



Board of Appeals

Minutes of Monday, February 7, 2011

Chairman Mann called the meeting to order at 6:45 p.m.

Board of Appeals members present: Gerald Mann, Lisa Berkman, Martin Mahoney, Don Turner (alternate) and Osa Flory (alternate)

Daley Decision Hearing-Continued

Chairman Mann opened the continued decision hearing at 6:45 p.m. in regards to the application of Timothy and Michelle Daley of 13 Hyde Hill Road, Williamsburg. Mr. Daley had a hearing on January 24, 2011, in which a special permit was granted for his property for new construction of an existing non-conforming use of a bait shop that is located in a barn on his property. The hearing had been continued due to Mr. Daley not giving the board a plot plan that showed the total property. Mr. Daley has submitted a plot plan since the hearing. The board noted there was no problem with the height of the building.

Motion made by Martin Mahoney to approve the Daley application subject to approval and conditions as discussed at the public hearing and decision hearing on January 24, 2011. The motion was seconded by Osa Flory. The vote on the motion was unanimous.

A motion was made by Martin Mahoney to accept the minutes of January 24, 2011 as written. The motion was seconded by Osa Flory. The motion was unanimously voted. Mr. Mann made a motion to close the hearing. The motion was seconded by Martin Mahoney. The motion was so voted.

Verillo Decision Hearing regarding 74 Village Hill Road

Chairman Mann opened the decision hearing at 7:00 p.m.

Chairman Mann read the Board's powers under the Zoning Act, Section 14. "In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit."

Mr. Mann gave a breakdown of the items in the appeal. His opinion was that not all items that were presented in the appeal and in the initial complaint were under the Zoning Board of Appeals jurisdiction. The board accepted his opinion to proceed with parameters. The board decided to dispose of the items in the appeal and complaint that were beyond the control of the Board of Appeals.

In the initial complaint of September 8, 2010, there were complaints of odor, dust, gas, etc that he felt the board could not issue an order on. Martin Mahoney agreed. Also, in the initial complaint, there was an issue with deafening noise. Under M.G.L. Chapter 214, Section 7B, there is an implied immunity for shooting ranges in regards to noise. The board felt that that was not under their jurisdiction to make a ruling on that. Mr. Evans had presented at the hearing of January 31, 2011, that the Chapter 214, Section 7B was inapplicable but Chairman Mann feels it does apply here.

Martin Mahoney stated that Chapter 214, Section 7B gives grandfathering of shooting range noise. The legislature took control away from towns regarding noise bylaws. Mr. Mahoney then stated he felt that the board could consider the noise as the current town bylaws took effect after that time and that Section 4 of the current town bylaws are very vague.

Lisa Berkman stated that since the Town accepted the "home rule clause" at Town meeting, in 2003, according to Mr. Mahoney, that the town can make bylaws and changes to bylaws that are "stiffer" than the laws set by the state.

Mr. Mahoney stated that since we do not have a noise bylaw and Section 4 is so vague, the board can make a decision based on the stack of letters, and testimony from the public about the increase in the noise at 74 Village Hill Road. That evidence can prove if there is a significant change in the level of noise since 2003.

Mr. Mann disagreed with Mr. Mahoney's interpretation of Chapter 214, Section 7B. He felt that the legislature gave sweeping immunity of noise levels to shooting ranges under this provision. He especially addressed the last paragraph.

Lisa Berkman stated that she felt that that area was "gray". She stated that our bylaws talk about public peace and tranquility.

Mr. Mahoney brought up that he is not sure if there is a differentiation between a recreational shooting range and a commercial shooting range spelled out in Chapter 214, Section 7B.

Mr. Mann felt that it was not specified, and all ranges would come under this provision.

Mrs. Berkman noted that this provision of the law was adopted in 1991, then amended in 2003, and only speaks of rifles, pistols, black powder, skeet shooting, and other recreational shooting and makes no reference to automatic weapons.

Mr. Mann stated the Board could come back to this. He then brought up the issue of the complaint of toxic lead and arsenic in the soil and water. Mr. Mann felt that the board had neither the ability nor the power to deal with such issues. The board unanimously agreed.

Mr. Mann brought up the complaint of stray bullets, and threats to hikers and children. He then again reiterated that this was beyond the board's ability or power to deal with this issue.

Mr. Mahoney agreed stating it was a criminal matter for the police, not the Zoning Board of Appeals.

Mr. Mann then stated that the major issue was the extension of non-conforming use of the property in question. He noted that no one representing the owners of the property came forward to assert the pre-existing non-conforming use of the property especially prior to 2003. Mr. Evans and Mr. Hasbrouck both assumed it was a pre-existing non-conforming use so the board will go with that assumption.

Donald Turner asked if the pre-existing non-conforming use was part of the building inspector's decision. Mr. Mann stated that it was.

Mr. Mahoney stated that if the board has to go with that assumption, then the only thing the board has to decide is if there was an enlargement and/or a change of use.

The board decided to not deal with the issues raised in expecting the Conservation Commission and the Board of Health to get involved with inspections of the property.

Mr. Mahoney feels there has been a substantial change of non-conforming use. There was credible evidence presented at the hearing on January 31, 2011 and testimony from long term abutters to the property that testified to increased noise and expanded use of the property. He feels that the owners should be required to apply for a special permit for the expanded use.

Mrs. Berkman agrees with Mr. Mahoney. She feels the board is looking at what the building inspector has found and the board's job is to agree or not agree with his decision. She felt the appeal was only based on Section 4 of the Zoning Bylaw of the Town of Williamsburg. She felt the board was hopping to Chapter 40A, Section 6 which is an expanded or change of use of a pre-existing non-conforming site. She wondered of the course of wisdom of the board doing their findings under Chapter 40A, Section 6, and just issue a cease and desist of the shooting range and then have the parties that own the property to approach the board with whatever modifications they are seeking.

Mr. Turner asked “what is the threshold of expanded use that would signify a significant change of use, for example 1%, 4%, 5%, or 1/2%”?

Mr. Mahoney responded to Mrs. Berkman’s statement of the cease and desist order. He feels that would be unenforceable. An owner has the right to fire a gun on his own property. He feels this would be outside the board’s authority. A shooting range is a recreational use that a property owner can use. He then addressed Mr. Turner’s question. He stated that it would need to be a substantial change and that he felt that had been presented at the hearing from the testimony and the amount of letters the board received.

Mr. Turner stated there were also abutters that testified that there was no increase in noise or amount of use. Mr. Turner lives in the neighborhood also and he feels the use has not significantly changed.

Mr. Mann stated that the letters they received was significantly more that talked of expanded use and increased noise than those that felt there was little change. He did note that not all letters received talked of use prior to 2003. He stated that some letters talked of use on Sundays but that not there is shooting six to seven days a week. In his opinion that is a significant change. He also felt that according to the testimony from the public present that there were no automatic weapons used at the site prior to 2003 and also no large groups that used the site. He did note it was a gray area if there was any commercial use of the property. There were videos and pictures submitted at the hearing, but those did not specifically show commercial use. Mr. Mann also noted that no owners testified at the hearing and they did not refute any of the testimony presented to the board.

Mr. Mann stated he had no problem with anything the building inspector wrote in his decision. The evidence presented shows a significant change of a pre-existing non-conforming site.

Mrs. Berkman noted the amount of years the members have been on the board. She has been on the board for 13 years, and Mr. Mann has been on for 12 years. They have attended many hearings with a lot of hot issues. She feels if the hearing generates the interest that this hearing did, there must be a problem. She noted the amount of people that attended the hearing.

Mrs. Flory stated that she feels there has been a change of use by the increase in escalation and the board needs to go back to when the bylaw was passed. If there is an increased use that bothers the public, it does impact people’s lives.

Mr. Mann noted they cannot outlaw noise but the board can use noise as an indicator of a change of use of the property and an increase in the use.

Mrs. Berkman noted that a change of use of a non-conforming use is a violation.

Mr. Mann stated that the building inspector did a great job on his decision in that he contacted the Environmental Protection Agency (EPA), the Department of Environmental Protection (DEP), the Police Department, and the Bureau of Alcohol, Tobacco and Firearms.

Mr. Mann and Mr. Mahoney noted the due diligence that was done on the part of the building inspector in regards to public health and safety.

Mrs. Berkman noted the board had received 38 letters about the change of use. She also noted the entrance to the shooting range was 1.3 miles from the Meekins Library. She noted there are 30 abutters to the property and that shows that most of abutters were impacted in that part of town.

Mr. Turner noted that the board was there not to issue restrictions but to decide if the building inspector made the right decision regarding the complaint presented.

Mr. Mann felt if the board issued a cease and desist order, the owners could come in seeking a special permit and restrictions could be put in place then.

Mrs. Berkman and Mr. Mann felt a cease and desist order can be issued as there was an expansion of the change of use of the land. This is defined under M.G.L. Chapter 40A, Section 14. They did note it has to be a unanimous vote of the board.

Mr. Turner noted that the shooting range is a lawful use and he felt the board could not issue a cease and desist.

Mr. Mahoney noted that the change of use made the lawful use an unlawful use. He felt the expansion of use made it an unlawful use.

Mr. Mahoney cited the Powers Test. Any one of those tests would trigger a need for a special permit.

Mr. Mann read the Powers Test.

1. Whether present use reflects the use prevailing when the zoning bylaw took effect.
2. Whether there is a difference in the quality or character as well as a degree of the present use.
3. Whether the current use is detrimental in kind on the affect of the neighborhood.

Mr. Mann noted that any one the courts would find the need for a special permit.

Mrs. Berkman noted that #2 and #3 were proven by testimony at the hearing on January 31, 2011. The board agreed.

Mr. Mahoney noted that any action the board takes should be through the building inspector. It was so noted.

Mr. Mahoney stated that the board cannot ask the building inspector to issue a cease and desist order from all shooting at the property but that a cease and desist of use that exceeds use after a determined date could be issued. The board needs to determine that date.

Mrs. Berkman noted that the letters and testimony stated the increase has taken place within the last three to five years.

Mr. Mann feels the appellant has given a date and the board should use that date which is when the town enacted the current set of zoning bylaws. The Board agreed. The date was November 17, 2003.

Mr. Turner stated again that he does not agree there has been a substantial increase of use of the property. He felt there was not enough compelling evidence to override the building inspector's decision.

Mr. Mann asked if the board was ready to make a motion.

Mr. Mahoney stated the wording should include instructing the building inspector to issue a cease and desist order of the increased use that did not exist prior to November 17, 2003.

Mrs. Berkman asked if the board could expand on that. She would like to see a cease and desist of all shooting.

Mr. Mahoney stated that the board cannot do that. They cannot restrict a property owner from shooting on his own property or the property owner allowing a friend to shoot on the property.

Mr. Mahoney stated there could be restrictions regarding automatic weapons, group use, auxiliary uses for commercial purposes, and no commercial use. The board agreed.

A question was raised on who would enforce these restrictions. The board felt if there was any use on the property that exceeded the restrictions, the board would hear about it

A motion was made by Martin Mahoney to instruct the Zoning Enforcement Officer, who is the Building Inspector, to issue a cease and desist order to the property owners of 74 Village Hill Road for all uses of the property that exceeds the use prior to November 17, 2003, specifically no discharge of automatic weapons, no commercial use, no auxiliary use for

commercial purposes, no group use of the shooting range and the hours to be limited to 8:00 a.m. to 10:00 p.m. as outlined in Massachusetts General Laws Chapter 214, Section 7B. The motion was seconded by Mrs. Berkman.

A motion was made by Martin Mahoney to close the decision hearing. The motion was seconded by Lisa Berkman. The motion was so voted.

Gerald Mann-Aye
Lisa Berkman-Aye
Martin Mahoney-Aye

Respectfully submitted,

Brenda Lessard, Secretary