

WEST TISBURY ZONING BOARD OF APPEALS
MINUTES THURSDAY, March 8, 2018
2nd Floor, West Tisbury Town Hall - @ 5:00 PM

PRESENT: Nancy Cole (Chairman), Larry Schubert (Vice-Chairman), Tony Higgins, Toni Cohen, Julius Lowe, and Bob Schwier (Associate Member).

ABSENT: Roger Hubbell (Associate Member)

Also Present: Tim Laursen, Dan Perry, Mila Smith, Robert Sparks, Stephen J. Hart, Attorney George David and Ted Rosbeck.

Hearing:

5:15 – A hearing on an application from Tim Laursen, agent for William Mason, to construct a 912 sq. ft. garage to be used for vehicle storage and an Art Studio under zoning bylaw 11.2-1 (accessory structure over 676 sq. ft.) and 8.5-1B (home occupation). Map 16 Lot 203.5, 24 Pioneer Lane, RU district.

Nancy opened the hearing. *Correspondence: Letter from William Mason, the property owner, allowing Tim Laursen to apply for a special permit to build a garage and a home occupation.* Tim Laursen explained to the board that he was working with the owner to build a 912 sq. ft., (the height is 26 ft.) garage (open floor plan) for personal storage and an art studio. The home occupation will be an art studio where various forms of miscellaneous arts and crafts are created (see narrative). The proposed structure meets all setbacks and the location of the building will be sited behind trees and thick vegetation in the center of the property. The siting of the garage is such that excess noise will be minimal from abutting properties. The studio will be open by appointment only. Gallery openings will be limited to one per month. Tim told the board that he is the only artist that will be working in the studio, and has no employees. The board told the applicant that if he chooses to have a sign it must comply with the town sign regulation, 8.4 of the zoning bylaws. Toni C. moved to close the public hearing and open the board meeting. Bob seconded, the vote was unanimous. The board reviewed the findings and conditions discussed above with the applicant. Larry moved to approve application as presented. Julius seconded, the vote was unanimous. Nancy explained the twenty day appeal period.

5:40 pm – A hearing on an application from Bob Sparks, agent for Patrick Barrett, to install a 18'x 36' in-ground swimming pool and associated pool equipment under zoning bylaw 8.5-4, Map 30 Lot 2.37, 222 Pond Road, RU district.

Nancy opened the hearing. *No correspondence was received from the direct abutters.* Bob Sparks, agent for Patrick & Debra Barrett, presented a site plan detailing an 18'x 36' in-ground swimming pool and associated pool equipment. The Barret's have entered into a purchase/sales agreement with Timothy & Helen Walsh the owners of the property. Mr. Sparks explained that prior to the completion of the sale the Barrett's are applying for an in-ground pool. The existing 16'x 24' garden shed will be relocated (see plan), to house the pool equipment which will be insulated and sound proofed. A bluestone patio area will surround the pool. The pool area will have a code approved barrier fence with self-latching gates. The pool meets all setbacks. Larry explained to Mr. Sparks that any lighting proposed for the pool will have to meet the requirements under 8.6 of the zoning bylaws, including the Mass. State Building Code (CMR) 780-R326.1, which regulates the requirements for swimming pools. Larry moved to close the public hearing and open the board meeting. Julius seconded, the vote was unanimous. The board agreed that the application has met all the requirements for a special permit under 8.5-4 with the finding and conditions as outlined. Larry moved to approve the application as presented, Bob seconded. The vote was unanimous, with one abstention, Bob Schwier (Associate Member). Nancy explained the twenty day appeal.

5:50 pm – A continuation of a hearing from February 25, 2018, on an appeal filed by Michael A. Smith, Executor: Dukes Probate Court, c/o Attorney Daniel Perry, of an October 14, 2017, decision of the West Tisbury Zoning Inspector denying a building permit to construct a single family dwelling under 11.2-1, non-conforming lot by the provisions of Section 6 of the Zoning Act. The appeal is filed under MGL 40A section 8 and section 15, of the Zoning Act. Map 7 Lot 69, 52 Longview Rd, RU district.

Nancy explained that since the last hearing the board forwarded the application and all correspondence, including a copy of the tape from the February 25th meeting, to the board's counsel, Attorney Mark Bobrowski. A copy of Attorney Bobrowski's brief dated March 2, 2018, was forwarded to the Board, including Attorney Perry and Attorney Davis. A copy of Attorney Perry's response was received on March 8, 2018; copies were given to the Board and Attorney Davis. The following is a synopsis from Attorney Perry in response to the Attorney Bobrowski brief dated March 2, 2018.

- Mr. Bobrowski's analysis is based on erroneous factual assumption, namely that Judith Smith had an interest in Lot 68 (owned by Michael Smith) when she bought Lot 69 in 1996. Michael Smith purchased Lot 68 in his own name which he sold in December 2014; Lot 69 remains owned by Judith Smith's estate.
- Attorney Perry disagrees with Mr. Bobrowski's analysis that he relies on authority of *Planning Board of Norwell v Serena* 27 Mass. App. Ct. 689 (1989) and *DiStefano v. Stoughton*, 36 Mass. App. 642 (1994), that ownership by spouses of adjoining lots connotes common control of the lots. In both these cases the lots had been held in same ownership prior to a zoning change/ownership was split between the husband and a wife just prior to the zoning change, which made the lot non-conforming. In these cases the court determined there had been a "transparent attempt at checker boarding", the transfers were ineffective to prevent merger. These reasons were the basis for the Court to infer "common control".
- Under Massachusetts law there are some provisions that make clear the Town cannot presume common control solely by the relationship of marriage between two owners. *GL chapter 209, section 1*; that spouses own and control their property separately.
- The Courts have held, regarding principals of equality under the Massachusetts Constitution, to treat married persons as having a separate identity.
- In this case the Town is determining whether a woman had a right to buy land and hold title to it in her name alone, as her property, when her husband owned an adjoining, grandfathered parcel. Judith had a legal right, guaranteed by the Mass. Constitution, to separately own Lot 69 and keep that lot separate and apart from the property her husband owned.

Nancy explained that Attorney Bobrowski had received Attorney Perry's response (letter dated March 7, 2018) to his brief of March 2, 2018. Attorney Bobrowski had not changed his opinion that the lots had merged. The board verified the following: The mortgage for Lot 68 was in Mr. Smith's name and he purchased lot 68 prior to marrying Mrs. Smith and the mortgage was in his name only. Larry suggested that the previous owner of Lot 69 (non-conforming) lot could have applied for a building permit prior to Mrs. Smith purchasing Lot 69. Larry asked Joe Tierney (Building/Zoning Inspector) if he would have issued a building permit for the lot. Joe answered that he would have based his decision by reviewing the zoning and specific circumstances during that time. The board members agreed that in the past building permits were probably issued for smaller lots as created by the Longview subdivision. Mr. Smith stated that his wife bought the lot for the purpose of building a small home for her son. The board was in agreement that they would request Attorney Bobrowski to elaborate further regarding Attorney Perry's brief (dated February 12, 2018). A brief discussion ensued among several board members who wanted further clarification on what constitutes "common control". How does "common control" affect a married couple who have separate properties in their individual names (bank accounts, trusts, etc.)? Julius pointed out that the board could make their own decision based on its own their interpretation, which may not agree with Counsels determination in regards to this case.

Attorney Davis (representing Cathy Tasman, Map 7 Lot 70), agreed with Attorney Bobrowski, that “common control” existed. He cited *Sorenti v Board of Appeals of Wellesley*, “was not the form of ownership, but control: did the landowner have it “within his power”, i.e., within his legal control, to use the adjoining land so as to avoid or reduce the nonconformity?”

A discussion ensued regarding questions on “Probate Law”. Julius had questions, 1) At what point did Mr. Smith have control of the estate? When Mrs. Smith died, or when the estate was probated through the Probate Court. 2) When is probate completed in regards to the probate law? 3) When did Mr. Smith gain control? The board was in agreement these are complicated questions regarding Probate Law, which they as a board are not familiar with. The board was in agreement that further insight from Attorney Bobrowski was needed. An extension of time in respect to the application was requested from Attorney Perry, he agreed verbally to extend the time for an additional 45 day from March 8, 2018, and documentation will be forwarded to the Town Clerk. Julius moved to continue the hearing till March 15th at 5:15 pm, Bob seconded. The vote was unanimous.

New Business:

Stephen Hart appeared before the Board to request an extension to SP 2016-04, filed March 17, 2016, with the Town Clerk for Map 10 Lot 53, 6 Pine Lane, West Tisbury. Mr. Hart (see email dated 2/1/18) stated due financial circumstances he is unable to start construction at this time. He is in the process of selling property in West Cornwall, CT, which will allow the means to proceed with the Pine Lane project. Larry moved to extend SP 2016-04, to March 17, 2019. Julius seconded, the vote was unanimous. A letter will be drafted and forwarded to Joseph Tierney, Building/Zoning Inspector, and cc to Mr. Hart.

Old Business:

Revised Budget FY 2019 - Larry moved to revise the FY 2019 budget reflecting changes to the personnel line due to the current administrator retiring in May 2018. Julius seconded, the vote was unanimous. A copy of the budget will be forward to the Finance Committee and Bruce Stone/Town Accountant.

Revised ZBA application form- Clare presented to the Board a draft of a revised application cover page. The change to the form makes the application process easier for the applicant to understand and what material is required when applying to the ZBA for a special permit or variance. The updated application cover sheet, including a fact sheet detailing the process and procedures for the Zoning Board of Appeals, is available on the Town’s website.

Correspondence:

The Zoning Boards Town Report for FY- 2018 was submitted to Selectman’s Office. Clare emailed a copy to the Board.

Meeting adjourned at 7:15 pm.

Respectfully submitted,
Clare A. Harrington
Administrator/ZBA

- Note: Minutes of 3/8/2018 approved on May 3, 2018.