Secondly, the CIC doesn't have the numbers from the CPC. Leah said that the Affordable Housing Committee was expecting \$200,000.00 per year. Bea said an agreement has been drafted between the AHC, the Selectmen and the CPC. Henry asked if it was too late to apply for funding. Bea said the deadline has passed but she said it could possibly be revisited.

Bea said the total being spent is \$392,645.00 and it leaves \$332,475.00 going into next year.

### **MINUTES:**

*Bea moved and Leah seconded the motion to approve the December 17, 2018 minutes.*

### **CORRESPONDENCE:**

- Two public hearing notices from Edgartown Planning Board:

Jane explained that one hearing notice advertises for a repetitive petition. She explained that she had called Edgartown for an explanation on what a repetitive petition meant. She was told that someone had applied for a renovation within the past 2 years and was denied. The new application is significantly different from what they had previously applied for so the petition allows the applicant to reapply within the 2 year time period. The 2<sup>nd</sup> notice was for a restaurant renovation across from the Square Rigger Restaurant.

### **DISCUSSION:**

#### **Coffin:**

Attorney Theise said he was present to discuss what the nature of an ANR plan is, and it is his, and the abutters belief that lot 2A1.1 on the plan is not a buildable lot. He said they oppose any building permit for that lot. It is a non-conforming lot because the 3.01 acres includes the road that runs through the lot. The road subtracts from the size of the lot by about one half acre. He said an ANR lot is simply to prove that there is proper frontage for a lot. This is a sufficient lot; however that is all it is. He said that the lot could be sold to an abutter to make the size of the lot acceptable. By itself, the lot is not buildable. The only way the lot could become buildable is if someone were to apply for a variance. ANR means approval not required. It is simply a sketch to show that there is a sufficient

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amount of frontage to create a lot. It doesn't require all the bells and whistles that a Form C subdivision has to include.

Jay said that the applicant has the right to appear before the Planning Board with a plan. Attorney Theise and the abutters think the abutters should have been notified, and we feel this should have been referred to the Martha's Vineyard Commission. This plan proposes to show a buildable lot that is clearly undersized. He said he and his client believe they are entitled to ask the Planning Board to ask for direction to the building department stating that this is not a lot that can acquire a building permit. This cannot be the subject of a building permit.

Jay continued by stating that there has also been discussion regarding something called the "fee in the way" statute. He pointed out that this was in his letter to the Building and Zoning Inspector. That provides that when there are ways like this, and conveyances are made out of a larger tract into smaller lots, with that conveyance come the fee, meaning the ownership interest in the way for the length that the lot abuts the way. The statute states that the ownership is to the middle of the way if the seller owns property on both sides of the lot. If the property is not owned on both sides of the way, then the entire fee becomes the property of the buyer of the lot. That is significant in the sense that what has happened along this way is that there have been several conveyances from the Coffin family, and each has a deed and each deed creates rights to use and pass and repass on the road. Jay said when he was at the Board of Health meeting, Counsel to the Coffins said he was wrong. He said the Coffins have the fee in the way, they own it, therefore it counts as part of the 3.01 acres. Jay said he knows that that is an incorrect statement because the highest court in Massachusetts that has dealt with that issue says the precise language that is in every Coffin deed which is precisely the same reservations of rights to pass and repass and use that the court has ruled is not the necessary language to prevent the fee in the way language from passing that title automatically. There is a provision in the statute that says you can exempt your ownership in the way if you create the specific exemption language that is contemplated. What the statute says is critical because essentially the Coffins other land does not join this parcel; it is cut off. It is impossible for the Coffin's to grant additional land because there is no connectivity anymore. The reason the court says this is if you grant a non-exclusive right for everybody, that doesn't operate to protect you from the operation of the fee in the way statute. The other thing the court said, because the defendant in that particular case said that his deed refers to a plan, and the plan clearly shows that we own it. The court said no, that in inadmissible you cannot refer to the plan, the statute says it is the transfer document (deed) that is referred to. The case quotes precisely the same language that is used in all of these deed grants which grants this non-exclusive right. Henry asked if you make a mistake in a deed, you are stuck with the mistake. Jay said it doesn't imply, it holds firm that a mistake in a deed stands. Jay said he was not aware of the fee in the way statute until recently. He said he was surprised by it. Leah asked Jay if what he is saying is that basically these three lots own all the way to the other side of the road. Jay said that on the plan he displayed, the light green is clearly Coffin owned property. However, as you move west, the purple is the side of the way that is owned by Gund. He owns to the middle of the road from his side of the property. The red for some of the way and into the pool lot for some of the way is the lot that the Coffin trust owns. Coffin can't do anything further with his property because the Waldorfs own half to the center line. The Gunds own the other half. There is no ownership in that space of the Coffin Trust, nor is there in the part of the Gund property that abuts the Ben

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Coffin property. It means that there is no way to attach additional Coffin land to Lot 2A 1.1. Another half-acre cannot be added to the lot. Henry asked if an easement could be granted. Jay said they can't answer that right now but he would ask his colleague. Henry said that we have a 3 acre minimum for zoning. If we have a subdivision and put a road in, if we don't convey more than 3 acres. Ginny said that in a Form C subdivision the created road is on its own. Matt said that what came to the board was a progression of Form A plans on this particular property. Jay said the plan is different than what I believe is the legal reality. However, he said that there is one reality on the plan. There is a 30 foot wide road. Matt asked if the road is actually considered 30 feet wide. Jay said he is looking for that determination. "I am looking for a determination because it is impossible for this to be a buildable lot under the requirements of this town." Bea said that it is not our job to call. Jay said she was correct. Jay said the board does have the right to waive provisions; those waivers must be expressed by clear, conscious evidence.

He said the minutes of the planning board indicate the board to have expressed considerable concerns regarding this series of plans. There is no clear, conscience evidence to Attorney Theise that those concerns have been waived. I am not asking the board to amend, revoke or alter this plan because the board probably cannot do that. Ginny said that in order to do that, we would need to be asked to do that. Jay said he is asking the board to do that. Leah asked him if he was asking the board to waive the 3 acre requirement. Jay said he was not asking for a waiver but he said the board has the right to direct this discussion to the Building and Zoning Department. He certainly asked that, if this returns to the Planning Board, it should be referred to the MVC. He said that the Rintel family has an interest in this property. Jay said he doesn't represent them nor will he speak for them. Matt asked if there was a building permit for this property that is being processed. Omar said not that he was aware of. Bea asked Omar if a septic application has been reviewed by the Board of Health and Omar said it has. He explained that they have reviewed the plan and it meets the criteria for the board to sign off on the plan but the Board of Health hasn't done that pending further decisions. Bea asked if the BOH could permit the plan even though the lot doesn't meet the criteria. Omar said this seems to be a "cart before the horse" type of situation. Jay said that his unsuccessful argument to the BOH was that this is an illusory lot and an illusory lot should not be granted a permit. Leah and Bea said the lot is real and Jay said that it is not a buildable lot. Leah said that the board understands that there is a previous partial septic system on the lot in question. Omar said that the application meets the requirements of the Board of Health. The dominant easement on that lot is for the Garfinkle property and that system is a four bedroom septic system. Myron Garfinkle said his system is on that lot. Ginny said that the board was originally not aware that a septic system was on this lot, nor was the easement shown on the plan. There was no notice from Natural Heritage. Bea said that the board had asked if Natural Heritage had reviewed the property and we were told they had. Ginny said that the board was told that a fire system was supposed to be installed but as of last week, no plans have been made according to the Fire Chief. Leah, we have in some cases allowed one lot to borrow some acreage from another lot. Jay said that everybody should have been informed. He said going forward, all the abutters and Jay request to be informed of any discussion on this property. Henry said we cannot direct the Building Inspector to do anything; he works for the Selectmen. Jay said we do not dispute that this is an ANR plan. The plan itself doesn't contain information that would be relevant. The board concurs

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Matt asked about the existing barn on the property. Scott Caskey said the Building Inspector condemned it in the early summer. He said it is in very bad shape. It was a livestock barn and now it is a public nuisance. Matt said that hypothetically this barn could be demoed and someone could build a structure and add a bedroom. Scott said that the barn can't be used as a habitable space. Leah asked if a building permit has been requested and Scott said it had. Leah said the board had no idea of this. Scott said the Coffin's barn has 4 to 5 stalls in it. The hold up on the barn is whether the Coffins are obligated to put up a fence around it to keep the debris from falling onto abutting properties and to keep people out.

George Sourati spoke about the discussion about how many bedrooms are allowed. He said that on a 3 acre lot, it can have up to 13 bedrooms. The Garfinkles have a 4 bedroom septic that takes away from the lot. There is plenty of room to put another system on the property. He went on to say that this is the original plan that has a 30 foot wide way is being presented as being a road. This is actually a 30 foot wide easement. As far as ownership, deducting land under the roads, it has been the practice of this Planning Board and us and other Land Surveyors, not to deduct the area under the road when doing form A's. Ginny said that is probably because we didn't know we should. Although we have always deducted the area of the road.

George displayed plans that the board has approved that have areas under the road and the road had been included in the lot. Henry said that if a deduction had been taken, there would still be enough land left even if the road had been deducted.

George said there is currently a request for a building permit for a single family residence on said lot. The Building Inspector is fully aware of what is going on. This is a zoning matter for him to review and either seek Counsel or decide what best to do.

Jay said it seems to me that standard states that if it isn't on the plan it doesn't count. This plan shows this as being a road. George said that roads are created on Form C's. He said that the town has designated that road. Ginny said it has always been considered a dirt driveway, not a road, Jay said it is a road on the plan. Jay said "the argument that supports a precedent that isn't based on the legal reality of this town is a very dangerous proposition, particularly plans where no notice has been given to anybody. "

Ginny asked Bill Veno if he had any comments. He pointed out that Edgartown is currently requiring that their Form A has to have frontage on roads that have been created. Leah explained that properties that pre-exist zoning were allowable. Many of these ways were access to these properties before 1972. George said that other Form A's have been done on this road. Bea said that on the matter of our failure to refer this to the MVC, I agree that we should have. Jay said it appears it was mandatory. He suggested that the board take a look at the ANR handbook. Henry said he would like to suggest that since this is a discussion, and there have potentially been mistakes in the past, perhaps we should seek Counsel. Bea disagreed. Bea said this has been brought to Joe's attention and it is in his hands now.

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Jay said he has no appeal of this plan because the appeal period has passed. There are two discussions in the ANR handbook, one of which is the right to annul which is different than modification. Ginny said that the board will be absolutely vigilant in the future to make sure that everything that needs to be on the plan appears on the plan. We have certainly learned a lot from this experience. Jay said it is clear to him that you have to consider the road in the way. In essence, the board granted an inaccurate plan. The Massachusetts law says so. If this lot was re-calculated, this lot can't be anywhere near 3.01 acres. If a new plan is presented to the board, the abutters want notice. The board concurred.

Jay said he can do something about the issuance of a building permit. Bea said if a permit is denied, then the Coffins could come back to the board.

David Rintel said he has been reading about the corruption of ponds on the island and how it relates to septic systems. He said he assumes that the board is paying very close attention to that. He said there are at the moment as many as eight houses in the vicinity. If four or five more are added it causes concern about overloading the pond. His other concern is that he has been living on the property for two years and in that time he had no idea this was going on. He asked that in the future he and the other abutters receive notice. It might not be too late to involve the MVC in this. He said he would like to have a chance to be heard. It changes the character of this small and precious area. Ginny said the board feels the same way about the ponds.

One of the problems with an ANR, we don't normally send out notices because it is not required. These plans and these divisions of land have occurred over a long period of time. Every time it re-appeared, we wondered if we should refer it to the MVC, however, we didn't. We are more than aware of what impacts property. I am sorry that you were not notified. If someone asks to be notified, we do. Mr. Rintel reiterated that he would like to be given notice. Mr. Rintel asked if it would be possible at this point to refer this to the MVC. Leah said that unfortunately, at this point that ship has sailed.

Jay said that with respect to this plan one thing you are certainly entitled to is the presentation of an accurate plan. That depicts the information that is on the plan so that you can make an accurate judgement. He said this plan does not do that I think the board can do whatever it can do to the extent that you are satisfied you have been presented with an accurate plan. We are relying on the proposition that this is not a buildable lot.

Omar said he will be holding onto the septic application until this is cleared up. Joe won't be able to issue anything until it's cleared with the Board of Health. Omar said we need a plan that is deemed legitimate by all. Jay said this is not that plan. The Mass Bar thinks so highly of the problem of the fee in the road statute that it publishes to lawyers that this is a trap for the unwary. Ginny asked if Jay would send that statute to the board and he said he would. He said it requires reading and re-reading for clarity. The case law is also clear. Ginny said the board doesn't doubt Jay's word; they just want to read it. He said there is a West Tisbury case mentioned regarding this. Bea asked about the annulment.

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Leah stated that this particular lot is the only issue she believes that the board is being asked to consider. The other lots are all larger and this issue of the fee in the way would not reduce their size to below what it has to be. Ginny said it might reduce them enough to make them ineligible for a guest house.

Mrs. Rintel asked how many lots make a subdivision. How are there suddenly five houses about to be built? Ginny said it wasn't sudden, it happened over many years. Jay said there is something called incremental zoning. Ginny said that this was gradual. They would break off one more lot and a couple of years later they would break off another. This looks like a subdivision to me and is a burden on this area. Ginny said that sometimes plans are not registered so when people go to check what is recorded with the Registry of deeds, it may not be all of what has actually been approved. When you do a title search, it may not present what has really taken place. George said there have only been two Form A's. Leah said we looked into this because of the creation of an affordable lot, and it was more than five years ago. Jay said there was one lot a very long time ago.

Mr. Caskey said that the Coffin's originally cut off a lot of land and sold it to Jeff Gund around 1991. The four lot subdivision was created in 2015 and it went from 4 to 5 lots in 2016, and that stretched into 2017.

Bill Veno said the question as to when does it amount to a subdivision. The reality about ANR approval not required in Massachusetts is that the fact that they are on a pre-existing roadway, exempts them from the subdivision process. But there are a number of criteria that it has to meet. Having been created over a period of time does not mean it is now a subdivision. Jay said this is a road because the plan said it is a road.

Myron said that what an ANR does is it gives you a plot, it doesn't give you the right to develop it. It is then determined as to its buildability. Leah said that was true and there have been cases where the board has designated that certain lots may be designated as non-buildable green areas.

**Light Industrial District:**

Jane informed the board that Carter Hakala has moves his business off of the Larkosh property. Ginny said he has relocated to Vineyard Haven. Matt said that Dan Larkosh will have to apply for a new tenant to have a business.

Meeting Adjourned at 7:20 pm

Respectfully submitted,

Jane Rossi, Administrator

**Approved on February 11, 2019**