MINUTES
ZONING BOARD OF APPEAL
AUGUST 3, 2015

The meeting was held in Hale School Auditorium and opened at 7:30 p.m. Members present were Edmund Tarnuzzer, Charles Barney, William Byron, Bruce Fletcher and Mark Jones (associate). Town Counsel Jonathan Witten and Building Commissioner Craig Martin were present. Also in attendance were Robert and Annette Albright with Attorney Julie Barry and Robert Collings with Attorney Thomas Mullen along with members of the public.

Robert T. Dawes Trust, Sarah Bailin, Trustee: At 7:30 p.m. a public hearing was held on the application for Special Permit under Section 5.2.2.3 of the Zoning Bylaw, "Water Resource Protection District", to allow additional sewage design flow within the WRPD at **2 Dawes Road.** The property contains 20,606 sq. ft. and is shown on Stow Property Map U-6 at Parcel 8.
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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 July 16 and July 23, 2015. The hearing notice had been forwarded to all abutters by certified mail, return receipt. No abutters were present. Mr. Tarnuzzer recited the criteria to be met for grant of special permit.

The applicant was represented by Richard Harrington of Stamski and McNary, Inc., Engineering, Planning, Surveying of Acton. It is proposed to raze the existing two-bedroom dwelling at the corner of Dawes Road and Sudbury Road and replace it with a three-bedroom dwelling. The site currently permits a two-bedroom septic design within the Water Resource Protection District. Mr. Harrington stated that the Board of Health has approved the new design that includes a Ruck System. A meeting with the Conservation Commission is scheduled for tomorrow evening on a Notice of Intent. The plan was revised as of July 27th to move the septic system further back on the property and away from the lake. The Ruck System pre-treats sewage to provide enhanced nitrogen removal to permit the additional bedroom design flow. The system will be maintained over time and inspected as it moves forward. An approved operator will inspect and report to the Board of Health. The three-bedroom design will have a deed restriction. Mr. Harrington described the Ruck System process that includes three effluent tanks for treatment of 330 gpd.

Mr. Tarnuzzer commented that if the Board of Health had given approval of the proposal, he had no problem with the grant of special permit.

The hearing was closed at 7:45 p.m.

Following the close of the hearing, Mr. Fletcher moved to grant the requested special permit; second by Mr. Barney. The vote was unanimous in favor.

The Collings Foundation – Robert & Caroline Collings: Chair Tarnuzzer opened the discussion of the appeals of the applicants concerning the cease and desist order issued by the Building Commissioner. He stated the discussion is limited to the cease and desist order and nothing else. In June 1982 town meeting action removed from the Zoning Bylaw the allowed use of airports and landing fields in all districts. Testimony at the hearing on the appeal indicated that hot air balloon and ultra-light activity on the property was intermittent. The property is mostly within the Residential District with a small portion in the Recreation-Conservation District. The bylaw in effect prior to 1982 (Section VI B.2.) required site

plan approval from the ZBA for non-commercial recreation including golf courses, etc., and any other non-commercial recreation use. No site plan was applied for nor granted. In 1984, according to Conservation Commission meeting minutes, there was land clearing for a tree farm and possible cattle-raising.

Mr. Tarnuzzer continued. Building permit records indicate a building permit was issued to Mr. Collings for a $50,000 barn. In 1979 there was a permit issued for a $76,000 addition to the existing barn. In 1985 a permit was issued to add a $250,000 to $300,000, 150x150x150' barn that became an airplane hangar. In 1984 Mr. Collings registered with MAC a non-commercial private use landing field under the name Riverhill Farm. This represents the first time a landing field was mentioned. Assessor records indicate several parcels of the property were placed under Chapter 61B Recreational Land for tax purposes and have been so classified as such since FY89.

Mr. Jones referred to the "Dover Amendment" as it relates to the museum operation.

Mr. Fletcher felt a pre-existing use was established, however site plan approval was neither sought nor granted. Recreational take-off and landing did not require site plan approval. For construction of a landing strip, site plan approval would be required. It did not seem to Mr. Fletcher that site plan approval was required to land a plane. It appeared logical to him that there was intermittent use for recreational landings before the bylaw change and it could be allowed to continue if site plan approval was applied for and granted for that recreational use. Perhaps an application could be filed for the Recreation-Conservation District. Mr. Fletcher said he was attempting to determine the district lines as had been created with the 1968 bylaw, but admitted it would be difficult.

Mr. Tarnuzzer said the original property was within the Residential District rather than Recreation-Conservation. Is that the understanding? Was expansion to the north or to the south in the Rec-Cons District? Mr. Fletcher noted that with permits issued over the years by the Town, it appears the situation was allowed to continue and established a pre-existing use in the Rec-Cons District. He said he would like to find a compromise to allow some occasional aircraft use with site plan approval. The Building Commissioner could have taken due consideration with regard to a "stay" offering a 30-day window to get affairs in order before execution of the order. Now planes cannot be flown out for inspection. It seemed to Mr. Fletcher that a compromise was in order.

Mr. Barney noted there was evidence of use prior to 1982, but he felt the cease and desist should stand. Mr. Fletcher reminded the use cannot be allowed within the Residential District and suggested a split decision. There had been a suggestion that a zoning bylaw change could solve the problem, but that does not appear likely. Mr. Tarnuzzer pointed out it is difficult to separate the Rec-Cons District from the Residential portion. The 1982 amendment did not allow landing fields in the Residential District, therefore such use does not have status as a pre-existing use in that district.

Mr. Fletcher continued the discussion between construction of a landing field and occasional landing and take-off. The bylaw was intended to address construction of airports and landing fields for occasional purposes. It does not make sense that site plan approval was required for that. He would like confirmation that expansion of the airfield was in the Rec-Cons District.

Mr. Jones did not feel that made a difference. It was not an allowed activity. Mr. Fletcher disagreed. Site plan approval was related to construction for the purpose in the Rec-Cons District. Mr. Tarnuzzer pointed out that the bylaw does not talk about construction, only use. Mr. Fletcher questioned the definition of "use" that he felt was open to interpretation. Mr. Jones added that "use" is defined in the 1968 bylaw with no mention of commercial or non-commercial. Mr. Tarnuzzer believed the bylaw referred to commercial uses.

Town Counsel Jonathan Witten entered the discussion and said the Board must determine whether the applicant has demonstrated that the use was lawful. At the time of the use, was it lawful? It cannot be made lawful after the fact. If it were lawfully in existence when the bylaw changed, it would be such now. There is no distinction between commercial and non-commercial. That is a question for another day. The interpretation of the bylaw is up to the Board. With regard to the difference between use and structure, use is an activity. There are uses that do not require permits. If the Board made an interpretation of its own bylaws, a court will allow that interpretation.

Mr. Tarnuzzer summed up. Prior to 1982 there was a field used for intermittent take-offs and landings. That was not allowed in the Residential District. There was a pre-existing use, but not legally. He asked if the Board wished to continue the discussion.

Mr. Fletcher said the applicant admitted there was recreational use, and it was discovered there had been activity prior to 1982. The facts of the matter have been updated.

Mr. Barney moved that the Board uphold the Building Commissioner's cease and desist order that a pre-existing use of the land was not lawful. Second by Mr. Jones.

Discussion: Mr. Fletcher did not believe both districts were involved. It was an allowed use in the Rec-Cons District even if site plan approval would have been required for continued use.

When Mr. Barney's motion was put to a vote, members Tarnuzzer, Barney, Byron and Jones were in favor and member Fletcher was opposed. Motion carried.

Mr. Witten reminded the decisions on the two separate applications for appeal of the cease and desist order are due to be filed with the Town Clerk by September 17th.

This portion of the meeting concluded at 8:45 p.m.

Robert Albright – Crow Island: Mr. Tarnuzzer opened the discussion by stating that the Crow Island matter is a bit different then the previous discussion (Collings). The 1968 zoning bylaw created the Recreation-Conservation District. Any non-commercial recreation use was permitted. It was his opinion that site plan approval for airports and landing fields referred to commercial operations. Crow Island is within the Recreation-Conservation District and was owned by George Morey who operated a sand and gravel business on the property. He gave permission in the late 70's to Mr. Albright and others to use the property for take off and landings of ultra-light vehicles, a non-commercial use. In 1982 the allowed use of airports and landing fields were removed from the bylaw in all districts. There is enough evidence that ultra-lights preceded the 1982 amendment. Mr. Albright purchased the property in 1985. In 2007 a permit was granted for a 52'x80' Quonset-type structure to house equipment and ultra-lights. The Planning Board issued a special permit in 1992 for commercial recreational uses on Crow Island specifically prohibiting taking off and landings of aircraft for commercial purposes. Mr. Tarnuzzer believed the definition of "use" referred to commercial operations.

Mr. Byron took issue with definitions. Day camps, country clubs, etc. could be commercial in intent. He felt that a reasonable bylaw had been created at the time by reasonable people who could not envision ultra-light vehicles. Mr. Fletcher believed the use was clearly established and the activity was lawful. To require site plan approval did not seem logical solely for the purpose of landing ultra-lights. The intent of the bylaw seemed to apply to commercial activity. Mr. Tarnuzzer said one cannot overlook that the bylaw addressed commercial uses as well as "any non-commercial recreation use". The people who wrote the bylaw were making allowances for other non-commercial uses. The intent was that commercial

operations would be subject to site plan approval. He did not believe it was the intent of the original bylaw to limit certain uses.

Mr. Jons felt that other uses listed in the bylaw required site plan approval. There was no such review in tis case, therefore no vested right.

Mr. Fletcher noted the use has been open and continuing. Permits were issued for uses and construction on the property with knowledge that non-commercial ultra-light activity has been conducted. It has continued and pre-dates the 1968 bylaw. Mr. Tarnuzzer added the ultra-lights were there since the 1968 bylaw was written.

Mr. Barney commented that this discussion makes it difficult to uphold the previous discussion (Collings). Mr. Tarnuzzer replied that in this case a non-commercial recreation use is allowed within the Recreation-Conservation District as a permitted use. Would the Board consider requiring the applicant to submit a site plan approval application? We can establish it is a pre-existing non-commercial activity. Mr. Jones repeated there was no site plan approval and no permitted activity when the bylaw changed. It was not an allowed activity no matter if it was non-commercial.

Mr. Tarnuzzer asked if the Board would make a finding that ultra-lights flew in and out prior to 1982. The Building Commissioner made his decision, and now it is up to this Board to decide. Mr. Fletcher commented that everything is open to interpretation.

Mr. Witten pointed out that the Board is not held to precedent. If the Board finds activity prior to the bylaw change, it may find the Town presumed the activity to be lawful. There is a fine line. The Board could interpret the site plan review liberally. Mr. Witten believed the Board could be liberal and equitable in its interpretation. Mr. Byron felt that if the Board finds that the recreational activity was pre-existing, there should be some sort of sanction for the activity. Mr. Tarnuzzer replied that site plan approval would have addressed any concerns. Conditions would have been issued.

At this time Mr. Tarnuzzer asked if the Board was ready to come to a decision. Mr. Fletcher felt that site plan approval was still an open issue. If it is now required, it should be under the then existing requirements. Mr. Witten pointed out that at that time the Building Inspector was to review site plans. There is no site plan requirement at present as the use is not allowed. An approved plan would be placed on file.

Mr. Barney moved to overturn the Building Commissioner's cease and desist order because the use is and has been recreational. Second by Mr. Fletcher. The vote was three in favor (Tarnuzzer, Barney and Fleltcher) to two opposed (Byron and Jones). The motion did not carry by a required 4 to 1 vote.

Mr. Fletcher then moved to reconsider and rescind the prior vote; second by Mr. Barney. The vote was three to two and declared carried by majority.

Mr. Jones moved to adjourn the meeting to another date for further consideration. There was no second.

Mr. Fletcher proposed the Board overturn the cease and desist order based upon the evidence of pre-existing non-conforming use and require the condition that the applicant meet site plan approval in light of the fact there is still the question of site plan approval being required at that time.

Mr. Fletcher then moved to overturn the Building Commissioner's cease and desist order and require the applicant to meet site plan approval with conditions. Second by Mr. Barney. The vote was four in favor (Tarnuzzer, Barney, Byron, Fletcher) to one opposed (Jones). The motion carried.

Mr. Witten reminded that the Albright-Crow Island decision is to be filed with the Town Clerk by August 28th.

The meeting was adjourned at 10:05 p.m.

Respectfully submitted,
Catherine A. Desmond
Secretary to the Board