



TOWN OF WAYLAND
MASSACHUSETTS
01778
BOARD OF APPEALS

TOWN BUILDING
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MINUTES
NOVEMBER 29, 2016

Attending the meeting held at 7pm in the Large Hearing Room in Wayland Town Building located at 41 Cochituate Rd. Wayland, were members Eric Goldberg, Chair, Aida Gennis, Jonathan Sachs, Thomas White, and Associate Member Shaunt Sarian. Building Commissioner, Geoff Larsen was in attendance. Town counsel, Mark Lanza, as well as Attorney for 150 Main Street, LLC, Charles Le Ray were in attendance. Audio recorded by WayCam.

Application of **Philip Martino** to Appeal the decision of the Building Commissioner/Zoning Enforcement Officer for the issuance of the building permit for CVS Store (issued on July 19, 2016), under the Town of Wayland Zoning Bylaws, Chapter 198, Sections 201 and 203, 604.9.1 and M.G.L. Ch. 40A; including but not limited to, Sections 8&15. The property is located at **150 MAIN STREET**, which is in a BUSINESS A DISTRICT with a portion of property located in a R20 SINGLE RESIDENCE DISTRICT. **Case #16-19** (cont'd)

Appeal withdrawn with prejudice following agreement between applicant and developer. Approved Unanimously.

No Public Comment.

Application of **Nancy Leifer** to Appeal the decision of the Building Commissioner/Zoning Enforcement Officer for the issuance of the building permit for CVS Store (issued on July 19, 2016), under the Town of Wayland Zoning Bylaws, Chapter 198, Sections 201 and 203, 604.9.1 and M.G.L. Ch. 40A; including but not limited to, Sections 8&15. The property is located at **150 MAIN STREET**, which is in a BUSINESS A DISTRICT with a portion of property located in a R20 SINGLE RESIDENCE DISTRICT. **Case#16-21** (cont'd)

Panel: Eric, Aida, Jonathan, Thomas, Shaunt. Eric will write decision with help of Town counsel.

Eric addressed letter previously submitted by Ms. Boelter requesting that the board replace Attorney Mark Lanza as Town Counsel on the matters relating to 150 Main Street. Eric expressed his view that the request to replace Attorney Lanza and the characterization of Board if it failed to do so were highly offensive. Eric further expressed that he had great respect for Attorney Lanza, and that Attorney Lanza would continue to represent the Board in connection with the 150 Main Street matters for so long as Attorney Lanza continued to serve as Town Counsel.

Applicant, Nancy Leifer, says she's lived in Wayland for over 40 years in Cochituate. She says yesterday afternoon per her request she received an electronic copy of a brief submitted to the board by Mr. Charles Le Ray who represents 150 Main Street.

She quotes Le Ray "I respectfully ask that the Wayland Zoning Board of Appeals deny Mrs. Leifer's appeal in its entirety." She says what follows that request is a nine page argument accompanied by eleven pages of case law. She asks the board how much weight Mr. Le Ray's brief and arguments have tonight for her hearing? Eric commends Ms. Leifer on the thoroughness of her submission and explains that the developer has the right to oppose her appeal,

including to challenge her standing.

Eric explains the basic principles of standing under G.L. c. 40A. Eric further explains that only abutters and abutters to abutters within 300 feet of the property line are presumed to have standing, and thus, are presumed to be aggrieved by a decision of a the Building Commissioner or Zoning Board. However, the presumption is rebuttable and can be challenged. Eric further explained that because Ms. Leifer is not an abutter or an abutter to an abutter within 300 feet, she is not presumed to have standing, and must instead demonstrate that she has suffered harmed by the Building Commissioner's decision to a private right that is special and different from the concerns of the general community. Eric further explained that standing is jurisdictional, and if an applicant is without standing, a Zoning Board does not have jurisdiction to consider the merits of an appeal under Massachusetts law.

Eric explained why Ms. Leifer is not presumed to have standing and must instead make the threshold showing that she has suffered harm to a private property interest that is special and different from the concerns of the general community, which the Board agreed she was unable to do.

Attorney Le Ray representing 150 Main Street concurred with Eric's explanation of standing.

Ms. Leifer questioned how it could be possible that she would be unable to appeal issues of concern. She further claimed not to be aware of the developer's opposition until shortly before the hearing, although Eric clarified that the opposition papers were filed with the Town on September 20 and were a matter of public record.

Attorney Le Ray expressed his view that Ms. Leifer lacks standing for the reasons outlined in his memorandum.

Eric explained that there was another jurisdictional defect beyond standing, namely, that Ms. Leifer failed to timely file the required filing fee when she first submitted her application for appeal. Ms. Leifer claimed she was told she could hold off paying the fee until after she presented her appeal. She was later informed by the Building Department to pay her fee, which she did, but not until after she had filed her appeal.

Eric reviewed a recent court decision that addressed the consequence of failing to timely pay a required filing fee. The case is Zoning Board of appeals of Hanover versus the Housing Appeals Committee. The court held that the application was incomplete because the required fee was not paid. In this case, the application was incomplete because Ms. Leifer failed to timely pay the required filing fee. Because the application was incomplete as of the filing deadline, the Board would not have jurisdiction to hear her appeal in addition to the lack of standing. The case addressed an appeal process under the 40B comprehensive permit statute but the rationale applied.

All members voted in favor of closing the public hearing to deliberate on the jurisdictional issues.

Mark Lanza explained that the Board could make a motion to deny Nancy Leifer's administrative appeal on the basis that the Board lacked jurisdiction due to Ms. Leifer's lack of standing. Eric adopted Attorney Lanza's motion. The Board voted unanimously to deny Ms. Leifer's appeal on the ground that she lacked standing and thus the Board had no jurisdiction to consider her appeal on the merits.

Applications of **GRETCHEN & PAUL DRESENS** to Appeal the decision of the Building Commissioner/Zoning Enforcement Officer for the issuance of the building permit for CVS Store (issued on July 19, 2016), under the Town of Wayland Zoning Bylaws, Chapter 198, Sections 201 and 203, 604.9.1 and M.G.L. Ch. 40A; including but not limited to, Sections 8&15. The property is located at **150 MAIN STREET**, which is in a BUSINESS A DISTRICT with a portion of property located in a R20 SINGLE RESIDENCE DISTRICT. **Case#16-20 (cont'd) & Case#16-29 (cont'd)**

Panel: Eric, Jonathan, Thomas, Aida, Shaunt. Eric will write the decision.

Attorney John Harkavy appeared on behalf of Gretchen Dresens. Attorney Harkavy principally addressed the jurisdictional issue raised by the late filing of Ms. Dresens' appeal. The appeal was not received by the Town Clerk's office until after the expiration of the 30 day filing deadline.

Attorney Harkavy explained that Ms. Dresens had 30 days, until August 18, 2016 to file an appeal. Ms. Dresens filed the appeal on August 17, 2016. Attorney Harkavy explained that Ms. Dresens walked into the building and the Town Clerk's office was closed for the day. So instead of leaving, she went to the Board of Selectmen's office and to the Planning Department. The planning board or the building department actually stamped in Ms. Dresens' application on the 17th. The Town Clerk did not receive the appeal until August 19, after the strict statutory deadline expired. The Board's printed rules indicate that the Building Department staff will deliver the application to the Town Clerk for filing. So, according to Attorney Harkavy, Ms. Dresens followed the Board's rules.

Attorney Harkavy cited a 1981 decision (Carson) in which the court allowed an extension to the filing deadline because the Town Clerk's office was closed due to the state of emergency and 6-day shut-down of government offices following the blizzard of '78. Attorney Harkavy argued that the case supports an extension of the deadline as to Ms. Dresens' appeal due to the closure of the Town Clerk's office on the 17th. The Board distinguished the case because there was no state of emergency and the Wayland Town Clerk's office was open on August 18. Eric noted that the papers were filed on the 17th, the Clerk's office was open on the 18th, and the papers were due on the 18th. Therefore, the appeal could have been filed timely had Ms. Dresens filed the papers with the Town Clerk's office on the 18th. Attorney Harkavy acknowledged that the courts have strictly construed the statutory filing deadline.

Ms. Dresens explained that she brought her appeal in on the 17th, and there was a note on Town Clerk's office, saying the office would be closed at 1:30. She walked to the Town Administrator's office, who informed her that she could have the papers stamped in by the Town Administrator. However, statutory law requires that the appeal be stamped in by the Town Clerk. Ms. Dresens expressed her dissatisfaction with the procedure that was followed and was frustrated by doing as she was instructed by feeling as though she was misinformed. Attorney Harkavy likewise emphasized that Ms. Dresens did as she was instructed. He also pointed out that Ms. Dresens is an abutter and thus is presumed to have standing.

Ms. Dresens stated that she was not opposed to the project. Rather, she wanted to ensure that the developer complies with the bylaws and obtains all required approvals, especially with regard to parking.

Eric explained that the Board is bound by statutory and decisional law with respect to jurisdiction. The Board cannot hear the merits of an appeal if the Board lacks jurisdiction. If there is a conflict between the Board's rules and the requirements under Massachusetts law, the statute controls.

Eric explained that as much as the Board may want to address the merits, the Board's authority remains constrained by the lack of jurisdiction.

Attorney Harkavy argued that the Board should nonetheless consider the merits given that she missed the deadline through no fault of her own. He further argued that reaching the merits would be good for Ms. Dresens and good for the developer to obtain closure. Eric explained that when jurisdiction is lacking the Board does not have the discretion to consider the merits.

Attorney Charles Le Ray addressed the Board on behalf of the developer. Attorney Le Ray stressed that the Carson decision was distinguishable due to the government statement of emergency. Attorney Le Ray also pointed out that Ms. Dresens failed to pay the required filing fee, which impacted the Board's jurisdiction. Attorney Le Ray questioned Ms. Dresens' standing.

Town Counsel, Mark Lanza, stated his view that the issues were fully and properly addressed.

Several members of the public expressed their view that the Board should accept jurisdiction and consider the merits of Ms. Dresens' appeal.

Arlene Schuler of 9 King Street suggested that the statute and Board's rules were not in conflict but rather provided alternate procedures for filing the appeal. Ms. Schuler also suggested that the Board should hear the merits to ensure that zoning is properly enforced as to the project.

Eric explained that the issue of jurisdiction is not a judgment call. It does not come down to good or bad faith, or anyone's best or worst intentions. Jurisdiction is purely statutory.

Steve Hage of 14 King Street suggested that the Board should assume the Town Clerk was aware of the filing by August 18 even though the Clerk did not stamp in the appeal until the 19th.

Eric explained that the date stamp is what controls.

Ed Collins claimed that cases from outside Massachusetts would support the Board considering the merits. Eric responded that the Board will follow Massachusetts law.

John Flaherty suggested that Ms. Dresens was trying to follow the proper procedure.

Eric took offense at the suggestion that the Board was trying to avoid reaching the merits. Eric stressed that each Board member takes his or her duties very seriously to uphold the Bylaw and to carry out the duties of the Board in accordance with controlling statutory authority.

Eric asked the other Board members to share their thoughts.

Jonathan expressed that he had mixed feelings because he thought it was unfortunate to not get to the merits of the appeal due to a procedural issue.

Thom agreed that it was a sad situation and likewise had reservations about the way the process unfolded.

Aida agreed that the statute was clear and that under the circumstances the Board did not have authority. Aida also agreed that the circumstances were disappointed and seemed unfair.

Eric moved to close the public hearing and decide the matter on the jurisdictional issue. Aida seconded.

Eric asked Town Counsel to formulate a motion for the Board. Attorney Lanza recommended that the Board move to deny the administrative appeal filed by Ms. Dresens on the ground that the board does not have jurisdiction because the appeal was not timely filed with the Town Clerk. The Board voted unanimously to deny the appeal.

Ms. Dresens' second appeal from the initial decision not to schedule a hearing on the first appeal was determined to be moot and withdrawn.

Ms. Dresens expressed her disappointment with the process. She felt as though she was made to pay a steep price from information provided by the town manager and the building department who all made mistakes. She thought this was going to be her opportunity to finally raise concerns with the project's approval process and the effect issues she attempted to raise in her appeal will have on her family.

A member of the public suggested that efforts be made to revise the Board's rules to prevent a similar thing happening in the future.

Application of **MOLLY UPTON** to Appeal the decision of the Building Commissioner/Zoning Enforcement Officer for the issuance of the building permit for CVS Store (issued on July 19, 2016), under the Town of Wayland Zoning Bylaws, Chapter 198, Sections 201 and 203, 604.9.1 and M.G.L. Ch.40A; including but not limited to, Sections 8&15. The property is located at **150 MAIN STREET**, which is in a BUSINESS A DISTRICT with a portion of property located in a R20 SINGLE RESIDENCE DISTRICT. Case#16-22 (cont'd)

Panel: Eric Goldberg, Jonathans Sachs, Thomas White, Aida Gennis, and Shaunt Sarian

Alice Boelter of Lake Shore drive expressed concern that the circumstances giving rise to the procedural issues causes distrust in the Town. Eric expressed appreciation for Ms. Boelter's comments and explained that the public is served by the Zoning Board acting only within the bounds of its authority, including as to jurisdictional issues. The Zoning Board should not act outside of its authority to determine whether the Planning board had acted outside of its authority.

Ms. Upton recognized that she likely could not satisfy the test for standing. Ms. Upton suggested using her hearing to instead question the Building Commissioner concerning the zoning issues raised in her appeal. The Board declined to do so as a proxy for a merits discussion about the issues raised in the appeal when jurisdiction was otherwise lacking due to lack of standing, it too was received late by the Town Clerk, and the fee was not paid on time.

Several members of the public expressed their disappointment with the process and the failure of the Board to consider the merits.

Eric asked each Board member to share their view as to jurisdiction. Each member agreed that jurisdiction was lacking. Eric moved to close the public hearing.

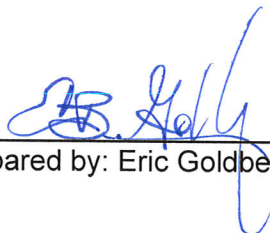
Town Counsel recommended that the Board move to deny Molly Upton's administrative appeal of the building commissioner's issuance of building permit 150 Main Street on the grounds that the board of appeals lacks jurisdiction because Ms. Upton did not demonstrate that she's a person aggrieved as that term is spelled out in Chapter 40A and explained and interpreted in the case law and because the appeal was not timely filed with the town clerk. Eric adopted Town Counsel's motion. The Board voted unanimously to deny the appeal.

The Board conferred with the Building Commissioner about the status of his review of the Grill 110 signage. The Building Commissioner is reviewing the matter.

Meeting adjourned.

April 11, 2017

Date Minutes Approved


Prepared by: Eric Goldberg, Chair