ZBA Minutes for May 14, 2020, adopted June 11

ZONING BOARD OF APPEALS
2 Fairgrounds Road
Nantucket, Massachusetts 02554
www.nantucket-ma.gov

Commissioners: Susan McCarthy (Chair), Lisa Botticelli (Vice chair), Ed Toole (Clerk), Michael J. O’Mara, Kerim Koseatac
Alternates: Mark Poor, Geoff Thayer, Jim Mondani

~~ MINUTES ~~~

Thursday, May 14, 2020 1:00 p.m.

Pursuant to Governor Baker’s March 12, 2020 Order Regarding Open Meeting Law

Called to order at 1:05 p.m. and Announcements by Ms. McCarthy

Staff in attendance: Eleanor Antonietti, Zoning Administrator
Attending Members: McCarthy, Botticelli, Toole, O’Mara, Koseatac, Poor, Thayer, Mondani
Early Departures: McCarthy, 2:53 p.m.
NCTV: Andrew Cromartie

Motion to Approve the Agenda as amended. (made by: Botticelli) (seconded.)
Carried 5-0//Botticelli-aye; O’Mara-aye; Koseatac-aye; Thayer-aye; Mondani-aye; McCarthy-aye

I. APPROVAL OF MINUTES
1. February 13, 2020
   Motion Motion to Approve. (made by: Botticelli) (seconded)
   Roll-call Vote Carried 5-0//Botticelli-aye; Toole-aye; Koseatac-aye; Thayer-aye; McCarthy-aye

2. March 12, 2020
   Motion Motion to Hold for proposed correction and amendments. (made by: Toole) (seconded)
   Roll-call Vote Carried 5-0//Botticelli-aye; Toole-aye; Koseatac-aye; Thayer-aye; McCarthy-aye

II. OLD BUSINESS
1. 06-20  Ack Sconset LLC 8 Center Street Reade
   REQUEST TO WITHDRAW WITHOUT PREJUDICE
   Voting McCarthy, Botticelli, Toole, Koseatac, Thayer
   Alternates Poor, Mondani
   Representing Arthur Reade, Reade, Gullicksen, Hanley, & Gifford LLP
   Discussion None
   Motion Motion to Accept the withdrawal without prejudice. (made by: Toole) (seconded)
   Roll-call Vote Carried 5-0//Botticelli-aye; Toole-aye; Koseatac-aye; Thayer-aye; McCarthy-aye

III. NEW BUSINESS
1. 08-20  Nantucket Westmoor Farms, LLC (Appellant) 6 & 8 Old Westmoor Farm Road Swain
   REQUEST TO CONTINUE WITHOUT OPENING UNTIL AUGUST 13, 2020
   Voting McCarthy, Botticelli, Toole, O’Mara, Koseatac
   Alternates Poor, Thayer, Mondani
   Representing None
   Discussion Not opened at this time.
   Motion Motion to Continue to August 13 without opening. (made by: Toole) (seconded)
   Vote Carried 5-0//Botticelli-aye; Toole-aye; O’Mara-aye; Koseatac-aye; McCarthy-aye

2. 09-20  Timothy E. Quinlisk & Elizabeth A. Quinlisk 88 Quidnet Road Alger
   Applicants are seeking Special Permit relief pursuant to Zoning By-law Sections 139-30 and 139-33.A(1) to alter, extend, and change a structure, which is pre-existing nonconforming as to side yard setbacks, situated on a lot which is pre-existing nonconforming as to lot size and frontage. As proposed, the pre-existing nonconforming setback distances will not be made more nonconforming. The Locus is situated at 88 Quidnet Road, is shown on Assessor’s Map 21 as Parcels 109, 104, & 70, as Lots 5 & 6 upon Land Court Plan 8606-A and Lot 33 upon LCP 8606-B. Evidence of owner’s title is registered on Certificate of Title No. 26998 at the Nantucket County District of the Land Court. The site is zoned Residential Twenty (R-20).
   Voting McCarthy, O’Mara, Koseatac, Poor, Thayer
   Alternates Mondani
   Recused Botticelli, Toole,
   Documentation File with associated plans, photos, correspondence, and required documentation
   Representing Sarah Alger, Sarah F. Alger P.C.
Discussion

Alger – Explained the application for a special permit. The structure is over 100 years old. The plan is to demolish the existing shed and later additions to bring the structure back to its original footprint; the result will be less non-conforming. An application has been submitted with Historic District Commission (HDC), and we anticipate changes through that process. HDC hasn’t yet heard this project.

Thayer – In the past we’ve asked people to finish the HDC process first. Koseatac and McCarthy agree with Mr. Thayer; this should finish the HDC process; they would prefer to see those approved plans.

Alger – Suggested continuing to June. Suggested the ZBA consider changing the bylaw in the event HDC can’t hear a project prior to the ZBA ruling.

McCarty – It is cleaner for us to do it this way.

Yankow – Postponing this would be the wise thing to do; his clients would also like to see the final HDC plans.

Antonietti – Read Ms. Williams comments: Her client opposes this project. HDC hasn’t heard this; it should be put off until after HDC reviews this since the structure is over 120 years old; asked that the matter be held for June meeting. Her client’s concern is the massing.

Motion

Motion to Continue to June 11. (made by: O’Mara) (seconded)

Moved: O’Mara
Carried 5-0//McCarthy-aye; O’Mara-aye; Koseatac-aye; Thayer-aye; Poor-aye

Applicants are seeking Special Permit relief pursuant to Zoning By-law Sections 139-30 and 139-33.A(1)(a) to alter, change, and extend a preexisting nonconforming lot, or in the alternative and to the extent necessary, a Variance, or the modification of an existing Variance, under By-law Section 139-32. The locus is improved with primary and secondary dwellings, constructed as principal residences for each couple. The dwellings have been treated separately, and for all intents and purposes as separate lots and structures, each served by a separate driveway. Applicants propose to separate out their properties for estate planning and other purposes. The proposal would encompass one of the dwellings and subdivision of the property into two nonconforming lots of approximately equal land area, each containing a dwelling. No additional dwellings are proposed, and the Applicants propose to permanently restrict each lot to one dwelling and no additional ground cover above that which would be allowed by right. In the alternative, the Applicants request relief to allow them to create a two-unit condominium or cooperative. The Locus is situated at 21 & 25 Monohansett Road, is shown on Tax Assessor’s Map 27 as Parcel 31, and as Lot 2 upon Land Court Plan 39913-A and as Lot 1 in Block 262 upon Plan No. 2, Page 60. Evidence of owner’s title is registered on Certificate of Title No. 17375 at the Nantucket County District of the Land Court and in Book 1655, Page 103 on file at the Nantucket County Registry of Deeds. The site is zoned Limited Use General One (LUG-1).

Voting

McCarthy, Botticelli, Toole, O’Mara, Koseatac

Alternates

Poor, Thayer, Mondani

Recused

None

Documentation

File with associated plans, photos correspondence, and required documentation

Representing

Sarah Alger, Sarah F. Alger P.C.

Peter Mackay

Public

Emily Molden, Nantucket Land Council,

Discussion

Alger – Her client is available to answer questions or add information. Reviewed the application for a special permit to allow the lot to be subdivided; the two lots would be non-conforming in size. The neighbors support this request.

McCarthy – Regarding the precedent Ms. Alger cited, File 32-10, she distinguishes that case from this because one of those lots became conforming. Asked if they are conforming regarding the change from 10 to 12 scalar separation.

Alger – Yes.

O’Mara – Confirmed that the line delineating the two lots would meet the guideline setbacks for both properties.

Alger – Zoning is LUG1; originally it was LUG2.

Toole – Asked if the client explored doing this in a different way; there is a provision in 139-8(C) that allows this as long as one of the lots is deemed a covenant lot.

Mackay – We’ve explored all options. One problem is these have been primary dwellings for 30 years. Explained why making one a covenant lot was not considered viable option; for one it devalues one of the structures.

McCarty – The main issue for us to address is separate ownership, not to maximize return. We don’t make decisions based upon the financial outcome.

Mackay – He’s looking for flexibility in the application of the bylaws in a very difficult personal situation.

Mondani – He’s uncomfortable relying on a mortgage site plan where property lines aren’t accurate; would prefer a more accurate view.

Alger – The plan of record is old and shows this property as a group of little lots. When this is subdivided, we would have to provide an accurate plan.

Mondani – Asked about the condo option.

Alger – That would be a good option as a whole but is not allowed by right; it would require a variance but would keep the houses under separate ownership and would not change the way the property is used.

Toole – Asked what distinguishes this from a bunch of other similar situations where a lot might want to be subdivided.
Alger – First the ZBA determines this meets standards set for the Variance granted in 1989; second it meets the standards applied in the case of File No. 30-10, providing you with a precedent.

McCarthy – In 1989, the ZBA found that there was a large group of pine trees to be preserved resulting in the current siting; asked if that stand still exists on the lot.

MacKay – Those trees still exist; the structures were placed in an open area to preserve that.

Toole – He feels the stand of trees being identified as a unique topographical feature was a stretch in 1989.

Alger – That previous Board made that finding. A variance to allow a condo would alleviate a significant hardship; she feels the condo is a less offensive non-conformity than an undersized lot.

Toole – The reasonable alternative is to create a covenant lot and a market lot; financial ramifications could be worked out between the owners.

McCarthy – The bylaw was created to address this exact issue.

Alger – Not everyone has an existing variance that could be modified or such a personal hardship.

Thayer – He’d like to support this but doesn’t think he can.

Antonietti – There are letters of support and a petition supporting this. Read Ms. Molden’s comments: The property creating this request will make this more non-conforming; this is not an appropriate practice or precedent for the Surfside area; this is the reason the secondary residential lot allowance for a qualified family member was put into place; asked that the request be denied.

Alger – Asked to continue this too June.

Motion: Motion to Continue to June 11th. (made by: Toole) (seconded)

Voting: Carried 5-0//McCarthy-aye; Botticelli-aye; Toole-aye; O’Mara-aye; Koseatac-aye

4. 12-20 Anne Maletta 15 Broadway Fader

Applicant is requesting relief by Special Permit pursuant to Zoning By-law Sections 139-30 and 139-33.A(1)(a) to allow alteration of the pre-existing nonconforming structure by adding an air-conditioning (“HVAC”) unit along the southerly side elevation of the structure. The proposed siting will be no closer to the lot line than the existing dwelling which is pre-existing nonconforming as to setbacks. In the alternative and to the extent necessary, applicant requests relief by Variance pursuant to Section 139-32 for a waiver from the side yard setback requirements in Section 139-16. Locus is situated at 15 Broadway, shown on Assessor’s Map 73.1.3 as Parcel 113 and upon Plan No. 2015-78. Evidence of owner’s title is recorded in Book 1506, Page 89 on file at the Nantucket County Registry of Deeds. The site is zoned Sconset Residential One (SR-1).

Voting: McCarthy, Botticelli, Toole, O’Mara, Koseatac
Alternates: Poor, Thayer, Mondani
Recused: None
Documentation: File with associated plans, photos correspondence, and required documentation
Representing: Marsha Fader

Patrick McCarthy, General Contractor

Public: None

Discussion: Fader – Reviewed the request for a special permit for HVAC and outdoor shower within the setback; circa mid-1700s structure and is non-conforming as to side setbacks. There is a 6-foot fence currently on the property line; that and the outdoor shower will help screen the unit. All exterior changes including the outdoor shower have HDC approval. Abutter Lisa Soeders has submitted a letter of support; the abutter across the road has asked for a quiet unit, which we have chosen.

McCarthy – Asked if there have been any changes to the exterior in the renovation.

Fader – There are no changes to the footprint. The outdoor shower enclosure is replacing an existing shower on the southeast corner of the property.

Toole – Noted there is ample room on the Broadway side.

Fader – In informal discussion with the HDC, the A/C would not be approvable on that side and the proposed location would be much less obtrusive. The site plan scales the A/C accurately.

Toole – Thinks the fence, shower, and structure might amplify the noise.

O’Mara – It’s safe to say the Board is more interested in the noise of A/C than the noise of a heater condenser. It might be more obtrusive to have one that hangs off the building. If the Board is of a mind to grant relief, it would be in everyone’s interest to get it as far from the property line as possible; he’s seen products that are attached to the building and would be more than one foot from the property line.

McCarthy – Asked what other options the applicant looked at.

Fader – They were focusing on a unit that was the least noisy, 56 decibels. The size and placement were chosen to allow air flow for a unit large enough to provide the requisite cooling and heating. Two wall-units might be required.

O’Mara – He thinks it would be appropriate to hold this for a month and for Ms. Fader come back with manufacturer details on wall units and how many might be needed.

Fader – She has all that information available for this unit and doesn’t understand the opposition to this unit.

McCarthy – We normally don’t like A/C in the setback; minimizing setback impact is our goal. Tall, thin units that attach to the house would not take up so much space in the setback. Asked Ms. Fader to talk to her HVAC contractor about using one of these smaller units.

Fader – A smaller unit might gain 10-12 inches, which seems a minimal gain. Doesn’t see the advantage.

McCarthy – It would minimize the setback issue.
Toole – He’d like to drive by and see why it can’t go on the Broadway side.
O’Mara – He agrees with Mr. Toole; creative landscaping would screen it.
McCarthy – We got a letter of support from 13 Broadway and a letter of concern from 11 Front Street.
P. McCarthy – There are windows on the side that would make it difficult for a wall-mounted unit. It would have to go under a window sill.
McCarthy – A continuance would allow for members to drive by and for Ms. Fader to get additional manufacturer information.
P. McCarthy – It’s 12.5 feet to the front wall of the house.
Botticelli – We need a plan with dimensions showing the front setback. She is okay with the plan; the neighbors have minimal concerns and it doesn’t increase the non-conformity.
Fader – We had looked at the southwest corner, but the neighbor requested it be placed in the back. The propane tank is at the northwest corner of the house.
Toole – He doesn’t have a fundamental problem with this as stated by Ms. Botticelli. However, if it can go on the south side and meet zoning, that would be great. He would like to see the documentation as to why other locations won’t work. It’s not just this one, it’s the next application. We need evidence in the file as to why it can’t go someplace else.
Thayer – He agrees with Mr. Toole and Ms. Botticelli and having the evidence.

Motion Motion to Continue to June 11th for more information. (made by: O’Mara) (seconded)  
Vote Carried 5-0 // McCarthy-aye; Botticelli-aye; Toole-aye; O’Mara-aye; Koseatac-aye

IV. OTHER BUSINESS

1. 051-03 Rugged Scott a/k/a Beach Plum 40B Holland / Posner  
   DISCUSSION of implementing policy in fulfillment of obligation to allow abutting property owners non-resident family membership privileges and access to the common amenities (Clubhouse/Pool/Lawn/Tennis Court Facility) in Beach Plum Village, as per provisions in Section 3.2(o) regarding Management Issues in the original Comprehensive Permit and Section 9 of the “Settlement Agreement”.
   Voting Botticelli (acting chair), Toole, O’Mara, Koseatac  
   Alternates Poor, Thayer, Mondani  
   Recused McCarthy  
   Documentation Beach Plum Village Comprehensive Permit, program proposal, and required documentation  
   Representing Josh Posner, Principle Rugged Scott a/k/a Beach Plum 40B  
   Paul Haggerty, Rugged Scott a/k/a Beach Plum 40B  
   Howard Edelman, 13 Wood Lily Road, Beach Plum Village Homeowners Association (HOA)  
   Ruth Plandowski, 10 Thistle Way, HOA  
   Public Tucker Holland, 4 Seikinnow Place  
   Chris Young, 12 Seikinnow Place  
   Discussion Holland – At the last hearing, the developer and representatives of Beach Plum Village put up roadblocks to the process of establishing a fair and equitable program consistent with the Comprehensive Permit. Will focus on March 13th proposal from Mr. Edelman. Reviewed the points of the proposal with which he and other interested parties agree. Non-transferability upon sale restriction should be reflected in the annual dues rate. Administrative fee and annual dues figures are a point of disagreement. Regarding the annual dues, non-residents are asked to pay the full $5,472 but have limited rights; that’s more than what some market-rate residents pay with unlimited rights. We’ve asked for evidence that Beach Plum Village residents have paid an initiation fee; no evidence has been forthcoming, which leads him to believe there is none. Would accept an administrative fee of $5000 and annual dues of $1000.
   Young – He’s saddened by the process which pitted neighbor against neighbor and could have been preventable. Read the original approval, Section 4 of the decision under “Construction”, which describes the comparable fee structure for the 10 non-resident members.
   Haggerty – Mr. Posner has stepped out of the middle of this because he feels this is between the HOA and the non-resident neighbors.
   Edelman – He and the rest of the Beach Plum Village residents are committed to living in harmony with their neighbors and doing the right thing. Despite whatever they have with the developer, we’ve taken this place over and it is our responsibility. We want to focus on what’s best for us and for those outside Beach Plum Village. He doesn’t agree that the neighbors are “sitting in coach” and being denied benefits afforded to Beach Plum Village residents. The annual fee is an annual maintenance fee from which 25% of our residents are exempt; 83% of our operating budget is attributed to maintenance of the amenities. The issue of a reserve, we made a substantial concession when we said we would not impose any capital improvement assessment once the agreement is made. The $5,000 non-resident fee goes to a separate fund, not the operating fund. Market-rate homeowners continue to pay substantially more than our neighbors.
   Plandowski – Mr. Holland put forth a memo with some of the points outlined today. The alleged $300 HOA membership fee has nothing to do with the HOA fee. We hired a consultant to guide us through the process of setting up the HOA; we set up an account and collected money for that process. Mr. Holland is calling that our HOA fees; our HOA fees are in the $1000s. The 10 affordable families qualified for those homes and paid much discounted prices for their homes and discounted HOA fees; none of the potential non-resident members qualify for that program and she feels should not be afforded the same discount.

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Posner – He feels badly about the tension and emotions surrounding this. He operated on the basis that sorting out the terms for offering amenities to non-residents would be handled by the HOA; there are a range of possibilities: many members would lower the cost or have fewer members to increase the privacy. The idea that people haven’t resulted in additional costs to the amenities is wrong. If the two sides can’t resolve this, he suggested both groups select a third party to make a binding decision; he will pay that cost.

Toole – Regarding Mr. Posner’s May 11th email, with only one more home to sell, his question is how was it that last the few houses were sold without Certificates of Occupancy (CO).

Posner – There are two homes without COs that have not closed; one is under a purchase and sale agreement. All houses except these last two have COs; there might have been some closings on houses without COs, but he doesn’t think so.

Toole – That was not our agreement; the agreement was no house would be sold without a CO. The intent was that no house would receive a CO and could not be sold until all issues were resolved.

Posner – We will not sell the last few houses without a CO. The agreement did not apply to the one house that sold without a CO.

Haverty – When we were talking about the COs, he thought that was pertaining to the use of the facilities.

Toole – The original condition was put on when Mr. Posner asked that the last lots be released because there had been several garages built upon affordable lots for market-rate users without our permission.

Haverty – Last fall, the condition had to do with use of the amenities. The issue with the garages impacted different COs and both those are being litigated.

Thayer – He remembers it as Mr. Toole stated it.

Kosecatac – He agrees.

Toole – It was an agreement made when Mr. Posner came for a Form J. We gave him that release on the condition that no COs would be issued on the last three houses.

Posner – He doesn’t recall it that way either. He’d have to ask Ms. Hanley, Reade, Gullicksen, Hanley, & Gifford LLP.

Toole – This issue came up months later.

Haverty – There is a motion of summary decision filed with the Housing Appeals Commission.

Toole – He accepts that and the statement from Mr. Posner that he won’t sell any houses without COs.

Holland – There are two letters in the packet dating back to November and August that address the issue of no COs until all matters are resolved.

Haverty – Asked if any of the last lots have anything to do with the garage issues.

Toole – The garages built on affordable lots were long before and came to our attention that they were built without permission or modification of the Comprehensive Permit; at the same time, Mr. Posner wanted his remaining lots to be released to start construction for sale. The agreement at the time was that the COs would be withheld. The issues with amenities have taken a long time to resolve. It’s in the minutes, everyone heard it, Mr. Posner said he wouldn’t sell without COs and they shouldn’t be issued COs.

Botticelli – The letter specifies the COs for the last lots be withheld.

Posner – He only agreed to hold off until the amenities issues were resolved; not the garage issue, which is still on-going.

Toole – Go back and review the minutes and tapes; he is not going to vote on this if it is all that is holding back the COs.

Thayer – He agrees.

Botticelli – It is clear in the Comprehensive Permit that it is the responsibility of the developer to offer the amenities to the neighbors.

Edelman – Mr. Posner has always deferred to the homeowners.

Posner – It is our responsibility to make this happen and we are doing the best we can to resolve that issue. He wants the HOA and neighbors to work out the terms, to which he will agree.

Mondani – Back to the issue, he’s looked at the documents and seen progress. With regard to the initiation fee, he doesn’t think it should be in there. The HOA needs to realize this was put into place prior to any sale of homes; homeowners have access to the facilities with a comparable fee structure. None of this should be a windfall for the homeowners and should not be assessed. The negotiation should be looked at as a pro rata share and should be similar to what the homeowners pay. This was agreed to in 2006 and confirmed in 2008. This is a major Comprehensive Permit issue, and we need to stay involved. The adjoining neighbors should be assessed in the same way as the residents using a pro rata share; that’s the way it’s structured.

Thayer – This was an agreement between the developer and the neighbors and doesn’t involve the HOA.

Edelman – Any fee will go either into a capital reserve fund or new or replacement amenities or reduce the fees for everyone.

Mondani – If you had been involved in 2006, that would make sense; however, that wasn’t the agreement. He sees that if the ZBA comes to an agreement, it will be with the HOA; asked if this needs to be considered a modification to the Comprehensive Permit.

Haverty – That is a fair question, the condition of the 2006 decision isn’t enforceable under current case law; in 2010, the Land Court clarified the conditions that can be imposed in Comprehensive Permits. If it weren’t for the fact this went to court and was supported, his client could have simply not gone forward with it. If the ZBA keeps pushing this issue, you could end up back in court. This should go through arbitration; it is going to be a decision that will be binding.

Botticelli – We feel responsible to ensure the Comprehensive Permits are adhered to. A lot of negotiations go into the Comprehensive Permits.
Toole – Thinks we should be represented by Town Counsel at this point.
Antonietti – She put in a request for legal services prior to the March 12th, but thinks it fell through the cracks due to COVID-19; she has sent a follow up email.
Holland – The object of what we are trying to seek is not to add to ZBA’s work; the garage issue is separate. We are willing to have further conversations with Mr. Edelman and see if there is a workable middle ground before going to arbitration.
Posner – He accepts that it is the developer’s responsibility and if they want me present, I will be there.
Discussion – Continued about whether or not any houses or lots were sold without a CO.
Botticelli – We should continue this for research on the garage issue and to get Town Counsel’s opinion and assistance.

Motion
Motion to Continue to June 11th. (made by: Mondani) (seconded)

Vote
Carried 6-0/Botticelli-aye; Mondani-aye; Thayer-aye; Koseatac-aye; Poor-aye; Toole-aye

2. Items

V. ADJOURNMENT

Motion to Adjourn at 4:11 p.m. (made by: Botticelli) (seconded)
Carried unanimously/Toole-aye; Poor-aye; Mondani-aye; Thayer-aye; Koseatac-aye; O’Mara-aye

Sources used during the meeting not found in the files or on the Town website:
1. None

Submitted by:
Terry L. Norton