

MINUTES OF MEETING OF WAREHAM ZONING BOARD OF APPEALS

Date of Meeting: January 9, 2013

I. CALL MEETING TO ORDER

The meeting was called to order at 6:45 P.M.

II. ROLL CALL

Members Present: Mike Martin, Chairman Pro Tem
Mary Scarsciotti
Richard Secher
David Sharkey
Wilma Engerman, Associate Member
Mike Johnson, Associate Member

Member Absent: Ken Ferreira

III. PRELIMINARY BUSINESS

A. Approval of meeting minutes: October 24, 2012 & November 14, 2012.

No minutes were available for approval.

B. Mandatory training – Conflict of Interest Law for Municipal Employees 2013.

Discussion ensued re: the mandatory training & the Board members were reminded that this is a bi-annual requirement. The members will be notified.

C. Informal discussion – Sammi Finni – Cromesett (in-law).

Present before the Board: Ms. Finni
Ms. Finni's mother

Ms. Finni stated she is looking to construct a 25x20 addition w/ a handicapped bathroom. She explained her mother is selling her home & will be living w/ her.

It was explained to Ms. Finni that accessory apartments are regularly approved for something 400 sq. ft. or less, however, this residence is a 40B which complicates matters. Ms. Scarsciotti stated there were many conditions written into the permit when the ZBA granted the permit to the developer that could conflict w/ Ms. Finni's request.

Discussion ensued re: this matter. The Board advised Mr. Finni to compose a formal letter detailing the request in order to discuss this matter with the ZBA's 40B counsel.

IV. CONSENT AGENDA

A. Authorization to sign bills, documents, etc.

There were no bills or documents to sign.

V. PUBLIC HEARINGS

A. Petition #27-12 – 22 Hammond Street – Ellen & Joel Greenman

Present before the Board: William Lockwood, Lockwood Associates

The public hearing notice was read into the record.

It was stated that the Board of Health has no comment on the project & there is sewer connected to the property.

The Board members reviewed the site plan. Mr. Martin stated it seems the site plan indicates the setback on the southerly exposure is increasing by two feet. He stated it looks like the existing easterly setback is being maintained & there seem to be no issues on the west or north setbacks. Mr. Lockwood added that on the easterly setback they are holding the same dimension as an areaway where there currently is a structured porch.

Mr. Martin stated it looks like the structure will be two stories. He asked if there is any exceeding of height requirements. Mr. Lockwood stated no & the height is approx. 10.6 ½ sq. ft. Mr. Martin asked if the roof deck is all included in the calculations in the site plan. Mr. Lockwood stated they are. The Board proceeded to review the site plan further.

Mr. Martin asked if the existing structure is one story or two stories. Mr. Lockwood stated it is a story and a half. Mr. Martin stated thus, this will be a Special Permit under section 1335.

Mr. Martin clarified that the site plan shows no exceeding of any existing non-conformities, no creation of any new non-conformities, & basically it is a tear down & reconstruction. Mr. Lockwood concurred. Mr. Lockwood also stated there is Town water & sewer.

Mr. Martin stated for the record, four letters of support have been received for this project. He has read the letters & said letters will be entered into the record as showing support for this project. He briefly read whom these letters were sent from.

Mr. Martin stated the hearing will now proceed from hearing those in the audience who are either in favor or against the project. He recognized many in the audience were present to speak in favor, but he stated the project looks like it meets the requirements of

the zoning ordinance, thus if anyone has anything important to add, he would ask that they refrain from coming forward due to time constraints for this meeting. He asked if anyone wanted to come forward to speak in favor. No one came forward. No one came forward to speak against the application.

MOTION: Mr. Sharkey moved to close the public hearing for petition #27-12 – 22 Hammond Street – Ellen & Joel Greenman. Mr. Secher seconded.

VOTE: Unanimous (5-0-0)

Ms. Engerman asked re: the garage in the back & how far away it is from the line. Mr. Lockwood stated approx. five (5) feet. Ms. Engerman stated it should be ten (10) feet. Mr. Lockwood explained right now it is an existing structure that is 4.6 feet so we are actually backing off from that six inches by removing the shed. He noted they are removing the existing house & the shed. Mr. Martin asked if the shed is attached to the existing building. Mr. Lockwood stated no & that it is a free standing structure. Mr. Martin clarified that right now the rear setback is 4.6 feet & 5.0 feet will be kept/used now. He stated Ms. Engerman's question is a good one, but in relationship to removing the shed he would agree that accessory buildings require a ten (10) ft. setback. He stated it actually should be fifteen (15) ft.; however, this new setback is going to be part of the structure. Mr. Lockwood stated it will be part of the structure.

Mr. Johnson asked if anything is going to be done to the garage. Mr. Martin explained the garage is going to be attached. He stated the question the Board needs to resolve is does the setback for the existing shed constitute a setback for the new construction. Mr. Sharkey stated it does. Mr. Martin feels they are still working within the same footprint. Ms. Engerman still feels there should be at least a ten (10) ft. sideline. She stated it is not taking away from the garage & the garage is big enough. Mr. Martin spoke re: accepting the setback from the shed vs. the garage. Mr. Lockwood stated he is speaking about the shed vs. the structure & there is no difference. He noted the accessory structure has a more vigorous set of requirements than the principal structure. Mr. Martin stated it is unusual. Mr. Lockwood stated he would argue that a setback is a setback & in this case it makes no difference what the structure is because there is practically no difference in zoning. Mr. Martin stated he would agree based on the fact because the setback does not distinguish what goes on in Onset & what goes on in West Wareham for an accessory structure; it is fifteen (15) ft. He stated it used to be five (5) feet. He stated in this particular case, by tearing down the shed, it is actually making the lot more conforming than leaving the shed. He doesn't think it's a big leap of faith in this instance to buy the argument. He stated the general lot is being made more conforming, the garage will be attached to the primary structure, so it will eliminate the accessory structure, thus he feels the overall plan is becoming more conforming & is still within compliance of Section 1335. He stated this project is neither creating any new non-conformity nor increasing any non-conformity & he does not think it is a derogation of the character of the neighborhood.

Mr. Secher doesn't see where the increase is. He feels it is less. Ms. Engerman stated its part of the house; it is attached to the house, which means the house still has to have a ten (10) ft. setback in the back. Mr. Martin stated this isn't the case if you agree that this is going to fall under Section 1335. He stated you are allowed to use the existing setback. He stated you can't use the 4.6 feet, but you can maintain a 5.0 ft. setback. He feels it is fair to utilize the Board's discretionary power to make that determination.

Ms. Scarsciotti concurred w/ Mr. Sharkey. Mr. Sharkey stated in the aggregate, it is an improvement.

MOTION: Mr. Secher moved to approve a Special Permit for petition #27-12 – 22 Hammond Street – Ellen & Joel Greenman

- B. Petition #28-12 – 32 Old County Road – New Cingular Wireless**
- C. Petition #29-12 – Off Kendrick Road – New Cingular Wireless**
- D. Petition #30-12 – 260 County Road – New Cingular Wireless**

The Board opened the public hearing for all three of the above #28-13, #29-13, 30-13; no one was present to represent the applicant; therefore, the public hearings are continued to 2/13/13

VI. CONTINUED PUBLIC HEARINGS

A. Petition #21-12 – 7 Sycamore Street – Jude Dineen

Present before the Board: William Lockwood, Lockwood Associates

Mr. Martin does not recall being present at the past public hearings, so, he will maintain himself as the role of Chairman, he will not be voting, however, the rest of the Board would be because it is a continued public hearing and he is not eligible to participate in the vote. Ms. Scarsciotti asked if Mr. Martin could hear the story and Mr. Martin agreed. Ms. Scarsciotti informed Mr. Martin of there was a house with a shed and the shed was originally before the Board and the proposal was to move it, which created a new non-conformity and this is to determine whether or not there was going to be a variance required in order to place the shed in a situation where it was within the setback or decide not to have a shed, so, this is when Mr. Lockwood was going to make a new presentation to tell us what he did about the shed. Then the Board will go back and vote on the reconstruction which included the new proposed deck and some rearrangement with the driveway, etc. Mr. Martin answered, that, it is up to Mr. Lockwood to inform the Board whether or not we have a variance or a Special Permit. Mr. Lockwood approached the Board. Mr. Lockwood advised the Board and reminded the Board, that as they recall, that the applicant did not come here about a shed, the applicant came before the Board for a deck and the deck is on the southerly side of the house. Discussion moved to one of a shed which had been put on the property previously and currently exists on the property on the side. It is about 3.5 feet off of the fence line on the property. It was put there with a building permit, so, I guess we are asking for a variance to approve the shed in place as

well as the special permit to put the deck on the other side of the property. That would be why we are here this evening. Mary Scarsciotti asked if the new proposed places to relocate the shed are the two (2) black squares on the plan. Mr. Lockwood stated that those are alternate places, the only two (2) places where one might be able to put it inside the zoning minimal, the property is a triangular piece of property, it is small, very difficult, if not impossible to place the shed in any other useful location than what it is. It is not out of character with anything else that goes on in the rest of the neighborhood, in fact, on each side of the fence that abuts this property; there are sheds on two (2) adjacent properties that directly abut the fence. One could conceive of making this part of the fence or part of the hedge that is immediately behind it, none of which continues the essential character of what it is but semantically could change the notion of what it is. Mr. Martin understands the conversation, so far, that the reconstruction or the new dwelling is not an issue. Mary Scarsciotti agreed but indicated the Board did not vote on it, but no one seemed to have any vile objections. Mr. Martin asked what brought the shed to light. Wilma Engerman gave Mr. Martin a copy of the Minutes. Mary Scarsciotti advised Mr. Martin that Myles Burke (former Director of Inspectional Services) gave a permit for the shed to put it there. Mary Scarsciotti pointed out on a plan that both sheds are there. Mr. Lockwood said that to the best of his knowledge, the abutter in question who objected, did not file with this Board to object to the decision in front of you. Mr. Martin said that this is the point he is trying to get clarified, if this was given a building permit, then the proper venue for this Board to address it would be an Appeal from an Administrative decision brought by the abutter and not a defense by the applicant. Wilma Engerman stated it was a violation. Mr. Martin replied that it is not the Boards place to cite for violations, it is the Building Inspectors place. Wilma Engerman told Mr. Martin that the Building Inspector brought this to the Boards attention in the Minutes, the prior Building Inspector issued the permit, and the current Building Inspector noted the violation. Mr. Martin asked, and Mr. Secher answered that the current Building Inspector basically said that this building permit should not have been issued. Mr. Martin agreed with Mr. Secher. Mary Scarsciotti said that this should address this, in light of the comments from the Building Inspector. Mr. Martin indicated that there are sometimes just because the Board becomes aware of an issue doesn't give the Board the authority to act on an issue. Mr. Lockwood respectfully agrees and the applicant has acted in good faith, went through the proper channels, and received a building permit (which was for a slightly larger shed). A woman stated that the Building Inspector did come to the property and say that he did not see any other place that it would conform and this is the best place to put it, so, he was in agreement with that and then issued the building permit. Mary Scarsciotti added that this was Myles Burke. Yes, the woman answered. Mr. Martin said that the building permit that was issued originally was probably improper, however, I don't know what mechanism that is available to the Board, to address that issue in this application, and it is a technical point. Wilma Engerman added that it is a violation and we could not vote on a new permit, this is indicated in the Minutes. Mr. Martin asked if Ken was here and reviewed the Minutes given to him by Wilma Engerman and Mary Scarsciotti as well as the letter from Building Commissioner, David Moore. Mr. Martin informed the Board that case law has stated that when someone is granted a building permit, you are given a permit to do something. It takes an administrative action to revoke that permit. Neither one of those letters do that. Mary

Scarsciotti said that the interpretation that Mr. Moore presented was in asking for another Special Permit; his interpretation was that the existing nonconformities have to be remediated. Mike Martin responded and stated that this is not what our zoning ordinance says. Our zoning ordinance says it cannot exceed. Most certainly if you had brought this, on its own, it is probably something I would not have gone along with, but my recollection of case law is that you are granted certain protections. A woman said that I would hope that if you are granted a building permit, it does seem odd to then have that building permit revoked after I put it in. Mr. Martin said that it can be, but not this way, these do not do it. They say, hey, there has been a violation but he has not given you a cease and desist order, he hasn't given you a remove from the property order, he says, in my opinion, the previous Building Inspector erred in granting you a permit. That does not take away your permit. Mr. Martin asked the Board what they wanted to do, the permit is in place, you can't make them, and we do not have it within our authority to revoke a building permit. Mary Scarsciotti said its not the revocation of a building permit, it's the suggestion that they move it and bring it into compliance, it's an accessory structure. Mr. Martin said the Board could, as part of the approval, you could make that a condition but I think you would be hard pressed to go on the variance on this but instead if you want to accept the condition to move it or if the Board grants it and appeal it. Dave Sharkey said that his recollection was, we went around in circles, like we are doing and eventually what came out of it was that we would ask him to make a good faith effort to re-plan it and this re-planning, in effect, is absurd, which is what we expected it would be when he did it. Mike Martin would agree and said if the applicant came forward and said we are going to voluntarily come forward and relocate the shed, great, but if they say we don't want to move the shed, then the Board has the option of either making them move it and I think it would be a hard condition to defend. Mr. Secher said he did not think they could comply, there is not enough room. Mike Martin advised that the Board can only require reasonable conditions and if the Board has no authority....Mr. Martin asked the applicant if they want to move the shed and the applicant said no, they do not want to move the shed. Mr. Lockwood answered, we can move the shed, but we cannot practically move the shed. Mr. Martin asked, is relocating the shed a reasonable condition to meet the intent and purpose of the zoning ordinance. No. It appears that they have made, looking at the plan, and they do have a triangular shaped lot....Mr. Sharkey said that we asked them to show theoretically what could be done even though it was absurd after you did it in terms of practical application. Mr. Martin said that the best that would happen at a variance hearing is the shed stays, the Board cannot order you to take the shed down, and they can't do that, not under the circumstances that exist. So, if you went forward with a variance, you would get the 3.6 ft. setback, the worst that could happen is nothing, the shed stays, one way or the other. A woman said, in good faith, we took what was said at the last meeting and we did go back and look at the property, Mr. Lockwood measured the property and generally, is there any place that we can put it. What it does, is it puts it in the middle of the yard or the middle of the driveway. Mr. Martin replied that there was no way that he would go along with this if this was a new application, but that he does not vote on this. Mr. Martin went around the table and got the Board Members opinions, Mike Johnson - I would suggest we take a vote and let them know the Building Inspector choose whether or not he wants to enforce having that shed moved at a later date. Mike

Martin thought this was an excellent job and furthermore, let him do his job which is to bring an action against you (the applicant).

Wilma Engerman – I feel that the Zoning Officer should enforce the shed be moved and take our vote with those conditions.

David Sharkey – I don't have a problem.

Mary Scarsciotti – I think that they have made a good faith effort to show that it would be absurd to try and move it and the places that would make it conform, I think that the original decision to allow it was a mistake but we are not in a position, at this point, I have no objection to it staying there.

Richard Secher – Its like trying to say we are right and you are wrong, but what does it accomplish.

Mike Martin thinks that what the Board can do is we can certainly ask that it be entered into the record that the Building Inspector enforces the ordinance as he deems, because it really is up to him. It is his job to interpret the ordinance, it wouldn't be the first time that they made a mistake and the remedy to correct the mistake is to bring an action against you which would require a Court action for you to relocate the shed.

Wilma Engerman said that it really wasn't legal because Myles Burke did not have the authority to sign these permits.

David Sharkey said that he was acting under the authority he was given by this Town.

Wilma Engerman said that he did not have his State Certificates and that's why we are going over it.

David Sharkey said that I can't believe what I am hearing.

Mr. Martin asked anyone in the audience if they have any opinion, one way or the other on this.

Motion made by Richard Secher to close the public hearing. The Motion was seconded by David Sharkey. Mr. Martin asked if there were any further Motions to be brought forward for discussion.

Motion has been made and seconded to approve the construction of the porch per the plan as presented, Mr. Martin will not be voting since this is a continued public hearing, however, the remaining members of the board will be and this requires a 4/5th's votes, all those in favor please signify by saying Aye.

Vote: Unanimous (5-0-0)

Mr. Martin reminded the applicant that you have 21 days before you can get the building permit. I do not see the abutter here, but if they wish to appeal, then they also will have the 21 days to appeal.

VII. ANY OTHER BUSINESS

A. Zoning violation – Algonquin Street – See correspondence.

The Board reviewed the correspondence re: this matter.

B. Discussion – 41 Oak Street – See correspondence.

The Board reviewed the correspondence & spoke to the homeowner. The homeowner would like to tear down a structure and replace with another single family residential structure that is one issue, you want to convert a garage and change the use, its going to be a tough hurdle to overcome. You have an undersized lot and two residential structures on a single lot is prohibited no matter what size it is. The homeowner went through this before with the Conservation Commission and the Building Inspector, we met the setback requirements; we have changed the garage and moving the structure to meet the setback requirements with the abutting neighbor. Mike Martin informed the homeowners that the difference here is its converting the garage; you are changing the use of the garage into something else. The homeowner stated that it has not been used as a garage in many years. Mike Martin asked what has it been used as and the homeowner said that room. Mike Martin asked what the tax records show and the homeowner did not know. The ZBA will be awaiting the homeowner's/applicant's application.

C. FEMA – Flood hazard determinations/FIRM maps/appeals – See letter dated January 3, 2013.

D. Discussion – Building Inspector's interpretation of Section 1300.

The Board concurred to table items C & D for a future meeting.

VIII. DISCUSSIONS/UPCOMING HEARINGS

A. Wareham Village Sign Program upcoming public hearings.

Mr. Martin stated he will contact Mr. Pina, CEDA Director & then advise the Board.

B. Upcoming public hearings.

1. Order of Remand – Barlett Pond

The Board concurred to schedule an Executive Session w/ Attorney Witten for January 23, 2013.

- 2. Upcoming: Petition #01-13 – Wal-Mart Stores East – 2680 Cranberry Highway – Variances – 1/23/13.**
- 3. Upcoming: Petition #02-13 – Richard Joy – 6 Fannies Lane – Special Permit – 1/23/13.**

C. Discussion – Change from tapes to digital recorder – See memo.

Brief discussion ensued. Questions were raised as to the budget in place now for ZBA.

IX. ADJOURNMENT

MOTION: A motion was made & seconded to adjourn the meeting at 8:00 P.M.

VOTE: Unanimous (4-0-0)

Attest: Mary Scarsciotti
Mary Scarsciotti, Clerk
WAREHAM ZONING BOARD OF APPEALS

Date signed: 10-23-13

Date copy sent to Wareham Town Clerk: 10-24-13 bs