

ZONING BOARD OF APPEALS MINUTES

DATE: February 9, 2016

TIME: 6:00 pm

LOCATION: Butterick Municipal Building, Room 205

6:07 pm – Sterling Zoning Board of Appeals was *called to order* by Acting Chairman, Joseph Curtin. Roll call taken. ***Sitting as a Board:*** Joseph Curtin, Richard Hautaniemi, Jerry Siver, Matthew Campobasso and William Bird. Jeffrey Donaldson and Patrick Fox were absent.

6:08 pm – Joseph Curtin opens the discussion with regards to questions given to outside Counsel on Zoning Board of Appeals and Earth Removal Board. Attorney Carolyn M. Murray from Kopleman and Paige, P.C. was present to address questions and answers. Please see attached documents as questions brought forth to Town Counsel for further review and answers given forthwith. Attorney Murray will send further language at the request of Joe Curtin regarding question No. 5 of attached document.

6:15 pm- Variance- Foley, Brian, Earth Removal Variance- 38 Clinton Road: Joseph Curtin opens discussion by reading said hearing notice and asked party to state full name and the purpose of requesting a Variance. Brian Foley states name and represents LCM Realty Trust. He explains his case as follows: He sits before the Board to seek a Variance in order to go forward and file an application with the Earth Removal Board in accordance to the general by-laws. Having attended a prior ZBA meeting he acquired fruitful dialogue of meeting and gained clarity as to procedure of obtaining Earth Removal permit which he tried to obtain first but got sent to Zoning Board of Appeals to gain a Variance Permit. See attached Findings of Fact for case set forth and hardship.

Mr. Foley addressed questions from board members. Major concerns from Board is the stabilization of the property, the need for Mr. Foley to get a Geo-Tech plan into place, the placement of a stone wall for stabilization and the appearance of the land itself.

6:39 pm - Acting Chairman Curtin opened *comments from the floor:*

Several abutters and concerned citizens addressed issues and concerns with regard to said Variance. Attached find a letter of concern. Facts and reasoning was given behind sending Mr. Foley to ZBA with regards to first application of an Earth Removal Permit. Opposition and concern of Mr. Foley violating permits and how the property of value has lessened by this project along with Mr. Foley even qualifying for said Variance. Also trucks being operated over the limited permitted use.

Brian Foley, Esq. – addressed all concerned parties.

7:27 pm- Joseph Curtin closes public hearing and with continuation of discussion among board members.

7:27 pm - Brian Foley, Esq. requests to the Board to Withdraw without Prejudice.

7:28 pm- Jerry Siver moved to grant the request to Withdraw without Prejudice. Richard Hautaniemi seconded. Voted: 5-0. All in favor. Motion Carried. WITHDRAW WITHOUT PREJUDICE.

7:31 pm- Special Permit Amended- Simpson, James B., 40 Redstone Hill/Off Redstone Hill:

Joseph Curtin opens discussion by reading said hearing notice and asked party to state full name and the purpose of requesting a Special Permit Amended. Todd Brodeur, Esq. introduces his representation to said applicant and James B. Simpson states his name and intentions as to applying for said Special Permit Amended.

James B. Simpson states his Findings of Facts. Please see attached.

Mr. Simpson and Attorney Brodeur addressed questions from the Board.

7:48 pm- Acting Chairman Curtin opened comments from the floor:

Several abutters and citizens voiced concern and opposition. First area of concern was the use of the prior special permit to be amended for a different parcel of land along with lot line and stonewall boundary concerns. Concerns of the cart path not to be destroyed. Upset over the cutting of trees and changes in the land layout itself. A few believe the construction itself is coming along beautifully but does not want to see it extended to another parcel. Concern of when the planting of trees, addressed from last meeting.

James B. Simpson addressed all concerned parties and assured after the construction is complete trees will be planted as said.

8:50 pm- Attorney Todd Brodeur requests to the Board for a continuance until the next meeting on March 8, 2016

8: 53 pm- request to continue the hearing was made by the applicant, the public hearing portion of the meeting remains open and will be continued at the next meeting. Motion to grant a continuance to the next meeting on March 8, 2016 was made by William Bird. Seconded by Richard Hautaniemi. Vote: 5-0 in favor. MOTION TO GRANT CONTINUANCE OF HEARING UNTIL MARCH 8, 2016 AT APPLICANTS REQUEST.

8:54 pm - Discussion. Counsel will research the issue a resident brought forth regarding the application to amend the special permit. See attached.

8:55 pm Matthew Campobasso made Motion to Adjourn, Jerry Siver seconded, No Discussion, Vote:5-0 All In Favor. Meeting Adjourned.

Mr. Curtin,

You have posed a number of questions regarding the Zoning Board of Appeal's ("ZBA") issuance of a use variance for earth removal activities. My responses to those questions are below.

- 1.) Is a variance required for earth removal in zones other than Neighborhood Residence ("NR") and Rural Residence ("RR") zoning districts if the earth removal is not the principal use but only required to construct an approved project?

Response: According to the Use Table of the Town's Protective Bylaws (the "Protective Bylaws"), earth removal as a principal use is only allowed in the Light Industrial ("LI") Zoning District. Section 6.2.2.2.a of the Protective Bylaws allows the ZBA to grant use variances under certain conditions which would allow earth removal as a principal use in other zoning districts. Section 2.2.3 of the Protective Bylaws addresses accessory uses: "Allowed accessory uses are limited to (a) uses customarily and incidental to permitted principal uses, and (b) uses that are permitted as principal uses within the zoning district and that are clearly subordinate and incidental to the principal use on the lot. Accessory uses are permitted only in accordance with lawfully existing principal uses..."

Moreover, Article 5 of the Protective Bylaws broadly defines "earth removal" as: "the removal of clay, gravel, sand, sod, loam, soil, stone or other earth materials as may be permitted pursuant to the By-laws of the Town of Sterling." Unlike Chapter 63 of the Town's General Bylaws where earth removal permits are granted by the Earth Removal Board for all earth removal and where a public hearing is required for earth removal of 1,000 cubic yards or more, the Protective Bylaws set no threshold for how much material may be removed before establishing earth removal as a principal use, nor does the Protective Bylaw distinguish between earth removal as a use and earth removal only associated with site preparation incidental to construction of a building or approved project. In fact, the only threshold regarding earth removal contained in the Protective Bylaws is found in the use variance provision of Section 6.2.2.2.a.4, where, in the RR or NR districts, "[r]emoval of less than 1000 cubic yards of soil from any premises does not require a variance." Therefore, with the exception noted for removal of less than 1,000 cubic yards in the RR and NR districts, it is my opinion that the Protective Bylaws require a use variance for any earth removal outside of the Light Industrial Zoning District.

- 2.) Other than a commercial sand/gravel operation, when is earth removal a principal use?

Response: In addition to a sand/gravel operation, earth removal could also be considered a principal use in a quarry operation or a business where loam or soil is stripped for landscaping, mineral mining or fill transported to other sites. Earth removal may also be associated with certain agricultural operations. Earth

removal as a principal use could also be based on the quantity of material removed or the duration of time that the earth removal operations are active.

3.) The Earth Removal Bylaw and the Protective Bylaws address the NR and RR zones, but what about the other areas?

Response: As noted above, the Use Table of the Protective Bylaws reflects that earth removal is only allowed by right in the Light Industrial Zoning District. However, Section 6.2.2.2.a of the Protective Bylaws authorizes the Board to grant use variances, effectively allowing a use not otherwise allowed in the underlying zoning district, provided the requirements for a variance under G.L. c. 40A, §10 and the six conditions listed in the section are met, where applicable. While Section 6.2.2.2.a.4 of the Protective Bylaws specifically addresses earth removal in the RR and NR zoning districts, this section of the Protective Bylaws is not limited to the use of earth removal, nor is it limited to those two zoning districts. Rather, any use not otherwise allowed could be allowed in any zoning district upon the grant of a use variance, provided the provisions of G.L. c. 40A, Sec. 10 and the six conditions set forth in this bylaw are satisfied, where applicable. For example, earth removal is not allowed as a use in the Commercial zoning district, so if a use variance for earth removal was sought for property located in the Commercial zoning district, the applicant need not satisfy condition number 4, as that condition only applies to the RR and NR zoning districts.

As for the comments offered by Judge Fox, I agree that the Protective Bylaws could be clarified and would be happy to assist the Board with amendments..

4.) What do you do in a case like this when you are evaluating a variance application and a variance may not be the correct remedy?

Response: The Board must evaluate each application on its own merits. If the applicant has sought a variance, then the Board should consider whether the variance criteria are satisfied. If it appears that a variance is not needed, the Board could express this position at the public hearing and afford the applicant an opportunity to withdraw the application without prejudice, but please note that after the matter has been advertised and the public hearing opened, the matter can only be withdrawn by a vote of the Board.

5.) Can the ZBA remand or challenge the Zoning Enforcement Officer's decision if the Board feels it is incorrect, and if so, what would be the procedure?

Response: No, the Board cannot unilaterally intervene in a decision rendered by the Zoning Enforcement Officer. Rather, if the applicant is aggrieved by the decision of the Zoning Enforcement Officer or Building Inspector, the applicant may appeal that decision to the Board, who may uphold or overturn the decision.

fracturing and falling of rock, dirt and stumps to the road edge below.

- g. The years of vibration and fracturing have allowed tree roots to expand further fracture and compromise the rock stability and it consists now primarily of weathered fractured rock.
- h. A substantial hardship exists based on the burdensome impact of the large volume of steeply sloped material, which renders the parcel inaccessible and unable to support a neighborhood residential use as described in the Town of Sterling Bylaws. Therefore the owner of the property would be deprived of any ordinary or customary usage of the property without the grant of an appropriate Earth Removal Variance in order to develop the end use of the property as residential housing.
- i. The slope and grading requirements of the surrounding properties will require earth removal on Lots 1,2,3,4, and 5. Without the requested earth removal variance the property is unable to be used for its permitted residential use in accordance with the Town of Sterling Bylaws, nor can the Earth Removal Board issue an Earth removal permit, thus resulting in further hardship which occurs when the literal application of the zoning bylaws prevent a property in a manner that would otherwise be permitted by the said bylaws.

5. That no substantial detriment to the public good would result from granting the **Earth Removal Variance** for the following reasons:

a. **Earth Removal Variance:**

- 1. The Protective Bylaws and the General Bylaws of the Town of Sterling specifically incorporates and references an Earth Removal Variance in all zoning Districts other than Light Industrial and the Earth Removal Variance is a temporary measure needed only to facilitate construction of residential buildings which is a permitted use of the subject property.
- 2. The granting of the requested Earth Removal Variance and the obtaining of a subsequent Earth Removal Permit would yield a more aesthetically pleasing residential development on a road that is considered to be a gateway to Sterling.
- 3. The parcel is surrounded on 3 sides by Earth removal operations zoned light industrial. Those said operations along with tree related root growth has fractured and compromised the integrity and stability of the present rock and dirt formation and rocks and related debris have begun falling to the heavily traveled roadway and surrounding properties below. Granting of the Earth Removal Variance is in conformity with the surrounding Light Industrial usage and the proposed end use of the property as residential usage aligns squarely with the permitted uses in accordance with the Town Of Sterling Protective By Laws.
- 4. Public safety warrants that the variance should be granted to protect the general public, lower surrounding tax paying property owners and the motor vehicle, bicycle and foot traffic that utilize the busy Route 62 below from harm and injury due to falling rock and related debris.
- 5. The roadway serving the parcel is presently used as a busy thoroughfare utilized by heavy personal, commercial and tractor-trailer traffic therefore there would likely be minimal if any additional traffic, noise, and hours of operation concerns as the temporary earth removal operations and residential construction as to days and hours of operation are already governed and restricted as per the present Town of Sterling Protective By Laws.
- 6. Therefore, the granting of the requested Earth Removal Variance to permit the removal of present dirt, rock and related material is a compatible extension of the parcel being able to be used for its **permitted end use of residential**

property as both are allowed, required and/or addressed by the Town of Sterling Protective Bylaws and the Earth Removal General Bylaw Chapter 63.

6. That no nullification or substantial derogation from the intent or purpose of the Town of Sterling Protective By Laws would result from granting the Variance for the following reasons:

- a. Variances are permitted in this zoning district pursuant to the Town of Sterling Protective Bylaws and the Earth Removal Variance is needed for the petitioners to make application for an Earth Removal Permit in accordance with the General Bylaws of the Town of Sterling.
- b. The requested subject parcel Earth Removal Variance is required simply as a temporary construction measure as Earth Removal is not a primary use of the property, but rather simply needed to construction residential dwellings on the parcels. The primary use of the parcel is residential housing, which is allowed by right in accordance with the Town of Sterling Protective Bylaws.
- c. Further, the granting of the requested Earth Removal Variance is necessary as a matter of public safety in order to protect the abutting tax paying landowners property as well as the safety of others passing in front of the property on the Route 62 roadway from falling debris, rocks and earth.
- d. The granting of the requested Earth Removal is needed so as to use the property in any permitted lawful manner and to prevent what could be deemed as a regulatory land use taking of the property by the deprivation of one's use of their property while collecting Real Estate taxes on the same.
- e. The granting of the requested Earth Removal Variances are unique to the subject parcel as they would be necessary for any person's attempted usage of the said property located at 38 Clinton Road in Sterling Massachusetts and not limited solely to the Applicant's proposed or intended use of the same.

Date: December 11, 2015

Respectfully Submitted,



By: Brian T. Foley, Esquire, for LCM Realty Trust and
TCF Holdings LLC

(Note: Make additional sheets if needed)

Robert Gibson
38 Wesquanset Rd.
South Orleans, MA 02662

February 8, 2016

Town of Sterling
Zoning Board of Appeals
Butterick Municipal Building
1 Park Street
Sterling, MA 01583

Dear Sirs.

I was notified as an abutter of a public hearing for LCM Realty Trust and TCF Holdings LLC of a Variance for purposes of earth removal at the property located 38 Clinton Road.

The property that is to the north, of which directly abuts 38 Clinton Rd, is owned by Carol Smith and I. It is a flat 7-acre parcel which includes a small pond and borders 38 Clinton Road of its total 700' rear lot line.

We realize that a Cease and Desist order was issued by the Earth Removal Board because the earth removed had exceeded the allotted amount to be removed from the property by the regulations of the town. From observing the work that has been recently done, it appears that it is more of a mining operation than the preparation for residential use.

Mr. Foley has various claims that I dispute.

Mr. Foley stated that the land is surrounded by earth removal operations. This is not correct, the property his companies own is in a Neighborhood Residence District. We as abutters are split between Neighborhood Residence and Rural Residence & Farming Districts. The existing residences located on either side the property of 38 Clinton Road are within the Neighborhood Residence District.

I also disagree with Mr. Foley's claims of a substantial financial hardship for LCM Realty Trust and TCF Holdings LLC on their property at 38 Clinton Road. John and Nancy Scarsella, Trustee's of LCM Realty Trust and TCF Holdings (a limited liability company formed on May 23, 2014 whose manager is Brian Foley), purchased 38 Clinton Rd. for \$7,000 on May 23, 2014. Across the street from 38 Clinton Rd, on Lesley Lane, for a half to three-quarter acre parcel the average assessed value is \$100,000. Because of such a low price, Mr. Foley who is a local lawyer would have known that the land was unbuildable unless some of the Towns Protective By Laws were breached. He would have known this before the property was purchased.

Mr. Foley states that he needs to remove more earth from the property to make it safer, more stable and useable. This defies logic. How can making a steep slope steeper,

disturbing the hillside further and then placing houses at the bottom of the excavation, make the property safer? The petition filed by Mr. Foley is not supported by professional engineering calculations, showing the data requirements on how the work should be performed, other permits required and the amount of fill that is needed to be removed. A topographic plan and a cross section showing the present and final grade are also needed. Any required retaining walls and their materials should also be shown. This information should then be made available for Zoning Board of Appeals for review.

On May 16, 2014 Mr. Foley filed a complaint for the prior owner Lisa Kennedy at Worcester Superior Court, to clear a restriction involving the "mineral rights" on the property. With this restriction lifted, it clears the title but also allows the land to be mined.

Our property, which directly abuts the property of LCM Realty Trust and TCF Holdings LLC at 38 Clinton Rd., has been significantly degraded in value by their operations. The denuding of vegetation and excavation of materials for future work of mining on the property is a eyesore and because of the lack of trees and shrubbery on the steep slope a person walking off our property on to lot 38 Clinton Rd. could be seriously hurt because there is now nothing to grab on to as you roll down the hill. We intend to place no trespassing and danger signs on our property. If LCM Realty Trust and TCF Holdings LLC are granted permission to excavate more earth for a housing development it would make the slope much more severe. We also fear that our property will be undermined, creating loss of land. **This is a hardship for us. Our property will definitely lose a substantial amount of value.**

The Zoning Board of Appeals was created to solve certain issues with people that could not comply with the zoning bylaws and was unfair to them. The Zoning Board of Appeals was also meant to override an incorrect interpretation of the bylaws by an agent of the town. But I don't believe that The Zoning Board of Appeals should have the responsibility of questioning another town board's decision. The Earth Removal Boards "cease and desist order" was applied because the earth removal operations at 38 Clinton Road clearly violated Sterling Bylaws.

I strongly oppose the work that has occurred and the proposed future work at 38 Clinton Road. I am in hopes the Board of Appeals will take my comments into consideration.

Respectfully Yours,


Robert Gibson


Carol G Smith

As the Board is aware the Zoning by Laws regarding multifamily development were amended at the annual town meeting in May of 2013. It was then that Sterling Real Estate Development Co. set out to design and permit the first neighborhood to conform to the amended bylaws.

- On March 12, 2014, The Sterling Planning Board voted to approve the site plan for Apple Blossom Estates.
- The Zoning Board of Appeals then voted to grant the special permit for the construction of 21 two dwelling buildings on April 16, 2014.

The original thought was to construct a mix of 1 and 2 bedroom dwelling units. After consultation with our real estate marketing professional we realized that it would be difficult to market the 1 bedroom unit because 1 bedroom rentals would be cheaper to habitate. The decision was made to make all the dwellings two bedroom residences.

- Construction of the infrastructure was started the summer of 2014.
- The first buildings began construction in the fall of 2014
- 2 furnished models were available for marketing last winter.
 - With the extreme weather last winter it was difficult to get people to leave their warm homes, never mind go townhouse shopping.
- Finally, in the spring of 2015, the properties began to go under sales agreements.
- Since then it has been quite a task to keep up with the demand.
 - Currently, 14 dwellings are occupied
 - A new one is finished every two to three weeks.
 - Of the 18 remaining dwellings, 11 are under contract.

As I mentioned earlier the Zoning Board of Appeals permitted the development for 21 two unit buildings or 42 dwellings. When the discussion was made to make all the dwellings 2 bedrooms, the limiting factor became the septic systems.

- The three septic systems have a combined capacity of 64 bedrooms.
- This limited us to 32 dwelling units or 16 buildings, far below the permitted 42 dwelling units.

With the addition of the parcel; known as Map 91 parcel 30, the development would be adding another 4.27 acres of land.

1. This new area allows for additional septic systems
2. The ability to construct 12 more 2 bedroom dwellings.

This would bring the total units from 42 to 44, or a net gain of 2 dwellings.

The proposed amended plan meets all the design requirements of section 4.2 of the bylaws. This includes dimensional requirements:

A. 5 acres minimum – 24.49 acres provided

B. 20,000 Sq. Feet per unit minimum - 24,245.1 provided

Design requirements 4.2.3a

1. All buildings are greater than 40 feet from lot line

2. All building are greater than 15 feet apart – 20 feet provided
3. Post development peak run off rates are below pre-development peak run off rates for the 2, 10, 25, and 100 year storm events.

Building design 4.2.3(b)

1. All buildings are 2 dwellings
2. All dwellings are 2 bedroom units
3. Only unoccupied basements are below grade at it's entire perimeter.

Circulation and Parking 4.2.3(c)

1. Maximum allowed parking area is 16- maximum provided is 4
 2. There are no loading areas or refuse disposal areas
 3. McIntosh Way (existing) has over 250 feet of visibility in both directions onto Redstone Hill Rd
 4. Shamrock Way is designed to the Town of Sterling
- Subdivision Rules and Regulations.

Open Space 4.2.3(d)

1. 60 % of Parcel shall be open space – 61.2% provided
2. 40% of parcel shall be contiguous open space – 61.2% provided

Exterior Lighting 4.2.3(e)

1. Lights at cul-de-sac and intersection only, as required by subdivision regulations.
 - Lights sourced through Sterling Municipal Light Dept.
2. Plantings are per plan
3. No Buildings are floodlit.

Dawn Metcalf

From: Carolyn M. Murray [CMurray@k-plaw.com]
Sent: Friday, February 19, 2016 2:49 PM
To: 'drpcurtin@comcast.net'
Cc: Gregg J. Corbo; 'mszlosek@sterling-ma.gov'; 'dmetcalf@sterling-ma.gov'
Subject: Sterling ZBA - Redstone Hill Road Special Permit

Mr. Curtin,

At last week's Sterling Zoning Board of Appeals ("ZBA") meeting, a question was raised by a resident regarding the application to amend the special permit previously issued to Sterling Real Estate Development, Inc. relative to property located off Redstone Hill Road. Specifically, the resident questioned whether the application should be treated as a new special permit, as opposed to an amendment to the existing special permit, in part because the applicant seeks to add a parcel(s) of land not part of the original special permit. In response to this question, I verbally opined at the ZBA hearing that the applicable statutes, G.L. c. 40A, §§9 and 11, make no distinction between a special permit and an amendment to a special permit, and therefore, there is no distinction in the process to issue a new special permit or to amend an existing special permit, as both would require a legal advertisement, notice to abutters, a public hearing, and a decision. However, I also stated at the ZBA hearing that I would like to review the materials for the original special permit and for the proposed amendment to ensure that the application was properly before the ZBA. For the reasons stated herein, it is my opinion that the application to amend the existing special permit is properly before the ZBA.

I have had an opportunity to review the original special permit decision and the advertisement and notice for the amended special permit. I note that the original special permit was issued to Sterling Real Estate Development, Inc. for property "situated on the southerly side of Redstone Hill Road known as number 43 Redstone Hill Road...shown in the Assessor Map Plan Book as Map #91, Lot #53." The Town has a standard form for requesting a modification of a permit or variance, which the applicant completed and which was on file for the public to view. Although the ZBA has an application to amend an existing permit, I note that, like the statute, there is no distinction made in the Town of Sterling Protective Bylaws between an original special permit or an amendment to a special permit. In addition, the legal notice for the amendment identifies the applicant as Sterling R.E. Dev. Co./Sholan Homes, Inc. seeking "an amendment to a previously approved Special Permit for purposes of adding 12 units of multifamily dwellings resulting in a net gain of 2 units at property located at Redstone Hill Road, Sterling, MA shown in the Assessor Map Plan Book as Map #91, Lot No. 30/53." In my opinion, the legal notice for the original special permit and the legal notice and application for an amended special permit adequately notified the public as to the property at issue and the relief sought. Further, the notice for the proposed amendment encompassed the same property that was the site of the original special permit (Map #91, Lot 53), as well as the new parcel, Plan #91, Lot 30, and therefore, notices to abutters and abutters to abutters would be based on both lots, ensuring that all parties in interest were notified.

There being no distinction under G.L. C. 40A or under the Town's Protective Bylaws relative to the treatment of an amendment to a special permit, it is my opinion that an amendment to an existing special permit be handled in the same manner as an original special permit, which appears to be the case here. It is my further opinion that the application for an amendment to an existing special permit is properly before the ZBA.

If you have any further questions, please contact me.

Thank you,

Carolyn M. Murray, Esq.
KOPELMAN AND PAIGE, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110
O: (617) 654 1726
F: (617) 654 1735

C: (617) 257 9581
cmurray@k-plaw.com
www.k-plaw.com

This message and the documents attached to it, if any, are intended only for the use of the addressee and may contain information that is PRIVILEGED and CONFIDENTIAL and/or may contain ATTORNEY WORK PRODUCT. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please delete all electronic copies of this message and attachments thereto, if any, and destroy any hard copies you may have created and notify me immediately.