

WEST TISBURY ZONING BOARD OF APPEALS
MINUTES THURSDAY, January 25, 2018
Ground Floor – Conference Room
West Tisbury Public Library

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

ABSENT:

ALSO PRESENT: Attorney Michael Smith, Daniel Perry, Joseph Tierney, George Davis, Lisa B. Epstein, Ivory Littlefield, Jo-Ann Taylor, and Aubrey Quinn Taylor.

Minutes:

January 18, 2018 – moved and seconded, approved with corrections.

Hearing:

5:15 pm – A hearing on an appeal filed from 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 Sections 6 of the Zoning Act. Map 7 Lot 69, 52 Longview Rd, in the RU District.

Nancy opened the meeting: **Correspondence/Inquires:** Ivory Littlefield (Map 3 Lot 85-3), Attorney George Davis and Attorney Hilary Schultz, all requested copies of the documents filed by the applicant. Attorney Perry introduced himself as representing Mr. Smith, the executor of his wife's estate, on an appeal to the Zoning Board a denial of a building permit for the above referenced lot, by Mr. Joseph Tierney (see letter dated October 14, 2017), Building/Zoning Inspector. Attorney Perry presented the facts relative to the appeal. Lot #69 is a one acre property which is part of a subdivision plan created in 1967. Michael Smith bought lot 68, in 1984. Mrs. Judith Smith bought lot 69, on February 16, 1996, at that time it was still a buildable lot, by being a pre-existing non-conforming lot that existed prior to the creation of zoning in the Town of West Tisbury. Michael A. Smith sold lot 68 in December of 2014. In regards to lot 69 Judith Smith died owning it in 2000 but her will was not probated until 2006. She left the property to her husband, Michael. The real estate was the only asset in her estate. The estate has never been formally closed; expenses regarding the administration of the estate are outstanding. As the executor of the estate, Mr. Smith has the power to sell the property on behalf of the estate. Under Massachusetts Law that divests the title for Mr. Smith retroactive to the date of Mrs. Smith death. Attorney Perry outlined the following points regarding chapter 40A section 6 of MGL:

- A lot has to contain at least 5000 sq. ft. of area.
- Has to have a least 50 feet of frontage.
- Held in separate ownership from any other land at the time of zoning change then it is protected in the future.

Attorney Perry stated what was unique about this case is that there is no “voluntary act” by the owner of the property to combine the two lots prior: Mrs. Smith died. But for Mrs. Smith’s death, lot 69 would be a buildable lot. It was not a “voluntary act” but if it’s sold by the estate it never passes ownership to Mr. Smith: it’s not merged as to title. Attorney Perry continued, more importantly regarding case law and the “doctrine of merger”; the law focuses on the act of the buyer actually combining the lots as a “voluntary act” to apply the “doctrine of merger”. These lots were never intended to be together. Mr. Smith had a mortgage on his lot #68; no mortgage was ever held on lot #69(Mrs. Smith), there was security interest only in one lot. The Town of West Tisbury has always assessed lot 69 separately and valued it as a buildable lot. Attorney Perry, stated both that the spirit and the letter of the law would allow the ZBA to overrule the Building/Zoning Inspector’s decision and allow a building permit for this lot because there has been no merger.

Nancy asked if the estate is still in “probate”, and if probate has not been completed is the lot still owned by the estate of Judith Smith? Attorney Perry confirmed; because the expense has never been paid, it is still subject to the claim of the estate to pay the expenses. Attorney Perry finished by saying it is particularly severe for the laws to punish someone because their wife died, and he believes that this was the interpretation of the law the building/zoning inspector made. He requests that to the extent the ZBA has discretion in applying the law to take that into account in this case. Julius asked if there are expenses still outstanding for the lot: is there a minimum/or maximum amount of time for these to be paid? Attorney Perry answered; the power of sale lasts forever there are no statute of limitation on the power of sale. Mr. Smith is the “appointed executor” of the will; the will gives him specific power of sale and can be exercised at any time.

Joseph Tierney- Building/Zoning Inspector: Mr. Tierney explained that he asked permission from the Selectman to retain counsel on the request of Mr. Smith’s contractor for a building permit on lot 69. Town council had a conflict and recommended Attorney Lampke. Nancy asked Mr. Tierney if he would like to read Attorney Lampke’s letter into the record or if he would like to paraphrase the document. Mr. Tierney stated that Attorney Lampke agreed with his decision that the lots have merged and lot 69 is unbuildable. Nancy read Attorney Lampke’s correspondence into the record: (Brief synopsis below full letter on file).

- Under zoning principals, when non-conforming lots (such as 68 &69) come under common ownership, they are deemed merged together for zoning purposes. In 2014, Mr. Smith created a zoning violation by selling off just lot 68, without the merged lot 69.
- The Town may have assessed both lots separately; assessment practices are not under the control of zoning.
- When lot 68 was sold without including lot 69, (Mr. Smith), created two non-conforming lots. Lot 69 is a non-conforming lot and would not be entitled to a building permit.

Attorney George Davis – representing Cathy G. Tasman, Trustee, Map 7 Lot 70. A copy of a letter dated July 13, 2016, to Mr. Tierney from Attorney Davis was presented.

In brief, the letter cites 40A section 6; non-conforming lots and supports (4th paragraph) “merger doctrine”. Attorney Davis maintains that between October 2006 and December of 2014, Mr. Smith had “continuous and uninterrupted ownership of both parcels”; total acreage is under the 3 acre minimum. Under WTZBL4.2-1, clearly falls within the parameters of the merger doctrine; the lot is not buildable. Attorney Davis addressed the case law which Attorney Perry documents in his narrative. Under claims that in Preston vs Board of Appeals of Hull, which the form is not of “ownership”, but “control”. He went on to point out under Sorenti vs Board of Appeals of Wellesley, was a “straw” it was in another name, but they both had the power of controlling that parcel, because it was a “straw”. The question here is not “ownership” it is “control”. In this case Mr. Smith as the sole benefactor had “control” over the parcel. Attorney Davis spoke to the procedures and policy of the Probate Court, as far as the probate court goes they would consider the case closed. The discussion continued regarding probate court and issues of the estate. The question was raised under the law does the estate still own this property or has it been transferred to Mr. Smith? Attorney Davis believes that the estate no longer owns this property. He states that the law looks at the “ownership” or the “control” of the property. In this case only Mr. Smith had “control” of this property even if he did not own the property, being the sole benefactor. In this case if you have ownership or control of the two parcels then you have merger of the lots, and the ZBA should uphold Mr. Tierney decision to not issue the building permit.

Attorney Perry stated that in the case laws cited, the applicant was trying to supersede the zoning change by buying them in separate ownership. There is no case that states that, after a party has died you have lost the right of a lot to be buildable. In this case they were purchased separately after the zoning change. The intent was to have separate lots and only the action of death brought the lots together; there was nothing voluntary about it; no decision was made to merge. Nancy asked if once probate is completed and whoever inherits the other lot; that merges “instantly” or is there a “grace period”. Attorney Perry said there is no clear real answer to your question, but citing Bobrowski in his discussion suggests that where there is intent that they will always be separate and there is not an attempt to undo after it was put together, but rather an attempt to keep them separate lot. That the “merger doctrine” should not apply. Attorney Davis disagreed, saying that they merged immediately. Under the law if you have “control” of the lot then it’s considered “ownership” of the lot, but the law is clear; that these two lots are now one. A brief discussion ensued regarding the practice of “checker boarding” back in the 1970’s, by developers who were purchasing property.

The ZBA has retained Attorney Bobrowski regarding this case and all records of these evening proceedings (along with a copy of the tape) will be forwarded to him. At this time the board agreed that the case should be continued. The board will compose some questions to Attorney Bobrowski in light of the testimony given at tonight’s hearing. Julius moved to continue the hearing till February 15, 2018, at 5:30 pm. Toni C. seconded, the vote was unanimous.

6:00 pm – A hearing on an application from Kali Wingood, for the installation of an accessory structure: a fence over 8 feet. Under zoning bylaw 4.2-2D4, Map 31 Lot 40, 11 Lineweaver Lane.

Nancy opened the hearing: **Correspondence:** Jo-Ann Taylor (map 31 lot 10, direct abutter) presented a letter of non-support for the project; the letter was read into the record.

A copy of a letter from the Zoning Inspector, dated November 7, 2017, to Ms. Wingood, outlined the following: apply to the Zoning Board for an accessory structure (fence over 8 feet) remove the fence or lower the height to comply with zoning. Ms. Wingood applied under 4.2-2D4, of the zoning bylaw, for an accessory structure (fence-over 7' in height). Ms. Wingood presented an updated site plan dated January 7, 2018, prepared by Vineyard Land Surveying & Engineering, including photos showing the fence. Kali explained to the board she and her husband constructed the fence for additional privacy between themselves and the abutter. She explained there is a contentious history between themselves and Ms. Taylor. She stated in her narrative that Ms. Taylor has been increasingly aggressive and has taken to photographing guests and visitors who park at her house. The fence runs from the edge of the driveway to the wood line approximately 80' along the east property line (as shown on the plan); the height is 8'- 2". Ms. Wingood told the board that the fence is on the property line.

Nancy asked for public comment. Ms. Jo-Ann Taylor (direct abutter Map 31 Lot 109), stated she was concerned about the height of the fence and the negative impact on her property, including liability issues regarding the maintenance of the fence, it could lower her property values. Ms. Taylor explained that there have been incidents with the Wingoods which includes digging up grass and removing stakes on her property. She does not believe the reasons given by Ms. Wingood are valid enough to (re: privacy) construct this fence. Ms. Taylor said a good neighbor would have placed the fence framing facing their side of the property. There was a brief discussion regarding the permanent easement (shared driveway) on record. Toni C. stated it is an individual's choice on how they define their need for privacy. Ms. Wingood presented a photo showing a row of arborvitaes along the fence. The plants are approximately 12 feet from the fence.

Julius moved to close the public hearing and open the board meeting. Larry seconded, the vote was unanimous. Nancy stated that she would not have a problem granting this special permit with conditions, particularly if it would help mitigate conflicts between neighbors, but concurred with Toni C. that it is an individual's sense as to what level of privacy is needed. The board discussed the following conditions:

- 1) Move the fence 18 inches in from the lot line (abutting property Map 31 Lot 109).
- 2) The fence framing to face towards the owners property (map 31 lot 40).
- 3) The applicant is responsible for the maintenance of the fence.

With no further discussion, Larry moved to approve the application with conditions under 4.2-2D4. Julius seconded, the vote was unanimous, with two abstentions (Tucker & Bob). Nancy explained the twenty day appeal period.

With no further business the meeting adjourned at 6:50 pm.

Respectfully submitted,
Clare Harrington/Administrator

- Minutes of January 25, 2018, approved on February 15, 2018 at a regular scheduled ZBA meeting.