

TOWN OF STERLING
ZONING BOARD OF APPEALS

Minutes of Meeting

DATE: December 10, 2013

TIME: 6:30 pm

LOCATION: Butterick Municipal Building, Room 205

Board Members Present:

William Bird, Richard Hautaniemi, Joseph Curtin, Matthew Campobasso, Jeffrey Donaldson and David Lozier

Agenda:

- **6:30 pm Discussion of Minutes**
- **6:35 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]
- **7:05 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]
- **7:35 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 pm ZBA Business**
[Also other issues to be discussed may include: Budget, Bills, Administrative issues, Memos, Comments from the Public]

Proceedings:

6:33 pm - Chairman William Bird opened the meeting with a roll call. The presence of *William Bird, Richard Hautaniemi, Joseph Curtin, Matthew Campobasso and Jeffrey Donaldson* established a quorum.

- Chairman Bird and Matthew Campobasso were not present at the November hearing. Therefore, their votes were based on their knowledge of the cases according to the content of the November minutes.

6:35 pm - Discussion:

- Mr. Curtin made a motion to approve the November 12, 2013 minutes with corrections. Mr. Donaldson seconded. There being no further discussion, the motion carried. Three to zero in favor.
- Chairman Bird established rules re quorums. After a case is heard, a motion will be made and seconded, then a vote will be taken so a case will *not* remain open or unresolved. The two Board Members, not being present at the November meeting, will rely on their review of the minutes and other discussion. There being no objections on either side regarding the two Board Members hearing their case and voting on it, the Chair opened the hearing for Case #627.
- [Board Member, Mr. David Lozier, arrives.]
- Mr. Curtin reviewed the November meeting re this case: Both sides presented their cases and public testimony was heard. Once the public portion of the hearing closed, a continuance of the case was granted so both parties could submit written rebuttals, which the two counsels have done.

6:39 pm Chairman Bird re-opened the public hearing for Case #627 Jeffrey Robinson et al -

Administrative Appeal to the order of the Zoning Enforcement Officer on property 228 Leominster Road in Sterling.

- Attorney Donna Truex, representing the petitioners, noted that the facts and evidence are represented in the briefs submitted to the Board. Atty. Truex added the restaurant use was stopped in January 2011 and only functions continued after that. This is a change of use and not permitted. This does not extend the 2 year period of time for a re-establishment of a non-conforming use. Also, the addition of a car show as an accessory use or a primary use is either an extension of that non-conforming use or a change which is not permitted.
- Mr. Hautaniemi inquired as to how counsel determined the restaurant was closed in January of 2011.
- Atty. Truex responded the testimony of the prior owner, Terry Heinold, evidenced the restaurant use ceased in January and only functions were held from that date forward.
- Mr. Lozier inquired if the testimony stipulated that the prior owner officially stopped operating as a restaurant or that business was very slow? Did Mr. Heinold abandon the opportunity to re-open it?
- Counsel responded that Mr. Heinold had ceased his operation of a restaurant for 2 years.
- Several Board Members gave witness they had dined there on several occasions after January 2011.
- Chairman Bird recognized Attorney William Hays, representative of *Fishco*, (the current owner).
- Mr. Hays maintained that the previous owner, Mr. Heinold, produced meals tax slips for May, June and July of 2012 and testified that he closed in July 2012. *Fishco* purchased the property in September 2012 and applied for a building permit in July 2013 (1 year after its use as a restaurant). They would have built easily within the 2 year period to continue the use which was a pre-existing non-conforming use, as stated in the letter dated August 27, 2013 from the Building Inspector.
- Chairman Bird recognized the Building Inspector/Zoning Enforcement Officer, Mark Brodeur. Mr. Brodeur determined that the 2 year time limit had **not** expired. The application for the building permit was well within the time frame. Both the testimony and the use is clear. As far as the other questions involved, we have no by-law regarding noise. The car shows are being viewed as being one of the functions held by the restaurant.
- The Chair invited comments from the floor.
- Maureen Robinson, an abutter to the property in question, stated that a car show is a function and different from a restaurant and should be prohibited on a residential lot.
- Jeanne Gabriel, also an abutter, voiced her discontent about the deception of the access road being for emergency use only.
- Eileen Fitzpatrick, also an abutter, noted the access road is intended for availability during an emergency, however, it has been blocked since the sale of the property.
- Mr. Donaldson stated the Board has not been presented with any documentation regarding any restriction for the access road so this does not fall within the Board's purview.
- Mr. Lozier concurred the road issue was irrelevant to this case.
- Mr. Curtin noted the focus should remain on the abutters appeal of the decision of the Building Inspector.
- Attorney Truex maintained the issue is whether the primary use of the property is that of a restaurant. There are incidental and accessory uses being made, one being a function hall and one being a car show. A car show is an expansion of a primary use. As for the function hall, when there is no restaurant the function hall becomes a primary use and that becomes a change in use.

7:00 pm - Chairman William Bird closed the public hearing.

Discussion:

- Mr. Hautaniemi noted the necessity to establish the primary use and/or accessory use.
- Mr. Curtin indicated there is no definition in our bylaws for a banquet hall, only "restaurant". Mr. Curtin, Mr. Hautaniemi, Mr. Lozier and Mr. Bird opposed the concept of the abandonment of use due to personal experience, having dined there in 2012. Although the property is zoned *Rural Residential and Farming*, there are certain rights afforded to pre-existing non-conforming uses and structures. Research shows our zoning *does* regulate *parking*. Once the Planning Board addresses the application for a *Banquet Facility*, the amount of parking will be established by the size of the facility. Is parking accessory to having a restaurant?
- Mr. Hautaniemi questioned what is accessory to a non-functioning restaurant.
- Mr. Lozier maintained the use is effectively still alive. The intention has always been to be a continuation of the historical use.
- Mr. Bird noted car show use is generally to bring business to some location. Mr. Heinold utilized car shows to generate business. As far as the noise and nuisance level, the police chief did not feel it was problematic.
- Mr. Donaldson remarked that the property is zoned RRF and a restaurant is *not* allowed in this zone. The grandfathered use should be the focus. The operation was one of a restaurant long before zoning bylaws were imposed and, as a matter of fairness and public policy, the zoning bylaws allowed ongoing use. So, as a matter of right, it is allowed only because of the grandfathered use. The grandfathered use is *not* before the Board to make a decision tonight. We are well within the 2 year time frame. The proposed use as a function hall is also not before the Board because Fishco is in the process of obtaining permits. Sterling's bylaws indicate the function hall may be acceptable because although we have a definition of a *restaurant* which may apply here, but the matrix chart actually reads, "*restaurant, service of food or alcoholic beverages*". So, even if it does not fall within the definition of a "restaurant", per se, because of that break (with the comma), if you are serving food and alcoholic beverages, does it fall within the same use? The restaurant is the primary use. What is the use now? It seems the car show became the primary use with the previous owner and that is not allowed. According to our bylaws, it appears Terry crossed a line which would have required a Special Permit. There are Special Permit provisions in a RRF zone for a *commercial recreation or sports facility* and also for a *non-profit social recreational club*, if they went the non-profit route. Once that line has been crossed, it becomes a Special Permit issue and a Special Permit would be required. At that point, the Board would have abilities to impose restrictions on the use. Mr. Donaldson views this case as an improper expansion of the accessory use which has now become the primary use of the property and the owner should have asked the ZBA for a Special Permit. Mr. Donaldson disagrees that it should be considered an historic grandfathered use.
- Mr. Lozier argued if you have a non-operating business in the grandfathered period and demolish a building, you cannot make any revenue from your business while it is in the permitting stage. Any restaurant use is incapable of serving meals while rebuilding.
- Mr. Donaldson refuted if a restaurant is non-operational and *that* is the grandfathered use, then it should *not* be permissible to do something else on the property. At that point, the zoning bylaw should dictate what should be allowed.
- Mr. Lozier suggested if you are within the window of time while you are rebuilding, it is alive in principle even though it is not alive in presence.
- Mr. Curtin re-established that parking then becomes an accessory use.
- In disagreement, Mr. Donaldson argued it is the *activity* that surrounds the parking. A stricter view would be to return to the concept of accessory uses and say having a car show really is an accessory use to having a restaurant. It is beyond what having a restaurant is and because this is a grandfathered use, because we are in a RRF zone as opposed to a commercial zone, we should consider taking a more

restrictive view of the definition of a restaurant because it is a grandfathered use. For a time, it operated as a restaurant before zoning was established. Then it became grandfathered because that is how it had been functioning. If it was just a restaurant then *that* is the grandfathered use.

- Mr. Lozier mentioned there have been many social functions during the history of the restaurant. I think we are creating an arbitrary concept of an historic use.
- Mr. Hautaniemi contended that social functions are directly related to the interior of the restaurant.
- Mr. Curtin researched zoning information which reasoned if it is a pre-existing non-conforming use the principles of being more detrimental, less detrimental should apply. These principles are called the *Powers Test* and have three criteria. One would apply the criteria to the use to come up with a determination. It still leaves it open-ended how to determine what is more or less detrimental to the neighborhood.
- Mr. Hautaniemi noted the purpose of our bylaws is to protect the owner of the business and to protect the neighbors and that should be the goal.
- Mr. Bird questioned if the issue was an *extension of use*.
- Mr. Donaldson queried if it was an *extension of an allowed use* or an *expansion of a use accessory to an allowed use*?
- Mr. Curtin sensed it was not the *allowed use*, rather the *grandfathered use*.
- Mr. Bird questioned if it were an *allowed grandfathered use*?
- Mr. Curtin asked for and received confirmation from the Chair that the vote would be whether or not to uphold the order of the Building Inspector.
- Mr. Campobasso called attention to what the use was when the zoning bylaw came into effect and what the current use is.
- Mr. Hautaniemi suggested perhaps the current use and the use just prior to being auctioned.
- Mr. Curtin believes definition would be added to the bylaw by defining accessory. The 3 criteria that determine use are: 1) *Was the nature and the purpose of the non-conforming use prevailing when the zoning took effect*; 2) *Is there a difference in the quality or the character or degrade of the resulting use*; 3) *Is the current use different in kind and effect upon the neighborhood*.
- Mr. Donaldson defined accessory use as *a use customarily incidental and located on the same lot as the with the principle use*.
- Mr. Curtin made the Motion to uphold the Building Inspector's decision as written in his letter dated August 27, 2013.
- Mr. Donaldson seconded it.
- **Discussion:** It was determined 4 votes were needed to overturn the decision of the Building Inspector.

7:40 pm - VOTE: 3 yeas; 2 nays; The motion did not carry.

For purpose of accuracy in wording and procedure, it was determined to repeat the vote.

7:43 pm - 5 minute break.

7:48 pm - Meeting was called to order.

- Mr. Donaldson made a motion to rescind the last vote.
- Mr. Lozier seconded.
- All in favor. Motion carried.
- Mr. Donaldson made a motion to vote to *reverse* the decision of the Building Inspector with respect to the current use being made of the premises located at 228 Leominster Road in Sterling.
- Mr. Curtin seconded.

- Mr. Chairman declared a motion to reverse the decision of the Building Inspector had been made and seconded. A vote *for* the motion would *overturn* the decision of the Building Inspector.
- 7:50 pm - VOTE to overturn the decision of the Building Inspector. 2 yeas. 3 nays. The motion did not carry.**

7:52 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]

- Martha Hawley voiced her complaint against Favreau Forestry Service and her objection against the ruling by the Building Inspector which was based on grandfathered zoning. Ms. Hawley presented pictures from 1985 showing only the farm and compared them to pictures taken in 2013 as the farm currently appears. Ms. Hawley based her objection to the Building Inspector's ruling on facts that that the Favreau forestry business was established in 2009 and did not exist in 1982.
- Mr. Brian Favreau, 109 Chace Hill Road, representing the owner of 95 Chace Hill Road, cited the definition of a "farmer" from MGL c. 90 for the Board's review.
- The Chair recognized Michael Pineo, Chairman of the Agricultural Commission and author of the *Right to Farm Bylaw* for the Town of Sterling. Mr. Pineo cited the bylaw as "*all aspects of forestry and lumbering are protected as agricultural activities in the Town of Sterling*". The town bylaw is further affirmed in the laws of the Commonwealth.
- Mr. Curtin referred to the Town's Right to Farm Bylaw: "*...growing and harvesting of forest products upon forest land and any other forestry of lumbering operations*". "*In the event of conflict between this bylaw and any other town regulation, this bylaw shall take precedence.*" "*The zoning enforcement officer/select board shall forward a copy of the grievance to the Agricultural Commission or its agent which shall reveal to facilitate the resolution of the grievance and report its recommendations to the referring town authority with an agreed upon time frame.*"
- Charla Kroll, 86 Chace Hill Road, questioned if the town law bypassed the state law.
- Mr. Pineo replied in the affirmative.
- The Chair recognize the Building Inspector/Zoning Enforcement Officer, Mark Brodeur.
- Mr. Brodeur read from his letter dated October 3, 2013 addressed to Martha Hawley, Stephen Kroll and Charla Kroll. "*Further, it is the opinion of the Zoning Enforcement Officer for the Town of Sterling that you have failed to appeal the original decisions with the Zoning Board of Appeals within the 30 day appeal period as outlined in MGL c 49A or with the Agricultural Commission as required.*" A copy of this letter was sent to the Agricultural Commission. The complaint made in June of 2013 was a multi-faceted complaint. The Favreau farming/forestry issue is protected use by Mass General Law and, as indicated in said letter, that appeal should have been addressed to the Agricultural Commission, not to the ZBA.
- Mr. Donaldson suggested a focus on whether the activity falls within the definition of *agriculture*. If it does, then grandfathering is irrelevant. There is a better and more inclusive definition of farming in §128 c. 21A.
- Ms. Hawley voiced her objection to the Favreau farm now being a processing plant, processing wood products.
- Mr. Donaldson noted that the issue is whether this is an agricultural use and is it an allowed use in the zone. The timing is irrelevant. If their activity falls within the definition of agriculture, it is an allowed use.
- Mrs. Kroll again questioned if the town law trumped the MGL.

- Mr. Donaldson replied any town which adopts the Right to Farm Bylaw is allowed to expand on the state definition of agriculture to encourage agriculture in that town. The nature of the agricultural product is not being changed into something that is non-agricultural.
- Chairman Bird called for questions from the Board and comments from the floor. There were none.
- Mr. Donaldson made the motion to vote to reverse the decision of the Building Inspector.
- Mr. Curtin seconded.

8:11 pm - VOTE: 0 yeas 5 nays. Motion did not carry.

8:12 pm - Chairman William Bird opened 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]

- Mr. Bird recognized Michael Pineo, Chairman of the Agricultural Commission.
- Mr. Pineo stated the Agricultural Commission is not involved with septic issues unless it has to do with the manufacture of fertilizer.
- Mr. Curtin questioned whether the complaint had to do with farming or with grandfathering.
- Mr. Bird replied that the appeal was a protest for zone violation.
- Mr. Curtin requested that the Building Inspector read and explain the reasons of his letter.
- Mr. Chairman recognized the Building Inspector/Zoning Enforcement Officer, Mark Brodeur.
- Mr. Brodeur stated that in June 2013 he sent a letter to Ms. Hawley stating that the Building Department did not acknowledge any violation of the Town of Sterling protective bylaws as referred to in her complaint. It is the opinion of the Zoning Enforcement Officer the operations at the Favreau property are grandfathered uses or uses allowed under MGL 128. In June 2013, that complaint was denied and no appeal was forthcoming. There are two factors here: 1. They are time barred from pursuing this any further ; 2. Mr. Larry Favreau stated that when he was a child, he used to accompany his grandfather on that farm and help him with septic work not dissimilar to what occurs today. If Mass Gen Laws had not changed, they would be manufacturing fertilizer from the collected septic. In any event, I believe the whole appeal process is time barred.
- Ms. Hawley and Mr. Curtin acknowledged an appeal was filed in July.
- Mr. Donaldson noted there did not appear to be a challenge of the grandfathered use as to an abandonment of a use or a non-continuance of a use. So that is really not before the Board. The only issue is Mark's ruling that it is a grandfathered use. Mr. Donaldson requested testimony from the owners as to the beginning of their operation and how it advanced through the years.
- Mr. Brian Favreau, 109 Chace Hill Road, represented his father, Larry Favreau, owner of 95 Chace Hill Road. Back in the 50's my father would cleanout outhouses, bring back the product and apply it to the land. Farmers, even back then, had to be resourceful to generate revenue to sustain the farm. Present day farmers may have working spouses or some second source of income to help maintain the farm. Mass Gen Laws now prohibits the farmer from applying the sewage onto the fields as fertilizer use. Today we do not bring the product back and process it. It is solely a parking facility for the truck.
- Chairman Bird reviewed the issue as being one of grandfathering.
- Mrs. Charla Kroll, 86 Chace Hill Road, called attention to the fact that the date of incorporation is 2002. The storage facility for equipment was moved from 91 Chace Hill Road after that date. Mrs. Kroll's objection is to the grandfathering. The septic operation was not originally on this property.
- Mr. Brian Favreau pointed out #91 was not there in the 1950's. That piece of land was separated out to build their house. The activity did actually happen at #95 back in the 50's and 60's and 70's. The farm has always held the activity of the operation.
- Mr. Donaldson inquired about the activity on the property.
- Mr. Larry Favreau, owner of 95 Chace Hill, responded by saying there is one truck parked there, garaged most of the time.

- Chairman Bird encouraged comments from Building Inspector, Mark Brodeur.
- Mr. Brodeur observed there have been subdivisions of the property. It was all one big parcel owned by the Favreau family and over time the land was divided. It has always been owned by the same family since the late 40's.
- After reviewing the septic activities, Mr. Donaldson commented there was no agricultural or commercial activity going on. A septic truck is just being parked there. Our zoning laws do say you are not allowed to do "*open lot storage*" and you may become subject to complaint if you leave the truck in the open. If you park the truck in the garage there are no other zoning violations.

8:34 pm - Mr. Donaldson made a motion to overturn the Zoning Enforcement Officer's ruling.

- Mr. Curtin seconded.
- There being no discussion, a **VOTE was taken** to overturn the Zoning Enforcement Officer's ruling.
- **0 yeas 5 nays. Motion did not carry.**

ZBA Business:

- Mr. Bird reviewed a letter of gratitude to Naglaa ElShamy for her ten years of service as Administrative Assistant to the ZBA. The Board unanimously approved the letter to be mailed as written.
- Mr. Donaldson made a motion to adjourn.
- Mr. Curtin seconded.

8:36 pm - Meeting adjourned.