

Approved 11.5.14

TOWN OF WENHAM

Zoning Board of Appeals  
Meeting of August 21, 2014  
Wenham Town Hall, 138 Main Street

Pursuant to the Open Meeting Law, M.G.L. Chapter 30 A, §18-25, written notice posted by the Town Clerk delivered to all Board members, a meeting of the Zoning Board of Appeals (ZBA) was on August 21, 2014 at 7:30 PM in the Selectmen Chambers.

With a quorum present, the meeting was called to order at 7:30 PM.

ZBA Members Present: Jeremy Coffey, Anthony Feeherry, Timothy Mansfield, and Associate member Shaun Hutchinson  
Also present: Emilie Cademartori, Coordinator; Attorney Mark Bobrowski, Special Counsel for the Town; Catherine Tinsley, Minutes Secretary

Officials present not participating:

Selectman Harrison

Selectman Whittaker

Building Inspector Charlie Brett

Electrical Inspector Robert Brown

**New Public Hearing**

Location: 76 Topsfield Road (Map 25, Lot 17)

Applicant: 110, Inc. Cross Keys Retreat

Appeal filed pursuant to MGL c 40A ss 8 & 15 of the Zoning Enforcement Officer's July 2, 2014 *Cease and Desist Order* and decision that the operation of Cross Keys Retreat at 76 Topsfield Road is non-compliant with Town of Wenham Zoning Bylaw allowable uses in a residential zoning district.

Present: Co-founders David Ray and Ari Nikolaou

Attorney Ben Fierro, Lynch & Fierro

Attorney Jill Brenner Meixel, Krokidas & Bluestein

Mr. Feeherry stated for the record that the meeting was being recorded with permission by the applicant.

He also stated that the applicant has filed suit against the Town regarding the *Cease-and Desist Order* and has a trial date of September 3, 2014.

The applicant was issued a "Cease and Desist Order" by the Building Inspector on July 2, 2014 that the operation is non-compliant with Wenham Zoning Bylaws of allowable uses. The applicant has opened an alcohol and addiction rehabilitation center and filed an appeal with the Zoning Board of Appeals to be heard on the Dover Amendment\*. Although the applicant was not required to be in attendance, agreed to be present in the spirit of cooperation to resolve the issue, and reserving all rights.

\*The Dover Amendment (40A) is a state provision in state zoning exempting non-profit educational programs from zoning ordinances of a town to regulate or restrict a non-profit educational corporation; the property may be subject to some regulations (dimensional).

Attorney Fierro addressed the Board. He reviewed the timeline beginning with initial discussions with the Town Administrator and Planning Coordinator on October 31, 2013 explaining the program, purpose, background, etc including information to support 40A zoning.

He referenced a letter from Town Counsel supporting the information that Cross Keys submitted qualifying them under the Dover Amendment. He went on to recount site inspections by the Fire Department, and Building Inspector had been conducted and improvements/upgrades completed as required, upon which a Certificate of Inspection was issued and operations started.

The property is a seven-bedroom residence on five acres of land. Evidence was presented to the effect that a twelve-step program is taught, there is a syllabus, a schedule, and classroom time is used to teach the twelve-step program and other

## Approved 11.5.14

programs to help the guests learn skills to lead productive sober lives. The Cross Keys program does not have any affiliation with Alcoholics Anonymous.

Attorney Fierro said it was not until an informational session hosted by the Board of Selectmen on June 5, 2014 that residents raised questions about the program.

Attorney Fierro cited the "Spectrum Case Law", but noted the difference is that Cross Keys does not dispense medication. There are no nurses, doctors, or licensed therapists on site. The co-founders were present and confirmed their belief that no license was required by the State/ Department of Public Health.

Mr. Feeherry noted that he called and spoke at length with the Director for Quality Assurance for the Massachusetts Department of Health, Erica Piedade (413.586.7525 x 3182), who indicated appears belief that the Cross Keys facility should be licensed as a drug and alcohol facility. The ZBA requested the applicant provide a letter from the state confirming no license is required for Cross Keys. It was noted that this is not relevant to applicability of the Dover Amendment, but was a separate issue of concern.

Attorney Fierro ended his summary stating that in April 2013, Ken Whittaker, Chair of the Board of Selectman sent a response to a resident indicating Town Counsel had concluded Cross Keys was allowed to operate under the Dover Amendment.

Mark Stevens, Cedar Street, asked for a list of names of abutters who were notified regarding Cross Keys, indicating that he is a direct abutter and was not notified. Attorney Fierro responded that the April 2013 communication was transmitted to residents who had inquired about Cross Keys.

The hearing was opened to public comment in favor of Cross Keys; there was none noted.

The hearing was opened to public comment opposed to Cross Keys.

Attorney Ben Tymann, counsel for Larry Miller of Topsfield Road (who is a direct abutter to the property) addressed what he called a gap in the procedural history. He stated that after Cross Keys began operations, Dr. Miller received a post card from Cross Keys, inviting him to meet with them. This was the first time he learned the business existed and he thereafter retained counsel. Attorney Tymann opined that the permitting process did not follow statutory process. Attorney Tymann shared his views that: a) Cross Keys was engaged in a non-compliant zoning use of the property; b) the informational session convened and facilitated by the BOS was without jurisdiction; and c) procedurally the BOS and Town Counsel allowing Cross Keys to open under the Dover Amendment was inappropriate. Attorney Tymann cited the "Campbell Case" and the "Kerr Case". Both documents were provided to the Board. Attorney Tymann noted there is no controlling case law that says education related to substance abuse is covered by the Dover Amendment and stated his view that Cross Keys is a multi-family housing functioning in a commercial aspect.

Attorney Tymann requested time to submit a rebuttal to the Cross Keys letter before the next ZBA meeting. He was extended to the end of Monday, August 25, 2014 to make his submission.

In closing, Attorney Tymann stressed Dr. Miller's concern that fifteen men are dealing with different substance abuse issues with only a wooden fence separating Cross Keys property from his residence, and reiterated safety and security concerns.

Attorney Tymann suggested the ZBA do a site visit and extended authorization from Dr. Miller to access his property at that time. Attorney Tymann also suggested a site plan review may be appropriate.

Alison Calandra, Topsfield Road, spoke about her concern that Cross Keys is not licensed. She noted her own professional experience and knowledge when referencing Cross Key's web site that guests need be sober for only four days before entering the program and coming to the facility. Mr. Ray responded that all guests must be medically cleared before entering the facility.

Ms. Calandra went on to say he had concern that counseling is taking place and questioned whether the people providing this counseling were trained, especially given the lack of medical support or oversight.

Attorney Fierro said information addressing her concerns would be provided.

Dennis Maguire, Topsfield Road, noted that according to the Cross Keys web site, the Wenham facility treats only the first seven steps before guests are transferred to another facility in Wakefield for additional treatment. He questioned

## Approved 11.5.14

whether this constitutes education qualifying under the Dover Amendment. Mrs. Maguire urged the Board to act on the best interest of the Town and read the case law presented by both sides before making a decision.

Maureen Weihs, Kimball Avenue, asked the board to watch the video of the BOS informational meeting on Cross Keys, saying she like many others spoke at this time. Mr. Feeherry noted this was a public hearing for the ZBA to hear public opinion before taking action on an application, and encouraged public comment.

In closing the applicant's attorney's reminded the Board that they did not make a full presentation but the focus is on the issue of the applicability of the Dover Amendment, adding his belief that Cross Keys is also protected under the Fair Housing Act, The American's with Disabilities Act and cannot be discriminated against.

It was confirmed that none of the Board members has been to the site. The Board agreed they were not prepared to make a decision during this meeting and agreed to continue the hearing on August 27, 2014 and to try to provide a written decision by September 3, 2014, the date on which Cross Keys' litigation against the town was scheduled to go to trial.

Attorney Bobrowski provided the copies of the case law of the Sisters of St. Joseph; copies were also provided to the applicant's attorneys.

*Vote: Mr. Mansfield moved, and it was seconded, to continue the hearing to a date certain of August 27, 2014 at 7 PM. The motion carried unanimously in favor three to zero.*

### Administrative

- Minutes – August 6, 2014

The minutes were deferred and no action was taken.

- Update - Middlewood (Burley Street) Ms. Cademartori reviewed that the approved site plan required guardrails to be installed along the structural crossing because of a four-foot drop. She noted there is a sidewalk but no fence. The contractor had indicated this would be completed but upon a site visit, Ms. Cademartori confirmed it had yet to be done and stressed this is a serious safety issue.

*Vote: Mr. Mansfield moved, and it was seconded to direct the Building Inspector not to issue any further permits for Middlewood until such a fence is constructed at the crossing consistent with discussions in November 2013. The motion carried unanimously.*

- The Board discussed a possible site visit with the Coordinator and had a general discussion regarding the application from Cross Keys.

The Board unanimously adjourned at 9:31 PM.

Respectfully submitted by

Catherine Tinsley

8.26.14