

TOWN OF ESOPUS
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Zoning Board of Appeals

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TOWN OF ESOPUS ZONING BOARD OF APPEALS
Minutes of the September 16, 2014 Meeting

CALL TO ORDER: Chair, Kathy Kiernan, called the meeting to order at 7:05 p.m.

PLEDGE OF ALLEGIANCE

ROLL CALL

Present: Vic Barranca, Joe Guido, Kathy Kiernan, Melanie Marino, Frank Skerritt, Dick Wenzel & Karl Wick

Also present: Michael Ankrom, Keith & Lisa Lewis, Michael Santoro, Ann Smith & Sheila Pratt.

MINUTES

Vic made a motion to approve the July minutes as written. Seconded by Dick. All in favor.

VOUCHERS

Joe made a motion to approve the voucher for secretarial work. Seconded by Vic. All in favor.

Kathy explained the three-part process of the Zoning Board of Appeals.

INFORMATIONAL

09-16-14-01

Eli Melamud
15 Rifton Terrace

zoning interpretation
71.30-2-25.200

Applicant was present as well as his attorney, Michael Moriello of Risely & Moriello in Kingston. Mr. Moriello explained the reason his client was before the Board. In June the Building Inspector had given a notice to applicant stating that the (Conditional Use) permit issued for his rooming house had not been renewed. Since it required renewal, the Building Inspector referred applicant to the Planning Board, (the issuing Board of the permit). It is the contention of Mr. Moriello that applicant does not belong in front of the Planning Board because the Building Inspector interprets zoning law and the Planning Board cannot interpret anything under the zoning law. If the Building Inspector interprets something, the only board that can reverse him or agree with him is the ZBA. He thinks that the proper forum is the ZBA and that is why they are appealing what he considers an interpretation. "It makes no sense to me that Eli requires anything more than, at most, a ministerial permit, which he has been doing since 2007." The Town of Esopus passed Local Law Number 2 in 2007, which requires businesses in the Town to obtain a permit every year in order to operate a business in the Town. Applicant has done this since the law was enacted.

Mr. Moriello continued. This particular use was in effect before the Town of Esopus had zoning. In 1971 the current owner came to the Planning Board and got approval for the use. The Planning Board made a decision which stated that the permit shall be renewed annually. There were no standards or conditions stated. As far as he can see by reading all the documents available, it seems as if the owner renewed the next year, 1972, but for 41 years after that there was no review or renewal.

Mr. Moriello stated that applicant bought the property in 1986 with the Building Inspector's approval at the time. He concedes that it was a lot easier to get approvals in 1986. Applicant (altered the interior of the rooming house) to make three more rooms to make a total of 12 rooms. There was no permit renewal or conditions required.

Mr. Moriello explained that it is their contention that, without any standards for renewal, it leaves it up to the discussion of the Planning Board to decide what applicant has to do every year to comply. He stated, "That is not the law. Land use and zoning approvals run with the land. They go with the people that own the property and I have given a whole bunch of legal reasons why that is so."

Mr. Moriello believes that applicant is not out of compliance with anything. He has been renewing his (operating) permit each year as required, as every business is required. If applicant is required to do more, Mr. Moriello does not think it is lawful.

He stated that applicant is trying to sell the premises and is having difficulty because of the issue at hand. He has run a business for many years in Rifton, lives in Rifton and wants to be a good neighbor, pays full taxes. Property is assessed as a multi-family use and is in compliance with all health department regulations and all fire inspections.

Kathy asked for verification of the request. "Your request is for us to determine whether the building inspector is correct in saying that he has to go back (to the Planning Board). It's an interpretation that you are looking for?"

Mr. Moriello replied, "Ideally, what we would like this Board to say is that there is no further discretionary review that Eli has to go through – he doesn't have to go back to the Planning Board. If there is a permit to be issued, either he's complied already or he'll pay whatever fee is reasonable and comply now." He contends that the permit should not be discretionary because there are no standards to base compliance on – not in 1971 and not now. He said that he would like this Board to reverse (the Building Inspector's) decision.

Mr. Moriello stated that he thinks Tim (Building Inspector) was trying to give applicant guidance by sending him to the Planning Board. When the Planning Board told applicant he needed to submit \$7500 upfront for an escrow account for their consultants and experts, he retained Mr. Moriello, who thinks this is excessive and not based on any law.

Kathy said the minutes of the Planning Board meeting in 1972 specify that the Conditional Use

Permit must be renewed annually. Mr. Moriello said, “. . . an annual renewal of the permit itself, but not an annual re-review of the project. There is ample case law that if there is a requirement for a permit renewal, the fact that you didn't get that permit doesn't take away your approvals and make you go back to square one and get re-approved.”

Vic asked, “Who initiates the review? Is it something the owner was supposed to do every year or the Town?”

Kathy said that was a good question.

Applicant stated that when he bought the property in 1986, he spoke to the Town Supervisor at the time, Marilyn Coffey, and she was very supportive. She said that applicant had the right to use it as single room occupancy, it was “grandfather-claused” in. Ms. Coffey did not say anything about having to renew anything. Applicant said that he didn't think she knew (about the renewal).

Vic stated, “That's not her place to say that.”

Applicant continued that he went to the Building Dept., took out a building permit, talked about the use, was in compliance with the permit. The inspector also did not mention a renewal (of the Conditional Use Permit). Applicant doesn't think anyone knew about it because for 10 years, before applicant bought the property, no renewals were issued. The original owner renewed the permit one year. Applicant stated that he has done everything he was asked, thought he was in compliance with the law for decades while he ran the business. When the issuance of Operating Permits began (2007), the boarding house got annual (fire) inspections and paid a fee for this permit. The boarding house passed every inspection and got the permit every year.

Applicant is ready to sell the property and this issue totally surprised him. “For 41 years nothing has happened. Nobody's clear on it. Nobody knows who was supposed to go where or what.” He stated, “I can't see how anybody on the planet would open a business anywhere. . .if they were told that every single year they had to come back and go through the whole process again.” He thinks that, because it was the early years of zoning in the Town, no one was sure about the procedure and everyone let it go.

Mr. Moriello stated that the wording from the Planning Board in 1972 says that the permit must be renewed annually, not the project has to be reviewed again. In his opinion, either the owner or the Building Inspector was supposed to remember that the annual renewal and fee was due. There is no way to know how the Planning Board expected this to play out.

Vic stated that the (Conditional Use) permit had stipulations as to the amount of people occupying the residence and the size of the dwelling not to expand.

Mr. Moriello stated that the original approval was for nine rooms and then applicant increased to twelve rooms when he took over.

Kathy asked if the structure had been changed when the three rooms were added. Applicant replied that the structure was not changed; he just used the interior differently.

Frank pointed out that originally the parcel was 4 acres and now it is 1.2 acres. He asked when it was subdivided. Applicant replied that this was before he bought it. Frank stated, "It should have come back to us anyway for review. (you're putting the same amount of people) on a smaller piece of property." Mr. Moriello stated that the subdivision may not have required any further review. Frank said that the decision in 1972 was based on a parcel of 4 acres and also that someone was going to be there at all times.

Mr. Moriello stated that it has to be assumed that the subdivision was done legally; otherwise it would have been corrected. "We can't retroactively bring somebody back in from somewhere between 1972 and 1986. Presumably, (the owner) went to the Planning Board and the Planning Board looked at it." Frank said, "You said that there was no zoning back then." Mr. Moriello said, "Back then there was no SEQRA - until 1974." Frank stated that because we have SEQRA now, it must be complied with it even if it is a pre-existing structure. Mr. Moriello disagreed. He stated that applicant doesn't have to comply with SEQRA unless he makes environmental changes which are exterior in nature. Frank said, "You've added three rooms and you've put more septic into the ground. How is that not changing the environment around the property?"

Mr. Moriello stated that he doesn't know what happened at the time, but he presumes the owner got all his approvals. Applicant stated that he did not add any structure to the building – he just made some rooms smaller. Mr. Moriello said that interior changes are not subject to SEQRA.

Joe noted that much case law was referenced in the packet of information that accompanied the application. He asked Mr. Moriello if the Board could have copies of all the cases so he could understand their significance to the application in front of the Board. Mr. Moriello agreed.

Kathy pointed out a discrepancy in the wording of a particular zoning ordinance, enlargement of floor area. Mr. Moriello's copy was different than current code. He will check this out. He thinks this may be the reason the Building Inspector referred applicant back to the Planning Board – the expansion of 9 rooms to 12 rooms. Applicant repeated that he did not add one square foot to the structure.

Kathy pointed out Code 123.30 B. She said "altered" was the key word. He said, "Prevailing cases. . . say that if you're operating in a confined space, you're not enlarging it because the intent was to occupy all of it." Kathy stated that it was altered in some way to get 12 rooms. Mr. Moriello agreed, but added that he didn't know what law was in effect in 1986. Applicant stated that Bill Barnes (Building Inspector at the time) approved everything that was done. One of the three rooms was not altered at all – its use was changed. The other change was to put in two small walls to make two rooms out of one.

Kathy said that the building permit that was issued in 1986 does not say anything about what is being done or what applicant was allowed to do. Applicant said Bill Barnes inspected everything and signed off on it.

Dick asked if any bathrooms were added when the three additional rooms were added. Applicant replied that when the renovations were done, he thinks they added a couple of bathrooms, all with Building Department approval. Dick asked if they were community baths. Applicant replied that some rooms have private bathrooms and some rooms have a shared larger bathroom.

Mr. Moriello stated that if applicant made internal changes, he would not have gone to the Planning Board, only the Building Department. He added that he doesn't know if this use was conforming at the time.

Joe said that the timeline needs to be clear. It is his opinion that a Conditional Use Permit goes with the property, but when you make changes, that voids the CUP. Mr. Moriello disagreed. There is a legal subdivision on record. He feels it would be chaos if you subjected people to standards in effect now for things that were done thirty years ago.

Joe stated that the standard for the CUP was for "that specific site, that specific way." Mr. Moriello argued that when the subdivision happened and the land went from 4 acres to 1.2 acres, no one knows what the conditions were at the time, but we have to assume that since there were no violations for 41 years, it was lawful.

Joe pointed out that many illegal structures, apartments, etc. come to light only when the owner tries to sell the property and a title search is done. Mr. Moriello stated that most times that happens when people don't go through any process; they just build something without approval. In this case, there are filed maps, building permits. Nothing was done without going through the proper procedures.

Applicant stated that he and his wife have put everything they have into the boarding house. They bought it because they didn't want it to be sold to a slum lord. They live in Rifton and care about the community. They ran the house with no problems until a few years ago. There were some problematic tenants that are all gone now. This created some bad feelings on the street. They are ready to retire now and want to sell the property, whose value is in its single-room occupancy. That's what they bought and the Town told them it was fine.

Kathy asked if there is someone who lives on the property and oversees it. Applicant replied that there is and applicant and his wife live a quarter of a mile away.

Applicant stated that the boarding house is going to be sold to someone who has a benign use for it. He can't sell it unless it is single rooms. He can't understand how the Town can come along after all these years and tell him there are issues now.

Mr. Moriello asked if the Board works with an attorney. Kathy replied that the ZBA has access to the Town attorney. Joe noted that we will probably have an attorney at the October meeting.

Mr. Moriello stated that applicant will address the concerns of the neighbors at the public hearing. Applicant said that Rifton is a small community and he doesn't want to have bad feelings between the neighbors and himself.

Joe said the neighbors can speak at the public hearing for the record, but if applicant wants to speak with them after the meeting and "iron things out," that's his choice.

Applicant stated that it is a quiet street and he wants to get along with everyone. His boarding house was there before most of them lived on that street. He noted that when the neighbors brought up issues that disturbed them, those issues were addressed and resolved as quickly as possible. The people who caused the problems are all gone. He doesn't want to have anyone in Rifton angry with him. He wants to sell the property to someone who isn't a slum lord. Applicant had a prospective buyer who backed out because of all the confusion surrounding the property. He has another buyer now and doesn't want to lose the opportunity to sell. He mentioned that there was not a new septic system installed, but he obtained Health Dept. approval for the project in the eighties.

Joe stated that applicant may not have done anything wrong, but "obviously due diligence wasn't done (on the Town's part)."

Karl asked if there was an increase in square footage when the house went from nine to twelve rooms. Applicant replied that it was interior changes only. In the original minutes, the owner was asked how many people would live in the house and he replies, "About 14." Applicant noted that he has never had that many living there.

Karl asked if there was a document approving the rooms going from nine to twelve. Applicant does not have anything except the building permit, which Bill Barnes signed off on. Karl noted that the (Certificate of Compliance) says "was inspected. . . and conforms to the NY State Uniform Fire Prevention and Building Code". Applicant said Mr. Barnes was there and saw what they were doing, it was no secret.

Karl asked Mr. Moriello if he thought a Conditional Use Permit is the same as an annual Operating Permit. Mr. Moriello replied that they are two separate entities. He believes with an Operating Permit there is no discretion of the Building Inspector – applicant goes in and pays the fee. The Conditional Use Permit requires discretionary review.

Karl asked if Mr. Moriello thought that the CUP renewal agreement signed in 1972 by applicant's predecessor was not binding on the successor. Mr. Moriello replied that it was agreed that the *permit* would be renewed, not the *use*. It was renewed one year and then never again for 41 years. Karl stated that (owner) did not do what he agreed to do and either applicant did not know about the agreement or he did not do due diligence. Mr. Moriello agreed that owners, past and present, did not renew the permit, but contends that it is unclear who was supposed to remind owner about renewal. The Town sends reminder notices about a number of other things.

Applicant asked rhetorically, “Who on the planet would open any kind of business or do anything in the Town of Esopus that required a Conditional Use Permit if every single year they had to go through the process again? Who would invest hundreds of thousands of dollars and go through it?” “I doubt there’s anybody else besides me who’s being held to this situation.”

Karl noted that Mr. Paton did it. Mr. Moriello contends that the original owner did not get re-reviewed – he simply paid a fee for renewal. He stated that the zoning law and approvals need to contain some standard by which to be measured.

Karl read from the minutes of Planning Board meeting in 1972 at which Mr. Dumond asked Mr. Paton, “Would you agree to an annual renewal?” Mr Paton replied, “Yes.”

Mr. Moriello contends that annual renewals are not lawful unless they are conditioned by specific criteria for that renewal. Karl stated they (are legal) if “one gives up one’s rights voluntarily”. Mr. Moriello stated that it is incumbent upon the Town to explain the conditions and the follow up process.

Applicant stated that there was no mechanism in place by which to accomplish this renewal. In 2007 when the Town put in place the annual Operating Permit with a fee and (fire) inspections, applicant complied completely

Karl stated that this is a different issue. He said applicant had complied with the Operating Permits but not the Conditional Use Permit. Karl noted that the fact that applicant didn’t know about the CUP might be something the Board needs to consider.

Joe and Karl agreed that it is unclear what the process was intended to be if applicant were to go back to Planning Board. Karl stated that the wording in the original agreement is vague and he doesn’t know how binding it is. He will review case law.

Mr. Moriello stated that applicant went to a pre-submission meeting of the Planning Board and then a regular meeting of the Planning Board. They wanted \$7500 for an escrow account for their review of his case.

Kathy asked if applicant was willing to go to the Planning Board for CUP renewal until they asked for \$7500. Applicant replied, “Yes. I didn’t know what to do.” Mr. Moriello stated that the Building Inspector sent applicant to Planning Board and he contends that the Planning Board cannot interpret zoning. The ZBA is the only board that can interpret zoning.

Applicant said that he met with Tim Keefe (Building Inspector), showed him all the paperwork from 1986. Tim said that they would work it out. After preliminary meeting (with Planning Board) and speaking with others, applicant decided to get a lawyer, who told him he didn’t belong in front of the Planning Board. Mr. Moriello told him that the ZBA has the jurisdiction in this case. He continued that he had “followed the rules of the Town, the letters of the law as best that they were told to us. If you can’t trust the Building Inspector, who do you trust?”

Applicant stated that he has an eager buyer and asked when he could expect to get a decision. Vic said that this is a three month process. Kathy noted that the public hearing can be extended 60 days if there is a lot of public comment. Therefore, the public hearing could be two months followed by the decisional meeting the next month. Mr. Moriello stated that from the close of the public hearing the Board has 62 days in which to make their decision.

Applicant was asked to return for the public hearing on October 21.

Michael Ankrom asked for copies of the application and Mr. Moriello's packet. He asked if the Board had received the letters from the neighbors. Kathy replied that they had been received and they would be read at the public hearing. Secretary asked Mr. Ankrom to come in to the Building Department and she would supply him with the copies.

Joe noted that members of the public will be allowed to speak at the public hearing for 2 to 3 minutes each. There will be a legal notice in the Daily Freeman and the neighbors will be notified of the public hearing by mail.

OTHER BUSINESS

Kathy read a note from Gloria Mesches thanking the Board for their consideration of her for the secretary position, but she is declining. Secretary introduced Sheila Pratt who in considering taking the position. Sheila has recently taken on the positions of secretary to the Waterfront Advisory and Environmental Boards.

Vic made a motion to adjourn the meeting. Seconded by Dick. All in favor.

Meeting adjourned at 8:05 p.m.

Respectfully submitted,

Joan Boris, Secretary
Zoning Board of Appeals