



TOWN OF WEST BOYLSTON ZONING BOARD OF APPEALS

127 Hartwell Street * West Boylston MA 01583 * zba@westboylston-ma.gov

MEETING MINUTES

September 13, 2012

Chairman: Philippe Chevalier

Members Present: Barbara Deschenes, Linda Isgro, and Charles Witkus

Others Present: Stephen Hart (Associate Member), and Secretary Toby Goldstein

Continued Public Hearing, Douglas Q. Meystre and Diane S. Meystre Et Al, 68 Newton Street, Administrative Appeal:

At 7:15 p.m., Mr. Chevalier re-opened the continued Public Hearing (continued from August 23). He informed the audience that Matthew Colangelo, who resigned his position on the board, will not be participating. Mr. Hart would sit in for him. Mr. Chevalier also discussed the process taking place tonight, that he would ask for any new evidence or comments from any of the participants, in addition to what was discussed on August 23.

Douglas Meystre, of 65 Newton Street, one of the applicants, addressed the board and others present. As he was not present at the August 23 meeting, he thanked the board and other participants at that meeting, and thanked Mr. Chevalier for the research that he prepared for that meeting. Mr. Meystre proceeded to discuss issues brought up on August 23. First, which was what he considered the most important, was the issue of pre-existing, non-conforming use of the accessory structure at 68 Newton Street. He said that the issue was not that of a building permit being issued by Mark Brodeur, Building Inspector. The issue was whether or not there was a change in use, character or quality of use of the structure, and its effect on the neighborhood. Mr. Meystre stated that, even if pre-existing, nonconforming use of the structure could be proven, if there was a change in structure or use, then it is covered by the zoning bylaws. The applicants had issue with the accessory structure after construction work was complete. The house and accessory structure both appeared to be occupied, but neither one by the property owner, Mr. Toomy. Mr. Meystre discussed the previous use of the structure by previous owners. He referred to the Birds, who were the owners before the Toomy's, and whose immediate family members (including Mrs. Bird's mother) lived there. Mr. Meystre then referred to the minutes of March 7, 1988, which further described the structure's

use over the years. Before the Birds, the DeWitts appeared to have used it for guests, and the Brooks' son lived there. He surmised that that the property was owner-occupied, with immediate family members or guests staying in the accessory structure. He feels that, since the construction on the structure was completed early this year, there has been a difference in the nature, quality and degree of impact to the neighborhood. He expressed concerns that this was a situation with an absentee landlord (Mr. Toomy lives in Hudson, MA, with an LLC owning the property), and possibly two units that could be rented at Mr. Toomy's discretion, with nothing stopping unrelated renters from renting them. This is a different situation from what previously applied to the property. The petitioners feel that this is a substantial extension of the pre-existing, nonconforming use principle, and feel that Mr. Brodeur's decision is in error. They are asking the ZBA to find the use of the structure to be illegal.

Christopher A. Flood, attorney of the Toomy's, spoke next. He discussed his opinion of the appeal by the petitioners not being timely, and also the opinion of Kay Doyle, Town Counsel. Mr. Flood referred to the fact that, as the previous owners attested to someone living in the accessory structure over the years, this makes it a dwelling, and Mr. Flood stated that there is no definition in the bylaws that the dwelling must be owner-occupied. He also stated that the main house and accessory structure have always been dwelling units, referring back to the March 7, 1988 minutes, and this would support the Building Inspector's decision.

Mr. Chevalier mentioned the fact that that there were differing opinions on when the house and accessory structure were constructed. Mr. Flood thought that the house itself was built around 1900. Ms. Isgro stated that tax assessor records showed that the accessory structure was added to the records in 1949, and referred to as a studio, therefore it was probably built in 1948.

Mr. Chevalier then asked for any further questions or comments, and there being none, he closed the public portion of the hearing. At that point, the board was to deliberate. Mr. Chevalier also asked at least a representative on each side of the appeal to stay for any questions by the board members. He also mentioned that all motions would be in the affirmative.

Ms. Isgro mentioned that she had with her documents from the August 23 meeting, Town Counsel's opinion, and legal cases that she outlined. First, she discussed the question of whether or not the petitioners' request was timely. She mentioned the fact that abutters must have actual notification within 30 days of the issuing of the building permit, which was on September 21, 2011. Plumbing and wiring inspections were done on October 3 and October 17, 2011. Referring to the "Gallivan vs. Wellesley Zoning Board of Appeals" case, when all building permits are issued, the abutters receive notice in that community. However, that is not the case according to West Boylston bylaw. Ms. Isgro, reading from the Wellesley case, said

that, since the abutters had notice, there is a “Duty of Inquiry” on the part of the abutters to question the issuing of the permit, and since they had notice, they could not wait until construction actually began. She also referred to the case of “Spooner vs. Board of Appeals of Brookline.” Regarding the Meystre appeal, construction did not take place during the 30-day appeal period for the building permit for the accessory structure. Most of the work was interior, with an underground trench dug for plumbing. The exterior repairs were mostly done in the back of the building. The work on the structure was not readily visible from the street. Ms. Isgro suggested that, regarding constructive notice, even with drilling taking place, that Conservation Commission and Board of Health notice was insufficient. Perhaps digging itself is not considered construction. Nothing on the building permit mentioned construction. She concluded that the “duty to inquire” rests more with the owner. She referred to the Building Inspector’s file, with the proposal on page 1, that states that the owner will apply for all zoning or other permits as necessary. The owner has the responsibility to obtain the necessary permits for the work to be done. Ms. Isgro supposed that, in relation to the abutters “duty to inquire”, perhaps no one inquired, as was said by Mr. Brodeur at the August 23 meeting, because they did not know what was going on.

Mr. Chevalier then discussed the issue of timeliness of the petitioners’ action. He mentioned cases that were previously submitted for the record, such as the Spooner case, where the ruling was that insufficient notice was given because either no building permit was posted or construction activity took place within the 30 day appeal period. He also mentioned the Gallivan case. In the Meystre case, statements by multiple people showed that the abutters knew that construction was taking place. Also, the petitioners did not appeal the Building Inspector’s determination, which was made in September, 2011, until June, 2012. Timeliness is an issue in this situation.

Ms. Isgro then again cited the Spooner case, and asked if it was the case that the abutters could pursue an appeal if the building permit is not noticeable and they are not aware of construction. Mr. Chevalier replied that they could, if there is no building permit notice or if the owners begin construction within the 30-day appeal period, but that those stipulations do not apply to the Meystre case. Ms. Isgro countered that the owner must prove that constructive notice was given. It was established previously that no one inquired about the building permit, and the permit was not visible from the street.

Mr. Chevalier then asked if the board needed to discuss the timeliness issue any further, and no one needed to do so.

Ms. Isgro then brought up the second issue involved, that of pre-existing, nonconforming use of the accessory structure. She stated that, if the owner can prove that it was used as a dwelling prior to the zoning bylaws (1946), and the abutters cannot prove that this use was discontinued

for more than two years, then the board can find pre-existing, nonconforming use. The burden to prove that it was originally used as a dwelling is on the property owner. According to a zoning map from 1939, the property showed a single residence. Zoning bylaws from 1946 allowed one detached family dwelling on a lot. Ms. Isgro then read the definition of a “single residence district.”

Mr. Chevalier then said that the language describing “one habitable dwelling” was not in the bylaw until 1975, stating that only one habitable dwelling was allowed on a lot.

Ms. Isgro then said that nothing in the bylaw allowed this in 1946. Ms. Deschenes replied that no bylaw existed when the building was built.

Mr. Chevalier then stated that bylaw allowed single family detached dwellings on a lot, but did not specify only one.

Ms. Isgro then added that the owner must prove pre-existing use as a dwelling, prior to the bylaws enactment. It was first used as a studio when built, taxed and assessed to reflect something that was not a habitable dwelling. Pre-existing, nonconforming use would have been discontinued for at least two years. The Dumonts in 1964-1965 used the structure as a studio and playhouse. No one lived in it, so there was an interruption of its use. In 1986, the Birds owned the property, and were denied a variance in 1988 for two residences on one lot. In the minutes of that meeting, the closest abutter, Mr. Grimes, testified that the use of the structure as a place for Mr. Bird’s mother to live was new use of the structure. Ms. Isgro pointed out that there had been breaks in type of use throughout the history of the structure, and opined that the owners did not meet the burden of proving that there were two existing separate dwellings on one lot.

Ms. Deschenes then mentioned that, according to the Town Clerk’s 2012 census, at 68 Newton Street, Lynn Bird and Peter Innamorati were listed as the residents, therefore the property was not owner-occupied. According to Mr. Toomy, Mr. Innamorati does live there, but not Lynn Bird. With there being no further comments or questions from the board members, Mr. Hart moved that the board rule in favor of the petition of applicants Douglas Q. Meystre, and Diane S. Meystre et al; and require that Mark E. Brodeur, Zoning Enforcement Officer, Town of West Boylston enforce the Zoning By-Laws of the Town of West Boylston as they apply to the use of the property and structures located at 68 Newton Street, presently owned by 68 Newton Street, LLC; and to order the owner of 68 Newton Street to cease using the accessory structure to the left and rear of the property as a dwelling. Ms. Isgro seconded. During the roll call vote, Mr. Witkus voted “no.” Ms. Isgro turned to Mr. Witkus and stated, “Charlie, that’s not how you were supposed to vote. You were supposed to vote “yes.” Mr. Witkus changed his vote to “yes.” The board voted as follows:

Mr. Hart – No

Ms. Deschenes – Yes

Mr. Chevalier – No

Ms. Isgro – Yes

Mr. Witkus – Yes

The motion does not carry. Mr. Chevalier will file petition with the Town Clerk, after reviewing it with Counsel, then will distribute it.

Open Meeting Law Complaint:

This is regarding a complaint from Ms. Isgro, received by ZBA on June 21, 2012, regarding supposed violations of the Open Meeting Law. The complaint was submitted on August 17 to the state Attorney General, who sent a response letter addressed to Ms. Isgro, dated August 30, 2012. Ms. Isgro discussed the situation of the complaint, wherein she felt that there was not an accurate record taken at the July 17, 2012 ZBA meeting, and that all documents used for discussion were not placed into the record, and that also, in the minutes, what the complaint was should have been stated. Mr. Chevalier countered that the board voted that the minutes were accurate and accepted them, and he asked at this time if the board had any comments or wanted to take any action, and they did not.

Old Business:

The board discussed the question of the Town hiring a housing specialist, and that they questioned the need of the Town to do so. Ms. Isgro motioned to invite Pat Halpin to meet with the board and discuss this further. Ms. Deschenes seconded. All in favor, so voted. Mr. Chevalier will contact Ms. Halpin for her availability.

Ms. Isgro discussed a list of affordable apartments in West Boylston that she helped to put together.

Kevin McCormick discussed with the board the special Town meeting, and informed the members that they needed to post any warrants 10 days prior to the meeting.

Minutes of August 23, 2012 Meeting:

During the review of the minutes, Ms. Isgro was questioning items and statements that were in the meeting minutes. Mr. McCormick, Chairman of the board of Selectmen, who was attending the meeting, reprimanded Ms. Isgro and the ZBA board for their procedure of reviewing board

minutes. After review of the minutes and discussion between the board members, Mr. Hart motioned to accept the minutes with changes in spelling and wording as indicated. Ms. Deschenes seconded. All in favor, so voted.

Discussion of Resignation of Ms. Isgro:

Mr. Chevalier submitted a letter from Ms. Isgro, in which she resigns from the board, dated September 10, 2012, by e-mail, with an indefinite effective date. Mr. Chevalier thanked her for her service. Ms. Isgro discussed the use of audiotapes of the meetings to help clarify what takes place at the meetings. Ms. Deschenes discussed what was supposed to constitute the minutes of the meetings.

At 8:55 p.m., Mr. Hart motioned to adjourn the meeting. Ms. Deschenes seconded. All in favor, so voted.

Respectfully submitted,

Toby S. Goldstein, Secretary

Date Accepted: _____ By: _____