

Shutesbury ZBA Meeting Minutes
December 21, 2020 Virtual Meeting Platform

Zoning Board members present: Chuck DiMare/Chair, Jeff Lacy, and Andy Berg

Zoning Board alternates present: Herb Gilmore

Staff present: Tessa Dowling/Land Use Clerk

Guests: Andy Cloutier, Anna Mancebo, Meaghen and Steve Mikolajczuk, David Holmes, James Martin, Donna MacNicol (Town Counsel), Karen Keegan

DiMare calls the meeting to order at 7:01pm.

Statement relative to conducting virtual meetings following the Governor's restrictions on public meetings is read into the record by Dowling.

At 7:03pm, Lacy moves and Berg seconds a motion to approve the 11.14.20 meeting minutes. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Public Hearing Continuation for a Special Permit/Variance (Case 20-003): Application of Andrew Cloutier for Installing a Shed at 80 Shore Drive

DiMare reads the public notice for Case 20-003. The Special Permit requests permission to install a shed that would not comply with frontage set backs.

DiMare asks why Cloutier submitted the application.

Per Cloutier, the house has no basement and a small shed would allow for extra on-site storage.

Per DiMare, have you discussed the shed project with your neighbors and whether they approve of the project?

Cloutier contacted all of the abutters and showed them a photo of what the shed would look like and no one opposes the project.

Cloutier was contacted by the abutter on Wendell Rd but after describing the project, which does not block the abutter's view, the abutter did not object.

DiMare, Lacy, and Berg have driven by the property, but Berg drove by after dark and could not see the stakes outlining the proposed location for the shed.

DiMare asks for comments from the Board.

Berg asks if the shed will be built near a trailer or the other shed that are already on the property.

Cloutier says no, the leach field prevents the new shed from being placed near the other shed.

Lacy believes no one behind the property would be affected by the shed and thinks the proposed location is logical.

Lacy references Town Bylaw 4.2-2 b2 for non-habitable structures.

Per DiMare, the development would not be more detrimental to the neighborhood.

DiMare asks for any comment from the public, but there is none.

DiMare polls the Board on their opinion of the project.

Board members are in favor.

Lacy agrees to write the draft of the decision for the project.

DiMare explains that the Board will review and vote on the decision draft at another meeting.

DiMare closes the hearing.

The decision for Special Permit Case 20-003 will be reviewed on January 25, 2021. The meeting will start at 7pm.

Public Hearing Continuation for a Special Permit/Variance (Case 20-002): Application of Steven & Meaghen Mikolajczuk for Reconstruction of a house at 32 Lake Drive

At 7:30pm, Berg moves and Lacy seconds the motion to move to the deliberation phase for Special Permit Case 20-003. After consideration, the Board decides to continue the discussion phase of the Special Permit Case 20-003 hearing. The Board's roll call vote on the motion: Lacy: nay, Berg: nay, DiMare: nay; the motion is denied and discussion continues.

DiMare explains that Gilmore is an alternate member of the Board who can be part of the discussion but does not vote on the project. The three voting member board requires a unanimous decision on the project.

Per Town Counsel, alternate members are designated at the start of a specific hearing when a voting board member cannot participate in that hearing. If a voting member suddenly has to withdraw from the hearing process, the alternate cannot replace that member and the hearing process would have to be restarted. The alternate member can be present at the hearings even when not designated to replace a voting member.

The Board will investigate this further as the requirement to designate alternate members ahead of time would not work if a voting member got sick. The Board had assumed that if an alternate had attended all the meetings involved in a hearing they would be able to join as a voting member should the need arise.

Martin is attending the meeting in the capacity of lawyer to the Mikolajczuks.

The existing structure does not meet side-yard setbacks, which makes the structure nonconforming and, therefore, projects on the property require a ZBA Special Permit application. The project will not increase the non-conformity of the side-setbacks, as the house rebuild will stay within the existing footprint. The contention around the project revolves around the height increase of the proposed building to 26.5 ft. The bylaw height limit for the Lake District is 28ft.

Martin cites a court case where an application for an addition to a single family home within a 25 foot town setback was denied by the ZBA but then approved by the state supreme court, case Willard vs. Board of Appeals of Orleans (25 Mass. App. Ct. 15, 514 NE 2nd 369, 1987). The denial "was annulled as in excess of the board's authority where it did not appear from the record that the board had proceeded under the first paragraph of G. L. c. 40A, Section 6, and applicable provisions of the zoning by-law, or that the judge on appeal to the Superior court had made the requisite independent findings on the questions whether the proposed addition would "increase the nonconforming nature" of the structure and whether the addition would result in a structure "not substantially more detrimental" to the neighborhood than the existing structure."

Martin does not find that the Case 20-003 project changes the nonconformity of the structure and, therefore, does not increase the detriment to the neighborhood.

Per Town Counsel, under G. L. c. 40A Section 6, there is an exception clause for single family and two family homes. They have an easier standard to meet for Special Permits.

Per Homes, height does not fall under nonconformity?

Per Town Counsel, the structure can increase in height as long as it does not increase nonconformity. The increase in detriment to the neighborhood is a subjective judgment.

Town Counsel cites court case Goldhirsh vs. McNear (32 Mass. App. Ct. 455, 590 NE 2nd 709, 1992) where an applicant was approved to build vertically while maintaining the same nonconforming footprint of a carriage house.

Per Martin, other similar projects in the same district have been approved.

Lacy disagrees that the neighborhood is defined as the district, cites Handbook of Massachusetts Land Use and Planning Law by Mark Borrowski, 2nd edition. The building footprint is one factor, but the Board needs to review all proposed changes. Lacy would like time to review the court cases mentioned during the hearing.

Lacy discloses that he called the applicant to suggest that a compromise where the house is extended to the proposed height but the dormers are eliminated from the project.

Martin believes this might violate Open Meeting Law.

Berg does not feel the call was appropriate. The Board had not discussed that anyone should reach out to the applicant.

Town Counsel would not rule the call as a violation as the Board can choose to compromise.

Per Lacy, I was reaching out on behalf of myself trying to move the project forward. It was a good faith move that was disclosed for the record.

The Mikolajczuks ask about the timeline for the project.

After the evidence phase of the hearing is closed, the Board moves to the deliberation phase and a member of the Board will draft the decision. The draft is circulated to the Board members and discussed at open meeting, potentially on January 25, 2021. Once it is edited, the final copy of the decision is filed with the town clerk. The decision must be made within 90 days from the close of the hearing. At the lower end of that timeframe, it can take 30 days from the start of the decision phase to when the final draft is sent to the Town Clerk.

Per Town Counsel, a denial decision is written only by the member or members who vote “no.”

At 8:42pm, Lacy moves and Berg seconds a motion to continue the Special Permit Case 20-003 hearing to January 13, 2021. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Dowling signs the Continuation form for the Mikolajczuks and DiMare with their approval and oversight. The Continuation form will be certified by the Town Clerk and shared with the ZBA and the Mikolajczuks. Per Town Counsel, an agreement between the applicant and the Board and a signed Continuation form is only required if the hearing extends past Special Permit deadlines, however, it is good practice to have a formal agreement.

Education/Guidance

No one attended for Education/Guidance.

New Business

There is no new business.

Old Business

- Reminder that Application Fees for Special Permits/Variations increase to \$400 & Application Fees for Site Plan Review Fees increase to \$200 beginning on January 1, 2021 (Voted in favor at the October 14, 2020 ZBA Meeting)

At 8:48pm, Berg moves and Lacy seconds a motion to approve the increase in the Appeals of a Building Inspector Decision fee from \$300 to \$400 effective January 1, 2021. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

The Planning Board has adopted a new fee schedule for large-scale ground mounted solar projects that reflects an array of costs, based in part by the actual cost of publishing the legal notice in the newspaper. The ZBA might be interested in looking at the fee schedule as a different approach for setting the fee cost.

Schedule next ZBA Meeting/Site Inspections

The Special Permit hearing for a house rebuild project at 16 Wyola Dr (Case 20-004), submitted by applicant Mathew Borowiec, is scheduled for January 25, 2021. The meeting will start at 7pm.

At 8:55pm, Berg moves and Lacy seconds a motion to adjourn the meeting. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Respectfully submitted,
Tessa Dowling
Land Use Clerk