

WEST TISBURY ZONING BOARD OF APPEALS
MINUTES THURSDAY OCTOBER 21, 2010
2ND FLOOR TOWN HALL AT 5 PM

PRESENT: Tucker Hubbell (Chair), Eric Whitman, Bob Schwier, Nancy Cole, Toni Cohen

ABSENT: Tony Higgins, Larry Schubert

ALSO PRESENT for All or part of the Meeting: Bill Hoff, John Hoff, Heather Hoff, Marcia Cini, Henry Kudish, Helene Brown, John Keene, Joe El Diere, John Powers, Eric Lowe, Tim Barnett, Dan Rossi

OLD BUSINESS

- The minutes of October 14, 2010 were approved.

DISCUSSION

Request by John Hoff of Middletown Nursery to be able to sell lanterns/lights currently made by his brother Bill at his Lamplighter shop in the Mixed Business District, and for his brother to be able to make the lanterns on the premises of the nursery. In his words, to give Bill a corner of the building where he can make his lights.

Tucker made it clear to all of the Hoff's that this was a discussion, not an application to amend as John had written in his brief letter to the Board. John and Heather made it clear to the Board that they are first and foremost a nursery. They use Bill's path lights at the nursery, so in a sense they are on display, but they are not selling them. They would like to sell them, and other exterior lights that Bill makes. Approved in their 2008 Special Permit is a list of things the nursery can sell, they'd like to add the lanterns/lights as they are part of landscapes.

The Board discussed that, as no one lived on the premises, there could not be a home occupation. Marcia Cini felt it qualified as a Craft Workshop which is a use permitted by Plan Review. (In this case the ZBA would be the Plan Review authority). The Board felt this use was meant for a group of craft producers, such as an art cooperative. Bill explained that he basically works alone and crafts his lanterns by hand. He uses sheets of metal, copper and brass, and works with antique hand tools. He cuts, bends, and solders. Eric Whitman said he believed that John and Heather, being the owners of the property, have the right to allow Bill or any other individual to use their property. After discussion, the Board agreed that this was the case. They added landscape/exterior lights made by Bill to the list of what they can sell. Bill has other outlets for selling his lights, off premises.

DISCUSSION

The Board were made aware of that Wayne Greenwell of Yellow Brick Road wrote a letter to the Selectmen and the Gazette demanding action (stop the activity) against an organized dirt bike group that ride at a track built on Freddy Fishers farm (with his permission) under the auspices of Oak Bluffs Policeman JJ Mendes. The complaint is the noise. Mr. Greenwell also appeared before the Selectmen with a letter signed by several people in agreement with the complaint. He has talked with Zoning Inspector Ernie Mendenhall. In response to previous noise complaints, the biker group built a fence to help block noise. Ernie will take action or notify Wayne

Greenwell that he sees no need for action. In either case, either party might appeal to the ZBA. After discussion, the Board did not find a use in the Zoning Bylaws that would encourage a Special Permit application. Chief Rossi said that complaints of loud bike use in other parts of Town had diminished since the focus was at Fisher's farm. They use it from 2-4:30 on weekends, and not on Holidays. The ZBA concluded they had no part in this process unless an appeal is filed.

6:00 PM DISCUSSION: Site Visit of October 7 to John Keene Excavation and home of neighbor Henry Kudish in response to a letter of complaint from Mr. Kudish to the Board of Health and the ZBA. 3 letters of Mr Kudish, Various ZBA Keene documents; History of Keene business; some Wiley ZBA documents. Those in attendance at the site visit by invitation of the Board of Health were: John Keene, Joe El Diere, Tucker Hubbell, Bob Schwier, Larry Schubert, Julie Keefe, John Powers, Tim Barnett, Ernie Mendenhall, Chief Dan Rossi and realtor Carmine Cerone.

(Henry Kudish had called the office to find out when his letter to the Board would be discussed, as he wanted to attend, and was it a public meeting? He was in Connecticut, but would come to the Island. He was told when the subject would be on the agenda, and yes it is a public meeting.)

Tucker addressed Mr. Kudish's criticism that the use had changed and increased. John Keene Excavation is a pre-existing use; it pre-existed zoning, adopted in 1972. It's use conforms with the designated zoning use of that area, light industry. What is being done and sold on the lot remains the same, although methods have been updated. Mr. Kudish read Section 11.1-1: "Continuation: If the use of a structure or land was legal when it started but is now in violation of this bylaw, it may be continued. Such a use or structure may not be expanded except as provided for in this Section 11.1." He said that the prior use has no resemblance to what John Keene does today. Nancy Cole said that predecessor, Olsen Brothers, was no Mom and Pop business. Tucker pointed out that there is not a stone crusher on the property, nor bobcats, two of the complaints Mr. Kudish had written about. The stone crusher referred to is actually a soil processing machine...separating soil, rocks and sticks. The machine was not there in '03, the time of noise studies made for the DEP. The first noise study showed the sound emanating from Keene's to be above what's legal.

The Board said that after the first study, Keene's addressed some noise issues, for example putting up a sound barrier, then re-tested and subsequently had DEP approval. John Keene said the stump grinders he has now are much quieter than those that passed the test.

Mr. Kudish said there is no sound barrier, what is the sound barrier? It was described as three wooden buffers by the compost pile, a barrier not unlike one on the turnpike. There is a natural barrier to the back of the property. Piles were strategically placed. The Board talked of how the whole area has also actually improved; i.e. the dump is now a transfer station. They asked Mr. Kudish if some of the noise, say bobcats, could be coming from the Wiley's nursery next door? Mr Kudish said no, we know where the noise is coming from. He said, it's the rock grinder, which is being worked from 7:30 in the morning til 5 PM. It's as loud as a steam locomotive.

John Powers, Board of Health Agent, said what had originally been tested was noise from the flailing tub grinder, a stump grinder, which Keene's no longer uses. Keene's mitigated noise issues after found to be non-compliant, and the DEP were satisfied that corrections had been

made. There have been no sound measurements since. Mr Kudish said the Town is also responsible for noise, not just the DEP. Tucker said he is not convinced that the noise is non-compliant. Mr. Kudish asked what it would take to convince the Board. They should bring a sound measurer to his property. John Powers said that a more complex study would be required, one that would take into account ambient noise such as from Vineyard Gardens, John Olsen's trucks, the landfill traffic and trucks, traffic entering and exiting Old Stage Road, Monte Bizarro's trucks, and traffic in general.

Eric Whitman asked Mr. Kudish if, when he was in the process of buying a house, he had visited his property on a week day? Mr Kudish replied that the property was shown to them on a Sunday morning. Nothing was operating and in hindsight feels it was no coincidence to be shown the property on a Sunday. Eric asked, you saw the business there, did you do any due diligence about it or the area. Mr Kudish said he did not know he was next door to a light industrial area; he did not go to the town Hall to do research. Eric said you've lived there for 5 years and it is now that you are strongly complaining; what has happened? Mr. Kudish believes the noise has increased. According to John Keene, Eric said, he is less busy now. Is the noise worse or are you just sick of it? Mr Kudish said the equipment is facing the road in a more direct fashion.

Back-up beepers were discussed: They have to be used by law. The Kudishes are aware of the laws, but it adds to the noise. Their concern is the noise. The grinding/rock, soil, stick separating is on every day from 7:30 AM to 5 PM. Tucker said, Keene's is restricted from using composting machines to between 9 AM and 3 PM. John Keene said none of his machinery is run for 5 days a week and does not run from 7:30 to 5. Mr. Kudish reiterated that it did. John Keene talked of how Mr Kudish asked him not to run his machines for 3 weeks in August while they did a house swap with a family from France. John said he agreed and they shook hands. This cost him a lot of lost money and stress. He did not run the machine during the agreed upon time. The tenant evidently complained to the Kudishes when their tenancy was over that the machines had run all the time and had been very noisy. John Keene said they started up the machines on the day the Kudishes came back from France. Mr. Kudish though he'd gone back on his word and from that point started his complaints to the Board of Health, Selectmen and Zoning Board. (Nothing was written to the Zoning Inspector).

Tucker and Nancy said, yes it is noisy, but does it reach the level of being non-compliant with noise regulation. Mr Kudish should appeal to the DEP. Mr Kudish again said it's been expanded since he bought his house. The ZBA said they have believed this is a grandfathered use in a district zoned for its use. The Olsens used to have a cement factory on the property. At this point, if Keene's wanted to have a cement factory, that would be considered an expansion of use and need permitting as per the bylaws. Having a stump dump, making compost and soil and selling the products is a continued use, albeit using different methods. When Keene's wanted to expand onto another lot, they came to the ZBA in 2003, and eventually got the permit from them to expand on to another lot, with conditions.

Mr. Kudish again referred to page 73 of the bylaws. Reading from 2004 DEP documents, Mr. Kudish quoted that local officials must keep a log of all complaints on the property. Tucker said that is exactly what the Board of Health, Selectmen and the ZBA have done. The ZBA passed on the complaints to Ernie Mendenhall. The Board of Health also responded with a site visit. No one brought a noise meter Mr Kudish said. The Board said that would not be conclusive. A

certified test must be done. John Powers said he relayed the complaint to the DEP who told him they wanted to keep it at the Town level. Tucker said Keene's put in a \$4,000 fence in front of the Kudish property, and switched the Kudish drive from Old Coach Road to State Rd. Have the Kudishes tried to make it better? Mr Kudish replied that it is not he who generates the noise, it's not his problem.

Helene Brown, also owner and resident of the house said that people who knew the former owners, the Elrichs, say it's noisier now than it used to be. The Board said that there is a lot of noise coming from all the businesses in the area and all the traffic. Tucker observed that, other than the soil separating machine, none of the other machines could be heard above ambient traffic and other noise. The noise did seem to funnel to the deck of the house. The house seemed more sheltered this visit than in previous years, with the addition of the fence and switched drive. Tucker pointed out that while Mr. Kudish wants the Town to take action, the fact remains that they bought a house across the road from the Light Industrial District. Mr. Kudish said as long as zoning is enforced he's OK with that. Tucker said, although he'd like to think he won't, Mr. Kudish does have the right to get involved with the court system. That would be preceded by a formal appeal to the ZBA. Eric reminded Mr. Kudish that Ernie Mendenhall is the Zoning Enforcer.

Tim Barnett, Board of Health Chair, summed up his Board's comments: The noise seemed louder on the Kudish deck than on the ground (the deck faces Old Coach Road and Keene's); maybe lowering the deck would help; there is a general increase in noise level in town; Big trucks use Jake brake systems which are noisy; big trucks come in and out of that road for the dump, Keene's and other businesses; It's the LI district and it's noisy.

Mr. Kudish said he wants the sound measured. Board members said a hand-held decibel meter at the Kudish property would not provide a conclusive, scientific study. In 2003, John Keene was applying to the Board for a permit. A noise complaint was made to the DEP. John Keene was told by the DEP to hire a DEP approved company, Tetra Tech, to perform many tests and then re-tests on his property, a process requiring several days of testing...the results of which were submitted to the DEP, and subsequently approved. Mr. Kudish said he had not known that that was the way the testing had worked.

The ZBA told Mr. Kudish to be in touch with Ernie Mendenhall and to talk with the DEP himself. John Powers said he'd cc'd the DEP a copy of the Kudish letter to the BoH. Mr. Kudish said the DEP had not contacted him.

OTHER CORRESPONDENCE

3 MVC letters...wind power and roads

Change in agricultural zoning and draft MVC agricultural proposal

The meeting was adjourned at 7:05 PM.

Respectfully submitted, Julie Keefe, Board Admin.