



TOWN OF WAYLAND
MASSACHUSETTS
01778
BOARD OF APPEALS

TOWN BUILDING
41 COCHITUATE ROAD
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October 27, 2015

Minutes

Attending the hearing was Eric Goldberg, Thomas White, Aida Gennis and Associate Members, Linda Segal and Shaunt Sarian. Norma Badger was in attendance to take minutes.

Continued from 10/13/15; no panel set, no quorum

Application of JOHN DARACK for any necessary approvals, special permits, and/or variances as may be required to demolish a pre-existing non-conforming single family dwelling and construct a new single family dwelling under the Town of Wayland Zoning By-Laws Chapter 198 Sections 201, 203, 401.1.2, 401.1.6 and 1604.2. The property is located at 55 LAKESHORE DRIVE which is in a SINGLE RESIDENCE DISTRICT and AQUIFER PROTECTION DISTRICT. (15-24)

Panel hearing matter: Eric Goldberg, Aida Gennis, Thomas White, Linda Segal and Shaunt Sarian. Eric Goldberg will write the decision.

Eric mentioned that this was a proposal to demolish a house and rebuild. He explained to the applicant that whenever this occurs, they typically set a time and date to have the panel see the house and to see if it meets the standard of the by-law for demolition. Structural elements, mold, etc. It has to meet the standard and would suggest that someone be there to point out the structural issues. Linda Segal said the technical information was from the architect and they often look for things like a structural engineer, but maybe our member Thorn, being an architect on the board, could point out things. Eric says just being an old house does not meet the definition. If the person making the points could be there would be helpful (like the architect).

Site visit: Schedule for Tuesday November 3, 2015 at 8:00 a.m.

Continued hearing to: November 24, 2015 at 7:00 p.m.

Application of SHEKHAR IYER & SUCHITRA VASANTHAKUMAR for any necessary approvals, special permits, and/or variances as may be required to demolish a pre-existing non-conforming single family dwelling and construct a new single family dwelling under the Town of Wayland Zoning By-Laws Chapter 198 Sections 201, 203, 401.1.2, 401.1.6 and 1604.2. The property is located at 140 CONCORD ROAD which is in a SINGLE RESIDENCE DISTRICT and AQUIFER PROTECTION DISTRICT. (15-23)

Panel hearing the matter: Eric Goldberg, Thomas White, Aida Gennis, Shaunt Sarian and Linda Segal. Aida Gennis will write the decision.

Eric gave this applicant the same direction of being a demolition and would have to set a site visit.

Site visit: November 12, 2015 at 8:00 a.m.

Continued hearing to November 24, 2015 at 7:15 p.m.

Linda had a few comments and asked the applicant about the engineering report and there was no narrative in the package that would make a case for demolition which and those things in writing would be good to submit, explaining why they meet the standards. Looked at the property card and someone has been living in the house for a long time and why should they consider demolition, some material would be of help. Need to see more than a cluttered bedroom and water stains. Eric said they need to see the structural damages.

Application of NADIA URATO for any necessary approvals, special permits, and/or variances as may be required to renew the special permit granted in ZBA Decision #14-25 dated October 27, 2014 to allow a home occupation (dermatology practice) under the Town of Wayland Zoning By-Laws Chapter 198 Sections 201, 203, 901.1.2 and 804-Table of Permitted Accessory Uses by District (Use #62). The property is located at 180 OXBOW ROAD which is in a SINGLE RESIDENCE DISTRICT and AQUIFER PROTECTION DISTRICT (15-25)

Panel hearing matter: Eric Goldberg, Thomas White, Aida Gennis, Linda Segal and Shaunt Sarian. Linda Segal will write the decision.

Eric asked Nadia if there were any changes in hours, operations, conditions, etc. Nadia said no there was no change to this but spoke to her neighbors. Linda Segal mentioned that the BOH set conditions.

Eric read through the prior conditions...all conditions are same.

Public comment: no one commented.

Eric moved to grant special permit to reissue the decision of home occupation and all conditions to remain as in decision #14-25 but change it from 1 year of renewal to 3 years. Aida second, all in favor 5-0.

Continued from 9/29/15; no panel set (only 4 members at last hearing, applicant requested to wait for a 5 member panel)

Administrative Appeal of the Building Commissioner's decision dated July 28, 2015 denying a building permit for the subject premises under the Town of Wayland Zoning By-laws Chapter 198 Sections 201, 202 and 205. The property is located at 150 MAIN STREET which is in a BUSINESS DISTRICT A and SINGLE RESIDENCE DISTRICT. (15-20)

Panel hearing matter: Eric Goldberg, Aida Gennis, Thomas White, Linda Segal and Shaunt Sarian. Eric will write the decision.

Attorney Charles LeRay represented the applicants whom were appealing the Building Commissioner's decision to deny the building permit. Attorney LeRay proceeded to read off the property address and history. How the land began and reconfigured. Now the applicants own all the lots except for lot #4. Hammond Road had been the road to access these lots. It is entirely owned by 150 Main Street and there is an access road for the Martino's living on Hammond Road. What they want to do is put a CVS in and at the time there was a question of the Planning Board as to what is Hammond Road (street, right of way, easement?) Street has setbacks and the proposed store would not meet those setbacks. In the planning board's decision...the "way" has been eliminated for lot four, so Planning Board has said to wipe it out, then they went to court to have that done, condition #30 and since they proved it they asked the Planning Board to remove condition #30. Now they have applied for a building permit and the board must determine if Hammond Road is a street and if so would need to meet the setback. Eric asked if they were expecting the Zoning Board to make the decision of Hammond Road being a street or not. Attorney LeRay said a street is defined as.....(read definition). Attorney LeRay explained: So is it possible that Hammond Road is a public way? Statute of laying it out by public, prescription, never became a public way through that. It was created 8 decades after the legislation passed the statute. Land court has found it not to be a public way. Since 2013 they have maintained signs that say not a public way, private way.

In January 2014 Town Counsel confirmed to DPW that it was not open to the public. Attorney LeRay explained that the applicants have taken those steps to make it NOT open to public. Read a description on how to make it a public way, read that and must follow procedure. In 1925 when the Town meeting adopted it and the board of selectmen acted as survey department and then passed it through Planning Board. No one ever passed plans for the public way and they would have to go through the Planning Board so as a matter of statute it is not a public way and they will not take the steps to make it a public way. Definitionally does not mean it is a public way. Stated a case in Lowell, explained the road situation there and the question was is it open to the public and court said no. The fact that just because customers or family members go visit CVS or the Martines does not give it the status that it is open to the public. If the town has given the dpw permission to plow, then it could be an interpretation as a public way.

Eric Goldberg asked whether the analysis would be different if a retail store situated on the property invited the public on the property. Attorney LeRay said no it does not. Eric said then it is considered a glorified driveway. Attorney LeRay said when the town votes to make it a road then it becomes a public way. Linda asked about utilities and people going to take care of the utilities. Other things come to her mind besides just the Martines and people visiting them. Attorney LeRay said Hammond Road isn't even a subdivision road and would not give the public any rights to it until the town accepts it. *McManus vs Board of Wayland*, front lot and street and voted buildable. Streets (read definition) and concluded it wasn't a street.

Not a public way, not a street in by-law and therefore there is no setback required. Attorney LeRay believes because it is not a street it turns out that condition #30 in Planning decision was not needed. Even if the appeals court rules in their decision, still looking at 6-8 months to satisfy condition #30 and what if it was not needed. They asked the Planning Board to remove condition #30. Then the applicants met with the Planning Board in June and presented the material and Town Planner said it would be a major amendment and was advised to file application for that. Chapter 190 Section ...to approve site plan for major changes the Planning Board shall make such decision and decision shall be issued within 60 calendar days or such shall be deemed approved for the major amendment.

Eric asked Attorney LeRay to frame out the question; is the applicant looking for them to declare or decide that there was a constructive grant or the zoning board to overturn a rejection? What are they asking the Zoning Board to do. Attorney LeRay replied to declare condition #30 be removed and that they did make a constructive approval and by declaring there was a constructive approval this would make condition #30 go away. Basically what the applicant is asking for is to remove condition #30 and define that there was constructive approval.

Attorney said the application for amendment was filed on June 16, 2014 and the Planning Dept opened the hearing on August 5, 2014. The Planning board asked for an extension of time since they did not feel comfortable with the case being in land court, the applicants agreed to sign an extension so the deadline was extended to September 23, 2014. On September 23, 2014 the Planning Board did not have a quorum and asked them to sign another extension to October 14, 2014 and asked to further extend it. The Planning Board suggested they amend the decision from 2 years ago and comment on condition #30, again asked them to extend for land court ruling so they declined to extend and 2 days later Planning made a decision and sent the decision out 5 days later. The decision was that the Planning Board wanted to wait for the land court. So the only way was to appeal a building permit. Attorney LeRay said that in the planning board response they referenced section 9 of the State Zoning Act, says nothing about site plans. Section 9 has 14 days to file to town clerk. Attorney LeRay claimed the planning board did not have the authority to put that in. Special permits, timelines. They complied with the timelines that they thought they had but the 14 day period as a matter of law was how the Planning Board's response appears. The appeals court said the same thing. Attorney LeRay read off some more cases...have to file that notice within 90 days of the permit or within the 60 days, that's what the statute says. Attorney LeRay said the planning board did not make that. They were told by Counsel that constructive approval would be possible and for all those reasons they believe it was a constructive approval and it was overturned by the Building Commissioner as stated in his letter of denial. Limitations, such as when they can apply for building permit, they believe they started the process when it first went to court and satisfied every /

preconstruction condition. Condition #26-2 year appeal.....Have to related to commencing limitations. Litigations.

Eric Goldberg asked the question to Attorney LeRay that if they sit as a separate board that they could have the authority to overturn the Planning Board's conditions?

Attorney LeRay responded that the Board's authority is to hear the appeal from the denial of the building permit and the Building Commissioner's determination that there has not been constructive approval/ or the applicant can appeal the site plan approval through the building permit appeal.

Eric Goldberg said to the applicants' Attorney that in order to better understand what the applicant is asking for is by the denial of the permit; the Zoning Board can get behind the permit to decide whether it was correct not to remove condition #30 of the planning board decision. Linda said the legal notice does not go into that depth of this and wondering how far they can go. Eric said they need to hear from Town Counsel on all three items. Eric would prefer that all points be made not repeatedly.

Them said the only thing before them is the appeal of the building commissioner. Does not want this to become an entire issue of the past, just what is in front of them, the denial of the building permit. No broader discussion.

Mark Lanza, Town Counsel. Eric said start with the issue of what authority the zoning board has with the lapse of the special permit. If there is a condition of site plan approval and what direction to take.

Mark Lanza counseled the board as to what they need to factor: The zoning board does have the power to toll building decisions, not planning decisions. If implementation hasn't begun in 2 years the site plan lapses. The applicants' attorney said there were litigations and that would make it impossible to implement. The fact is what was the litigation and what made it impossible to start the implementation. All the litigation that appears is regarding condition #30. Litigation seeking a land court decision that all the properties could be combined together or an easement for the Martines. The "way" is a separate lot and that the litigation was over; was that by the applicant and was it necessary for the applicants to proceed with the project? The other litigation is the constructive approval, the case was dismissed that the constructive grant issue was not decided. Did that appeal interfere with the applicant starting the project? That is what the zoning board has to determine. Did the two cases interfere and stop them from starting the project.

Attorney LeRay gave the reasons why.

Discussion by the Board: Will go prong by prong..

Delay piece. Start dates, litigation dates. Litigation applies to the owner. Thorn White said the building commissioners' denial does not provide all the pieces and they do not have all the pieces and litigations in front of them. Would agree that the legal action that had been taken whatever the mechanism was; could they have moved forward with the decision of the planning board. If the applicant must meet condition #30 and they do not; he could see the reason for denial.

Eric asked if there were comments from public concerning the expiration of permit. No one commented.

Eric asked about street. Eric said he read the materials and read letter to town, talking about a street for zoning purposes. Land court involved is separate. If looking just according to zoning definition; (read definition under the by-law) and if it does not meet that definition it is not a street and does not need to meet the street frontage bylaw.

Mark Lanza recalled some court cases on the definition of street and the appeals court. Here the applicant is in the opposite position to avoid setback issues. Hammond Way is not used

as a public way. One of the issues for the building commissioner was that perhaps it could be used in the future it shows on the plan for CVS and court decided it was a way and could that "way" become a street to meet the setback. Is it a street in the zoning by-law definition? Mark Lanza said NO. Was it back in 1920's; perhaps.

Aida asked if the whole lot is registered land and no adverse possession, and could not create an adverse possession, so the use was a tolerated use? Mark said that is what the court decided. So as an owner changes the owner can change that also? That is what the building commissioner was asking, was it or would it be a street or not. Eric said they can only make their decision based on today.

Linda was concerned with the lack of awareness of other legal matters pending. Does this lack of information affect what the applicants spoke about. Mark Lanza said in 2014 the court ruled the land was not a way, and only if the street was used as a public way would consider it a street and this clearly was not.

John Maccini, Wayland resident and business owner, thought the land court approved it as a "way". Eric said from a zoning perspective, the issue is setback, is there a setback issue to be enforced. The Building Commissioner determined that Hammond Way is a street and if so it requires a setback. The owners say it is not a street as far as Zoning is concerned and is there a setback required. A Street is a public way or a private way used as a public way for traffic. If it doesn't meet that then it is not a street and if not a street does not have to meet setback. John Maccini asked if so could the building be built on top of that. Eric said that if they have done enough to meet the condition #30 and if they haven't and there is still the condition #30 issue then the commissioner was right.

Erin Gibbi of 25 Mitchell Street stated that per the site plan that the applicants have submitted and if it were to go to the intended proposed use of the property then it opens it up to public use.

Dave Flaherty of 39 West Plain, thinks it is a public way the way the public uses it. One of the primary entrance way for the house and ball park also. Eric said if there is a sign on the lot, not for public use, then why could they park there. Attorney LeRay said that is a granted license they can revoke anytime.

Constructive grant or not constructive grant. Cannot understand that they have the authority to mess around with site plan approval. Linda also asked about the legal notice. Mark said unless the board has written that in the rules. Mark made examples of the cellular tower and...the board could vote the planning board was wrong, they do have the authority but this is not in front of them. The narrow issue is whether condition #30 been met. Constructive approval may not even be necessary. Eric said they have to get to the constructive approval piece. If they decide the building commissioner was correct that condition #30 had not been complied with. One is a subset of the other.

Mark Lanza continued to explain...Constructive approval from administrative approval? There is no mention of the site plan in the by-law, which is correct. Courts have not addressed the constructive approval of the site plan. Wayland does address constructive approval, Mark remembers discussion of it, in the by-law it sayswithin 60 day period which Mark Lanza continued to explain that if that was all that was there in the by-law then it would be a constructive approval, but the by-law does state that the planning board can make their own regulations, which they have. Look at the two together and see what the procedure is. Eric asked about the argument of the 14 days can't ever go beyond the prescribed deadline. Variance is 100 days. Attorney LeRay said the planning board did not adopt a rule, they referenced the state statute 90 days for decisions and 14 days after and that 14 day period cannot go beyond the 90 days, and incorporating that makes it a constructive approval. Eric said the issue for them is whether the planning board adhered to its procedures and rules and

regulations, the building commissioner acting upon what was in the planning board decision.....

Nancy Leifer of 73 East Plain asked if all the board members read the land court decision. The site plan that is before all of this, it clearly states the parking spaces are in the right of way and judge ruled it couldn't be.

Arlene(????) of East Plain, said the #30 could have been appealed and did not.

Attorney LeRay said that is a condition of law, they cannot take a direct appeals; they have to wait for the building permit to be issued.

Eric proceeded with what do they do about #30 and was the Building Commissioner's appeal correct and did the applicant comply with #30. Was the condition complied with, was the condition placed on constructive grant. What puzzled Eric was the absence of the November 25, 2014 decision, which was the decision that the planning board was waiting for to guide them and that decision was not in their packet for tonight's hearing. (someone in the public handed Eric a copy of legal court hearing material needed) Eric said on November 25, 2014 decision of appeal from court, the last paragraph and read it...condition #30; Eric regards this as the court adding another road block to the ability to comply with condition #30. The record before the court was that it was not preserved for the access rights, but there were deeded rights for the Martines. Access protection. Judge allowed consolidation of everything but not the "Way" and could not meet condition #30 therefore this would make it seem that the commissioner was correct in stating they did not meet condition #30. If condition #30 still exists unless there was a constructive grant. That is how they overlap each other.

Public: Gretchen Dresens of 155 Main Street, read a letter in support to the building commissioners denial letter and submitted to the Zoning Board, signed by 14 abutters

34 Pequot Road, "abutters" is not valid.

Molly Upton of 23B Bayfield Road, asked part of the problem that the parking is in the way.

Eric said what he thought the judge was struggling with the fact that the plan didn't document how the access rights were going to exist.

Michael Bell asked if there was ever a consideration to go around the parking lot. Eric said this is not particular to this hearing.

Attorney LeRay said everything they have in front of them is under appeal. Is that a way or public access, then go to court. The thing in the middle is what is it as an engineering appeal so land court could tell. It was filed but land court called it a way and said the owners of 150 Main Street own the way. Then they went back to have that property put as one but the court could not determine if it was a public way or not. The judge asked about the consolidation and he looked at the wrong plan and questioned about easement rights. Case law is clear if they want to relocate and if they don't agree they go to court. Judge got himself in a circle. Eric explained that what they are here for is to see if the commissioner's denial is something they would uphold. And Eric said it goes back to Condition #30 as being complied with. Attorney LeRay said it doesn't matter if condition #30 was complied with or not, at the time the issue was the constructive grant part and the commissioner had that in front of him.

Bill Martino, 9 Hammond Road, said Hammond Road is deeded to them, and not an easement.

Attorney LeRay said the court ruled that it was all their property. Eric said what is in front of them is to determine if condition #30 was met and the commissioner's denial would be upheld.

Doug of 8 Bogren Way, asked about other businesses and how things are done.

Eric Goldberg suggested that they close the public hearing for deliberation. Linda asked if they have questions can they ask. Mark suggested it is a good idea to close it, so evidence has been submitted. Eric moved to close the hearing, Thorn second all in favor.

Eric said without knowing every time limit, it seems that the applicant has done everything they have done, has been trying to implement the site plan approval, and now have taken the steps to get the site plan approval. By appeals, court, etc they have started before the lapse date and would not agree with the Building Commissioner in that the time of the approval had lapsed. With respect to setbacks, the building commissioner decision was an error because "way" does not fit the definition of a street and not a public way, not a street and not required for setbacks. Board need not rule upon whether the Planning Board's rules and regulations were proper. No basis to find that the Planning Board failed to follow their own rules and regulations. Therefore no basis to find constructive grant. The Building Commissioner correctly determined that condition #30 was not met. Therefore Building Commissioner correctly determined that he could not issue a Building Permit.

Aida Gennis felt the same.

Attorney LeRay, said they did not present that the planning board did not follow its rules and regs. He did say that the planning board adopted the 14 day period cannot take you through that 90 day period. Eric said point taken. Will leave it as the planning board followed its rules and regs and the planning board is in compliance with them and the decision would not lead to a constructive grant and in that case the building commissioner did make a correct determination for denial. Mark Lanza said make a finding that he was correct and this issue makes his (Building Commissioner's) denial stand.

Eric made a motion that the board make findings as framed by Town counsel as follows concerning the Building Commissioner's findings::

1. That the Site Plan Approval lapsed – (finding by the board, the site plan did not lapse it had been acted upon)
2. Hammond Road is a street which building setbacks apply – (finding by the board, Hammond Road does not meet the definition of Street, therefore no setbacks apply)
3. Condition #30 had been eliminated by the constructive approval – (finding by the board, there was NO constructive approval)
4. Condition #30 had not been complied with by the applicant – (finding by the board, agree that condition #30 had not been complied with therefore denial of a building permit is correct)
5. And based on the findings the zoning board denies the applicants appeal and affirms the building commissioner's decision.

Aida second the motion, all in favor 5-0

Board voted chair to authorize town counsel to review and amend decision.

Eric second all approved.

Shaunt motioned to adjourn at 10:00, Aida second. All approved.

January 26, 2016
Date Minutes Approved

Norma Badger
Prepared by: Norma Badger

