

**BOARD OF APPEALS  
REGULAR MEETING MINUTES  
WEDNESDAY  
OCTOBER 23, 2013**

**Members Present:** Clayton M. Harrison, Chairman  
Christopher Graham, Vice Chairman  
Donna Lambert, Clerk  
Gerald Coutinho  
Gary Simmons  
Larry Kidney  
**Absent:** Heather Salva  
**Also present:** Ralph Souza, Building Inspector

Chairman Harrison called the Zoning Board of Appeals meeting to order at 7:00 PM in the Westport Town Hall, 816 Main Road, Westport, MA.

**Robert Pozzo - RE: Applicant seeks a variance for an addition/alteration of a pre-existing non-conforming structure (care takers cottage). The property is located at 409 Horseneck Road, Westport, MA also known on Assessor's Map 73, Lots 68 & 68A.**

The public hearing was called to order at 7:00 P.M. with Chairman Harrison reading aloud the Public Hearing Notice. Chairman Harrison explained the procedure for the hearing; first, the applicant would present their petition and then input would be taken from the abutters. Anyone wishing to speak must identify themselves; name and address.

**Members present:** Clayton Harrison, Christopher Graham, Larry Kidney,  
Gary Simmons, Donna Lambert, Gerald Coutinho  
**Member absent:** Heather Salva  
**Also present:** Ralph Souza, Building Inspector  
**Hearing petition:** Clayton Harrison, Christopher Graham, Gerald Coutinho,  
Donna Lambert and Larry Kidney.  
**Present:** Robert Pozzo, applicant  
Christopher T. Wise, Architect, representing petitioner  
**Abutters present:** Elizabeth Meyer & Michael McCaffrey, Turtle Hill Farm

Mr. Wise stated the Pozzo's bought the lot in 1993, which contains 18 acres. There was a larger house, a small house, two sheds and one garage. Mr. Wise indicated that the Pozzo's wanted to replace the house closest to the River with a new larger house, but could not get a building permit to do so legally because Town bylaws did not permit two or more habitable structures on one lot. The single lot was thus divided into two ANR lots in 1993 at the Planning Board in order to build a larger house. The shed on the lot was being used as living quarters, although not permitted as such. Since 1998, a caretaker has been living in the building identified as a shed which is the subject of this hearing; now, the Pozzo's want to expand this building so a couple can move in, in order to care for the Pozzo's. Mr. Wise stated his client is seeking relief to put a second floor on the residence with it becoming a two-bedroom residence instead of an efficiency dwelling. The building is located 5 ft. off the property line. Mr. Wise stated the Assessor's records have it listed as an office with a bathroom.

Mr. Coutinho questioned why Mr. Pozzo did not correct this with the Assessor's Office. Mr. Pozzo stated ignorance, plus his taxes just went up \$6,000.00 this year, he already pays enough taxes. The applicant said that they knew there were two residences were not allowed on one property, and that is why the property was subdivided by the Pozzo's in 1993.

Mr. Coutinho asked Mr. Pozzo whether there has been a permanent caretaker with that location as a permanent address.

Mr. Pozzo stated yes. Mr. Graham asked for a clarification as to whether the applicant was seeking a variance or a finding because the advertisement was for a variance but the application is for a finding. Mr. Wise stated he was not sure what the difference was, other than a variance stays with the property, and that a finding does not need to demonstrate hardship. Mr. Coutinho stated that a finding deals with legal non-conforming uses; the applicant was aware of two dwellings on the property.

Mr. Graham stated that an aerial photo shows one access through the lot; are there any easements? Mr. Wise stated no; the owner can grant himself access over his own property.

Mr. Pozzo stated that upon his passing, the property will be sold as one piece. Mr. Harrison stated the property can be sold as two separate lots now that it has been subdivided. Mr. Coutinho stated there are now two separate lots without a legal easement for one of them; and asked if the Building Inspector would issue a building permit today in such a situation. Mr. Souza stated it depended on whether there was an easement or a driveway and enough frontage. Mr. Coutinho asked if the prior building permit for the shed was issued in error? Mr. Souza stated it may have been missed when the property was subdivided. Mr. Coutinho stated that so far, he has not seen a legal use of the shed building as a habitable residence.

Presented at the meeting was a summary submitted by the Assessor's Office of the history of the property, along with copies of the Assessor's property cards (see attached). Shown on the records were the original house (which was demolished), the main house, a guest house, garage and two sheds, tennis court and swimming pool. Mr. Wise and Mr. Pozzo stated that one of the sheds was being used as a residence, but not to the Town's knowledge.

At this time, Mr. Harrison read into record the letter of denial by the Building Inspector. Mr. Pozzo corrected Mr. Harrison in that, in the shed, was a full bath, not a half-bath. Mr. Coutinho stated the Building Inspector's letter went on the assumption that this was a legal non-conforming use according to the Assessor's records but the Assessor's Records say different. Mr. Souza stated he did a site visit and took pictures; he found a residence there and it being lived in for quite some time. Mr. Coutinho stated we need to make a determination as to whether there were more than two legally habitable buildings on one lot before the rule went into effect; which will determine if this should be a variance or a finding.

Mr. Wise stated there is no evidence that there was ever a permitted residential use for this shed. In 1990 a building permit was granted for the renovation of this shed for office and storage use (not a habitable residence). This was prior to Mr. Pozzo owning the property. Mr. Coutinho stated evidence is needed to show that it was legally occupied. One way to handle this would be to connect the shed building to the main house if there were at least 200' of frontage, as was done in another case; however, this is probably not feasible in this situation. Mr. Harrison stated to the Building Inspector, this is a case of two dwellings on the same property, which would have been denied; and that his concern is that a finding is being sought, but a variance is what is needed.

Mr. Coutinho questioned where the septic systems were located for the buildings. Mr. Pozzo stated there is only one septic system for both residences on this lot but he plans on putting in another system if allowed. Mr. Pozzo stated there is only one meter for the electric coming into the property also. Mr. Coutinho asked Mr. Pozzo, that when the property was sold to him, did the real estate agent indicate there were three habitable buildings on the one lot? Mr. Pozzo stated yes, he was told that, in 1990, the prior owner slept in the converted shed due to allergies. Mr. Souza stated the building permit in 1990 was for an office / storage area. There were no permits for a kitchen and no occupancy permits issued for this shed.

Mr. Wise stated it appears it is described as pre-existing, non-conforming and so it is not entitled to a finding but it sounds like the Board is inclined to deny a variance for a second building on the lot unless it is connected to the main house. Mr. Wise stated that another possibility that Mr. Pozzo and himself have discussed is to further divide this lot into three lots; if it is subdivided, how much of a problem would the setback be? Mr. Coutinho stated another thought, would be to look into case law and the Citgo Rule, which in some cases allows subdivision where a substantial building has existed. There have been at least a couple of cases in Town under the Citgo Rule, and they were able to go forward. This may be something to look at; this might be something to help you proceed. Mr. Coutinho stated he was not a lawyer, but the subject matter might be looked into. Mr. Souza stated a decision would still have to be made on the insufficient side setback, however.

In response to a question from Mr. Wise, Mr. Coutinho stated that the Board can't tell you how it would handle a new application; that could not be decided until there is actually a petition before us, with new information. Mr. Grillo, a member of the Board of Assessors who was in the audience, stated that there is a lot of case law on the Citgo Rule, but whether the ability to subdivide exists in this situation, he was not sure. Mr. Harrison stated that if the lot was subdivided, then a variance could be applied for, as long as a hardship is shown and pictures were presented, etc.

At this time, Mr. Harrison read a letter of correspondence submitted by an abutter, Turtle Hill Farm - Elizabeth Meyer & Michael McCaffrey in support of this petition.

Mr. Coutinho stated that based on what has transpired tonight, the applicant has a few options; to request to withdraw without prejudice, to ask for a continuance in order to gather more evidence, or to ask the Board to make a decision. If requesting to withdraw without prejudice, the applicant can reapply within two years.

Mr. Pozzo and Mr. Wise agreed to request a withdrawal without prejudice in order to look at other options for this property. Mr. Pozzo submitted a signed request to the Board.

**Motion** made by Mr. Coutinho to allow the petitioner to withdraw without prejudice. Second by Mr. Kidney. The Board voted unanimously in favor.

### **Other Business**

Informal discussion – Robert Grillo regarding his property on Cahoon's Way and the way in general.

Mr. Robert Grillo was present. He stated that an approved ANR plan has been obtained from the Planning Board. The Building Inspector is trying to make a determination and Town Counsel has been contacted in regards to this. Mr. Grillo then stated he only wanted to speak with the Board in general about the laneway itself and aside from his property, there are about 5-6 lots on this laneway with frontage and over 60,000 sq.ft. of land; already 5 lots have approved ANR plans. Mr. Grillo stated that a lot of research has gone into this area and he presented minutes from the Planning Board. Mr. Grillo then gave the Board a short history on this area. Mr. Harrison stated that it revolves around

the Building Inspector's decision whether the building application is denied and if it is, the applicant has a right to come to the ZBA; prior in court cases on this, the applicant has prevailed. Mr. Souza stated that even after the approved ANR plan, he questioned how they approved it because there is no frontage (on the plan, the property is not touching the road). Mr. Coutinho stated the Planning Board indicated they approved the ANR Plan, but there could be problems down the road. Mr. Grillo stated he was here tonight, hoping to get everyone on the same page at the same time. He stated there court cases were in place, but was told they did not pertain to his property. Mr. Souza stated there is a lot of information on this matter and he has yet to review it all and once it is reviewed, he must go to the Building Commissioner Andrew Bobola, who did do a site visit with him. Mr. Graham stated the Board could not say anything about Cahoon's Lane until a petition is before them. Mr. Grillo stated he sent for a letter of determination back in August and has not received a determination yet. Mr. Coutinho noted that the Land Conservation Trust has purchased 81 acres on the right hand of Cahoon's Lane, which could be a problem once that area is opened up to the public. Mr. Souza stated the next move is the question of the laneway, giving frontage not coming out to Cahoon's Lane; that determination will have to be made by Mr. Bobola. Mr. Grillo stated his deed says "out to Cahoon's Lane". Mr. Coutinho stated that Mr. Souza was looking for support by the Board in helping him get an answer from Town Counsel on this matter. The Board agreed to send a letter to the Town Administrator offering support in helping Ralph Souza get legal advice on Cahoon's Lane. The Board thanked Mr. Grillo for coming in and speaking with them and stated they will give support to having Town Counsel work with Mr. Souza on this matter.

Informal discussion – Ryan Mann, Exec. Director of the Westport Land Conservation Trust regarding special permits.

Mr. Ryan Mann, Executive Director of the Westport Land Conservation Trust and Mr. Chris Detwiller, Trustees of Reservations were present. Mr. Mann wanted to speak on special permits, especially in regards to the 2009 Brookside project located on Rte. 177. Mr. Mann stated the Planning Board approved a plan in 2009 pending the obtainment of a special permit from the ZBA. There is nothing substantial in the minutes showing when the Land Trust met with the ZBA along with Attorney Tongue but at this time, Attorney Tongue did submit an opinion. Mr. Coutinho stated he had not read the material, it was just received tonight but we do have a bylaw, which you say does not apply to you. Mr. Harrison stated the bylaw was done at an Annual Town Meeting and it was done for a reason. Mr. Detwiller pointed out that Attorney Tongue's opinion has five points, especially towards article 2.5.0, which refers to building or occupancy permits. Mr. Coutinho asked if what was being said is that because there are no dimensions, the bylaw is defective. Mr. Detwiller stated no, but we are not applying for a building permit as is stated in the bylaw. A discussion then ensued regarding how the bylaw applied and when it should apply. Mr. Coutinho concluded the discussion with the fact that the language needed to be corrected; and at this time, the ZBA is working with the Planning Board on correcting bylaws such as these. The bylaw is vague and it does go too far. Mr. Harrison stated that we need to clean up old bylaws before approving new ones and that is why working sessions with representatives from both boards is taking place. Mr. Coutinho noted that the bylaws were supposed to be safeguards; and back in 2009, when the initial meeting with Attorney Tongue and the Land Trust took place, it was mentioned that the bylaw was unconstitutional affecting people's rights. The Land Trust was supposed to come back to the ZBA but not 4-5 years later. Mr. Graham noted that the Table of Use is ambiguous. Mr. Coutinho stated the Table of Use was supposed to be a guide only but the Planning Board is making it almost as strong as the bylaw; in the future, this will be

addressed. Mr. Coutinho stated that for now, the bylaw is in place and it should be followed until it is corrected, and by adhering to it, it eliminates any illegalities in the future, for example, the soccer fields had to come in and apply. This matter should not be sent to Town Counsel, it would be wasting money. As far as a special permit, it could be used to set limitations. Mr. Mann stated that the Rte. 177 project has site plan approval; we want to open this area to the public but our fear is that we won't be getting an answer soon on special permits. Mr. Coutinho stated he sees an answer in less than a year. Mr. Detwiller stated that he would like to be included in the working sessions of the ZBA and the Planning Board. Mr. Coutinho then asked Mr. Mann why the big push now, since 2009 walking trails and such have been installed without a special permit. Mr. Mann stated that right now, there is a chain across the Rte. 177 project because they need a special permit according to the Planning Board approval. Mr. Detwiller stated they have properties waiting to be opened. Mr. Coutinho stated the intent was to protect, not restrict and that is not clear enough in the bylaw. The Board agreed to review Attorney Tongue's opinion and agreed collectively as a Board that the bylaw needs revision. Mr. Detwiller stated he will speak to Jim Hartnett, the Town Planner for when the next working session is scheduled for and will ask to be included. The Board thanked Mr. Mann and Mr. Detwiller for coming in and speaking with them.

#### **Correspondence**

No actions were required by the Board, informational only.

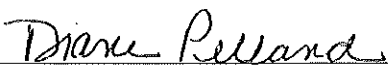
#### **Next Meeting**

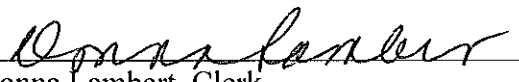
The next meeting of the ZBA will Wednesday, November 13<sup>th</sup> in order to hear a petition filed by Joan Casey-Amaral.

**Motion** made by Mr. Graham to adjourn the ZBA Meeting at 9:30 PM. Second by Mr. Simmons. The Board voted 6 in favor, 1-absent (Salva).

#### **Adjournment.**

Respectfully submitted,

  
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Diane Pelland, Principal Clerk  
to the Zoning Board of Appeals.

APPROVED:   
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Donna Lambert, Clerk