

**MINUTES
ZONING BOARD OF APPEALS
JULY 20, 2015**

The Board of Appeals met in Hale School Auditorium to continue two hearings that opened on July 6th, 2015 at Stow Town Hall. Members present were Edmund Tarnuzzer, Charles Barney, William Byron, Bruce Fletcher and Mark Jones (associate). Also present were Town Counsels Jonathan Witten and Barbara Huggins.

Albright – Crow Island: At 7:30 p.m. the hearing continued from July 6th and July 13th was opened on the the Appeal From Unfavorable Action of the Building Commissioner filed by **Robert Albright, Trustee of Crow Island Realty Trust, 84 Boxboro Road** concerning a cease and desist order related to the existing landing field at **Crow Island off Track Road**. The property contains 1,299,394.8 sq. ft. and is shown on Stow Property Map R-23 as Parcel 3.

Board members present: Edmund Tarnuzzer, Charles Barney, William Byron, Bruce Fletcher, Mark Jones (associate)

Mr. Tarnuzzer chaired and read the notice of hearing as it had appeared in the *Beacon Villager* on June 18 and June 25, 2015. The hearing notice had been forwarded to all abutters by certified mail, return receipt. Applicants Robert and Annette Albright were in attendance and were represented by Attorney Julie Barry of Prince Lobel. Also present were Town Counsels Jonathan Witten and Barbara Huggins.

Mr. Tarnuzzer opened the proceeding by introducing the Board members. He noted the Board had heard almost all sides of the argument and asked if the applicant had more to present. Attorney Barry submitted a supplemental letter addressing some of the points that came up at the last hearing. In addition there were attached affidavits from various persons who provided letters and e-mails. Most attached a copy of the new letter attesting to the prior letter.

Mr. Albright said Crow Island was used for non-commercial purposes and is a pre-existing, non-conforming use before the 1982 zoning bylaw amendment. He attested to use of the Island from 1978.

Ms. Barry noted a letter from John Buckley, retired Army, who had worked at the former military annex adjacent to the Island. He said there was so much aircraft use that memos were issued to airmen of landings and take-offs at the Island. Other uses were cited. Ms. Barry said that letters were still coming in attesting to use of the property for recreational aircraft prior to 1982. She continued that Town Counsel had provided a memo addressing the pre-existing, non-conforming use. Evidence is the Island has been used continually since 1978 for non-commercial recreational purposes. It has been open to the public for all sorts of activity. Ms. Barry reminded the appeal is only of the cease and desist order of the Building Commissioner. The incorporation was only to protect the owners from liability. The huts on the property are not aircraft hangars. Section 3.9 says the use may continue so long as not abandoned or discontinued. The winter weather has no affect on flying. The Building Commissioner states no evidence of activity prior to 1982. It was an allowed use, so there is no reason why there would be anything in his file.

Ernest Dodd, speaking as a private citizen and not as a member of the Planning Board, said that since 1978 the bylaw permitted such use with site plan approval. Therefore, pre-existing, non-conforming use was not authorized and the pre-existing designation does not apply. Ms. Barry noted that site plan approval was required only for commercial use and not non-commercial use. In this case, there are no roads, no parking lots, no landscaping issues, etc.

At this point, Mr. Tarnuzzer announced that enough facts were before the Board. Town Counsel will be asked to provide advice. Ms. Barry said the applicant would be willing to grant an extension of time for the Board's decision if necessary.

Mr. Barney asked if it matters who owned the property prior to 1982. Ms. Barry replied that the use runs with the land and not the owner. It appeared to Mr. Fletcher that use began long before the bylaw. Mr. Byron did not believe there was recreational use by prior owner George Morey. He had an earth removal permit for construction of a pond. The applicant purchased the property in 1985. Ms. Barry said it did not matter that Mr. Morey owned the property at the time. The issue is that the recreation-conservation district provides that non-commercial activity is an allowed use in the district. That use runs with the land and has been consistent prior to the 1982 bylaw. She cited the letter of Mr. Buckley who submitted it on his own based on his recollection and signed under the penalties of perjury.

Town Counsel Witten said that his office has issued guidelines to the Board. If the Board finds for the applicant, it may overturn the cease and desist order of the Building Commissioner.

Member Jones commented there is no site plan approval, therefore it is non-conforming to the bylaw. Ms. Barry again pointed out that site plan approval was not required for non-commercial use. Mr. Albright said there is one ultra-light aircraft for instruction purposes but with no lessons given. There are no fixed-wing aircraft. Ultra-lights are of different size and weights.

At this point, Mr. Tarnuzzer announced the Board had heard enough testimony and suggested closing the hearing. Mr. Fletcher moved, second by Mr. Barney, to close the hearing. It was voted unanimously at 8:10 p.m. to close the hearing.

The Board will meet again to discuss and consider the testimony and facts submitted. The question to consider is that of pre-existing, non-conforming use prior to 1982. A copy of the bylaw prior to 1982 was to be obtained and reviewed. The Board announced it will meet on Monday, August 3, 2015 to discuss and vote its decision on the appeal. It was noted a decision on the appeal is due August 28th, 100 days from filing of the appeal with the Town Clerk.

The Collings Foundation – Robert & Caroline Collings: At 8:15 p.m. the hearing continued from July 6th and July 13th on the Appeals From Unfavorable Action of the Building Commissioner filed by **The Collings Foundation and Robert and Caroline Collings, 137 Barton Road, Stow** concerning denial of a request for reconsideration of a cease and desist order **and** denial of a request for stay of a cease and desist order as related to the existing airport and landing field at said address. The property contains 2,208,000 sq. ft. and is shown on Stow Property Map R-25 as Parcels 16A, 16B and 17.

Board members present: Edmund Tarnuzzer, Charles Barney, William Byron, Bruce Fletcher, Mark Jones (associate)

Mr. Tarnuzzer chaired and read the notices of hearing as they had appeared in the *Beacon Villager* on June 18 and June 25, 2015. The hearing notice had been forwarded to all abutters by certified mail, return receipt. Robert Collings was present with his attorney Thomas Mullen. Also in attendance were Town Counsels Jonathan Witten and Barbara Huggins.

Attorney Mullen referred to a memo from Town Counsel Huggins to the Board that a Land Court judgment protects the Town, and the cease and desist order is not rendered unenforceable under G.L. c. 90, s. 39B. He argued that is not the law of the land, but the opinion of a single Land Court judge and not binding on other Land Court judges, and until it is a statement from an Appeals Court or SJC. As regards the Zarrow case, the Building Inspector's decision then was based on that case and landings continued to

be permitted after 1982. The Building Inspector did not make a determination of non-conforming use. As regard the Collings Foundation, there is an accessory use issue. The articles of incorporation of the Foundation state it is a non-profit educational organization. That is required for Dover Amendment status. Since 1979 the museum use is educational.

At this point, Mr. Tarnuzzer interrupted Mr. Mullen and said the appeal is not involved with the museum or the Dover Amendment and not an issue before the Board. Mr. Mullen replied they are allowed under the bylaw and incidental to the principal use. Mr. Tarnuzzer countered it seems there is an attempt to confuse the issue.

Mr. Mullen said there is a prior non-conforming use. The museum is a living history with aircraft that need a place to take off and land. Also, a place is needed for pilots to obtain certification and retain it. Several affidavits were presented to the effect that in the four years prior to 1982 there was incidental but regular use by ultra-lights. The affidavit of Donald Rising was read that the Foundation has been involved in its educational Living History activities from its creation. The landing field was constructed in 1978 and doubled in length in 1984. Mr. Collings said that National Geographic is planning to come to the site this weekend. Mr. Mullen requested the Board stay the cease and desist order for this weekend only to allow the visit. He said the applicant is willing to sign any document to enable the use for the event. This was said to be the chance of a lifetime to show turn-of-the-century aircraft and horse-drawn stage coaches.

Mr. Witten reminded there is an order in place that the landing field activity is illegal. To honor the request for stay, the Board would have to conclude that it could grant a waiver after deliberation. The issue is the evidence and reasonable conclusion that the Building Commissioner was wrong. Mr. Fletcher suggested a stay until the next meeting. Mr. Jones noted that two-thirds of the landing field is within the residential district with one-third in recreation-conservation. There is not enough evidence to decide the Building Commissioner is in error. Mr. Mullen referred to Section 9.9 that any pre-existing use in any district may continue. Site plan approval applies only to commercial uses.

Several residents of Barton Road cited the noise from the events held on the property and disruption to the neighborhood. Also, a fence had been erected to prevent the public from using the property. Mr. Collings took issue with a statement that there are charges for flights and admission. Mr. Byron made some remarks attributed to something he had read for which Mr. Mullen took issue, prompting him to request that Mr. Byron recues himself as being biased to the applicant. Mr. Witten defended by saying that a Board member has the right to speak, based on evidence presented to him/her.

Ernest Dodd, speaking as a private citizen rather as a member of the Planning Board, noted the property is primarily zoned residential. Landing fields were not permitted except in the recreation-conservation district, and therefore not a pre-existing, non-conforming use. A copy of the earlier zoning bylaw was to be obtained.

Mr. Fletcher presented the following motion: I move that we issue a stay of the cease and desist order for a level of aircraft activity that could be considered pre-existing non-conforming, specifically occasional and infrequent landings and take-offs until our next meeting at which time we can deliberate further; and that we uphold the cease and desist order for any aircraft activity above and beyond that which could be reasonably considered pre-existing, recognizing that any substantive increase in intensity of use beyond occasional and infrequent, in the opinion of the Building Commissioner, requires appropriate findings by the Board in order to be approved, and the issuance of a Special Permit, if in fact the use can be determined to be lawful. There was no second to the motion.

Mr. Jones moved to close the hearing; second by Mr. Barney. Voted unanimously at 9:05 p.m.

The Board will meet on Monday, August 3rd to discuss and consider the testimony and evidence submitted toward decisions that are due to be filed no later than September 17th, 100 days from filing of the appeals with the Town Clerk.

Next Meeting: The Board will meet on Monday, August 3rd to consider and discuss testimony and evidence submitted regarding the two hearings. The meeting will begin at 7:30 p.m. with a hearing on an application for special permit concerning property at 2 Dawes Road.

Adjournment: The meeting was adjourned at 9:10 p.m.

Respectfully submitted,
Catherine A. Desmond
Secretary to the Board