

TOWN OF DEERFIELD  
ZONING BOARD OF APPEALS  
MEETING MINUTES

April 15, 2004

- I. Meeting convened at 7:00 p.m. Main Meeting Room, Municipal Offices, South Deerfield, MA.

Members Present: Chair Francis Olszewski, Ronald Bohonowicz, Stephen Barrett, Roger Sadoski, Leonard T. Grybko, Sr, and Grace Friary

Members Absent: Richard Calisewski

II. **Olszewski opened the meeting continuing the Rice Oil Company Inc. dba Deerfield Neighbors public hearing from March 18, 2004.**

Attorney Pepyne advised the Board as to the procedure to follow for this hearing - a roll call vote must be taken on every issue, separately.

Chair Olszewski stated he had received a letter/questionnaire from Ronald Bohonowicz. He asked if that was okay under the open meeting law.

Bohonowicz stated that he mailed them out but did not receive any responses.

Attorney Pepyne stated that the document was draft findings and the Board members can agree or disagree after hearing all the evidence. He advised the Board to listen to the presentation. Afterward the Board can request additional information and then take a vote.

Attorney MacNicol and Jeff Pechulis approached the table. Attorney MacNicol introduced Jeff Pechulis, Traffic Analyst from J.S. Pechullis/Land Development Services, Inc (JSP). Mr. Pechulis gave his address 25 Mill Street, Springfield, MA and stated he was the president of JSP. Pechulis gave a presentation based on a new traffic count that JSP had conducted. He stated he had done the original traffic report, site design and layout for the Mobil station. On April 1<sup>st</sup> they did the traffic count and he gave an overview of that information. (See attached presentation from JSP.).

Attorney MacNicol noted that the morning queuing had nothing to do with the special permit because the hours of operation are not within the period of time being discussed. She noted that Neighbors would be willing to put in 6 more parking spaces if necessary. The Rice owned convenience store in the nearby Town of Whately was used as a comparison for sample sales, because it matched the demographics. It was noted the Whately site has more transactions than the Deerfield Neighbors location. Two weeks worth of recorded data was presented – all beer and wine sales for every hour the store was open (8:00 am to 11:00 pm).

The data collected was divided into several classes: Class 1 - beer and wine only, Class 2 – a beer and wine purchase plus another item from within the store (beer and wine and gas are not identified as a joint sale item). This information was taken off the register receipt and no gas sales were included. There was more beer purchased than wine. Attorney MacNichol stated they erred on the side of being conservative, the slowest days were Sunday and Monday, on Thursday and Friday sales were 35 – 40 transactions per day - buying beer and beer/wine with an in-store purchase and Wednesday had more sales due to a sports game. The numbers were consistent and did not jump on Fridays. And during a 15-hour period there were 25 transactions. Pechulis noted that it was evenly split between Class 1 and Class 2 sales. (40% beer and wine only and 52% beer and wine plus a store purchase). There were no sales at 8:00 am; 9:00 am reflected pretty low sales; the sales picked up during the afternoon (between 2:00 pm and 10:00pm) with an average of 3 – 4 purchases per hour. The smallest amount of beer or wine that can be purchased is a 16-ounce can of beer. In summary she stated purchases peaked before 5:00 pm, Neighbors would be willing to address the parking in the morning (this did not affect the special permit because the hours on the permit began at 11:00 am) and the ZBA can set hours. Mr. Puchulis stated that the parking is not really a problem in the morning and dissipated quickly.

Bohonowicz asked the following questions: what made them pick April 1<sup>st</sup> to do the traffic count, what was the highest till day, why would they pick a day that was not the highest volume to do the traffic count and why only one day?

Attorney MacNichol stated it was not fair to focus on the day it was done. Friday and Saturday are the highest till days. These figures are based on solid data, she stated

Puchulis stated that it is typical to use a Tuesday or Thursday and that traffic counts should not be done on the slowest or busiest days. He said he was very confident with the traffic count data. He gave an explanation regarding how the statistics are adjusted by factors dictated by the State. The traffic counts are seasonally adjusted based on State figures/factors. The month of April is an average condition for the year and all figures were adjusted based on the State's adjustment factors. The State information is based on permanent counting stations, one of which is in Deerfield. Puchulis said that he had been doing this for 17 years and one day is a standard way of doing the count. The count is not done on holidays, election days or when roadway construction is underway. The current traffic count confirms both the other sets of figures done for the store. The original State ITE numbers were calculated before the site was built, everything was factored in to create the numbers. The data for the first hearing, before it went to court, confirms those figures. The April 2004 count factored in the State requirements for the time of year and season. The seasonal factors are the number of factors in the analysis based on one hour worth of counts, four fifteen-minute periods. The highest number in a fifteen-minute period adjusts all the other numbers upwards; the calculations are done behind the scenes by

accepted software developed by the State. The Federal Bureau of Transportation will look at the data and analyze it before used, the software will raise it up higher. The software will use impact analysis adding a lane or changing of a signal and time. Throughout the survey and during analysis there proved to be low traffic associated with the sale of beer and wine.

Attorney MacNichol stated, based on the data, there were three to four transactions during the afternoon for any given hour between 2:00 pm and 10:00 pm, the data shows consistency. There are no credits for those buying gas and then getting beer/wine, it was listed as a beer/wine sale only. The peak hours were between 4:00pm – 6:00 pm. There are safeguards in the software. There are no changes in the level of services or operational delay; one-second delay in leaving the site is negligible. There is no change in the number of vehicles queuing during the day. The beer/wine sales information was based on a good sample source the traffic. She began her summary stating that the law is different in special permit situations. The most recent case was on March 15<sup>th</sup> of this year. TCR Mid-Atlantic any properties verses the City of Weymouth. (This statement is taken from The Massachusetts Law Reporter Cite as 17 Mass. L. Rptr. No. 15, 344 [March 15, 2004] and was read by Attorney MacNichol) Cape Land Development Corp., 371 Mass. At 24 Quincy, 39 Mass. App. Ct. at 22-23. The Court essentially found that, although the law permitted shopping centers to be built in this zoned area, the ZBA was essentially undercutting that law by finding excuses to prevent the developer from receiving the special permit he needed to build the shopping center. See Quincy, 39 Mass. App. Ct. at 22 – 23 [“judge correctly ruled that, in denying the application (for a special permit for a permitted use of the land] without reasons, the board had made no effort to impose reasonable and appropriate conditions on the permitted use”). Thus, where a development plan involved an underlying use permitted as of right by the statute, but nonetheless requires a special permit, the ZBA may only “impose reasonable conditions which do not amount, individually or collectively, to a practical prohibition of the {permitted} use.” Cape Ann Land Development Corp., 371 Mass. at 24. Stated differently, the courts shall intervene when a ZBA acts as if to say “While in theory you can build such a development in the zoned area, in practice you will never receive the special permit to build that development because we will always find a reason to justify a denial.” Attorney MacNichol continued by stating that the town has a commercial zone, the town has chosen that if there will be liquor sales but they were to be reviewed by the ZBA, the town didn’t say that there will be no retail sales there, there is no limit on what the store can sell that doesn’t need a special permit but could double traffic to the store, the ZBA can issue conditions but not a denial, because the site is not liked or because the sales of beer/wine is not liked. That is arbitrary and capricious. The Neighbors Store is in a commercial zone, the Town didn’t say you couldn’t have Dunkin Donuts, fresh donuts and coffee. If the issue is beer and wine sales during a busy morning time, the ZBA can issue conditions and not allow sales in the morning. If the ZBA doesn’t want an individual to purchase a single beer a condition can be put on the special permit. But the ZBA can not be arbitrary and capricious in its decision. A special permit can not be denied because retail sales are allowed at this location. She stated that Jeff has done a wonderful job giving

the facts on the traffic counts. She reiterated the queuing time difference of only a second. There is not a traffic problem. She acknowledged that Dunkin Donuts is busy in the morning, but this is not related to the special permit we have requested, we will cooperate and create more spaces. This has nothing to do with traffic around the beer/wine sales; it is not even an issue. The peak is 4:00 pm – 6:00 pm for beer/wine transactions, 4 cars going in there. Regarding the economics - there are 30 jobs on site, beer/wine sales will enhance the economic position of the site. People are using the site for convenience (bread, milk, etc) the cost is between \$7.00 and \$8.00 for the average price of a six-pack, the average store sale is under \$2.68. Fifty Deerfield customers signed the petition, which asks the ZBA to grant the special permit to the Deerfield Neighbors. The convenience is to local and traveling customers. During the week 70% – 79% are Deerfield residents, 20% are from out of Deerfield but could work in Town. On the weekend 60% are from Deerfield. The traffic consideration is negligible, the morning is the busiest time but she claimed that this information can't be used to deny the permit there is no relevance. She stated there is only two hours in a two-week period where more than one person bought beer by itself until 1:00 pm. Most purchases were made when people were leaving work between 5:00 pm – 6:00 pm. Between 4:00 pm and 6:00 pm is the most traffic getting out on the roadway and there is only a one second change in traffic patterns. If the ZBA requires a remedy six additional parking spaces will be added to alleviate this concern. As much as 10% of the store sales will be beer/wine, this is 2% - 3% of all transactions at most and that is less than 5% of trips to the site at the busiest time. Utilities are adequate there is no affect, no adverse affect on public services or utilities. Clearly this is a commercial neighborhood and the store fits in with the character and social structure not adversely impacting in anyway. She noted that regarding the fiscal and economic criteria Neighbor's Store provides thirty jobs to Deerfield. Deerfield Neighbors/Rice's Oil has profit sharing, after a certain amount of money is made; the remainder of profits goes into the employee's pocket directly. As the site is developed there will be additional real estate taxes, four resident's income could increase basically the alcohol license is a positive impact on the community. The special permit criteria states that the Zoning Board of Appeals must weigh the negative impact and the negative impact must outweigh the positive and then the permit can legitimately be denied. However there is not any proof there is a negative impact: traffic is not a negative impact with a second delay, if that. There is no other negative impact. In summary Attorney MacNichol stated that they had met all the criteria, presented data, specific figures and testimony to support their case. She asked that the ZBA grant the special permit and she noted that if they had any conditions that they had options and could put conditions on the special permit. And that it could be reviewed in a year if the members had concerns. The beer/wine sales are highly controlled by the State and any violations means the Board of Selectmen can immediately take the liquor license, there is no reason not to give Neighbors the special permit and give them a chance. If the concerns the ZBA has materialized then the ZBA can review. But to deny the special permit after all of the information has been presented is arbitrary and capricious. She then requested copies of tapes of both public hearings.

Bohonowicz asked if anything else was being added to the store to increase the growth going on inside or on the property in the next twelve or twenty-four months. Mr. DeCarlo stated no, not at this time.

Attorney MacNichol and Puchulis returned to the audience. The chair closed the hearing and discussion began.

Attorney Pepyne recommended the ZBA be presented the information regarding the maps. Bohonowicz presented a compilation of photographs, data and reference maps. He stated that it was for the convenience of those individuals getting on/off Route 91.

- ◆ Map I - contained the number of many package stores/breweries in the area for convenient purchase of alcohol.
- ◆ Map II – related to social structure
  - Education
  - Tourism
  - Farming
- ◆ Map III – showed the traffic flow from Route 91 to Rt. 5 & 10 and back on to Route 91.
- ◆ Photographs were used to present the impact on nature and the environment. He stated that this site is not the entire problem. The photos contained images of trash: bottles, beer cans/box, cups and several pieces of Dunkin Donuts paper/cup. The photos were taken along Route 91, Route 5 & 10 and Route 116. No one is addressing trash issue.

The Chair asked if all members agreed with the photos, commenting that all of the trash is not the fault of the Neighbors site and the beer bottles pictured don't have an impact on this case.

Bohonowicz commented on the draft decision he created after the last ZBA meeting, to address issue by issue and he commented that representation did not address the trash issue.

Attorney Pepyne advised that the hearing should be closed.

Attorney MacNichol asked the Board if she could respond to comments made.

Attorney MacNichol's comments on Map III.

- The on/off Route 91 pattern was created very specifically and very intentionally for Yankee Candle, Historic Deerfield, Magic Wings. These businesses and Deerfield want people getting off Route 91.
- Along 5 & 10 is a commercial tourist alley and yes it needs to be kept clean. That is a condition you can put on the permit
- Whether you grant a special permit there will be people getting off Route 91

Attorney MacNichol's comments on Map II

- If the permit is denied because the traffic is too much of a problem why are you allowing the Deerfield Shops to continue to expand –
- if this is the case then the ZBA should be clamping down all over the area not just Rice's.

Attorney MacNichols commented that the sale of beer/wine at Rice's site does not affect traffic in that area, it is not advertised on Route 91, only people who frequent the store will know about the sale of beer/wine.

Attorney MacNichol's comments on Map I

- The site attracts people who like to purchase Mobil gas, who may not want to have to travel somewhere else to get beer, that is not convenience. She stated that where other alcohol is sold has nothing to do with it, under law you cannot deny the special permit because there are other package stores in the community, a certain number of licenses are allowed by the state, as long as that is not exceeded it is a violation of restraint of trade to deny a special permit for liquor sales. The special permit does not talk about need, it talks about economics, traffic and natural environment.

Frairy asked for a copy of information relative to violation of restraint of trade regarding special permit.

Attorney MacNichol said everyone hates litter. And she noted that Neighbors had gone the extra mile to keep the site clean. She suggested Adopt-A-Highway as a possible solution for trash on Route 91. She continued by commenting that 5% of the transactions will help the store become more economically successful and employees make more money and it should not be denied because people litter, it is not legitimate. Yes it is an environmental issue and there are laws about littering. On this permit you can make it a requirement as to clean up on site, ZBA can ask that a sign put a sign on the door not to litter to use the appropriate receptacle, get special bags and do public education. This will take care of some of the problem, but it is not fair to deny the special permit because people litter. The ZBA can make conditions but the court would not find litter an adequate reason to deny the permit, there is no other environmental impact. She asked if there were further questions.

On a motion by Grybko seconded by Friary it was voted to close the public hearing.

Attorney Pepyn advised the ZBA members read the proposed motion, make any additions or subtractions and then take roll call votes. Attorney MacNichol received a copy.

Bohonowicz stated he created the summary based on items addressed in each section and comments members had made at the previous meeting (attached).

Friary stated it was an accidental/impulse not a benefit, there are other stores to purchase beer/wine locally.

Bohonowicz read his written document and asked for comments from members. There was discussion and changes made to the Findings.

#### ZBA Finding

**Petitioner:** Rice Oil

**Request:** Special Permit to sell alcohol in a CII district

#### **5321. Social economics or community needs which are served by the proposal;**

There are no further benefits to the town or surrounding communities. Rice Oil has two stores; one located approximately 500 ft on Route 116 in the southeast direction from the proposed Greenfield Road site, the second which is located approximately 2 miles to the northwest of the Greenfield Road site on Route 116, which has adequate access and ware, including alcohol to service the community conveniently.

The only public which this proposal will be conveniently servicing would be patrons who get off Route 91 exit 24 and travel one mile north to get back on Route 91 exit 25 and vice versa. These patrons would be classified as recreational travelers only passing through, hopping on and off Route 91. If this patron wanted to get alcohol they have the option of patronizing one of the other two Rice Oil Neighbor's stores. (Reference Map 1 & 3)

The Town of Deerfield also has several other stores that sell beer and wine:

Deerfield Spirit Shop	Deerfield Market
Savages Market	Keg and Cork

Immediately over the Sunderland Bridge are two other locations:

Billy's Package Store	DB Market
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Any impact on the existing market has a negative impact on the Town.

The niche market of selling cold beer and wine to travelers getting conveniently on and off Route 91 is devoid of any social, economic or community need of the Town of Deerfield.

Accident consumer – impulse buyer.

#### **5322. Traffic flow and safety, including parking and loading;**

The roadway which is described above, Route 5/10 between Exit 24 and Exit 25 of Route 91 is vital to the local communities' economic success. It is traveled by many school children (approximately 500 per day) both public and private schools, employees of our major industries in town upward of 2000 employees per day. In addition, over 2 million tourists per year are going to Yankee Candle, Historic Deerfield and Magic Wings.

The Route 116 and Route 5/10 intersection approximately 250 ft. from the proposed site is congested and a site with numerous accidents. The board members have instructed family members to exit right out of the Greenfield Road site for safety reasons. There have been accidents and near misses on the site. Traffic on many occasions' backs up on Route 5/10 in front of neighboring Yankee Candle, as well as backed up down Exit 24 onto Route 91 north. Historically traffic only gets worse as time passes. Board members have witnessed the traffic concerns of the site.

The traffic study presented by the petitioner is over two years old, dated November 2001, and was completed prior to operation of Dunkin Donuts on site. Therefore the traffic study is invalid to the members.

Route 91 is the access route and halfway between metropolitan New York, vacation homes and destinations in Vermont. A prime reason to make a convenient stop in Deerfield for cold beer and wine is that alcohol is being consumed in the vehicle. A vehicle in which alcohol is being consumed is a dangerous vehicle because the driving is impaired or otherwise distracted. Empty bottles and cans are regularly observed on the exit ramps of Route 91, Routes 5 & 10, Route 116 and Route 91 it self. (Reference 22 photographs)

Inverse of traffic study is other sites offer opportunities of convenience within a small geographic area.

### **5323. Adequacy of utilities and other public service;**

Public service will be negatively impacted with an increase number of calls to the Police Department. The petitioner states that their staff is trained to identify and report intoxication or minor trying to purchase alcohol or cigarettes. The Police have been on this site in the past.

Petitioners have suggested that they pay \$750.00 per year for a liquor license. This only covers administrative expenses. One court related problem or auto accident affects police services otherwise provided to the town.

### **5324. Neighbor character and social structures;**

The intended use the petitioner is applying for does not fit into the social structure of the town. (Reference Map 2)



Deerfield's Social Structure which is vital to the town's economics are;

- ◆ Three renowned private schools
- ◆ Two public schools
- ◆ Three major tourist destinations
- ◆ Historic Deerfield
- ◆ Yankee Candle Company
- ◆ Magic Wings Museum
- ◆ Farming

Industry

- ◆ All of the Deerfield Industrial Park
- ◆ Two (2) plastic plants
- ◆ Hardigg Industries
- ◆ Bete Publishing

All of the two vital accesses serving its social structure is the same route as the on/off liquor customer.

#### **5325. Impact to the natural environment;**

The board members have witnessed beer bottles and cans, other beverage bottles, cans, cups and trash including Dunkin Donuts trash on the side of the roads in close proximity to the Greenfield Road site. With increased sales, history shows that there will be an increase in trash on the side of the road. It shall be noted that the petitioner has trimmed large pine tree limbs on state property to the south to enhance the visibility from the Route 91 exit. That would indicate the targeted market. (Reference 22 Photographs)

#### **5326. Potential Fiscal Impact including**

Impact to town services, tax base and employment.

Additional tax base, employment will not change as a result of granting a special permit.

Police services have the ability to be impacted.

#### **Summary:**

In summary the benefit of servicing a niche market of travelers on and off the Route 91 belt way "conveniently" does not come close to outweighing the detrimental impacts to the Town. Therefore approving the special permit would only profit Rice Oil Company at the communities' loss.

The Rice Oil Companies proposal for alcohol sales is devoid of any benefit to the Town of Deerfield. The principal detrimental impacts are; Traffic flow, safety of the traveling public and the natural environment.

The following members supported the Summary – Sadoski, Grybko, Bohonowicz and Friary. Chairman Olszewski did not support the Summary.

On a motion by Grybko seconded by Sadoski a roll call vote was taken to deny the special permit based on the findings. The roll call vote was as follows; Sadoski – deny, Grybko – deny, Bohonowicz – deny, Friary – deny, Olszewski supported the special permit. The special permit was denied.

A short recess was taken.

**II.** Chairman Olszewski opened the continuation hearing for Cumberland Farms request for a shed.

Members Present: Chair Francis Olszewski, Ronald Bohonowicz, Stephen Barrett, Roger Sadoski, and Leonard T. Grybko, Sr.

Members Absent: Richard Calisewski and Grace Friary

Mr. Miller approached the table and responded to questions regarding the environmental shed, the dumpster location and the ice chest. He responded to the questions in order:

- ◆ the environmental shed will be moved in approximately 2 years, per Lorie Gilmore Environmental Operations. He has negotiated with the State and received permission to remove the electrical connection from the west side of the building and move it to the right side/back of building. This will mean the second shed (6x8) can be put directly next to the environmental shed. As requested he will ask for written documentation from the State and forward it to the ZBA regarding the time frame of the environmental shed being on site.
- ◆ the dumpsters have been repositioned as close to the restaurant as possible there is no other convenient location to put it without giving up a parking space
- ◆ the ice chest will be removed seasonally from November 1<sup>st</sup> to March 10<sup>th</sup> (snow season) This will allow room for more snow storage. The ice chest will be put back during the season and any other smaller device would be positioned in a non-snow area.

The Chair asked if Board members had any other questions.

Bohonowicz asked Mr. Miller what his responsibilities were to that store and who pays the bills for this store. He also asked if Mr. Miller had followed through on a meeting with the Police Chief.

Mr. Miller stated that he was the Divisional Maintenance Manager for this store and all stores in Vermont, New York and Western Massachusetts. He noted his home office was in Palmer, MA. He stated that the store pays directly and uses petty cash. He said for next year however the check will be mailed to the snow removal company. He stated that he did not meet with the Police Chief and Highway Superintendent because there was now more room for snow because of the ice chest removal.

Sadoski stated that Mr. Miller may have to reevaluate the site to accomplish what he wants to. The neighbors have voiced complaints in the past but no abutters are here tonight to complain.

The Chair asked for a motion. There was more discussion about snow removal. There were comments from several members about the time frame of the snow removal. Mr. Miller responded that after the last plow is when the snow is removed from the site - within 24 – 48 hours after snowfall ends. He would rather plow than pour salt and sand. He stated that they would buy the property next door if it ever came available.

Bohonowicz stated that when there is a reasonable amount on site before snow removal happens. Snow needs to be kept workable.

On a motion by Grybko seconded by Barrett it was voted to grant a variance with condition to erect 8' x 6' abutted to existing environmental shed. Remove snow 24 hours after last plow. Secondly remove the ice chest from November 1 to March 1. When the environmental project is complete, environmental shed will be removed.

There was some discussion about the oxygen pump, probes and electrical upgrade done by the electric company. Mr. Miller left the table.

Grybko stated he had an issue to bring up about the Neighbor's Store. He stated it bothered him that the Board of Selectmen are issuing liquor licenses to people, taking their money last year and this year and that the licenses can't be used because they are not grand-fathered and need special permit/variance. Sending a letter to the Board of Selectmen was discussed.

Olszewski stated that an individual only needed a special permit for a change of use.

Grybko continued by stating that the Board of Selectmen did not follow procedure. He questioned if this was legal and if the ABCC knows these people have a license that has been issued to areas that are not permitted use. He stated that the Board of Selectmen granted the permit, the legal counsel is employed by the Board of Selectmen (who pays and appoints legal counsel). He asked if the town counsel can serve two masters both the Board of Selectmen and ZBA if they grant a license and we deny. He asked how the Board felt about this.

Barrett suggested that a letter be drafted to the Town Counsel and Board of Selectmen and ask how this situation would be handled.

Olszewski stated the Court would be against the ZBA. And that Grybko should talk to the Board of Selectmen. He also noted that the letter Bohonowicz sent would be included and heard if there was a court case.

Bohonowicz said Grybko should talk to Board of Selectmen and that only one person should go so it won't be considered a meeting.

Grybko will ask for procedural information and question the Board of Selectmen about why they are granting permits. There was discussion and Grybko will go to Board of Selectmen as the ZBA representative.

The members discussed Magical Wings - the procedure, the court case of May 5<sup>th</sup> and whether to send it back to the Board of Selectmen for them to make a decision.

On a motion by Bohonowicz seconded by Barrett it was unanimously voted to adjourn the meeting.

On a motion by Sadoski seconded by Friary it was unanimously voted to close the meeting and it was so voted. Meeting adjourned.

Respectfully submitted,

Vivien Venskowski, Zoning Board of Appeals Clerk