



OFFICE OF
BOARD OF APPEALS

TOWN OF NORWELL

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FINDINGS AND DECISION OF THE NORWELL BOARD OF APPEALS

File No. 13-7

A PUBLIC HEARING(s) was held on January 15 and February 12, 2014, by the Norwell Zoning Board of Appeals under Massachusetts General Laws, Chapter 40A, Sections 7, 8 & 15, at the Norwell Town Offices, 345 Main Street Norwell, MA on the application of:

George and Marynel Halatsis
24 Grove Street
Norwell, MA 02062

and

Ramona A. Caruso
30 Grove Street
Norwell, MA 02061

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For an Appeal of the Decision of the Building Inspector/Zoning Official and a determination that the use of 12 Grove Street is in violation of Sections 2330 (Business District B and 4300 (Aquifer Protection District) of the Norwell Zoning Bylaws. The property is shown on Assessor's Map 5D, Block 20 Lot 8, Land Court Cert. #108468. The Public Hearing for this application was duly noticed in The Norwell Mariner on December 26, 2013, and January 2, 2014, and posted by the Town Clerk, as required by the Open Meeting Law.

The Applicants and representatives were in attendance at the hearing to present the Application as were the owner and representatives of A Fox & Hounds to oppose the application. There was substantial and thorough legal and factual briefing of the issues by both sides. At the outset of the hearing, one of the Zoning Board members sitting on the hearing disclosed that he had boarded his dog at A Fox & Hounds, once, approximately two years ago, when the business was located in Hingham. The Zoning Board member stated that he believed that he could be impartial on this matter. Counsel for the Applicants and counsel for A Fox & Hounds both agreed that there was no need for him to recuse himself.

The Board received the following information into its files:

1. Copy of the legal notice for The Norwell Mariner;

2. Abutters List;
3. Application, completed and signed by the applicants and date-stamped on November 20, 2013, by the Town Clerk with exhibits;
4. A copy of Building Permit #15866 dated September 17, 2013;
5. Assessors Card print-out;
6. Photographs of 12 Grove Street from the applicants' property;
7. A printout of the Fox & Hounds Pet Care website;
8. Correspondence from Drohan Tocchio & Morgan dated October 30, 2013, request for enforcement;
9. Building Permit Application for 263 Washington Street;
10. Email exchanges between Tim Fitzgerald and Rachel Chrisman related to a permit for a dog spa at 263 Washington Street in which Mr. Fitzgerald states that a dog spa needs a special permit;
11. Zoning Board decision 11-16 for the dog spa at 263 Washington Street;
12. Correspondence from Timothy Fitzgerald to Drohan Tocchio & Morgan P.C. dated November 4, 2013 stating that the business may operate during day time hours;
13. Business summary for a Fox & Hounds dated November 2013;
14. Correspondence from Acentech Inc. dated November 11, 2013 to Robin Fox regarding observations about noise;
15. Printout of Doody Calls website dated November 13, 2013;
16. Correspondence from Drohan Tocchio & Morgan dated November 13, 2013, Request for Enforcement;
17. Photographs of 12 Grove Street;
18. Deed to 12 Grove Street;
19. Correspondence from Timothy Fitzgerald to Drohan Tocchio & Morgan dated December 11, 2013;
20. Correspondence from Drohan Tocchio & Morgan to the ZBA dated December 16, 2013;
21. Correspondence from Issadore & Arons dated January 8, 2013;
22. Correspondence from Drohan Tocchio & Morgan dated January 8, 2014;
23. Correspondence and brief with exhibits, including an affidavit of Robin Fox, from Issadore & Arons dated January 14, 2014;
24. Correspondence from Drohan Tocchio & Morgan dated February 5, 2014;
25. Board of Water Commissioners Draft Meeting Minutes for the Meeting dated January 16, 2014 and filed with the ZBA on February 7, 2014;
26. Correspondence from Drohan Tocchio & Morgan dated February 5, 2014 including an affidavit of Ramona Caruso;
27. Correspondence from Issadore & Arons dated February 10, 2014.

FINDINGS:

This Application presents the kinds of difficult issues for a Zoning Board that arise when a residential district directly abuts a business district.

A Fox & Hounds is a pet care business that provides dog daycare, boarding, grooming and training. It services approximately 70-80 dogs during the day and has a

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fenced in area in which dogs are allowed to play outside. It also boards dogs over night and over the weekend. A Fox & Hounds utilizes a pet waste management company to remove from the site dog waste that is bagged. The Applicants' property is approximately 30-50 feet from a fenced in area where dogs play. Currently, there are separate conditions on the use which have been imposed by the Norwell Board of Selectmen which were imposed in connection with a nuisance complaint.

The Applicants did not appeal the issuance of the building permit, which issued on September 17, 2014. Instead, the Applicants sought an enforcement action contending that the use requires a special permit because the business of A Fox & Hounds is not a permitted use in Business District B and because A Fox & Hounds is located within the Aquifer Protection District, thus allegedly triggering the special permit requirements under that section of the zoning bylaw.

There is no dispute that a building permit was issued on September 17, 2013, and that the permit was displayed at the front door of the business. Work subsequently commenced and contractors and subcontractors renovated the property, which is adjacent to the applicants' property. Actual business operations started on October 1, 2013.

Both Applicants visited the property: Ms. Caruso visited on October 9th and Mr. Halatsis visited on or around October 2-4. Both Applicants were very upset with the business and stated that noise from barking dogs was interfering with their enjoyment of their property and interfering with their daily activities. Ms. Caruso filed a nuisance complaint against A Fox & Hounds with the Board of Selectmen on October 18, 2013, regarding the operation of the business and the barking of the dogs. The complaint states that the date of the incident was "October 1 to the present." Ms. Caruso also called the Building Department on October 9, 2013 with a complaint about the business and she filed a report with the Norwell Police Department about her interactions at the business on October 9th.

Ms. Caruso and Mr. Halatsis met with the Town Administrator, the Chief of Police and a Selectman at Town Hall on October 10 and, at that meeting, the Town Administrator stated that he had ordered the Building Inspector to shut down the business for not having a certificate of occupancy. The Applicants were particularly concerned about dogs being within the fenced in area, which was constructed by A Fox & Hounds. As a result of the nuisance complaint, the Board of Selectmen has imposed conditions including without limitation, restrictions on the number of dogs that can be outside at any given time, requiring supervision, and has restricted dogs from being outside at night.

A building permit must be appealed within 30 days of the permit's issue date under G.L. c. 40A, sec. 8 and 1. Based upon the evidence described above, the Board finds that the Applicants were on notice that a building permit had issued prior to October 17, 2013. Under these circumstances their appeal is untimely. Connors v. Annino, 460 Mass. 790 (2011). In Connors the Supreme Judicial Court held that where an applicant has notice of a building permit, a later appeal from a denial for a request for enforcement under G.L. c. 40A, sec. 7 - as applicants made here - "is not an available alternative remedy." Id. at 791. In this case, the Applicants had notice of the issuance of the building permit no later than October 10 when they met with town officials, seven

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days prior to the expiration of the 30 day appeal period for building permits. Accordingly, their appeal is untimely since the issuance of a building permit was also a decision by the Building Inspector that the use was authorized and this Board therefore lacks jurisdiction to hear the matter.

Even if the Applicants' appeal was not untimely and the Applicant was able to challenge the use, the applicants would not be able to get redress before this Board. First, A Fox & Hounds does not, in the opinion of this Board, need a special permit simply because it is within the Aquifer Protection District. The Board of Water Commissioners has reviewed A Fox & Hounds' operation and concluded that the business has no impact on the water supply. Moreover, the dogs' waste is bagged and removed by a pet waste removal company. Finally, as noted at the hearing, numerous and various animals, both wild and domesticated, reside within the Aquifer Protection District and their waste has not had an detectible or adverse impact on the Aquifer Protection District.

Second, because the business is a permitted business use under sec. 2333(a) of the Norwell Zoning Bylaws, no special permit is necessary. The Board finds that A Fox & Hounds is a service establishment that provides services at retail principally within an enclosed building structure. Its clients are dog owners. The service it provides to dog owners is the day and night boarding, grooming and training of dogs. Clients drop off and pick up their dogs during normal business hours and do not do so outside of these hours. While allowing dogs to exercise in the fenced in area is certainly part of the service offered by A Fox & Hounds, the services at retail, i.e., the day and night boarding, grooming and training of dogs is offered within the enclosed space and retail transactions occur within the enclosed space. The fenced in area is akin to a restaurant with an outside deck; it is accessory to the main business and therefore not principally the use of the property.

The Board notes that dog kennels are not specifically allowed or disallowed in any of the town's business districts; however, the Board determines that the language of the bylaw authorizing generally service businesses is sufficiently general that the bylaw authorizes the uses ongoing as a service business. The fact that an applicant for a dog spa sought a special permit does not change the Board's view in this case because, in that prior matter, the issue of whether a special permit was (or was not) required was not addressed. In this Application, the issue was placed squarely before the Board by the Applicants.


Finally, the Board also notes that the Board of Selectmen has jurisdiction over nuisance complaints and issues relating to dogs. If there are issues related to noise or the operation of the business, then the proper avenue for review or redress is before the Board of Selectmen. Had a special permit been required, then the Board likely would have imposed conditions similar to what the Board of Selectmen required.


DECISION:

Based on the Application and evidence presented and its findings above upon a motion duly made and seconded, the Board **VOTED** unanimously that the Applicants' request for enforcement be dismissed for failure to file an appeal within the requisite 30

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days under G.L. c. 40A, sec. 8 and 15, and, even if the appeal were timely (which it was not), to uphold the decision of the Building Inspector because the business conducted by A Fox & Hounds is a permitted service business use principally within an enclosed structure under sec. 2333(a) of the Norwell Zoning Bylaws.


Philip Y. Brown


Thomas P. Harrison


David Lee Turner

Date Filed with Office of the Town Clerk

*This space reserved for
Date Stamp of Town Clerk*

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NOTICE OF APPELLATE RIGHTS: Any decision of the Board of Appeals may be appealed to Superior Court within twenty (20) days after filing of the written decision with the Town Clerk. Any construction or pre-construction activity is undertaken at the applicant's risk during the appeal period.