

**WEST TISBURY ZONING BOARD OF APPEALS  
MINUTES OCTOBER 17, 2007  
6:45 AT THE HOWES HOUSE**

**PRESENT:** Eric Whitman, Tucker Hubbell, Bob Schwier, Tony Higgins, Nancy Cole, Larry Schubert

**ABSENT:** Toni Cohen

**ALSO PRESENT for All or Part of the Meeting:** Robert Harris and Kathy Harris (appellants), Atty John Amabile, Brion Koning (sound consultant), Carole Fonseca (stenographer), Robert Potts (editor of Broadside), Martha Moore, Ernest Mendenhall (Building and Zoning inspector), Glenn Hearn (Selectman), John Powers (Board of Health Agent), Dena Ferry, Tom Vogel, Ed Pierce, Dyan Redick and Kurt Freund (owners of the subject birds), James Carroll, Katherine Long, Kenny Francis, Rose Francis, Brian Athearn, George Athearn, John Mancuso, Joan Mancuso, Hermine Hull, Leslie Baker, Dan Culkin, Terry Kriedman, Durwood Hughes, Mark Yale, Dawn Charters, Jeffrey Nelson, Joan Jenkinson (Animal Control Officer), Robert Skydell

**BUSINESS**

- The minutes of October 3 were approved.
- The ZBA voted to ask for \$3,500 more in Project Review Fees for the Sprint/Nextel project. \$1,400 out of the \$1,500 initial fee went to Broadcast Signal Lab for its pre-application analysis and \$375 is due to Mark Bobrowski for consultation with Broadcast Signal Lab. There will be more testing done by BSL. Applicants are given back money that is not used for project review, plus interest.
- Builder Randy Simon re a house in the Roadside District that will be torn down and rebuilt; can they apply to go higher than its current 24'? The ZBA agreed there has to be an application and a site visit; they couldn't comment on it until then.

**HEARINGS**

**7:15 An Appeal by Robert and Kathy Harris of an August 15, 2007 decision of the West Tisbury Zoning Inspector.** It was the Inspector's decision that according to the Zoning Bylaws he could not restrict the Harris's abutting neighbors' (the Freund/ Redicks) right to have roosters and other fowl on their property. The Harris's maintain that the roosters and other fowl are in violation of the Zoning Bylaw by creating unacceptable noise and disturbance. The Freund's property is Map 7 Lot 143, 31 Millstone Lane; RU Dist. Sects 8 and 15 of MGL Ch. 40A. *Correspondence to ZBA: 1) Abutters Bradford Voigt and William Burton; 2) Dale McClure, Pres. MV Ag. Society; 3) Copy of email to Ernie from Reddick; 4) abutters Jim and Vicki Nelson; 5) abutters James and Debra Hendrickson; 6) abutters Scott Jones and Kell Hicklin. All correspondence and other documents on file in ZBA office.*

Correspondence to the ZBA was read, but the email to Ernie was not read at this point. John Amabile gave Board members a brief in addition to previously submitted materials. Part of the brief cited Sections 3.2-1, ("...any use of any building, structure or premises which is injurious, obnoxious, offensive, dangerous or a nuisance to the community or to the neighborhood through noise, vibration, odors, fumes, smoke, gases, dust, harmful fluids or substances, danger of fire or explosion or other objectionable feature detrimental to the community or neighborhood health, safety, convenience or welfare." ) He also referenced Sections 8.5-2A and 8.5-2G. He spoke of the following: His client's, the Harris's, home is a modest one on a one-acre parcel in Longview, a residential subdivision developed in 1975. Covenants were in place at that time and for 30 years

that restricted the keeping of non-domestic animals: “No animals or livestock of any kind except the usual household pets shall be kept on any part of the premises or any buildings erected thereon.” When the Harris’s bought their house in 1992, the covenant was in place. The covenants expired in 1995, however Longview seemed free of non-domestic pets until 2006, when the Freund/Redick household moved in next door with their chickens, roosters and guinea hens. An extreme disturbance was caused by the roosters. The Harris’s attempted to reason with the bird owners then and again in 2007 with no success. They sought enforcement under the Zoning Bylaws and MA noise levels. They contracted with a sound engineer, who measured for a one-day period from the Harris’s deck. The sound level exceeded the State’s environmental limit and was in violation of State Regs. They requested enforcement from the Building and Zoning Inspector Ernie Mendenhall and John Powers, Board of Health Agent. They also met with the Planning Board on this matter. Mr. Amabile said he suggests that the B&ZI did not investigate enough before determining there was nothing he could enforce. The Harris’s seek relief from the noise, disturbance and nuisance from the fowl, especially the roosters.

Atty Amabile went on to say that the Harris’s themselves undertook to document the frequency of the rooster crows, how many times and for how long, recording as many as 431 and 541 crows on single days. The crows are not occasional, but repeated, primarily at daybreak. They start at 4 AM, and go on during the day and sometimes at night. “Excessive” is not defined in the Zoning Bylaws, but this is conduct going beyond the lawful limit. They have clear-cut evidence that the levels are in excess of state levels, and of the frequency. Enforcement should be taken to abate the sound. The Harris’s should have the ability to enjoy their property. This is a serious matter. In this matter they have endured publicity, jokes made about them and unfair comments. They’ve lived there since ’92 and now their peace and quiet is gone. They ask that as a remedy that the decision of Ernie Mendenhall be overturned, that action be taken to abate the sound.

Acoustic consultant Brion Konig who measured the sound levels and prepared the report on the matter, said his testimony and report are objective, both of which had been submitted. He passed out copies of Mass Noise Regulations to Board members. He doesn’t know the Harris’s. The words in the Zoning Bylaw are subjective, just like the varying neighbors’ perceptions of the rooster noise. His objective data show the sound levels to be in violation of MA noise regulation. He showed up to test on a random day, June 7 of this year. Ironically, all the birds were in their coop in the AM due to some lawn work being done, and then were released. He took ambient readings in the AM and tested the bird noise after they were let out, using MA DEP criteria: How much (quantitative) and what kind (qualitative.) MA DEP asks that background noise is recorded, and decibels above that level. The tonal sound is also significantly unacceptable. Urban and rural background (ambient) noise have different criteria. His tests showed the birds exceeded the ambient sound levels by well over 10 decibels. The time he was on the island he heard roosters crowing dozens of times, and this wasn’t at dawn. He said he learned that roosters can and do crow during all daylight hours. He said it was MA DEP’s intent that there be both state and local enforcement re noise.

Appellant Robert Harris said they bought their home in Long View in 1992 as a vacation home, and winterized it so they could retire here. They loved the peacefulness. All was great until June of 2006 when they heard the new noises, which have disturbed them to the point to take this action. Early on he had cited, primarily to Mr. Freund, his concerns over noise, the loudness and frequency, the all day situation, the pertinent bylaws, that the noise was unreasonable and not neighborly. He got nowhere. He had also supported the association’s attempt to renew the covenants, but that attempt had gone by the wayside. He sought help from the town as he felt the

noise was in violation of the zoning bylaws and state noise levels. They expressed their concerns to John (Powers) and Ernie (Mendenhall), who ultimately felt they were not in a position to enforce their complaints, although he requested action. John had contacted the DEP and they told him they probably wouldn't be involved in a case like this. Ernie then sought counsel and made a ruling, which the Harrisese are now appealing to the ZBA.

He said there had been a meeting with the Planning Board in the summer where he'd been told to try to resolve it with the bird owners, and wherein that Board said the birds shouldn't be roaming. He placed a call to the bird owners, which was not returned. He said the Freund/Rediks contend that they researched whether the Town allowed fowl to be kept in the RU district and found that nothing prohibited them from the keeping of poultry. He said they hear noise from the roosters all day, starting at 4 AM. Since June of '06, they have not enjoyed their property.

Appellant Kathy Harris spoke. She said she was feeling very, very emotional and it would be hard to put into words the love and joy their Vineyard home has provided them. They fell in love with their home and Long View in '92. She's a homebody, takes pleasure in doing things at home; she does the crosswords, reads, gardens. She doesn't love being on her property anymore; the joy is gone, the peace is gone. They wake up at 4 AM and hear the birds shrieking all day long, even with the doors and windows closed. They can't get away from it. She used to love sitting quietly on their deck with a cup of tea doing the Times Sunday puzzle, and she can't any more. She is asking that their former joy and love of their property be restored. Mr. Amabile said that the relief the Harris's seek is that the decision of the Zoning Inspector be reversed, with an order for enforcement.

Chair Eric Whitman spoke. He said that he keeps chickens, and no longer has any roosters; he orders hens. Chickens don't need roosters to produce eggs. In all the large commercial egg businesses, there isn't a rooster on the property. Companies that raise broilers for fried chicken get the roosters. Roosters from far away are not a bad sound, but not up close; he had roosters and now he doesn't. Roosters make a lot of noise, starting before dawn. He had 20 chickens and 4 roosters on a property, the roosters challenged each other and bothered the hens all the time, jumping on them and pecking their necks. Speaking as a ZBA member, he feels chickens alone are OK. The Zoning Bylaws may refer to West Tisbury as a rural community, but there are few large farm lots left; the two subject properties are adjacent one-acre lots, part of a large residential subdivision that was originally one large parcel. He doesn't think the Harris's should be made to feel like "city people". He is very sympathetic to their plight.

ZBA member Tony Higgins said he and his family keep chickens and they like to have one rooster, because he is good at protecting the flock from predators, but multiple roosters are a problem. You need one nice rooster, not two. People like to incubate eggs, and a rooster can protect and service the flock. Eric asked, and a rooster doesn't bother you? Tony said multiple roosters make noise and jump the hens too much. John Amabile said they did not know the number of birds on the Freund/Redick property. Eric asked if the bird owners were in the audience and could say how many birds there were and whether these were pet roosters? There was no response. Mr Amabile said that their appeal was in no way an attempt to make a statement about farm animals; that it boils down to the unreasonable noise.

West Tisbury resident Dawn Charters spoke. Her family keeps chickens and they had gotten rid of extra roosters. They want a flock of hens and one rooster to guard them. She came to say they did not want to lose the right to keep chickens. West Tisbury resident Brian Athearn said he has

25-30 chickens and will be getting 65 more to replace the current flock, He said he has gotten up to behead screaming roosters keeping him or others up, but has learned they can protect from raccoons, hawks, etc. He said he was sorry Mr. and Mrs. Harris weren't having a good experience in West Tisbury, but is more concerned that his children won't have the same experience growing up as he did. He couldn't believe they were having this conversation in West Tisbury. His forebears would be rolling in their graves. Eric said that the difference is that his ancestors lived in a world of large farming plots. Long View used to be owned by one person and now its divided into about 125 small parcels. Brian asked if we were talking about a Town issue, a ZBA issue or a Longview issue? Eric said, talking about a specific case. Brian said we're all here because of concern this will set a precedent. Eric said the six of us here tonight are not going to be making chicken policy for West Tisbury.

ZBA member Nancy Cole said the zoning regs at the basis of the appeal have to do with excessive noise and smell, etc spilling onto other properties if common sense and good practices aren't used in the keeping of farm animals and poultry. People didn't used to live so close together. These subdivisions with small lots; common sense needs to be involved When she lived on a one and one-half acre lot, a neighbor in a similar sized lot kept pigs that produced an odor that overwhelmed the neighborhood, due to bad agriculture practices. The ZBA does not want to effect a big change, but does want there to be civility. People don't need more than one rooster as they egg each other on by crowing. She's kept chickens for over 25 years, and nobody ever needs more than one rooster...they're nasty and crow nonstop the more you have and egg each other on.

Inspector Ernie Mendenhall spoke. He said I'm being appealed here. He said he has sympathy for the Harris's and did not make his decision lightly. He said not one size fits all, but he believes the Zoning Bylaws say he cannot make an enforcement action, because the Zoning Bylaw says one size fits all. The private covenants ran out, but the area was zoned Agricultural Residential from the start. He does feel for them; he went to the Planning Board and Town Counsel for help on the issue. There is not a way he can make the situation better. If the ZBA has a way to do it and directs him to do it, that's fine.

Atty John Amabile said, with all due respect, he doesn't believe the Zoning Bylaw is one size fits all. It addresses the issues the Harris's are bringing up, namely about using property in a way in a particular neighborhood that creates excessive noise or odor. If there is excessive noise, they feel that it is an enforceable violation. They are not trying to set a precedent, they are not trying to restrict agriculture. They are bringing a specific case first to the Zoning Inspector and now to the ZBA. They are concerned with a particular case to give these property owners and taxpayers relief from a zoning violation. It's a broad enough document to allow for case by case enforcement. He believes the ZBL allows for guidance and enforcement in this case.

Abutter Dena Ferry spoke. She said she abuts the Freund/Redick property, has had the property for 29 years, moving in when the covenants were in place. About 95% of the people, she believes, moved in when the covenants were in place and no farm animals has been the character of the neighborhood. She said clucking in the background as ambient noise is one thing, the screeching of roosters all the time is another. She rents her house when they can't be here, and has lost one long-time renter and a second renter left early to take another place. Normally Long View is a tranquil, wooded setting and she has advertised it as such. The roosters have affected them; they have planned to be year round residents.

ZBA member Bob Schwier asked the Harris's if they had read Dyan Redik's ( October 10, 2007) email to Ernie Mendenhall. They had not, they had no first hand information. She wrote in part, "I no longer have any guinea hens including the ten new ones that were hatched on the property. My entire flock was given to Susan Gibbs and living in peace somewhere else on the island. I also only have 11 chickens which includes my now 9 year old rooster and one other one. They have not been out of the pen since August....." Bob asked if the Harris's had noticed a lessening of the noise level. Robert Harris said they had come to their house that day and it had been quiet. They have never known how many birds there were or are.

At this point, Kurt Freund identified himself. To begin with he said, they had 5 guinea fowl, 21 chickens and 3 roosters. They like roosters as they like to hatch out baby chicks. They know more than one rooster can be noisier, but they have more than one breed of chicken. They don't know what sex the baby chickens are until they grow up and start crowing, at which point they start looking for other homes for them, an ongoing process. The young ones can be pretty noisy. They have found a new home for all the guinea fowl. At the Planning Board hearing (sic), they were told to keep them cooped and they complied with that. It's hard to keep the Guineas cooped as they need to roam, and they are there to eat ticks. They are gone, as well as 2 roosters and they are down to 2 roosters and (9) other birds that are now in an enclosure. They had thought it was OK to free range and had used an existing shed on the property for their shelter at night. This summer at a Planning Board hearing (sic) they were told it's not OK for their poultry to roam. If the Guineas can't roam, why have them. They have 2 roosters and 9 hens.

Eric asked if they were in a building or pen. They are in a pen connected to a small run on the right of their property, Kurt said. They are complying with the request from the Planning Board that their guineas and other fowl don't roam; they're trying to comply. They had gone out of their way to make sure they could have poultry on the property; had been told they could keep roosters; had assumed the ZBL permitted roosters. In some places, you can't keep roosters. They have taken steps to ameliorate. Board of Health Agent John Powers was the first visitor to their new home because the Harris's called John Powers before they had even met them. The Harris's also called the previous owner of their new home. They'd had a second call from John Powers before they met the Harris's. When they did talk to the Harris's they had not been unsympathetic to them. They have continued to remove extra roosters from the flock, the coop is insulated. The roosters are cooped and now there is a small run attached. They had thought they could free range. They had been told it was OK to have roosters and they assumed the people who wrote the regs knew roosters crowed and how loud the average rooster is. He thought they were in compliance and will try to be. They feel they have been unfairly characterized as being unwilling to cooperate. They were trying to be good neighbors. They were aware of the noise over the summer.

After the Planning Board hearing (sic), the Harris's called to ask to meet. He was willing to meet but he works long hours in July and August and didn't have the time then, then found out the Harris's filed a suit in court and wasn't so willing to meet. He doesn't like the fact that he's here tonight having to attend another meeting with these neighbors. It's quieter on the property now with less birds and two roosters, and the birds can no longer roam.

Tucker asked how many roosters were on the property when Mrs. Harris was recording hundreds of crows a day. Kurt Freund's answer was four. Were they in or out during the testing? He said that during the sound test they had been free range and were noisy when let out of their coop. They had tick spraying done in the yard that day, so they were not let out at their usual morning time, and made noise exiting the henhouse. He said he went to see (Executive Secretary) Jen Rand to ask about noise ordinances, and she told him they did not pertain to roosters. He also told

her the Harrises suggested they keep their birds in at all times and she had told him she thought that was an unreasonable request. (This was before the chicken run was erected.)

Board member Tucker Hubbell said that recently he had driven up there 6 times, around 7 AM or 4:30 PM, and had yet to hear the birds. Dyan Redick spoke. When the young roosters were on the property this summer, there was competition going on. She now has two roosters, one nine year old who crows a little and a Silky, and they don't compete. Referring to some of the ZBA members' rooster experiences, she said that her roosters didn't behave like that. They occasionally crow and it was noisier over the summer. At one point she brought the birds into their basement at night to try to keep things quiet. She spoke of "helping Toby out" by keeping his rooster, someone from Vineyard Haven who no longer could keep his rooster at his home and wanted to show the rooster at the annual Fair. Eric asked if there would be additional roosters every summer in preparation for the Fair. Dyan said I don't want to have a lawsuit hanging over my head because I'm helping kids out for the Fair. Eric cautioned that people have to take measures to not make too much noise, for example like John Keene has at his business. He said he did not hear the Long View roosters when he listened at 6 AM the past few days.

Ms Redick said she doesn't feel that guinea hens should be restrained. She had had Lime Disease and they controlled ticks. Tucker and Eric said it seemed reasonable and fair that they not be on others properties; to be sensitive to neighbors who may not want them in their yards. Kurt Freund disagreed. Dyan said she had been sensitive to the neighbors....the Guineas are now gone. She then said, if you want the other two roosters gone, I'll do it. They were tired of being characterized as insensitive. They had checked for all the Regs...this is a hell of a welcome. Eric commented that she wouldn't be here if it weren't for the roosters. Dyan pointed out hens can be noisy too and that the complaint had included all their birds. Tony Higgins agreed hens could be noisy, having "cluck-ups". At this point Atty Amabile said he'd made it clear to Ernie Mendenhall and he'll repeat it again, if there was a written agreement that they will get rid of the roosters, this would resolve the issue and they would withdraw this appeal. He again stated that in the ZBL there is a limitation on noise that can be inflicted on neighbors. His clients are not trying to interfere with people's hobbies, or avocations, just trying to stop unreasonable noise levels. If they had researched the issue, they would have found that there are limitations on noise levels in Town.

Tucker asked Brion Konig if State Regulations regulated animal noises. He read from 310 CMR 710-2, which Brion had passed out. He told him, I realize you heard excessive noise with the roosters, but the Reg he just read did not mention animal noise, but rather, alarms, demo equipment, etc. Brion said most noise regulations were developed for commercial and industrial uses, but there are cases involving animal noise, particularly barking dogs. He said the DEP prefers not to be involved and looks for local enforcement.

West Tisbury resident Tom Vogel spoke. He pointed out and quoted from Section 125 of MGL 111 (regarding that nuisance from farm operations be subject to the provisions of this section.): "Provided however....noise from livestock used in normal, generally acceptable farming procedures.... shall not be deemed to constitute a nuisance..... Eric said he felt the State Reg that Tom quoted was intended for parcels of 5 acres or more, which in this State you have the right to farm; Longview is a development of primarily one-acre lots. Tom Vogel said Long View is zoned agricultural. He doesn't want chickens prohibited. Eric said it is also zoned residential, but as he said in the first place, the ZBA doesn't want to be setting chicken policy. Tom Vogel urged the Board to support Ernie Mendenhall's decision.

Selectman Glenn Hearn said this has been an ongoing situation for a few months; mediation might be the best way to solve the problem. He has talked with a mediator who is willing to help out. Ms Redick has said she'll get rid of the roosters and Atty Amabile has said they'll withdraw if that's the case. He suggested they pursue that. Eric said mediation might resolve this case, but doesn't resolve the next time and again he's not sure this hearing is the venue to solve the next one. Glenn asked Dyan if she would get rid of both roosters. Dyan Redick said if she had to get rid of the roosters, she would like to hear everyone's in Town opinion on the subject, whether that's what she should do. Glenn said, you didn't say that before. Brian Athearn and an unidentified mail voice said they were not going to give away their fowl. Tony Higgins said that a precedent could be set excluding roosters. The male voice said he'd move back to Quincy or Dorchester if (this happened). John Amabile said, if it's a private agreement, no precedent would be set. Precedent, he said, would be set by the case going through the courts and a judgment made. Tony Higgins said, it would have a chilling effect on backyard livestock nevertheless.

John Amabile said his clients are only looking for relief in their court action, not looking for money (compensation); they want to enjoy their property. Nancy Cole asked if the Harris's would accept one rooster? To her it's a question of noise, not about keeping poultry or not. Four roosters on a small piece of property through the 3<sup>rd</sup> week in August is too many. Tony Higgins stood by his chilling effect statement, and said even though people once had livestock and gardens in their backyards out of necessity and no longer need to, he'd hate to see the right to ...

Brian Athearn asked for clarification: If his sheep got out, and they do, he wouldn't be coming to the ZBA. Isn't this a Joanie thing? (i.e. Animal Control Officer Joan Jenkinson) Once he killed his rooster after a neighbor's child was kept up by it. He waited for the child to grow up a bit, then got another rooster. Farmers were passionate, he said, and then to Mr Harris, You picked a real tough crowd to try to sway. He said we are in the wrong place for this quorum. Some drastic change could take place and we're still talking "he said, she said, I like them, I don't like them." Nancy asked how crowing roosters are different from barking dogs, as ZBA has never done barking dogs before. Eric replied, this is an appeal case, that's why ZBA has it. Ernie Mendenhall, John Powers and Glenn Hearn said different laws; there is a State barking law.

John Powers introduced himself as the board of Health Agent; one of his duties is Animal Inspector. Regarding complaints he gets about the keeping of poultry, it's always about roosters. People do have the right to not have their properties disturbed. No one is trying to make it so you can't keep chickens, this is an isolated, neighbor to neighbor incident that is being considered; not consequences for the whole Town. He described the area between the two properties as a natural bowl, where sound could be intensified. He'd talked with a DEP contact who told him it was unlikely they'd get involved with the rooster complaint.

Glenn Hearn said he felt these should be individual cases, neighbor to neighbor settlements. Atty Amato said they will withdraw if there is an agreement in writing, as the two roosters could be removed, but 10 more might be hatched, and they'd be starting all over again. Eric said this would be decision on an individual case. Audience member James Carroll and Eric had a dialogue on whether or not there would be more cases if the ZBA voted one way or the other, rather than individual mediation. Eric said there may be more and would have to go through the same process. Nancy said each case is different, has different merits.

Planning Board member Mark Yale spoke. He said he had a question for the (chicken/rooster) supporters: Do you feel that all animal owners can have a free pass on noise, odor, anything? There were many yeses. One voice saying that is what rural zoning is about. Mark continued, so you feel that as far as roosters go, there's no excessive noise or too many? Again, some yeses. Brian Athearn said there's good and bad farming. He had 8 pigs last year, lives across from Lambert's Cove Cemetery, and nobody smelled a pig because he's in charge of the pigs (and takes care of them). Mark Yale, said, yes but what if someone is not responsible like you are? Brian said he would go to the offending neighbor and the Animal Control Officer who would issue a citation; it's not a Town issue, a Planning Board issue or a ZBA issue. Mark asked him, what if your neighbor won't comply or negotiate, and what if a noisy rooster is not a matter of not taking care of it properly? Brian would have Joanie (Jenkinson, Animal Control) take care of it, it would be a noise complaint and then a police situation. Mark Yale said you'd have to create new rules for that. Brian was concerned about creation of new laws in a rural community for a one-time situation. Mark said no one was proposing to create new laws here at this hearing.

Tucker turned to Ernie for his opinion. Ernie said that this outcome would be precedent setting, particularly as this would be a first case before ZBA re animal noise. He then said, if you say this is a noise violation, it depends on how differing lawyers look at the zoning bylaw. If it's a noise violation, he'd have to get rid of say turkeys accused of making too much noise. Tucker pointed out that the case before them was for particular birds and acoustic evidence from a certain time and place and even that has changed by now. He's been out there about 6 times now and hasn't heard the noise, as he said had Tucker. Ernie said he feels this would be precedent setting in that he'd be called upon to enforce, then the ZBA might be hearing the appeal. Tucker and Tony Higgins agreed with Ernie that it would set a precedent for more cases if they did not support Ernie's decision. Eric Whitman did not think it was the ZBA's job to regulate policy. He'd been on the Board for 28 years, and it may be another 28 before the ZBA gets another case. He agreed with Glenn about working things out between the parties.

Dianne Redick said the poultry are no longer laying eggs. Also, she'd talked with some neighbors who were "OK with it". The lawsuit was filed in June, before the Planning Board meeting. Since before the Planning Board meeting, they have a reduced number of birds. She would get rid of all roosters if it would help the Town, but doesn't think that would be the result. At this point, ZBA member Bob Schwier said we should uphold Ernie's decision or not; we can't get into rooster counting. If the parties decide to settle it privately, the case should be withdrawn Eric said. Bob suggested a continuation.

John Amabile said there had been ongoing incidents in August and that most people wouldn't consider inflicting this on the neighbors, and that hasn't happened here. He referred to Brian Athearn's chopping off a rooster's head in response to a complaint. If there is written agreement of no roosters, the civil lawsuit goes away and the appeal is dropped. His clients want their peace and quiet of 15 years restored. Brian Athearn asked if there might be legal action against the Town? (A civil complaint had already been filed in court.) Nancy Cole responded that, (in addition to the civil action) if the ZBA upholds Ernie's decision, the ZBA will most likely be appealed by the Harris's in (Superior or Land) court. She added that the threat of a lawsuit being filed has never had an effect on a ZBA decision. There was more discussion about court action between Brian Athearn, Dyan Redick and the ZBA. ZBA explained that any party can appeal a ZBA decision in court; that the suit would involve the people being appealed *and* the ZBA; the ZBA has always gone to court backed by the Town to defend a decision; the ZBA does not feel threatened by the possibility of such an action; that appeal of Zoning Boards is a legal right.

that there is a separate civil action already filed in this case; and in an answer to a question from Brian, No there is no threat of a lawsuit here having an effect on any proceedings.

Mark Yale asked Ernie, you ruled that you cannot rule on the issue...is this according to that the bylaw won't let you or there is no provision? Ernie said both the Planning Board and Town Counsel said there's (nothing he can enforce), noise issues do not apply in this case. (Agriculture is allowed by right and there are no regulations that speak specifically to animal noise or nuisance.) Mark asked, if they (ZBA) say it does apply, would you rule now that the noise is not excessive? Ernie said, I already have. Eric said it was probably excessive in July, but now with the removal of birds, there is less noise as witnessed by testimony of his, Tucker's and Ernie's visits.

Eric was hoping there would be settlement, compromise without the Board having to vote on Ernie's decision. Hopefully, he said, we are moving to, maybe not dead silence, but the noise being at an acceptable level. Tom Vogel referred to a NY Times article about people appealing their local poultry ordinances (later passing out copies of the article). Eric Whitman said he doesn't want the ZBA to be in the position of making policy.

Proprietor of West Tisbury's Fiddlehead Farm stand Robert Skydell spoke: He has kept poultry, at one time up to 17 roosters, and they can be a nuisance. There is a threshold...a few dog barks a day versus excessive dog barking. Another example being the occasional use of a wood chipper next door, to a threshold of use where you notice it's reached an intolerable or nuisance level, stopping you from enjoying your property. The Harris's situation reached the point where there were troubles. The Harris's have legitimate issues; they shouldn't have to lose their property rights. Maybe the hearing should be continued so the parties can reach a threshold they can both live with, a threshold under the nuisance level. Some chickens and some enjoyment of deck. . Referring to an issue with neighbors in Chilmark, he said people should be held responsible if negatively affecting their neighbors. He'd like to see the people leave the room tonight and have it be resolved privately, hammer out a binding resolution rather than put the Board in the position of having to weigh in on this.

ACO Joan Jenkinson said she agreed with Bob. I'd hate to see a situation where people were told they could have one rooster on their property, then two pigs move in next door that smell and are a nuisance. You'll be having another meeting over pigs. With dog offenses they treat them individually and try to mediate, but all the dogs in town aren't affected by one case. Glenn Hearn again offered the help of mediation in this case. With the hope that the neighbors could resolve the issues themselves, Eric Whitman moved to continue the meeting; the ZBA agreed, and the date of November 28, 2007 at 7:15 PM was set. Mrs. Harris said she was unable to meet on Nov. 14, as first suggested. Most of the audience got up to go before the date and time were agreed upon and announced.

## **OTHER CORRESPONDENCE**

MA Federation of Planning and Zoning annual meeting

The meeting was adjourned at 9:55.  
Respectfully submitted, Julie Keefe, Bd. Admin.  
Approved on November 28, 2007