

TOWN OF STERLING
ZONING BOARD OF APPEALS

Minutes of Meeting

DATE: November 12, 2013
TIME: 6:30 pm
LOCATION: Butterick Municipal Building

Board Members Present:

Joe Curtin, Jeffrey Donaldson, David Lozier, Richard Hautaniemi

Alternates Present:

Jerry Siver

Agenda:

- **6:30 pm Discussion of Minutes**
- **6:35 pm Case #626 Kevin Prest - Special Permit**
[Special Permit for purposes of a basement in-law apartment on property 8 Cole Road in Sterling]
- **7:05 pm Case #627 Jeffrey Robinson et al - Administrative Appeal**
[Administrative Appeal to the order of the Zoning Enforcement Officer on property 228 Leominster Road in Sterling]
- **7:35 pm Case #628 Martha Hawley - Administrative Appeal**
[Administrative Appeal to protest zone violation with respect to the Favreau Forestry LLC on property 95 Chace Hill Road in Sterling]
- **8:05 pm Case #629 Martha Hawley - Administrative Appeal**
[Administrative Appeal to protest zone violation with respect to the L. R. Favreau Septic on property 95 Chace Hill Road in Sterling]
- **8:35 ZBA Business**

[Also other issues to be discussed may include: Budget, Bills, Administrative issues, Memos, Comments from the Public]

Proceedings:

- Mr. Joseph Curtin opened the meeting with a roll call. Present: *Mr. Joseph Curtin, Mr. Jeffrey Donaldson, Mr. Richard Hautaniemi, Mr. Jerry Siver and Mr. David Lozier.*

- **6:30 pm** Mr. Donaldson moved to defer discussion of the minutes until the end of the first case. Mr. Siver seconded. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0
- **6:31 pm** Mr. Curtin opened the hearing for Case #626, Kevin Prest who requests a special permit for an accessory apartment at 8 Cole Road.
 - Mr. Curtin opened the floor for the applicant, Mr. Kevin Prest.
 - Mr. John Canty, Contractor for the applicant, introduced himself.
 - Mr. Curtin explained that the bylaw regarding an accessory apartment was formulated 2-3 years ago and is very specific. Mr. Curtin asked Mr. Canty to give the Board an overview of his plan.
 - Mr. Canty gave a summary of his plans for a basement accessory apartment in the existing house at 8 Cole Rd.
 - Mr. Donaldson voiced a concern that the plan shows square footage to be in excess of what the by-laws allow for an accessory apartment. (800 s.f.)
 - Mr. Canty agreed to reduce the floor living space to the required 800 s.f.
 - Mr. Mark Brodeur, Building Inspector, noted he would review the revised plan showing the square footage to be 800 s.f. or less before issuing a building permit. That plan will become part of the file and permanent record. Inspections would confirm the same.
 - Mr. Curtin asked if there were questions from the Board. There were none.
 - Mr. Curtin asked if there were questions from the audience.
 - Mr. Jim Decker, neighbor of the petitioner, inquired if an accessory apartment could someday be rented out to someone other than family.
 - Mr. Donaldson noted there is no law stating the tenant must be related to the homeowner.
 - Mr. Curtin added that it is required the homeowner be the principal resident of the property.
 - Mr. Curtin closed the public session of the hearing.
- **6:44 pm** Mr. Donaldson moved and Mr. Lozier seconded the motion to grant the Special Permit with the stipulation that a corrected plan be submitted to the Building Inspector showing the apartment floor area will not exceed 800 s.f. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0
- **6:50 pm** Mr. Richard Hautaniemi moved to approve the minutes of August 13, 2013 as presented. Motion was seconded by Mr. David Lozier. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0
- **6:51 pm** Mr. David Lozier moved to approve the minutes of September 10, 2013 as presented. Motion seconded by Mr. Jeffrey Donaldson. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0
- **6:52 pm** Mr. Jeffrey Donaldson moved to approve the minutes of October 8, 2013 with one correction. Motion seconded by Mr. David Lozier. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0
- **7:05 pm** Mr. Curtin opened the hearing for Case #627, Administrative Appeal of Jeffrey Robinson et al
- Mr. Curtin opened the floor for the applicants.

- Attorney Donna Truex, representing the petitioners, stated that the petitioners request the Zoning Board take action against the owners of 228 Leominster Road to cease the use of the property as a car show venue. Ms. Truex added that the restaurant status of the property use has lapsed and the new proposed use as a function hall is not a permitted use and requires a Special Permit and Zoning Board approval. The petitioners are abutters to the property and are interested in the use of the property as it impacts the use and enjoyment of their own properties. The testimony of the petitioners show the impact of excessive noise, safety concerns, and increased traffic congestion created by the car show use. The use is not confined to the property and extends well beyond its boundaries. The property's current use is commercial in nature. It is not a permitted use in a Rural Residential Farming zone. According to §2.2.1 of the zoning bylaw, uses not permitted are prohibited. The use cannot be considered an "accessory" because there is no other use for the property. In violation of the zoning bylaw and the building code, the owner constructed a gazebo, a shed and placed a trailer on the property without obtaining proper permits and approvals. Owner intends to construct a function hall for which they have not applied for a Special Permit from the Zoning Board for a change in use. The abutters contend that the time period has lapsed for pre-existing non-conforming use. Also, the transition of the property from restaurant to a car show venue or function hall is not permitted as a changed use.
- Ms. Truex invited the abutters to make statements about the impact this has to their property.
- Maureen Robinson, 8 North Row Rd noted the volume of the music and noise made conversation impossible. Meeting with the owners brought no relief of noise control.
- Jean Gabriel, 4 North Row Road expressed concern about property value, the loud noise and having strangers wandering the emergency access road invading privacy.
- Jay Westbrook, 4 North Row Road voiced his concern that with no bylaw changes, the property no longer meets the *Rural Residential Farming* zone requirements .
- Jim Diperri, 10 North Row Road stated that due to the volume of noise it is necessary to leave his premises every Saturday.
- Paula Diperri, 10 North Row Road is not understanding why a commercial use is being allowed in a residential zone. Noise level is unbearable.
- Attorney Truex: Testimonial letters of support from absent abutters were presented to the Board for review.
- Mr. Curtin requested Mark Brodeur, Building Officer, give a summary of his familiarity of this case and his subsequent correspondence.
- Mr. Brodeur indicated the use of the property as a restaurant is still in play. The applications for building permits are well within the 2 year limitation of that use being discontinued. So the issuance of a building permit is still in play. The Police have said they are getting a lot of calls from abutters but nothing they can act on because there are no violations, including no "excessive" noise. The previous owner had car shows, cooked and sold food, ran it as part of his business and nobody objected. The first complaint received by the Building Dept. was after the property was sold. There is nothing to indicate that it is a non-permissible business activity.
- Attorney William Hays, representing the property owner, summarized the facts presented. Car shows ended in September. The use of the property is a protected existed non-conforming use. The restaurant was started in 1903 and has been used that way ever since. Prior owner operated the restaurant from 1996 - 2012. The restaurant functioned in the summer 2012. FISHCO purchased the property at a foreclosure sale in September 2012. The Sterling Fire Dept burned the building as a training instrument in February 2013. FISHCO applied for a building permit for a function facility.

On October 9, the Planning Board approved their site plan. Once they receive the building permit, construction will begin on the new facility. It is well within the 2 year period. Over the years the restaurant has existed, there have been numerous accessory functions. There is nothing different now. It is clearly a pre-existing non-conforming use. It is currently a commercial use as a restaurant and will continue that use because it is grandfathered.

- Former owner, Terry Heinold, 8 Pratts Junction Road gave a history of the restaurant's existence and use from 1903 through the summer of 2012. Mr. Heinold also reviewed the history of his ownership and use of the property. He stated the purpose of accessory uses were to promote business, which the car shows did. Mr. Heinold maintained the licenses and state required annual inspection for tax benefits after the property was sold. The new owner, Mr. Fisher, needed the annual certification to obtain all his other licenses. The grandfathered use of the property is good through 2014.
- David Fisher, 3 Elizabeth Lane, present owner, stated one of the reasons he purchased the property was because of the grandfathered pre-existing non-conforming use status. The non-profit car shows were held to promote future business. The Planning Board approved the project on 10/9/13. An Order of Conditions for the building is pending. An application for a building permit has been filed for the function hall. Mr. Fisher discussed the issues of the neighbors.
- Mr. Donaldson inquired as to how many days per week the car shows were held. The answer being 1 (4 hours on Sat. afternoon).
- Attorney Truex noted that car shows are an expansion of the non-conforming use as a restaurant. A Special Permit should have been required by the Board in order to hold the car shows, as it ended being a restaurant in 2011. This was a change of use that did not come before the Board for a Special Permit. Although the Town of Sterling has no noise ordinance, zoning by-laws still need to be respected. The uses in a residential neighborhood are restricted for purposes of protecting the integrity of the neighborhood, including noise.
- Jeff Robinson, 8 North Row Road conveyed the history and his involvement with the car shows.
- Maureen Robinson, 8 North Row Road reported that as long as the town allows a car show, the Police will assess the noise level as such, and *not* as a residential neighborhood.
- **8:00 pm** Mr. Curtin closed the public testimony and opened discussion among the Board Members.
- The Board agreed there are two issues at hand, that of the noise level and whether a use change has occurred.
- Mr. Donaldson questioned the matter of right connected to the assumed grandfathered use as a restaurant? Since change of ownership, the use went from 12% to 100% for the car shows. Now it becomes the principal use. The by-laws indicate it could be considered a commercial, recreational or sports facility or it could be a non-profit social recreational club. Our bylaws specify a Special Permit is required to change the principal use to a non-profit social recreational club in a *Rural Residential* zone. Public policy then says when you come before us for a Special Permit we can impose restrictions on it.
- Mr. Siver suggested that this is all past history so even if we deny them the car shows, everything changes once they get the building ready for next year.
- Mr. Curtin reminded the Board they have 100 days to decide on this. He suggested the two representing attorneys follow-up their findings of facts in writing for the Board. After review of the written rebuttals, the Board would be better prepared to respond to the issues presented.

- Mr. Donaldson would like the counsels to address the confusion about the grandfathered use. If a non-profit would be required to obtain a special permit, then it should apply here as well.
- Mr. Siver again suggested the circumstances will be completely different in 9 months because then it will not be a non-profit entity.
- Mr. Hautaniemi would like to see both sides suggest how to alleviate the noise problem.
- Mr. Donaldson queried whether it is a noise complaint or an inappropriate use for the zone.
- Town Counsel, Mr. Stanley Weinburg, noted that the restaurant which was in existence for decades, clearly preceded the establishment of zoning in Sterling and therefore is a pre-existing non-conforming use. A second issue is that the car shows which began in 2010, are *not* a non-conforming use issue. The issue is *are the car shows permissible?* The noise issue is irrelevant. The *use issue* is the matter before you. Can car shows be considered a permissible or non permissible expansion of restaurant use?

8:20 pm Mr. Siver moved to continue hearing this case to December 10, 2013. Mr. Donaldson seconded. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0

8:26 pm The two cases involving 95 Chace Hill Road were continued to the December meeting due to a quorum deficiency. Mr. Donaldson moved to continue both hearings to December 10, 2013. Mr. Siver seconded. Motion carried. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0

8:36 pm Motion was made and seconded to adjourn. All in favor. Yeas: 5 (*Richard Hautaniemi, Joseph Curtin, Jerry Siver, Jeffrey Donaldson, David Lozier*). Nays: 0

ZBA Business

- The Board acknowledged this was Naglaa Elshamy's last meeting with the ZBA and thanked her for her ten years of service and assistance.