

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

COMMITTEE: ZBA  
MEETING DATE: August 13, 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.

**7:06PM** Ed Mills made a motion to approve the May, 2018 meeting minutes, Arthur Amirault 2<sup>nd</sup> the motion Vote: 5:0

**7:08PM** Earl Baumgardner made a motion to approve the warrant for cell phone usage for the Board Admin \$24.99, Ed Mills 2<sup>nd</sup> the motion Vote: 5:0

**7:11PM** Ed Mills made a motion to approve the closing out of the McCarthy Escrow Account-that pertains to the Village at Merrimac. Account has \$280.00 and will be turned over to the attorney's office-James Flood.

**7:13PM** Chairman Jackson made a motion to have Arthur Amirault and Mitch Kostoulakos be able to sign warrants in the absence of the chairperson, Earl Baumgardner 2<sup>nd</sup> the motion: Vote 5:0

7:15PM

Applicant: Meghan Taylor

Chairman Jackson recognized the applicant, Meghan Taylor at which time she was given the opportunity to speak about the proposed project. The Petitioner requests a Special Permit for a building permit according to Merrimac Zoning By-laws Article 17.3.3.1 and 17.3.3.2: Her parents wish to move into and intend to be finished in-law unit on the second floor of the main residence.

Board members reviewed the zoning bylaw, the plans and all material provided to them.

All those interested were given the opportunity to be heard either in favor or in opposition to the petition.

Earl Baumgardner made a motion to grant the petition with conditions for a Special Permit as needed according to the Merrimac Zoning bylaw Article 17.3.3.1 and 17.3.3.2. The petitioner will be responsible to demonstrate the following:

- The in-law apartment will remain at 900 square feet of living space, which is equal than the 900 square feet permitted.
- Since no exterior construction is being undertaken all set-backs will remain in effect and continue to be met.
- The in-law apartment will remain in effect for as long as the petitioner's cousin (Ryan Hovey) reside at 17 Bear Hill Rd. In addition, any change in ownership or occupancy of the in-law unit or primary home will necessitate further consideration by the ZBA. This permit is null and void upon the vacancy of the petitioner's parents or the home is sold where it will immediately revert back to a two family home.
- Clear passage throughout the home will remain in effect.
- 2 means of egress will be demonstrated and maintained.
- Petitioner will abide by Article 17 in the Merrimac Zoning By-laws, including but not limited to the accessory unit will be subordinate to the principal living quarters, the installation of a common wall or partition of the existing living space, no other living unit may be located at this address, a separate ingress and egress will be provided for each unit as determined by the Building Inspector which will not detract from the single family appearance of the dwelling, and off street parking will be made available for both residents and guests that will be in keeping with the neighborhood.

Ed Mills seconded the motion made by Arthur Amirault. The Board voted 5 votes in favor, no dissenting votes.

**7:20PM**

Applicant: Laerte DeAssis

The Zoning Board of Appeals will held 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 2<sup>nd</sup> 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.

Applicant submitted letter to withdraw application without prejudice.

Earl Baumgardner made a motion to grant the petition with conditions for a Special Permit as needed according to the Merrimac Zoning bylaw Article 17.3.3.1 and 17.3.3.2. The petitioner will be responsible to demonstrate the following:

- The in-law apartment will remain at 900 square feet of living space, which is equal than the 900 square feet permitted.

- Since no exterior construction is being undertaken all set-backs will remain in effect and continue to be met.
- The in-law apartment will remain in effect for as long as the petitioner's parents (Laerte DeAssis & Nagmar Baisi) reside at 2 Prospect Hill Street. In addition, any change in ownership or occupancy of the in-law unit or primary home will necessitate further consideration by the ZBA. This permit is null and void upon the vacancy of the petitioner's parents or the home is sold where it will immediately revert back to a two family home.
- Clear passage throughout the home will remain in effect.
- 2 means of egress will be demonstrated and maintained.
- Petitioner will abide by Article 17 in the Merrimac Zoning By-laws, including but not limited to the accessory unit will be subordinate to the principal living quarters, the installation of a common wall or partition of the existing living space, no other living unit may be located at this address, a separate ingress and egress will be provided for each unit as determined by the Building Inspector which will not detract from the single family appearance of the dwelling, and off street parking will be made available for both residents and guests that will be in keeping with the neighborhood.

Arthur Amirault seconded the motion made by Earl Baumgardner. The Board voted 5 votes in favor, no dissenting votes.

7:28PM

Meeting Adjourned Ed Mills made the motion to adjourn the meeting, Mitch Kostoulakos 2<sup>nd</sup> the motion Vote: 5-0

APPROVED

DATE

2/12/12