NOTICE OF DECISION

Board of Zoning Board Appeals Certification

Log/Case No.: Appeal 02-10
Applicant: Nancy Medsker

We, the Town of Danby Board of Zoning Appeals, hereby find that the prior determination of the Code Enforcement Officer was correct and

√ CONFORMS
~~does not conform~~
~~conforms with conditions~~ *(circle one)*

with the Town of Danby Zoning Ordinance (as amended) and its intended purposes, and accordingly, the instant appeal is **DENIED**.

The Board of Appeals shall complete the following section: *(whichever is appropriate)*

A. INTERPRETATION – Decision rendered in interpreting the Danby Zoning Ordinance or map: *(Decision must conform with the intent of the Zoning Ordinance and the Town's Comprehensive Plan)* See attached Findings Statement and Determination.

The foregoing determination and findings statements, together with any supplemental sheets or documents referred to herein, were put to the vote of the Town of Danby Board of Zoning Appeals and the determination and findings set forth above were duly and lawfully so adopted by such Board.

DATED: May 3, 2010

_____
Chairman of the Board of Zoning Appeals
Town of Danby

FINDINGS STATEMENT AND DETERMINATION OF TOWN OF DANBY BOARD OF ZONING APPEALS APPEAL OF NANCY MEDSKER REGARDING HOME OCCUPATION AT 58 MARSH ROAD

Dated May 3, 2010

TOWN OF DANBY ZONING BOARD OF APPEALS
TOMPKINS COUNTY, STATE OF NEW YORK

In the Matter of the Appeal Application of Nancy Medsker for an Interpretation of the Zoning Ordinance of the Town of Danby, on appeal

APPEAL 02-10

HISTORY AND FINDINGS OF FACT

1. On February 14, 2010 the Town of Danby Code Enforcement Officer ("CEO") issued a determination that the proposed use of 58 Marsh Road for training workshops of "The Aromahead Institute" for up to 20 people in each workshop, to be held by the residents of 58 Marsh Road (Andrea Butje and Cindy Black), during a 4-month period annually, operating from 9:00 a.m. to 5:00 p.m. at not more than 10 days per month, with no more than 4 cars in the driveway, would be consistent with the parameters of a home occupation as defined in and allowed by the Zoning Ordinance of the Town of Danby. The subject property is located on Tax Parcel 6.-1-31.1, in a Low Density Residential Zone. Upon April 9, 2010, Nancy Medsker appealed the CEO's determination claiming that such interpretation was inconsistent with the Zoning Ordinance as the use did not qualify as a home occupation and that a use variance was required.

2. A Notice of Public Hearing before the Town of Danby Board of Zoning Appeals ("BZA") was duly filed, published, and posted in accord with law, and all residents entitled to written notice were mailed notices as required by law. This application, being an appeal of a determination of the CEO pertaining to the interpretation of the Zoning Ordinance, did not trigger GML § 239-m review and is a Type II Action under SEQRA (see 6 NYCRR Part 617.5 (31)) requiring no environmental review. Accordingly, the BZA finds that this matter has regularly and properly come on to be heard in accord with law. BZA Member Nancy Medsker recused herself, as she was the appellant, and did not sit with the BZA nor participate in the BZA's deliberations in any manner or respect.

3. A public hearing was thus duly held upon April 29, 2010, at the Danby Town Hall at 8:15 pm, whereat the owners of 58 Marsh Road, the appellant, the CEO, and interested members of the public were permitted to speak, introduce documents and evidence, and address any one or more points of fact or law pertaining to the appeal and the original interpretation of the CEO. All parties to the appeal, the landowners, and the public were also provided with an opportunity to address and/or rebut any statements or evidence presented by any party or person. In all, several

dozen pages of documents, maps, and letters were submitted on and entered into the record, as well as observations of the public and Members of the BZA pertaining to the property and the use thereof. In all, over 10 interested parties and persons addressed the Board, including counsel for the appellant (Mahlon Perkins, Esq.) and counsel for the landowners (Mariette Geldenhuys, Esq.).

4. The interpretation of the CEO was that the home occupation proposed by the landowners consisted of teaching in the field of essential oils and aromatherapy upon a limited basis, and that such use was and constituted a permitted home occupation under the Zoning Ordinance due to the following facts: (i) teaching is a specifically listed and allowed home occupation; (ii) the Zoning Ordinance does not limit the number of pupils or the subject matter taught, but instead required an analysis of potential impacts that could, or would, cause significant or deleterious impacts upon the residential neighborhood in which located; (iii) the residence remains the primary use of the home and the proposed use does not impact such primary use in any way as to change the residential character of the home; (iv) there are no significant or deleterious external or visible impacts arising from the proposed use; and (v) such proposed use and home occupation were consistent with the intent, spirit, and purpose of the provisions of the Zoning Ordinance pertaining thereto.

5. Among the reasons proffered by Nancy Medsker (and others) in support of the reversal of the determination of the CEO include the alleged class sizes, the alleged traffic impacts, the alleged dust and noise, the alleged purpose of the recent construction at 58 Marsh Road, the visible exterior impacts arising from the size of the recently constructed addition to the home and the number of persons that would be visibly present at the home, and the fact that this home occupation is actually a "school" under the Zoning Ordinance and thus requires a use variance.

6. The Zoning Ordinance defines a "Home Occupation" as follows:

> "An accessory use which is located on a lot whose primary use is residential. In particular, a home occupation shall be limited to dressmaking, hairdressing, teaching, laundering, carpentry, electrical and plumbing work, and similar types of activity, and professional offices, such as architects, lawyers, realtors, doctors, dentists, engineers and insurance brokers, operated by the person living on the property and employing not more than two additional people who are non-residents. A home occupation shall produce no offensive noise, vibration, smoke, dust, odor, heat, glare or electronic disturbance beyond the property it occupies. The home occupation may not entail the outdoor storage of materials, equipment, or other items of commerce; nor the uncovered parking of more than one commercial vehicle. The home occupation shall not generate traffic in any greater volume than would normally be expected in a residential neighborhood, and any need for parking generated by the occupation shall be met off the street and in accordance with any other regulation of this ordinance."

The Zoning Ordinance does not define the term "school." The BZA finds that this definition of "Home Occupation" is controlling as to the appeal before it.

7. The BZA considered all evidence and statements made at the hearing and/or as made a part of the record in this matter and determined that: (i) the appeal should be denied; and (ii) the determination of the CEO was correct and should be upheld. The BZA makes the following findings based upon the record in support of these determinations:

a. The principal use of 58 Marsh Road is as a residence and the teaching use is secondary and ancillary thereto;

b. The teaching proposed is to occur in the primary residence structure, within a 900 square foot living room, equally or alternately describable as a great room. The size of such living room, architecturally speaking, is consistent with the design of the residential structure overall, is not excessive compared to other homes and high-end residential buildings in the Town and the County, and does not detract from the residential character of the home or the neighborhood.

c. Complaints as to trucks, dust, and traffic impacts pertained to the construction of the residence and are thus, by definition, temporary in nature and do not seem more severe than impacts associated with any residential construction project; besides, the issuance of the building permit is not here in issue. Further complaints as to traffic impacts were speculative and not supported by competent evidence. At best, it can be said that up to four additional vehicles would travel along Marsh Road, a public highway connecting other public highways, up to 10 days per month. Such traffic is not inconsistent with normal traffic flows, is not of a volume as would be inconsistent with traffic flows for an average residential neighborhood, and would not make this home occupation distinguishable from any other residential increases in traffic that arise from family picnics, birthdays, social gatherings, Tupperware parties, etc.;

d. Similarly, speculative complaints about the impact of having up to 20 people in the home were likewise unsupported by the record. The activities are quiet and meditative in character, conducted mostly, and sometimes exclusively, indoors, and the presence of students (mostly or exclusively adult students) engaged in teaching activities was not shown to have any unusual or negative impacts. Again, such activities would not be distinguishable from other typical residential gatherings occurring in residential zones throughout the Town, such as those that arise from family picnics, birthdays, social gatherings, Tupperware parties, etc.;

e. Speculative complaints about vehicles in driveways or parking areas were also unsupported by the record. The BZA finds that having 3-4 visible vehicles in a driveway is common in residential neighborhoods, does not detract from or harm the residential character of the home or the neighborhood, and is not indicative of a non-permitted business, school, or commercial enterprise. Having 4 vehicles parked at a large residential home does not in and of itself create any adverse impacts upon the residence, change the character or nature of the primary use of the land and buildings as a residence, nor create any harmful or non-residential impacts upon the neighborhood;

f. Complaints about noise were deemed speculative and unsubstantiated by the record. The appellant's home is located almost 500' from the roadway and is located approximately 350 feet away from the home occupation use herein complained of and considered. Appellant's home is screened, in part, by 2 patches of woods. The nearest residential structure is located approximately 150 feet from the subject home and is screened by a hedgerow. The area is characterized by large lot and low density residential homes generally and widely separated in a rural environment. Accordingly, the BZA finds that any potential noise impacts will be mitigated by such distances and the related ambient noise levels of the existing rural residential area, such as other residential and farming uses in the neighborhood.

g. The Zoning Ordinance allows one commercial sign and one uncovered commercial vehicle, but even these external visible impacts do not exist for or in relation to this home occupational use. Further, no significant or material visible impacts arising from or in connection with the proposed home occupation were proven to exist. Beyond the foregoing analyses, there was not any significant or material evidence submitted, whether competent, persuasive, or otherwise, that there are any other impacts, such as retail sales, on street parking, outdoor inventory or other storage, the use of accessory buildings, the use or display of commercial signage or vehicles, the presence or use of employees, noise, smoke, dust, odor, vibration, heat, glare, or electronic disturbances;

h. Therefore, the BZA finds that as a matter of fact and of the evidence presented, including the weight to be accorded all such testimony and evidence, including taking into account the credibility of the speaker as to such subject matter, there are no known or identified significant or material impacts that could or would alter the primary residential use of the property or cause any negative or other impacts to the residential character of the neighborhood.

i. Turning to the Zoning Ordinance itself, the BZA finds that the proposed use falls within the definition of "Home Occupation" as set forth in Appendix A. The BZA finds that the phrase "teaching… and similar types of activity" covers the teaching and instruction proposed by the home occupation under consideration. Further, the BZA finds that it is and remains the intent of the Zoning Ordinance to be flexible and allow home occupations in less dense zones. For example, in a Commercial Zone, almost all activities listed as home occupations in residential zones would require some type of review, whether special permits or site plan review. See, e.g., Section 603(2)(d). Further, and even though the Town had the option to include more specific regulations in its definition of "home occupation," such as the commonly utilized limits pertaining to the number of allowed students, hours of operation, and detailed definitions of what is a "professional office," "teaching," or "dressmaking," the Town chose not to include such restrictions so as to allow zoning to be flexible in such zones;

j. Under Section 600, entitled "Low Density Residential Zone," subsection (2)(b) permits accessory home occupations "provided that there shall be no external evidence of such activity…." The BZA finds that this home occupational use is accessory to the

primary use as a residence, and as noted above, finds no exterior evidence of such use or any impacts arising therefrom that interfere with the residential character of the property or the neighborhood. Thus, the BZA does not find that Subsection (3)(j) is applicable to this matter. Subsection (3)(j) reads: "Uses permitted by special permit only" … [include] "customary home occupations and professional residential offices where external evidence of same exists on the site." To the extent some arguments were made that this type of teaching is not "customary" and therefore should not be deemed a home occupation, the BZA finds: (i) that the word "customary," while not determinative, does not exist in subsection (2)(b); and (ii) even if it could be implied or imported, which it cannot, there is nothing defining the scope or meaning of "teaching" in the Zoning Ordinance. Under common usage and vernacular, this use is found to be within the scope of "teaching" as such term used in the Zoning Ordinance. See, Zoning Ordinance at § 300.

k. Similarly then, the use is not a "school" as such term is used in the Zoning Ordinance. The term "school" is undefined, and under this Zoning Ordinance such word means a place where students are given courses of study sufficient to qualify attendance thereat as compliance with compulsory education requirements, where three principal elements are met: (i) a curriculum of progressive learning; (ii) a plant consisting of adequate physical facilities, and (iii) a qualified staff and attendance requirements as are necessary to carry into effect its educational objectives. In other words, the term "school" in the subject Zoning Ordinance means a typical school (such as an elementary school for grades 1-6), and the BZA does not find that the meaning or import of such term may be expanded to "shoehorn in" other places where any type of training or education occurs. This proposed home occupation is not a school as it lacks the necessary structure, regularity of attendance, and progression of instruction necessary to constitute a school; nor is there any affiliation with any state school district, college, or university; nor is there any known license possessed to operate as a public or private school.

l. Finally, even if the BZA did wish to import implied restrictions and restrictive definitions of undefined terms, the BZA is mindful that zoning is in derogation of the common law and the Constitutional rights of landowners to exercise rights of ownership and control over their lands, such that, when there is an ambiguity in a zoning law, such ambiguity should, or must, be decided in favor of the landowner. Indeed, BZAs must always be mindful of the fact that one of the underlying purposes of a BZA is to address unique circumstances and situations that always arise under zoning laws to allow for reasonable flexibility and prevent unwarranted restrictions upon personal and property rights. Moreover, the application of the provisions of a zoning law may be impractical or unreasonable in a given situation because of the unique characteristics of a particular piece of property or the use (or proposed use) thereof. Consequently, variances and appeals serve an important function by providing flexibility in the application of a town's zoning scheme under appropriate circumstances. Here, the BZA finds that an overly strict interpretation of undefined terms, or the importation or adoption of overly

restrictive definitions of such terms as commonly used or understood, would be unduly harsh and would interfere with the designed flexibility of the Zoning Ordinance; and again, the Zoning Ordinance is designed to regulate home occupations based upon their impacts, not strained definitions of the terms used within such Zoning Ordinance.

m. Consequently, having found that the home occupation is an allowed home occupation under the Zoning Ordinance, and having further found that the use is permitted the applicable zone, the BZA finds that no use variance is required.

8. For the reasons set forth above, and upon the evidence, law, and facts, it is the opinion of the BZA that this appeal must be, and hereby is, unanimously denied, and the prior determination of the CEO unanimously upheld and affirmed.

Dated: May 3, 2010

Town of Danby Board of Zoning Appeals

By: _____
Allen S. Becker, Chairman