

ADMINISTRATIVE MINUTES



Board Members

Jacqueline Figueiredo, Chairman
Halim Choubah, Clerk
Robert Gardner

TOWN OF DARTMOUTH
Office of the Zoning Board of Appeals
400 Slocum Road, Dartmouth, Massachusetts 02747
(508) 910-1868

APPROVED

DARTMOUTH TOWN CLERK

1/29/14 11:15AM

RECEIVED

ADMINISTRATIVE MINUTES

FOR DATE OF HEARING: January 7, 2014

PRESENT: The Board, Chairman Jacqueline Figueiredo, Robert Gardner, Associate Members David Dore and Kevin Melo, and Principal Clerk Assistant, Tina Cabral

ABSENT: Halim Choubah, Jay Peabody

6:00 P.M. *Chairman Figueiredo opened the meeting*

ADMINISTRATIVE

The Board unanimously voted and approved the following Minutes:

- Administrative Minutes of 12/3/13 Meeting
- Six Month Extension Case: 2012-33 (9 Kennedy St)
- Variance Case: 2013-39 (1 Posa Place)
- Amendment Case: 2013-42 (570 Hawthorn St)
- Variance Case: 2013-40 (20 Elliot St) (revised version)

DISCUSSION: The Board reviewed further revisions to the Rules and Regulations of the Board of Appeals and made the following changes:

- Page 12, end of first paragraph add: "This may result in the continuance of a hearing to a future Board meeting and require the applicant to approve an extension for statutory guidelines"
- ➔ Under Section, 1.7:
 - Change title to: "Findings, Conditions and Decisions"
 - End first sentence after the word "fact" and strike the remaining sentence and add "which are statements made by members that result from testimony during the hearing or from provisions of the by-laws that are applicable to the case"
 - Revise next sentence: "This process of stating findings and conditions and making a decision are part of the deliberative process of a hearing and is conducted within the public hearing."
 - Add after third paragraph: "and will include the enumeration of any conditions".
 - Add to end of fourth paragraph: "and/or statutory requirements for granting a Variance."
 - Strike fifth paragraph and add: "Pursuant to M.G.L. Chapter 40A, §16: no appeal, application or petition for which there has been a decision is to be brought before the Board within two years of the decision. However, prior to the lapse of two years, the Petitioner may

ADMINISTRATIVE MINUTES

file a Repetitive Petition with the Planning Board to seek permission to reappear before the Board with any requested petition/decision change(s)."

→ Under Section 1.9-Extensions:

- In first sentence, strike the remainder of the sentence after the word "extend" and add: "the required time limits imposed for a public hearing and action on a petition by written agreement." In the last sentence change "an" to "the" and change "such" to "the written".

The Board unanimously voted to continue the discussion and review of the Rules and Regulations Governing the Procedures of the Board of Appeals to January 28, 2014 at 6:00 p.m. Discussion will begin with Section 1.10 on page 13.

6:25 P.M. Adjournment

Tina Cabral

Tina Cabral, Principal Clerk
For the Zoning Board of Appeals

Date of Approval: 1-28-14

MINUTES



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Halim Choubah, Clerk
Robert Gardner

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1/29/14 11:15 AM
DARTMOUTH TOWN CLERK

MINUTES

DATE OF HEARING: January 7, 2014
CASE: VARIANCE
CASE NO: 2013-36
Petitioner/Applicant: Tekeyla E. Atkinson
Property Owner: Tekeyla E. Atkinson
Representative: Thompson Farland, Inc.
Subject Property: 11 Tolland Path, Dartmouth, MA 02747
MAP: 177 LOT: 16 BOOK: 10782 PAGE: 147
District: Single Residence A

PRESENT: The Board: Chairman Jacqueline Figueiredo, Kevin Melo, David Dore, Robert Gardner and Principal Clerk Assistant, Tina Cabral

ABSENT: Halim Choubah and Jay Peabody

ALSO PRESENT: Jeff Sanders, Esq.

6:30 P.M. Chairman Figueiredo opened the hearing

NEW DOCUMENTS RECEIVED

- Alternate Site Plan dated 1/8/14

Chairman Figueiredo invited the Petitioner or representative to present the case.

Jeff Sanders, Esq.: Petitioner is seeking a Variance to construct a 31' x 17' accessory structure with a 20' setback from Kingston St. and a 15' setback from Tolland Path, where 50' is required by zoning. This accessory structure will become an esthetic/massage salon home occupation. Petitioner took Board's prior suggestion into recommendation at the December 3, 2013 meeting to draw an alternative plan with regard to the proposed structure so that the proposed structure could meet all setbacks. However, after drawing a new plan, the alternative plan for the proposed structure would not work out as it would require the proposed structure to be 10 ft. away from the Paskamansett River. Petitioner's prior plan proposed a 22 ft. setback from the Paskamansett River and, therefore, Petitioners would like to remain with their first proposal. There is no detriment to the neighborhood. The Petitioners were not present because they were away on vacation.

Chairman Figueiredo: Questioned Attorney Sanders if Petitioners had the alternative plan available as the Board did not receive any new documentation prior to tonight's meeting.

MINUTES

Jeff Sanders, Esq.: Affirmed that Thompson Farland redrew plans for the suggested proposal. The Petitioners did not approve of new proposal and they were not aware that they were still required to submit a copy of the alternate plan. Petitioner is in possession of the alternate plan and will provide the Board with a copy for the record.

Chairman Figueiredo invited any board members to ask questions.

A lengthy discussion ensued relative to the meaning of "premises" in Section 4A.205 with regard to home occupation and whether or not it is limited to the home or the total subject property. It was the conclusion of the Board that "premises" referred to the total subject property.

A discussion further ensued with regard to the hardship of this Variance.

No further questions by board members.

Chairman Figueiredo invited public comments regarding this project.

No further public comments.

The Board made findings:

- Locus property
- Portions of the property fall in Flood Zone A and X.
- Property located on corner lot with frontage on Kingston Street and Tolland Path
- Kingston Street is public way; Tolland Path is private way.
- The 20,100 +/- s.f. lot borders the Paskamansett River on its southerly side.
- A man-made brook on the southerly side leads to the river.
- Existing dwelling is a non-conforming structure pursuant to Section 3B.200.
- Proposed accessory building meets size requirement for home occupation Section 4A.205D.
- Variance is for front setbacks pursuant to Section 4A.205.
- Front setback required in Single Residence A District is 50 ft. per Section 4A.404.
- Proposed front setbacks on the corner lot are 15 ft. and 20 ft.
- Proposal meets required frontage and side setbacks.
- The proposal includes three off-street parking spaces as required by the home occupation Section 4A.205(F), and the use of crushed stone for these spaces will provide natural drainage.
- Drainage is enhanced with the proposed installation of a three chamber stormwater recharge system
- Applicable flood zone standards are met pursuant to Section 19.400.
- Petitioner attempted to meet all required setback through an alternate plan, but plan would place proposed structure closer to the brook/river than original proposal
- Variance meets the statutory requirements as outlined pursuant to M.G.L. Chapter 40A, §10

Conditions for the approval of the Variance were outlined.

David Dore motioned to close the public hearing which motion was seconded by Kevin Melo. Motion passed unanimously.

MINUTES

David Dore motioned to GRANT the VARIANCE based upon the findings and conditions as stated. Motion was seconded by Kevin Melo. Motion passed unanimously.

7:00 P.M. Hearing adjourned

Tina Cabral

Tina Cabral, Principal Clerk
For the Zoning Board of Appeals

Date of Approval: 1-28-14

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1/29/14 11:15 AM
DARTMOUTH TOWN CLERK

MINUTES

DATE OF HEARING: JANUARY 7, 2014

CASE: SPECIAL PERMIT
CASE NO: 2013-37
Petitioner/Applicant: Barbara Armstrong
Property Owner: Barbara Armstrong
Subject Property: 21 Bayview Avenue, Dartmouth, MA 02748
MAP: 105 LOT: 39
District: Single Residence B

PRESENT: The Board, Chairman Jacqueline Figueiredo, Kevin Melo, David Dore, Robert Gardner and Principal Clerk Assistant Tina Cabral

ABSENT: Halim Choubah and Jay Peabody

Also Present: Bruce Brooks, Barbara Armstrong and Other Interested Parties

7:05 P.M. *Chairman Figueiredo opened the hearing*

NEW DOCUMENTS RECEIVED:

- Letter from Abutter, Raymond K. Silveira, dated 12/31/13
- New Proposed Renovations Plan dated 12/10/13
- Photos dated 1/7/14

Chairman Figueiredo invited the Petitioner or representative to present the case.

Bruce Brooks, Contractor: Explained that he and the Petitioner took into consideration the Board's suggestion relative to switching the knee wall to the East side to accommodate the next door neighbor's concerns. He has submitted a new proposed Plan in which he has considerably downsized the proposed addition to 8'6"x 16' versus prior proposal of 22' x 22'. The new proposed addition will now be 15 feet away from neighbor's property line.

Some abutters made comments and/or expressed their concerns relative to this project.

Raymond K. Silveira, 19 Bayview Ave (Opposed)

- Janet Doe, (In Favor)
- Ronald Dipippo

MINUTES

A lengthy discussion ensued between the Board and all interested parties relative to concerns of the existing garage.

The Board made findings:

- Locus property
- Lot is on the corner of Degari and Bayview Avenues and consists of 9,801 +/- s.f.
- The dwelling and the garage are existing non-conforming structures pursuant to Section 2B.200.
- The Petitioner purchased the property in February, 2013 and now seeks a Special Permit pursuant to Section 3B.202 to allow the construction of an office studio above the existing garage with no change to the existing footprint.
- The plan of survey by AVT Associates dated 10/03/13 shows the lot frontage of 100 ft. with a front setback to the existing structure at 6.2 ft. and side setbacks to the two abutting properties at 8.4 ft. to 4.1 ft. respectively
- The architectural drawings dated 12/10/13 show a revision of the original plan wherein the proposed size of the studio has been reduced
- The newly proposed plan will cover less than 1/4th of the roof on the existing garage
- The newly proposed addition will have a 21 ft. front setback from the street
- The newly proposed addition will have a 15 ft. side setback (not including overhanging gutters) from the abutting property
- The newly proposed addition is not more detrimental to the neighborhood than the existing non-conforming structure.

Conditions for the approval of the Special Permit were outlined.

Chairman Figueiredo invited any Board members to ask questions.

No further questions by board members.

Chairman Figueiredo invited public comments regarding this project.

No further public comments.

Kevin Melo motioned to close the public hearing which motion was seconded by David Dore. Motion passed unanimously.

Kevin Melo motioned to GRANT the SPECIAL PERMIT based upon the findings and conditions stated. Motion was seconded by David Dore. Motion passed unanimously.

7:55 P.M. Hearing adjourned

Tina Cabral

Tina Cabral, Principal Clerk
For the Zoning Board of Appeals

Date of Approval: 1-28-14

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1/29/14 11:15 AM
DARTMOUTH TOWN CLERK

MINUTES

DATE OF HEARING: JANUARY 7, 2014

CASE: AMENDMENT TO CASE: 2012-31
CASE NO: 2013-41
Petitioner/Applicant(s): Joseph W. Lemieux
Property Owner(s): Joseph W. Lemieux
Subject Property: Thomas Henry Heights Estates, a/k/a Brady Estates
West Side of Hixville Rd off of Digger Drive
District: Limited Industrial
MAP: 56 LOTS: 17, 17-3 thru 17-20 BOOK: 8354 PAGE: 205

PRESENT: Chairman Jacqueline Figueiredo, Robert Gardner, Kevin Melo, David Dore and Principal Clerk Assistant Tina Cabral

ABSENT: Halim Choubah and Jay Peabody

Also Present: Steve Gioiosa/SITEC, INC. and Joseph W. Lemieux

10:20 P.M. Chairman Figueiredo opened the hearing

Chairman Figueiredo: Addressed that this case was continued from the December 3, 2013 meeting. Since the Petitioner is seeking to amend a condition of a Variance less than two years after its grant, he needed to successfully obtain a Repetitive Petition approval from the Planning Board pursuant to M.G.L. Chapter 40A. The Petitioner decided to seek that approval prior to appearing before the Board of Appeals so that the filing of the decision would not be delayed. As a result, Petitioner appeared before the Planning Board on January 6, 2014 and the Repetitive Petition was approved by the Planning Board

NEW DOCUMENTS RECEIVED:

- Amendment application time-stamped with the Town Clerk on 11/08/13
- Letter dated 11/26/13 from Petitioner, Joseph Lemieux, requesting continuance from the Zoning Board to meeting scheduled 1/07/14
- Legal Ad dated 12/10/13 for Planning Board Meeting/Public Hearing of 1/06/14
- Letters from Planning Director, Donald Perry, dated 11/25/14 and 1/07/14

Chairman Figueiredo read into the record both letters from the Planning Director, Donald Perry, dated 1/7/14.

Chairman Figueiredo invited the Petitioner or representative to present the case.

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Steve Gioiosa/SITEC, INC.: The Petitioner is seeking to amend a condition of a Variance less than two years after its granting. The Petitioner would like to amend Condition #14 of the Variance Decision since some of the language in this condition is vague. Within the past year, a wetland delineation has been completed, and the Petitioner has filed a plan with the Conservation Commission to demonstrate that access to Parcel B is possible, but a permit to construct the access road must now be secured from them. Therefore, the Petitioner is requesting to extend the timeline for gaining said permit and to eliminate the inapplicable language, "and must apply for a permit for the same from the Building Department". Additionally, the Petitioner would like to extend the deadline for conveying Parcel B to the Town from 20 years to 25 years. The Petitioner is proposing a solar farm for this property which would be economically viable to the Town, however, he has found that developers are not interested in pursuing solar projects that would remain effective for less than 25 years. Petitioners also owns the small housing development on Digger Drive which abuts Parcel A on the subject property.

Chairman Figueiredo: Commented that rewording Condition #14 paragraph in the Variance would be more feasible than stating the changes individually.

Chairman Figueiredo invited any board members to ask questions.

No further questions by board members.

Chairman Figueiredo invited public comments regarding this project.

No public comment.

The Board made findings:

- Locus property
- The Petitioner, Joseph Lemieux, has owned the property since 2006
- Parcel A has been conveyed to the Town
- Parcel B is the subject of the current Amendment application
- The Petitioner is seeking an Amendment to Variance Case #2012-31, Condition #14 to extend two time limits: (1) to obtain a permit from the Conservation Commission to construct the access road to Parcel B; (2) to extend the conveyance of Parcel B to the Town from 20 to 25 years
- Pursuant to M.G.L. Chapter 40A, §16, Petitioner filed a Repetitive Petition with the Planning Board. He appeared before the Planning Board's January 6, 2014 meeting and the Petition was approved at that meeting
- The requested time extensions are reasonable based on the time needed to obtain the necessary permit from the Conservation Commission approval and to attract viable solar projects
- Approval of the Amendment would not be a detriment to the public good since the changes will have no impact on the housing development on Digger Drive.
- Condition #14 is approved to be modified as follows: Parcel B on the plan shall be conveyed to the Town through its Select Board for the general use of the Town. This conveyance may be delayed in order to permit the Petitioner, Brady Estates LLC, to establish a solar farm upon Parcel B. Within two (2) years of this Variance decision,

MINUTES

Petitioner, Brady Estates LLC, must receive approval from the Conservation Commission and/or DEP for construction of an access road to Parcel B. Should Petitioner, Brady Estates LLC, fail to meet these requirements within this two (2) year period, then Parcel B must be conveyed to the Town immediately. If Petitioner, Brady Estates LLC, at any time decides to forgo establishing a solar farm upon Parcel B, then Parcel B must be conveyed to the Town within thirty (30) days of said decision. Regardless, Parcel B must be conveyed to the Town within 25 years of this Variance decision. Prior to this conveyance, any solar farm that has been constructed must be decommissioned, and Parcel B must be restored, in accordance with the Town's solar farm by-law (Zoning By-Laws, §37). Prior to the conveyance of Parcel B to the Town, it may be used solely for the operation of a solar farm, and such operation, and the permitting of the same, must be in accordance with said solar farm by-law.

The Board made conditions:

- All prior conditions and/or restrictions set forth in prior decisions not hereby modified from Case #2012-31 shall remain in full force and effect
- Permits subject to standard Town Board/Agencies' approvals and conditions are needed most specifically with the Conservation Commission prior to the construction of the access road to Parcel B

Chairman Figueiredo invited public comments regarding this petition.

No public comments.

David Dore motioned to close the public hearing which motion was seconded by Robert Gardner. Motion passed unanimously.

David Dore motioned to GRANT the AMENDMENT based upon the findings and conditions stated. Motion was seconded by Robert Gardner. Motion passed unanimously.

11:00 P.M. Hearing adjourned

Tina Cabral

Tina Cabral, Principal Clerk
For the Zoning Board of Appeals
Date of Approval: 1-28-14

MINUTES



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1/29/14 11:15 AM
DARTMOUTH TOWN CLERK

MINUTES

DATE OF HEARING: JANUARY 7, 2014

CASE: USE VARIANCE
CASE NO: 2014-1
Petitioner/Applicant: Victor M. Vieira/New Bedford Country Club
Property Owner: James G. DeMello, Trustee of the DeMello Realty Nominee Trust
Representative: Michael J. McGlone, Esq.
Subject Property: 636 Slocum Road, Dartmouth, MA
District: Single Residence A
MAP: 177 LOT: 71 CERTIFICATE NO: 23055

PRESENT: The Board: Chairman Jacqueline Figueiredo, Robert Gardner, Kevin Melo, David Dore and Principal Clerk Assistant, Tina Cabral

Also Present: Wendy Henderson, Director of Public Health, Michael J. McGlone, Esq. and Victor M. Vieira and Other Interested Parties

8:00 P.M. Chairman Figueiredo opened the hearing

LEGAL AD: Notice is hereby given of a public hearing to be held on Tuesday, January 7, 2014 at 7:00 P.M. in Meeting Room 304, Town Hall, 400 Slocum Road, Dartmouth, MA on the petition of Victor M. Vieira/New Bedford Country Club, who is seeking a VARIANCE to use an existing structure located at 636 Slocum Rd, Dartmouth, MA in the Single Residence A District as a "snack shack". Structure was previously used as a "snack shack", but such use has been discontinued pursuant to Section 3B.103 of the Zoning By-laws. (Section 36.300-Use Variance and Section 3B.103-Discontinuance of Non-Conforming Use)

ADVERTISED: The Notice for public hearing was published in The Dartmouth Chronicle on Wednesday, December 25, 2013 and Wednesday, January 1, 2014.

ABUTTER'S LIST: Kevin Melo motioned to waive the reading of the abutter's list into the record, which was seconded by Robert Gardner. Motion passed unanimously. A certified abutter's list is available for review in the office of the Zoning Board of Appeals.

DOCUMENTS ON FILE

- Use Variance application time-stamped with the Town Clerk on 11/22/13 with brief
- Legal Ad

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- Certified Abutter's List
- Vision Appraisal Card
- Letter from Planning Director, Donald Perry, dated 1/6/14
- Letter dated 8/27/02 from former Building Commissioner to former property owner
- Property photos
- Site Drawing dated 1/7/14

Chairman Figueiredo read into the record a letter from Planning Director, Donald Perry, dated January 6, 2014 and comments from the Director of Public Health.

Chairman Figueiredo invited the Petitioner or representative to present the case.

Michael J. McGlone, Esq.: Petitioner would like to open a "snack shack" using a pre-existing structure located at 636 Slocum Road which such use has been discontinued. The subject property is owned by James G. DeMello as well as the abutting two lots. There is also an easement with the New Bedford Country Club on the 7th tee on this property. (He presented Board with drawing of subject property.) This lot is irregularly shaped and there are large boulders on the property. The existing structure is located to the rear of the dwelling on the property and is 15x15 in size. The snack shack had been previously used since 1951 to serve the members of the New Bedford Country Club and the public. Petitioner is proposing to lease the snack shack from Mr. DeMello. There will be no change in the size of the structure, no outside seating, no parking spaces, and no alcoholic beverages will be served. Petitioner is proposing to serve hot dogs, chips, water, soda, etc. from the snack shack.

Chairman Figueiredo: Questioned if Petitioner is intending to have a grill in the snack shack for hamburgers or just steamed hot dogs.

Victor M. Vieira: Answered that there will be an electric grill inside the snack shack for hamburgers as well.

Chairman Figueiredo invited any board members to ask questions.

Robert Gardner: Questioned as to why previous owner let this business expire.

Michael J. McGlone, Esq.: This property was owned by the New Bedford Country Club under the title of 636 Slocum Road LLC from 2004 to 2013 and it was believed that they did not have the right to reopen the snack shack at that time.

Robert Gardner: Commented that in the past this snack shack had outdoor seating with tables, benches and umbrellas and questioned if there will be outdoor seating or any type of signage on the snack shack.

Victor Vieira: Answered that there will not be outside seating as this will be used as an extra amenity for the members of the golf club and that there will be no placement of a sign on the snack shack.

Chairman Figueiredo: Pointed out that the general public (in addition to Country Club golfers) will be allowed to make purchases from the snack shack since is on a public way (Hathaway Road).

Robert Gardner: Asked if there are utilities available for this snack shack.

MINUTES

Victor Vieira: Responded that Mr. DeMello will be providing the utility services to the snack shack from his dwelling and will be billing the Country Club for use of the utility charges. There is no natural gas at the snack shack. There is no bathroom in the snack shack. He also stated that he would like to post a menu on the outside of the building, but that there will be no other signage.

Wendy Henderson, Director of Public Health: Responded with regard to her comments on the application that her assumption was that there was a bathroom in the existing structure. It currently is not connected to town sewer, but if Petitioner is proposing to have a sink or bathroom in the structure he would need to file for a permit. Under the food regulations code, a bathroom is required for the use of employees in the snack shack.

No further questions by board members.

Chairman Figueiredo invited public comments regarding this project.

No public comments.

The Board made findings:

- Locus property
- James G. DeMello, Trustee has owned the property since April, 2013.
- Mr. DeMello owns both abutting properties on Hathaway and Slocum Roads.
- Property abuts the New Bedford Country Club Golf course.
- There is a 7th tee easement on the subject property for the New Bedford Country Club.
- Use Variance pursuant to Section 36.300 and 3B.103
- The existing building lost its non-conforming use status since the use was discontinued for more than two years.
- The Petitioner, Victor M. Vieira, from the New Bedford Country Club is seeking a Use Variance to reopen a snack shack that is located at the rear of the subject property.
- The snack shack had existed for over 40 years serving golfers of the New Bedford Country Club and the general public.
- In 2002, it was determined to be a pre-existing use per the Zoning Enforcement Officer at that time. There is a letter on file dated August 27, 2002 from the Building Commissioner/Zoning Enforcement Officer, David Silveira, stating that the snack shack was a protected pre-existing use at that time.
- Topography of the lot is unique due to large bedrock on the property.
- Shape of the lot is irregular.
- Pre-existing structure is 15x15 in size and there is no intended change to structure.
- There will be no outdoor seating.
- Petitioner intends to have business open seven days a week from dawn to dusk during golfing season
- The owner of the property is willing to lease the snack shack to Petitioner for its stated purposes including costs of utility charges

MINUTES

- Utilities will be electricity and water provided by the owner of the property and billed to the Country Club.
- No gas service or restroom facilities in existing footprint of structure
- Types of food that will be served will be hot dogs, hamburgers, chips and soda, etc.
- There will be no alcoholic beverages served or sold
- Placement of a menu board listing daily specials to be allowed on building
- The Board found that the requested Variance does meet the statutory requirements for granting a Variance pursuant to Massachusetts General Laws Chapter 40A §10.

Conditions for the approval of the Variance were outlined.

Kevin Melo motioned to close the public hearing which motion was seconded by Robert Gardner. Motion passed unanimously.

Kevin Melo makes the motion to GRANT the VARIANCE based upon the findings and conditions as stated. Motion was seconded by Robert Gardner and motion passed unanimously.

8:40 P.M. Hearing adjourned

Tina Cabral

Tina Cabral, Principal Clerk
For the Zoning Board of Appeals

Date of Approval: 1-28-14

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Halim Choubah, Clerk
Robert Gardner

APPROVED

MINUTES

DATE OF HEARING: January 7, 2014

CASE: ADMINISTRATIVE APPEAL
CASE NO: 2014-2
Petitioner/Applicant: Kathleen Simbro, Trustee
Representative: Philip N. Beauregard, Esq.
Property Owners: Kathleen Simbro, Trustee
Subject Property: 765 State Rd, Dartmouth, MA 02747
District: Single Residence B MAP: 52 LOT: 9 BOOK: 8553 PAGE: 276
District: General Business MAP: 163 LOT: 56 BOOK: 8553 PAGE: 281

PRESENT: Chairman Jacqueline Figueiredo, Robert Gardner, Kevin Melo, David Dore and Principal Clerk Assistant Tina Cabral

ABSENT: Halim Choubah and Jay Peabody, Esq.

Also Present: Dartmouth Town Counsel, Anthony C. Savastano, Esq., Philip N. Beauregard, Esq., Manuel Soares, Paul Murphy/Director of Inspectional Services, Wendy Henderson/Director of Public Health and Other Interested Parties

8:45 P.M. Chairman Figueiredo opened the hearing

LEGAL AD: Notice is hereby given of a public hearing to be held on Tuesday, January 7, 2014 at 7:30 P.M. in Meeting Room 304, Town Hall, 400 Slocum Road, Dartmouth, MA on the petition of Kathleen Simbro, Trustee, who is seeking an Administrative Appeal to appeal the determination of Paul Murphy, Director of Inspectional Services, that the material processing operation use for property located at 765 State Rd is not an allowed use. The subject property identified on Assessor's Map 163, Lot 56 is located in the General Business District and the subject property identified on Assessor's Map 52, Lot 9 is located in the Single Residence B District. Information is on file in the office of the Board of Appeals and may be seen upon request. (M.G.L. Ch. 40A §7 and §8)

ADVERTISED: The Notice for public hearing was published in The Dartmouth Chronicle on Wednesday, December 18, 2013 and Wednesday, December 25, 2013.

ABUTTER'S LIST: Robert Gardner motioned to waive the reading of the abutter's list into the record, which was seconded by Kevin Melo. Motion passed unanimously. A certified abutter's list is available for review in the office of the Zoning Board of Appeals.

MINUTES

DOCUMENTS ON FILE

- Administrative Appeal application time-stamped with Town Clerk on 11/26/13
- Certified Abutter's List
- Legal Ad
- Vision appraisal parcel cards
- Letters dated 5/31/13, 10/30/13, and 10/31/13 from Director of Inspectional Services, Paul Murphy to the Petitioner
- Letter dated 1/6/14 from Planning Director, Donald Perry
- Memorandum from Christopher Michaud, Soil Conservation Board Inspector, dated 1/7/14
- A property tax document for each lot on the subject property time-stamped 1/7/14 by Town Collector and submitted by Manuel Soares, owner of the operating material processing business Granite City Crushing to Board of Appeals office on 1/7/14
- Application to MassDEP Solid Waste Program signed and dated 11/5/13 by Manuel Soares, owner of Granite City Crushing for property at 765 State Road
- Report by Prime Engineering submitted by Philip N. Beauregard, Esq. as representative for Petitioner
- Correspondence dated 1/5/14 from Bernard P Giroux of Giroux & Company, as representative of Peter D. Hallissy, who is the manager of abutting property at 449 Reed Road, which is owned by 449 Reed Road LLC
- Colored photos for years 1986, 1990 and 2000 of subject property submitted by Wendy Henderson, Director of Public Health, dated 1/7/14
- Correspondence received in support of petitioner from Eric Belink of Dartmouth Indoor Tennis, dated 12/11/13

Chairman Figueiredo read into the record the following:

- Comments from the Environmental Affairs Coordinator, Mike O'Reilly and Wendy Henderson, Director of Public Health
- Letters from Director of Inspectional Services, Paul Murphy, dated 5/31/13, 10/30/13 and 10/31/13
- Letter from Planning Director, Donald Perry, dated 1/6/14.
- Correspondence dated 1/5/14 from Bernard P Giroux of Giroux & Company, as representative of Peter D. Hallissy, who is the manager of abutting property at 449 Reed Road, which is owned by 449 Reed Road LLC

Chairman Figueiredo invited the Director of Inspectional Services to present the case.

Anthony C. Savastano, Town Counsel

Informed the Board that the initial burden is on the Zoning Enforcement officer to explain what the zoning violation is and why there is a violation of zoning. The burden then shifts to the landowner to show that its current use is grandfathered as a pre-existing, nonconforming use.

Paul Murphy, Director of Inspectional Services

The two parcels of land in question are owned by Kathleen Simbro, Trustee. This matter was brought to his attention in May, 2013 which resulted in a site visit to the subject property. Through his observation it was very clear that there was a massive processing operation going on behind the property known as the "ledge". There was involvement with regard to the trucking in and trucking out of various types of

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gravel/demolition in large quantities occurring at the site. This type of operation is not allowed in the General Business District, and it has not been allowed since 1968, therefore, the operation constitutes a zoning violation. After lengthy research he determined that this operation is not a lawful use. Mr. Murphy made numerous attempts to reach out to the Petitioner to give the Petitioner the opportunity to provide documentation and/or evidence to support this use. Petitioner made no effort to provide any response to Mr. Murphy. Therefore, on October 31, 2013, pursuant to M.G.L. Chapter 40A, Section 7, Mr. Murphy issued to Petitioner a cease and desist from any and all activity associated with stockpiling, processing and maintaining a material processing facility on the subject property.

Anthony Savastano, Esq.

Questioned if there was anything done with the material on the site relative to the trucking in and out of material.

Paul Murphy, Director of Inspectional Services

There was crushing, sorting, and moving of various types of materials to various places on the site.

Chairman Figueiredo

Reiterated that her interpretation of the case is that it involves two lots, with one located in the General Business District and the other in the Single Residence B District. Therefore, if this operation is not allowed in the General Business District, then it must not be allowed in the Single Residence District.

Paul Murphy, Director of Inspectional Services

Responded that is correct. It is not allowed in either District.

Anthony Savastano, Esq.

Informed the Board that one lot is entirely in the General Business District and the other lot has a significant portion in the General Business District with a portion towards the South side in the Single Residence District.

Chairman Figueiredo

Questioned if these lots abut a town well and wetlands.

Paul Murphy, Director of Inspectional Services

Stated that the town well abuts both of these lots.

Chairman Figueiredo

Reported that prior to this evening, the Board had not received any new information regarding the issues relative to these lots other than copies of Mr. Murphy's letters to the Petitioner regarding this issue and the Administrative Appeal application.

Paul Murphy, Director of Inspectional Services

Affirmed that he provided the Petitioner with written notification in May of 2013, requesting that the property owner provide documentation that afforded him the right to operate the business. He received no response. The Petitioner had ample time to provide documentation or evidence that this operation is an allowed use, therefore, when the Petitioner did not provide any documentation, Mr. Murphy issued the cease and desist order.

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Chairman Figueiredo invited the Petitioner or representative to present the case.

Philip N. Beauregard, Esq.

Manny Soares is the operator of the business and manages the properties in question. The properties are owned by his mother, the Petitioner, Kathleen Simbro in Trust. The Petitioner arranged to have a site visit completed and a report prepared to provide proof of burden. Just prior to the hearing, he submitted copies of the report prepared by Prime Engineering to Board members. The report included topographic maps and aerial photos of the properties. Mr. Beauregard explained that the lots in question are tax title lots, and said lots were purchased through auction by Petitioner on March 2, 2007. Mr. Soares has been actively using the properties since it was purchased for crushing, processing, and stockpiling of various types of gravel and fill. About 10-20% of the stockpiling is on the lots in question and the majority (80-90%) of the activity of crushing and processing is done on a portion of the abutting lot owned by Mary Robinson. Mr. Soares leases a portion of the Mary Robinson's lot for his operational use. The Petitioner is aware these properties are located in the Aquifer and near a town well. The Petitioner understands that it is not an allowed use in the current zoning. The Petitioner's basis for the legitimacy of the use of the operation is what Petitioner believes to be the history of the lots in question, thereby conferring grandfathered/non-conforming use rights of past and present owners of the property. Attorney Beauregard stated that he will rely primarily on the Prime Engineering report submitted this evening.

Attorney Beauregard agreed that the current use is not an allowed use under current zoning, and that the basis of the legitimacy of the use is what has been the history of the use of the subject lots.

Manuel Soares

Stated he is the beneficiary of the Kathleen Simbro Trust who presently owns the properties in question. He operates two businesses out of this location, which are M. Soares Excavating and Granite City Crushing. He has a stationary office in Westport, MA, but has a portable trailer for this operation on the subject property. He has a portable crusher, which he moves to and from his Westport and Dartmouth businesses. For the past 20 years he has been renting and operating his business on the abutting lot that was owned by Cecil Smith and now by Mary Robinson. In 2007, he purchased the two lots in question. Since purchasing these two properties he has cleaned up the lots significantly. He has placed jersey barriers on his property lines to limit any disturbance to abutting properties. Portions of the lot contain vegetated stockpiles that were pre-existing since the 1960s. Some of the stockpiles have 45 year old trees in them. He claims that his burden of proof is the placement of pre-existing stockpiles that were placed by the town since the 1960s and his clean-up of the properties that contained tires, shells, and significant dumping of trash prior to his purchase. He provided no evidence supporting his statements, and did not discuss any processing prior to his purchase of the property. He only stated that the subject property has been used for stockpiling and illegal dumping.

Robert Gardner

Questioned where the egress to the site is; if there is a road leading to this business from Route 6; how far down does the road go along and beyond the property.

Manuel Soares

Answered that there is a paved road that begins at Route 6 and ends at the cul de sac near the town well. The egress to the site is off of the paved road, across from the Indoor Tennis site.

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Chairman Figueiredo

Stated she made a site visit, went as far as the fenced area, and observed a stock pile and some gravel piles on the site. She also noticed a stone building, and questioned Mr. Soares if the stone building is on his property.

Manuel Soares

Affirmed that the stone building is on Mary Robinson's property and commented that Joe's Cycle is also located on the Robinson property.

Chairman Figueiredo

Expressed her concern to Mr. Soares that the Board received very little documentation or evidence for this case until tonight's meeting. Board members were only in receipt of an application for this appeal along with three letters which were provided by Paul Murphy prior to the meeting. She addressed the Petitioner stating that he had ample time from his first notification letter by Mr. Murphy to provide any documentation and/or evidence. Mr. Soares stated that although he did not know who all of the owners were, there have been many people who have been mining the property over a period of time. Mrs. Figueiredo stated that no one has provided any documentation to show that.

Anthony Savastano, Esq.

- The Petitioner stipulated that the current use of operation is not in conformance with zoning.
- The Petitioner must produce evidence to demonstrate that there has been continuous use, except for a break in use of not more than 2 years, to prove a pre-existing non-conforming use.
- Submitted a Memorandum prepared by the Soil Conservation Board Inspector summarizing the history of these properties going back to 1954
- In the 1960s and 1970s there was a gravel removal operation.
- The change in zoning occurred in 1968.
- The last soil removal and gravel removal permit was issued in 1971 for these properties.
- The Map and Lot numbers have changed but the Lots referenced in Mr. Michaud's letter are the lots at issue in this hearing.
- Crushing, processing, and selling material is significantly different than running a granite removal operation which requires a soil removal permit.
- There has been no evidence produced to show that there has been a continuous use for a material processing operation since the change in zoning.
- There has been no testimony prior to the Petitioner's purchase of the property that there has been any asphalt, brick or concrete recycling done on the property.
- While the burden of proof is on the Petitioner to prove a pre-existing, nonconforming use, the Zoning Enforcement Officer is not required to produce any evidence to the contrary, the Town will none the less produce testimony from Wendy Henderson, Director of Public Health

Wendy Henderson, Director of Public Health

- Employed by the Town in January 1987
- First became familiar with the site in question in 1987
- Site contained a large number of H&M drums and hazardous waste materials, therefore, DEP and EPA have been involved in cleanup of this site in 1981.
- In 1986, a lawsuit was filed relative to a solid waste site at the property by the Town.
- Town of Dartmouth and Cecil Smith, and the Hills were the parties involved in the lawsuit.

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- Visited what was in the past referred to as “the Hill property” relative to concerns of materials being dumped on the site
- No applications had been filed relative to gravel processing or re-processing prior to Nov. 2013.
- In Nov. 2013 an application was filed by Granite City Crushing with DEP, and copies were provided to the Board of Health.
- Visited the site numerous times since 1987 relative to court attempts to obtain cleanup of debris, boats, various trailers, large quantities of gas tanks, large ocean type freighter mooring buoys, broken pieces of concrete, tires, and scrap metal
- Initially, in 1986, the Board of Health required that the site be cleaned.
- There was no evidence of any gravel operation on the site during her visits other than some piles as well as large concrete stockpiles that had trees growing through them. Through observation they clearly had been there for a period of time undisturbed.
- Site was visited during the years 1987, 1988, 1989, 1990 and from 1994-2000, when there were numerous visits to the site. The subject parcels remained undisturbed during this time period.
- In 1996, police contacted the Board of Health relative to removing vehicles that were in the ledge quarry of the Cecil Smith property.
- In 1998, the Board of Health took action against Bob Gosselin relative to stockpiling and selling clam shells on property.
- From 1979 through 2006, H &M hazardous waste drum cleanup was ongoing, and Ms. Henderson occasionally visited the site cleanup companies.
- In 2002, the Board of Health took action against Mary Robinson with a cease and desist order relative to the dumping of ABC material on both her property and on a portion of the property in question.
- In March 2002, DEP issued a notice of non-compliance with a penalty to Mary Robinson and Mr. Soares.
- In years 2006 and 2007, she observed that there were various materials/operations on the subject properties such as: road-based material, processing and reprocessing concrete, processing and sorting gravel.
- In 2002, DEP and the Town granted the Petitioner 180 days to remove all asphalt, brick and concrete from the Mary Robinson parcel.
- DEP hired consultants to continue to provide cleanup requirements on the site, and currently there is still cleanup needed on the Robinson parcel also.
- In 2006, the Petitioner’s properties had been determined “cleaned” of hazardous waste materials by DEP. The topographic maps and aerial photographs are consistent with Mr. Michaud’s records regarding cessation of quarry and gravel activity.
- She submitted photographs and stated that these photographs fairly and accurately represented the conditions of the parcels on the dates noted on the photographs .The photographs show an absence of any gravel activity and the current business of gravel processing, crushing, sorting, etc.

Philip N. Beauregard, Esq.

Addressed the Board that he believes a fair process should be allowed to the Petitioner and to the Town and expressed his concern that the Board have time in a form of a continuance to review the report he submitted from Prime Engineering as well as other documentation pertaining to this case.

Chairman Figueiredo invited any board members to ask questions.

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No further questions by Board members.

Chairman Figueiredo invited public comments regarding this project.

No public comments.

The Board made findings:

1. The Petitioner's counsel stipulated, and the Zoning Enforcement Officer demonstrated, that the current use of the property, including material processing operation of stockpiling, processing and maintaining of various types of gravel and fill is currently in violation of zoning and which is not an allowed use in the General Business and Single Residence B Districts and has not been since 1968.
2. The very limited evidence submitted by the Petitioner did not satisfy his burden of proof. The Petitioner did not present sufficient evidence to demonstrate that there has been any continuous non-conforming use subsequent to 1968 of any gravel operation, and certainly not the current use of stockpiling, processing and maintaining of various types of gravel and fill subsequent to the change in zoning in 1968. The Report by Prime Engineering submitted by the Petitioner containing topographical maps and aerial photographs actually supported the testimony of, and documents submitted by, Wendy Henderson, Director of Public Health .
3. Although the Zoning Enforcement Officer is not required to present any evidence given that the burden of proof belonged to the Petitioner, he did so. This evidence included testimony of Wendy Henderson, Director of Public Health in which she testified of her visits to the property since 1987 and provided photographs of the property over that time period. Both her views and the photographs showed no gravel operation and no material processing operation. The evidence also included Memorandum from Christopher Michaud, Soil Conservation Board Inspector, dated 1/7/14 stating that based upon a review of the Soil Conservation Boards files for property, he determined that the Town sanctioned soil removal/mining/quarrying at some or all of the property starting in 1954 and continuing until April 1, 1966. In 1968 the Chairman of the Soil Board indicated the pit was abandoned, however, the Board issued a renewal permit to the Town on November 1971. Upon the expiration of the renewal permit granted in 1971, the Town of Dartmouth Soil Conservation Board has not issued any permits for the Property. This evidence clearly demonstrated that there was not a continuous non-conforming use on the property.

Kevin Melo motioned to close the public hearing which motion was seconded by Robert Gardner. Motion passed unanimously.

Kevin Melo motioned to DENY the ADMINISTRATIVE APPEAL and UPHOLD the decision of the Director of Inspectional Services/Zoning Enforcement Officer based upon the findings stated. Motion was seconded by Robert Gardner. Motion passed unanimously.

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10:15 P.M. Hearing adjourned

Tina Cabral

Tina Cabral, Principal Clerk

For the Zoning Board of Appeals

Date of Approval: 2 | 25 | 14