

**HARVARD ZONING BOARD OF APPEALS
MINUTES OF MEETING
NOVEMBER 7, 2007
APPROVED: March 26, 2008**

Chairman Chris Tracey called the meeting to order at 7:04pm in the Town Hall Meeting Room.

Members Present: Chris Tracey, Steve Moeser, Robert Capobianco and Orville Dodson (Associate Member)

Others Present: Liz Allard (LUB Admin), Mark Lanza, Valerie Hurley (Harvard Press), Gerry Palano (Mass Dept. of Ag), Joseph Sudol, Gregory Barros (Harvard Hillside), John & Frances Hall, Bill Carr, Steve Nigzus, Mark Durrenberger, Steve Strong, Al Combs (Ag. Ad. Comm.), Wendell Willard (Ag. Ad. Comm.), Paul Willard (Concom), Annette Rosenthal, Tricia Kenyon, Ruth Silman, Peter Basile (Ag. Ad. Comm.), Pam Marston and Frank Carlson

Administrative Appeal Hearing – Steve Nigzus, 26 Madigan Lane (Map 16 Parcel 9). Opened at 7:04pm

Minutes

Robert Capobianco made a motion to approve the minutes of May 23, June 13, June 27, July 10, August 9, August 14, September 4, September 12, September 19 and September 26, 2007 as written. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

Executive Session

Chris Tracey made a motion to have the Board go into executive session pursuant to Massachusetts General Law Chapter 39, Section 23B (3) to discuss strategies with respect to pending litigation between the Fruitlands Museums, Inc. and the Board of Appeals and potential litigation because a public discussion of these matters will have a detrimental effect on the litigating position of the Board. The Board will return to open session in solely for the purpose of adjourning this meeting. Robert Capobianco seconded the motion. A roll call vote was taken and all were in favor of the motion.

Adjournment

Once the executive session ended Steve Moeser made a motion to adjourn the meeting at 10:22pm. Robert Capobianco seconded the motion. The vote was unanimously in favor of the motion.

Signed: _____
Steve Moeser, Clerk

**Harvard Zoning Board of Appeals
Administrative Appeal Meeting Minutes
Steve Nigzus, 26 Madigan Lane (Map 16 Parcel 9)
November 7, 2007**

Chairman Chris Tracey opened the hearing at 7:04pm in the Town Hall Meeting Room under the Zoning Act, M.G.L. Chapter 40A §8 and 15 and the Code of the Town of Harvard, Chapter 125-47A(1)(b).

Members Present: Chris Tracey, Steve Moeser, Robert Capobianco and Orville Dodson (Associate Member)

Others Present: Liz Allard (LUB Admin), Mark Lanza, Valerie Hurley (Harvard Press), Gerry Palano (Mass Dept. of Ag), Joseph Sudol, Gregory Barros (Harvard Hillside), John & Frances Hall, Bill Carr, Steve Nigzus, Mark Durrenberger, Steve Strong, Al Combs (Ag. Ad. Comm.), Wendell Willard (Ag. Ad. Comm.), Paul Willard (Concom), Annette Rosenthal, Tricia Kenyon, Ruth Silman, Peter Basile (Ag. Ad. Comm.), Pam Marston and Frank Carlson

This hearing is for an Administrative Appeal filed on behalf of Steve Nigzus in regards to the erection of a wind turbine to produce power for use by the farm only at 26 Madigan Lane, Harvard.

Steve Nigzus presented his application to the Board. Mr. Nigzus stated he has chosen a Bergey Energy system for his wind turbine. Mr. Nigzus pointed out that there is an existing wind turbine on Poor Farm Road. Mr. Nigzus explained that Gabe Vellante, the Building Inspector/Zoning Enforcement Officer struggled with the process of determining if a building permit should be issued for the erection of a wind turbine. Mr. Vellante questioned how many kilowatts (KW) would be used from the wind turbine. Mr. Nigzus determine the turbine would have the potential to produce an average of 5,000 KW per year.

Chris Tracey explained to Mr. Nigzus and those present that the Board decisions are based on the Protective Bylaw and not how the Board feels on a subject matter. Mr. Tracey added that it is not a matter of whether or not the Board supports green power.

Town Counsel, Mark Lanza, read the definition of agricultural use from the Harvard Protective Bylaw, Chapter 125-2, which directly references the Zoning Act, Chapter 40A §3. Attorney Lanza stated the Board needs to determine if the wind turbine is in fact an accessory use to the commercial agricultural use on the property.

Robert Capobianco stated the Town will most likely starting seeing more wind turbines due to the number of farms in operation. Would the Board be setting precedence if they overturn the Building Inspectors decision? Attorney Lanza stated each wind turbine would be a case by case determination. Mr. Capobianco asked if theses structures require

a fall zone. He informed they do not and there is no provision within the current Protective Bylaw.

Mr. Tracey noted that he did not see in Mr. Vellante's findings that the farm is not in commercial agricultural and that this structure is not an accessory use. Mr. Tracey also noted he did not see any evidence in the letter as to why it is not an exempt use.

Orville Dodson stated to Mr. Nigzus that it is not a function of your KW use, but rather what you use the energy for. Mr. Capobianco asked if that meant the KW generated can only be used for the farm. Attorney Lanza advised against the Board making that determination. Mr. Nigzus stated the over rated system would allow for growth of the farm.

Mr. Tracey asked the members if they saw evidence that this is a functioning commercial agricultural farm. Steve Moeser stated that he does, but he is trying to see what the difference is between using wind to generate power and using wind to pump water. Mr. Moeser is more concerned with the view shed if this turbine is permitted as a by right structure. Mr. Capobianco stated he would like some documentation showing the farm operates as a commercial business. Mr. Dodson is convinced the turbine will be used for agricultural use and believes the farm is in primary commercial use.

Mr. Nigzus stated the property is twelve (12) acres in which seven (7) are hayed and that twenty-five (25) % of the products produced are sold. Mr. Nigzus further explained the only way he can get Chapter 61A status is by submitting documentation of a working farm to the Town. Attorney Lanza stated for zoning purposes you have to meet Chapter 40A §3 requirements.

Mr. Capobianco thinks Mr. Moeser is right and Mr. Nigzus operation fits within the regulations of the law. It is just a matter of facts and figures, such as certification from a Certified Public Accountant or a certified affidavit from the property owner. Mr. Nigzus stated he could supply the Board with a copy of the Chapter 61A application. Mr. Capobianco would like an affidavit that applies to the statute.

Mr. Capobianco would like to have a condition that if the turbine is no longer used it will be removed. Mr. Capobianco believes if the Board set up guidelines for the Building Inspector to follow when issuing a building permit for this type of structure then it would eliminate appeals of his decisions. Mr. Moeser does not believe the Board should be establishing guidelines.

Ruth Silman, the chair of the Wind Energy Conversion Systems Committee, a sub-committee of the Planning Board, was present. Ms. Silman stated the committee is researching the different types of wind turbines, educating the public and compiling other Town's bylaw on wind turbines in hopes the Planning Board will present a Bylaw at the Annual Town Meeting in the spring. Ms. Silman stated the direction from the Planning Board was wind turbines as an accessory use to residential, agricultural or commercial properties.

Joe Sudol, was present as a resident of Town and not the Co-Chair of the Planning Board, stated the issue of an accessory use is a complicated issue that should have reasonable regulations to protect the safety and character of the town. Such regulations should consider the clearance of the blades, the fall zone, over speed controls, noise, safety compliance with uniformed safety codes, building codes, the color and reflectivity of the blades, abandonment and decommissioning plan.

Attorney Lanza stated the amount and type are different on exempt uses as to those on a residential use. The Board does not have the legal right to place conditions on an exempt use.

Al Combs, a member of the Agricultural Advisory Commission, stated a Right-to-Farm Bylaw was passed by the Town two (2) years ago. Mr. Combs believes that some where along the line he read that agricultural regulations require a structure to have a fall area that is contained to the property the structure in on.

Steve Strong, of Renewable Energy Systems, stated there is confusion between kilowatts and kilowatt hours (KWh). KWh is the actual output.

John Sweeny, an abutter of Mr. Nigzus, stated he has done a large amount of research on wind turbines. Mr. Sweeny is concerned with the requirement that Mr. Nigzus determines his income as a farmer. Mr. Sweeny added it is also hard to classify what the energy is used for. Mr. Capobianco clarified the Board is looking for a percent (%) made not an actual amount, since M.G.L. Chapter 40A §3 requires that twenty-five (25) % of the sales be that of products produced on the property. Mr. Sudol stated that without any regulations anyone can build a turbine for their farm without any restrictions. Mr. Dodson stated that Chapter 40A §3 does allow the Town to have reasonable restrictions.

Paul Willard, a resident and farmer in Town, stated that it is his understanding the proposed wind turbine bylaw will be primarily residential and not agricultural based. This property is clearly agricultural use.

Gerry Palano, of the Department of Agriculture, explained the process taken in supporting the erection of this device. The letter sent by the Department states that they believe that the structure will be an accessory use.

Mr. Capobianco asked what the life span of the turbine is and what is the time frame for pay back of the turbine. Mr. Nigzus stated the life span is twenty (20) years and the pay back with tax rebates is eighteen (18) years. Mr. Capobianco asked how many electrical meters are on the property. Mr. Nigzus stated there are two (2), but that only the primary one will be tied into the turbine.

Mr. Tracey asked the members if they were comfortable with the information provided that this structure will be a primary accessory use. Members stated that they were. Attorney Lanza stated if the Board is confused with the difference between kilowatts and

kilowatt hours maybe they should consult someone how does. Peter Basile, a resident, asked where the issue was. Mr. Tracey stated the Board would like to know if the size is appropriate. Mr. Tracey asked if the Department of Agriculture could submit a letter that clearly states that this wind turbine as an accessory use is appropriate at this size. Mr. Basile asked if once this letter is received would the Board be satisfied. Mr. Tracey stated they would.

The letter dated October 19, 2007 from the Department of Agriculture was reviewed by Attorney Lanza. Attorney Lanza stated the wording within that letter is not a conclusion that it is an appropriate use. Mr. Tracey asked Mr. Nigzus if all of the information submitted to the Board was also conveyed to the Department of Agriculture. Mr. Nigzus stated and Mr. Palano confirmed that all of the same information was reviewed at the State level. Mr. Tracey stated then he was satisfied.

Mr. Nigzus submitted an affidavit stating twenty-five (25) % of the products produced by his farm are sold. Ms. Silman stated that Chapter 40A §3 clearly states this is an exempt activity and once the property no longer remains in agriculture then and enforcement order can be issued for the removal of the system.

Robert Capobianco made a motion to close the evidentry portion of the hearing. Steve Moeser seconded the motion. The vote was unanimously in favor of the motion.

After a brief discussion Steve Moeser made a motion to allow the Administrative Appeal to be over turned and allow the construction of a wind turbine in accordance with all State buildings codes at 26 Madigan Lane. Robert Capobianco seconded the motion. The vote was, 3-0-0, unanimously in favor of the motion.

Signed: _____
Steve Moeser, Clerk