

The Office of the Zoning Board of Appeals
THE TOWN OF MERRIMAC
Massachusetts, 01860

COMMITTEE: ZBA
MEETING DATE: May 14, 2018
Meeting Place: Merrimac Town Hall
86 West Main Street, Merrimac, Ma 01860

Members present: Chairman Josh Jackson, Ed Mills, Earl Baumgardner, Arthur Amirault and Mitch Kostoulakos

7:00PM

Chairman Jackson opened the meeting.

7:01PM Mitch Kostoulakos made a motion to approve the March, 2018 meeting minutes, Earl Baumgardner 2nd the motion Vote: 5:0

7:02PM Arthur Amirault made a motion to approve the April, 2018 meeting minutes, Ed Mills 2nd the motion Vote: 5:0

7:03PM

Applicant: Laerte DeAssis

The Zoning Board of Appeals will hold a public hearing on April 9, 2018 at 7:10PM at the Merrimac Town Hall, School Street, Merrimac, Massachusetts, under General Laws, Chapter 40A, as amended on the application of Laerte DeAssis concerning the premises located at 2 Prospect Hill Street, Merrimac, Massachusetts. This property is located in the Village Residential Zone. The Petitioner seeks a Finding of Fact relating to the the provisions of Article 17.3.3.1 and Article 17.3.3.2 of Merrimac Zoning Bylaw and in accordance with Massachusetts General Law ("G.L.") Chapter 40A, 10, whereby the petitioner seeks to add an accessory dwelling section to the property.

After discussion, Bob Sinibaldi is going to seek legal counsel from Kopelman and Page relating to this filing. Ed Mills made the motion, Arthur Amirault 2nd the motion Vote: 6:0

Macella Vincent of 33 East Main was present and did discuss traffic concerns relating to this property.

This item will be continued to the April 9, 2018 meeting.

APRIL 9, 2018:

Legal counsel was consulted-summary enclosed:

The Merrimac Board of Appeals ("Board") has asked whether it can grant a Special Permit for an accessory dwelling where the application before the Board was for a Finding of Fact to convert into a three family dwelling use. Here, after review of the proposed decision and initial notice of public hearing, we do think that there is a plausible basis for challenge if the Board were to issue a Special Permit on the application as originally presented. It is our recommendation, therefore, that the applicant withdraw the application and file a new application for a special permit.

It is our understanding that on February 16, 2018, Laerte DeAssis ("Applicant") filed an application seeking a Finding of Fact to convert the use of the property at 2 Prospect Hill Street into a three family dwelling. The Applicant actually seeks to add an accessory dwelling unit pursuant to Articles 17.3.3.1 and 17.3.3.2 of the Merrimac Zoning By-laws, which use requires the Applicant to obtain a Special Permit, not a Finding of Fact. The Board held a public hearing on May 14, 2018. The Board voted to grant the Applicant a Special Permit for the accessory dwelling subject to confirmation from Town Counsel that the Board could do so without requiring the Applicant to file a new application for a Special Permit. The Notice of the Hearing ("Notice") references said Articles 17.3.3.1 and 17.3.3.2 and the accessory dwelling use but also indicates that the Applicant seeks a Finding of Fact in accordance with G.L. c. 40A §10, which concerns variances. The Board has drafted its decision on the Application but has yet to file it with the Town Clerk.

In our opinion, the most prudent approach is for the Applicant to withdraw the original application and file a new application for a Special Permit for the accessory dwelling use. Given the inclusion in the Notice of the references to Articles 17.3.3.1 and 17.3.3.2 and an accessory dwelling, an argument could be made that "[r]eclassifying the nature of the relief sought was within the [B]oard's authority as any interested parties had adequate notice of the substance of what was wanted by" the applicant. Duteau v. Zoning Board of Appeals of Webster, 47 Mass.AppCt.664, 666 (1999). However, it is our opinion, that where the application misstated both the form of relief (finding v. special permit) and the substance of the relief (3-family conversion v. accessory apartment) and the Notice made reference to both a Finding of Fact and G.L. c. 40A §10, signifying a request for a variance rather than a special permit, the best approach is to start over with an accurate application and clear notice to interested parties. Please note that in order to withdraw the original application, the applicant should make a written request to the Board to withdraw the application without prejudice, and the Board must vote to approve that request.

If the Applicant objects to withdrawing the Application and filing a new application, then, in our opinion, the next best course of action is for the Board to delete the entire paragraph from the draft decision that references seeking advice of counsel and begins "The petitioner intended to file the paperwork as a Special Permit...." and file the revised Decision with the Town Clerk (see attached for reference). As indicated above, because the original application misstated both the form and substance of the relief requested, and the Notice could reasonably be argued to be misleading as a result, pursuing this alternative may very well increase the risk to the Applicant, in the event of an appeal, that a court will overturn the Board's grant of the Special Permit. It seems prudent, therefore, to start over, with a correct application and notice.

The applicant has decided to withdraw the application without prejudice (letter in file) and reapply for as special permit. This will be heard at the 8/13/18 meeting.

Discussion

June Ryerson 10 Bear Hill Road-possibility of placing a 14X24 shed on existing garage slab/foundation. The board members were not in favor of her plan as presented.

7:58PM

Meeting Adjourned Arthur Amirault made the motion to adjourn the meeting, Earl Baumgardner 2nd the motion Vote: 5:0

APPROVED

DATE

8/13/18