

**WEST TISBURY ZONING BOARD OF APPEALS
MINUTES FOR WEDNESDAY JULY 23, 2008
TOWN HALL AT 6 PM**

PRESENT: Eric Whitman (Chair), Tucker Hubbell, Bob Schwier, Toni Cohen, Tony Higgins

ABSENT: Nancy Cole, Larry Schubert

ALSO PRESENT for All or Part of the Meeting: Ernie Mendenhall (Bldg Insp), John Powers (Bd Health), John Alley, Chuck Sullivan, Glenn Provost, Enid McEvoy, Jackson Kenworth, Mary Kenworth, Atty Eric Wodlinger, Volker Kaempfert, Kathleen Kaempfert, Mary...., Megan Cernin, Rita Brody, Mark Weiner, Laura Alexander, Alex Alexander, Michelle Foster, Atty Ellen Kaplin, Eleanor Pearlson, Leslie Pearlson, Abby Rabinowitz, Richard Rooney, Meg Bodnar, Jim Hickey (Gazette), Bob Mone, Gene Erez, Teresa Brewster, Norman Hall, Peter Farrelly, Nancy Dole

6 PM CONTINUATION from July 2 and July 17, 2008: An application by Chuck Sullivan on behalf of prospective owners John and Mary Kenworth for a Special Permit to reconstruct, alter and extend the pre-existing, non-conforming fire damaged restaurant at 688 State Road in North

Tisbury: Sects. 9.3-C2, 11.1-3, 11.1-5 of Zoning Bylaws; Map 22 Lot 54; 688 State Rd; RU Dist.

Correspondence: 1) *Pascal Albanese and Jeanie Hay Sternbach*; 2) *Laura and Alex Alexander*; 3) *Dale Julier*; 4) *Joyce and Robert Siberling*; 5) *Deb Colitti*; 6) *Scott and Charlotte Caskey*; 7) *Dee Rotondi*; 8) *Robert and Tracey Smith*; 9) *James and Susan Holmes*; 10) *Tim Boland*; 11) *Minor Knight and family*; 12) *Larry and Mimi Cannon*; 13) *Richard Rooney*; 14) *abutters Kristten Kusama and Jeffrey Levy-Hinte*; 15) *Eben Armer and Elizabeth Cecil*; 16) *Deborah Pigeon*; 17) *Lynne Whiting*; 18) *Jeremy and Annie Bradshaw*; 19) *Allen Whiting*; 20) *Hallie Armer*. **New**

Correspondence since July 2 meeting: 1) *Owner Eleanor Pearlson*; 2) *Nancy Dole*; 3) *abutter Kathleen Kaempfert*; 4) *abutters Bill and Betty Haynes*; 5) *Leslie Pearlson, Associate of Tea Lane*.

Correspondence since July 17 meeting: 1) *Anthony Friedman*, 2) *Zelda Gamson*, 3) *Susan Sanford*; 4) *Nicholas Catt*; 5) *Bruno Kosheleff*; 6) *one letter signed by Mary Beth Norton, Ellen Weiss, Judy Birsh, Susan R Suleiman, Gabrielle Spiegel* 7) *Tina Miller* 8) *Teresa Brewer* 9) *Alan Brigish*, 10) *Nancy Dole*, 11) *Ellen Wolfe*, 12) *Michelle Foster*, 13) *Dave and Vivian Stein*, 14) *Debbie Philips and Rob Berkely*, 15) *Tracy Meyers*, 16) *Everett Whiting*, 17) *Judith Birsh*, 18) *John and Patricia Durfee* 19) *Inez and Allen Janger*, 20) *Marjory Potts*, 21) *Stacey Trevino*. 46 letters

All strongly in favor of Kenworth's ability to manage a well-run restaurant, for permit and expansion except from abutters Kaempfert and Haynes and testimony of Mark Weiner (Glassworks abutter)

The names of the 21 new letter writers were read aloud. None were opposed to the expansion of the restaurant; some were from former owners, managers and employees recollecting numbers of seats, and basement use, and praising the Kenworths. Eric explained there would not be time to read them all aloud, but if anyone had a strong urge to have their letter read, please say so. Michell Foster asked that her letter be read. She is the property manager for Pebco who own the restaurant property and works at Tea lane Associates. Michelle's letter was lengthy and in it she related her involvement with the property, her knowledge of the property during and before the involvement, the previous open use of the basement space and urging the ZBA to reconsider their consideration that the space had been illegally used, the concern and respect the owners have tried to show for abutters, the needs of the community for a restaurant, that the premises have consistently had a good restaurant functioning, and urging the Board to approve the application so the Kenworths can buy the property.

Bob Mone asked to speak: He once lived (???????) next to the Lambert's Cove Inn, as does ZBA member Tucker Hubbell who is a close neighbor to the Inn. Despite many big changes at the Inn and weddings being held there, they are good proprietors and considerate of their neighbors. He'd guess they have 80-100 seats there. Tucker thought more like, 60-77. Bob felt the problem with the Pebco restaurant is who's been running it. The Kenworths would be good. In the past, it's been more that the workers are making the late night noise as they leave, not the diners. Eric pointed out that the Inn also had 7 ½ acres in which to buffer noise.

Mary Kenworth said she'd written down what she'd like to say: She thanked the ZBA and other officers for reviewing their application, all the letter writers, all those who attended the meetings, and Julie. She said she'd spoken with abutters, neighbors and former managers of the restaurant, all in order not to repeat any mistakes. She'd thought the neighbors had appreciated being sought out, she'd been led to believe the restaurant would be an amenity for the B&B. They have provided for reduction in noise, better parking, staff training, good management. Their restaurant, Sweet Life, abutted homes: In 11 years they were without complaints, 2 other nearby restaurants had complaints from these homes. Since the last meeting they have tried to fit all into 2,000 sq ft rather than the 2,568 sq ft plan they first submitted. Chuck's new plan with existing and proposed footprint has kept the existing curb cut in the current location. Parking is for 30 cars. The existing shed of 200 plus sq ft will be rotated to encroach less on a bound (42') and be enlarged to 504 sq ft to become an office for the restaurant. Chuck did new plans; one at 2,000 sq ft and one at 2,146 sq ft. The 2,146 plan allows for all equipment to be enclosed, reduced noise, more energy efficient and better circulation for the bathroom area.

Mary went on to say she agrees the basement space is not *habitable* space, but the space was used for other than storage. Your attorney said you could count it if you decided to. It allows more entry and aisle-way. Tucker said we voted last week that the floor area was 1,583. We could vote on you going up to 2,000 sq ft, but not the 171 over that. Mary asked, did you actually vote on it? Eric replied, we were all in agreement that it had been illegal space and couldn't be counted.

Eric Wodlinger, attorney for the Kenworths, spoke: This is a pre-existing structure and use. According to the bylaws, once granted a special permit, the use becomes conforming. The structure remains non-conforming. He believes the ZBA can count space as it was actually used. The basement use was pre-Building Code use. He explained to all that State building code did not become uniform until well after the basement use started in 1973. The zoning bylaws define what constitutes floor area; all is counted unless exclusively used for storage. Part of the basement was not used exclusively for storage. The Board does not have to say the use didn't exist because it doesn't meet building code. That shouldn't be the ZBA's purview; it's open to the Board to deem that it wasn't exclusively used for storage.

Bob said, in either incarnation (both new plans), the office is no longer on the second floor (as shown in original new plan) and the basement is for storage only. Eric said the Plan B looks like a better plan, the plan incorporating 171 sq ft over 2,000 and needing the current used basement space to be counted in order to replace what has been damaged and will be rebuilt. Eric said, if you were granted this space would you still want 60 seats? Yes. Eric asked is there anyway you could reduce that 60 and still make the amount that you need, say do more take out like Homeport backdoor dinners? Tony Higgins pointed out that would increase traffic, unless there was a cutoff before late evening.

Mary said she appreciated the brainstorming, but the margins for profit are so slim, it would not work.

Atty Eric Wodlinger said the seating numbers should not be based on noise disturbance issues. He pointed out the 1985 covenant with the Board of Health showing the restaurant had 62 seats inside and 36 outside. That and other Board of Health related documents submitted showed a variety of number of seats before 2,000, all over 44 seats. He said the real issue for zoning is square footage. The number of seats should be set by the septic plan, by the Board of Health. He urged the Board to make a finding that the basement footage counted as it was there before the State Building Code. He discussed the merits of the case law the ZBA had considered.

Tucker said, referring to the 4 or 5 documents submitted re seating, there is a history and legitimacy of the Town permitting for 60 and more seats.

Abutter Volker Kaempfert said he was not adversarial to this application as he knows there will be a restaurant there in any case. Kathy Kaempfert hoped people would not be congregating in front of the restaurant. Also, what else would be in the shed besides an office? Will there be enough parking spaces? Would they screen and fence? The answers were, the shed will be office and storage; there will be screening. Tony Higgins said there should be a buffer between the restaurant and farmhouse. It was discussed that the parking plan should not cause the loss of the beautiful and often mature evergreens on the lot. Chuck said it's a preliminary site plan; hopefully they won't lose trees but will move them around. Tucker emphasized there were a lot of trees on the lot and worried that some won't be relocated. He noted Bill Haynes was not there, but he was sure he would want screening of parking on his side too.

Abutter Mark Weiner asked if the septic system had ever failed. John Powers replied that right now they have an incomplete plan on it. There have been some backup problems in the past. The lessening of the seats had to do with some of the neighbors concerns. He said one half of the basement is damp, wet with plumbing. There was one room in the basement for Pat Harris (office). There was a lounge and bar. The bar had been removed. There's been a fluctuation of seats, but he didn't think it had ever had 90 seats, as described in the covenant.

Building and Zoning Inspector Ernie Mendenhall spoke: He said there was a good argument for counting some of the basement space. The applicants have said there will be legal egresses for the new basement and more space would enable the handicap bathrooms. It would be better for the abutters if the freezers and such were inside and they were spared constant banging doors. The difference with this application is that the Kenworths are going to buy the place so they have a vested interest to take good care of the place and their neighbors.

Seasonal West Tisbury resident Peter Farrelly said there's going to be a restaurant here, it would be best to permit it for the Kenworths who would be excellent owners. For example, before he never knew where to park, he ended up in someone's back yard one night; they will change it for the better.

Year round West Tisbury resident Nancy Dole said she lived behind the Glassworks and has never been bothered by their business.

The Board took a second vote regarding the previous use of the basement space as other than storage in the running of the restaurant. They agreed that 571 sq ft of the basement had been part of the restaurant and as such the restaurant could be re-built up to 2,154 sq ft. 1,583 plus 571 equals 2,154. The Plan B building plans show a 2,146 sq ft building. If a yes vote, they may rebuild 154 square feet larger than the 2,000 sq ft limit due to the restaurant being able to rebuild up to its pre-existing, non-conforming size.

The Board set up conditions in case of a yes vote for the restaurant. It was also established that walk in coolers and freezers would count as storage and could be kept in a new basement. Chuck asked if the ZBA would consider letting them put a 25 sq ft employee bathroom in the basement as it is very awkward for employees to share one with customers. The Board said yes, that it was common sense, noting the restaurant Plan B with the basement bathroom would be 2,146 sq ft plus 25 sq ft being a total 2,171 sq ft of floor area.

In response to Bob's asking, Mary said measures to reduce parking lot noise would be: A good parking plan with screening, training of staff, signs designating parking, getting the message out to customers. It was decided that they would submit a definitive parking and landscaping plan, that the ZBA must do a site visit before the relocating and cutting of trees. A second visit would be made when all was done before the opening of the restaurant.

Another part of the plan amended by the applicants called for the existing approx 200 sq ft shed on the lot to be re-angled and enlarged to be 504 sq ft, to be used for office and storage. It would be more conforming by setback in its re-siting. Wrapping it up, Chuck said the new building would look similar to the old. The kitchen would be getting larger, a dormer would be lost. They could make it work at 2,171 sq ft and the office shed, (rather than the original asked for expansion of up to 2,568 sq ft in one building) The hearing was closed and the Board meeting resumed. The vote was unanimous to grant the Special Permit with Conditions to rebuild the restaurant according to Plan B, including the basement bathroom and enlargement of the pre-existing non-conforming shed. The Board told the Kenworths and their agents that they had come up with a good plan, that they were pleased they would be the new owners and operators and appreciated their work with the Board and consideration neighbors. The Kenworth contingent in turn thanked the Board.

The conditions are:

1. *The applicants are to comply with the narrative dated June 16, 2008: Letter and Proposed Restaurant Operation. The Proposed Construction Project component is no longer applicable.*
2. *The applicants shall comply with all Sections of the West Tisbury Zoning Bylaw in regard to signage, lighting, parking and noise.*
3. *There is to be no persistent, loud music during operating hours or preparation and clean up times.*
4. *The number of "seats" is limited to 60. All seating will be inside the restaurant. The applicants must comply with all Board of Health requirements.*
5. The basement will be for storage and a 25 sq ft employee bathroom.
6. *The parking shall remain at the back of the restaurant in the reconfigured parking spaces, as per submitted and approved plans. A post July 23, 2008 revised parking and landscape and screening plan must be approved by the Board. The Board must make a site visit in this regard before the removal or relocation of the trees on the property. Landscaping and further screening as proposed must be put in before issuance of an Occupancy Permit, and must be maintained.*
7. *Restaurant hours: 7 AM to 10 PM. The kitchen must close at 10 PM.*
8. *No deliveries before 8 AM.*
9. *Recycling and garbage pickup after 9 AM and no later than 8 PM.*

- 10. Adequate health and sanitary measures for clean-up and waste disposal must be put in place and adhered to in order that rodents and other pests are not attracted to the neighborhood. Management must provide an adequate number of receptacles, and maintain the surrounding area in such a manner that promotes sanitation and does not unduly attract rodents other animals and insects.*
- 11. After hours or early morning clean-up and preparations shall be performed quietly in regard to the neighbors' right to have peace and quiet at these times. The applicants will attend to recyclables such as wine bottles, or other noise producing outside clean-up, no later than 9 PM. Waste removal must be coordinated on a timely schedule that will not disturb the neighbors.*

BUSINESS

Draft opinion from Bobrowski/Costa re Martha's Vineyard Savings Bank. The Board read Atty Adam Costa's opinion regarding the Bank's question of whether the bank could increase the floor area size of a new building up to 5,300 sq ft through Section 4.4-2. That is, the size limit in the Mixed Business District for new construction is 3,500 sq ft, but ground floor area may be increased by 900 sq ft for each second floor affordable apartment added (up to two apartments), and the bank wanted to convert a building on the lot into 2 apartments to get the extra footage credit. The Board, in a previous discussion with Bob Wheeler, Glenn Provost and Bruce MacNelly, felt the intent of the whole Bylaw was to promote affordable housing, but needed a legal opinion of whether they could interpret the precise language of 4.4-2 to benefit the bank with square footage and the Town with 2 affordable apartments. The Bank has bought the abutting Parcel to the south of their existing bank building, and want to build fan office building.

Adam wrote essentially there is no room for speculation for meaning or intention here. The language of the section is clear that the apartments must be on the second floor, that's it about a mixed use building. The bylaw does not authorize the grant of a special permit for apartments for the bonus footage unless they are second story apartments. The Board accepted this opinion, agreeing that, sensible or not, they had to follow that section of the Bylaw as it was written.

The meeting was adjourned at 8:15 PM.

Respectfully submitted, Julie Keefe, Board Admin.