

SUDBURY ZONING BOARD OF APPEALS

MINUTES

April 11, 2013

The Board consisted of: Jonathan G. Gossels, Acting Chair; Jonathan F.X. O'Brien, Clerk; Jeffrey P. Klofft; Stephen A. Garanin, Associate; and Nicholas B. Palmer, Associate.

MEETING OF THE ZONING BOARD OF APPEALS

The meeting was convened by ZBA Acting Chair Jonathan Gossels at 7:45 p.m.

Endorse Plans for Comprehensive Permit #11-27, The Coolidge at Sudbury, 189 Boston Post Road:

Final Plans were submitted for Comprehensive Permit 11-27, The Coolidge at Sudbury, at 189 Boston Post Road. The plans fully reflected the requirements of the Comprehensive Permit. Director of Planning and Community Development Jody Kablack reviewed the plans and in an e-mail distributed to the ZBA recommended endorsement. All members present signed the plans. Signatures will be obtained by the Building Inspector, DPW Director, and Town Clerk prior to their release to the applicant.

Continue Public Hearing Case #13-2, 9 and 23 Old County Road:

Mr. Gossels reopened the hearing for Case #13-2 continued from April 1, 2013. He began by referencing notes that he had prepared summarizing points raised at the April 1 meeting. Copies of his notes were circulated to the Board, Acting Building Inspector Mark Herweck, applicant David Kaplan, and the Lewises' attorney, Mark Bobrowski. Since that meeting the Board was able to review memos submitted by Mr. Kaplan and Mr. Bobrowski. Mr. Gossels reiterated that the notes were his own personal thoughts and were prepared solely to facilitate discussion among the Board during the hearing so that a decision could be rendered.

As to the status of the case he said that the ZBA would be focusing on whether positions Mr. Herweck took in his December 6, 2012 letter were correct.

The Board discussed whether or not Mr. Herweck erred in his December 6, 2012 letter when he concluded the current uses were essentially "grandfathered" so that current zoning does not apply. In his December 6, 2012 letter to Mr. Kaplan Mr. Herweck wrote, "The property at 9 and 23 Old County Road has been zoned Industrial 1-12 since July 25, 1958 and businesses have been operating at the location prior to the adoption of many of the Town's Zoning Bylaws." Language in the 1956 bylaws state that, "no uses shall be permitted which would be seriously detrimental or offensive to adjoining districts or tend to reduce property values by reason of dirt, odor, fumes, smoke, gas, sewerage, refuse and other waste matter, noise or excessive vibration or danger of explosion or fire." Therefore Mr. Gossels suggested that even under the 1956 rules uses causing those effects would be prohibited. The decision of the 1987 Site Plan Application (no. 87-30), issued by the Board of Selectmen, granted that the site be, "subject to compliance with all governmental laws and regulations including, but not limited to zoning, building and health laws and regulations, and, further subject to the following conditions...." Given this Mr. Gossels felt that Mr. Herweck was mistaken in his conclusion that the property was "grandfathered" and zoning did not apply. Mr. Bobrowski noted that Mr. Herweck did not use the term "grandfathered" in his letter. Mr. Klofft said that while he did not specifically use the word "grandfathered" Mr. Herweck's opinion,

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taken within the context of the letter, implied that zoning was not going to apply. Mr. Klofft then asked Mr. Herweck directly whether he thought that zoning laws did not apply. Mr. Herweck answered that he did not think that there was a violation of use at the properties.

Mr. O'Brien said that in his view the error Mr. Herweck made in his the decision was to issue a sweeping statement in his letter where he should have included an analysis of the facts to establish a basis to support his opinion on which bylaws were or were not applicable and why. Moreover, a timeline of uses of the property should be established, which will impact the applicability of the town's past and present bylaws. When asked what he thought was the primary use of the site Mr. Herweck answered that it was self-storage.

Mr. Gossels then asked for a sense of the Board about whether or not they were in favor of this conclusion that Mr. Herweck erred in his decision that zoning bylaws did not apply. The Board agreed that he had erred, generally speaking, by not explaining the basis for his decision.

In regard to Sections 3423 Noise and 3425 Glare, the Board discussed whether or not Mr. Herweck erred when he used ambiguous language in his decision regarding Noise and Glare. Mr. Herweck wrote in his December 6, 2012 letter, "However, I have determined that the early morning activity stated in your complaints may be in violation of the sections for Noise and Glare." Mr. Gossels maintained that Mr. Herweck did err because although the noise has not been quantified, there is overwhelming circumstantial evidence in the form of public testimony from residents at The Villages at Old County Road from the ZBA hearings, police records, complaints to the Building Inspector, and complaints to the Board of Selectmen that early morning and late day noise emanating from the site constitutes a nuisance and violates Section 3423.

Mr. Gossels further suggested that since the local bylaw references the standards that the DEP set forth in 310 CMR 7.10 (1) which prohibit the willful or negligent emissions of sound, the Board would accept the definitions of Noise and Air pollution in 310 CMR 7.00. Accordingly, the Board would reject the assertion by the property owner that the burden of proof is on the complainants. The applicable standard is "...in such concentration or duration as to (a) cause a nuisance...(c) unreasonably interfere with the comfortable enjoyment of life and property..." He opined that headlights shining into the windows of The Villages at Old County Road is a clear violation of section 3425 that says, "No vibration, odor, glare, or flashing shall be detectable without instruments at any lot line of a residential or institutional use."

Mr. Klofft said that he concurred with Mr. Gossels' assessment only to a point, but by Mr. Herweck's use of the word "However" he does not find Mr. Herweck's finding to be factually incorrect. He said that it was ambiguous, but not wrong. Mr. Klofft further said that there is no hard evidence in the way of data to measure the noise. Mr. O'Brien said that noise violations would be under the jurisdiction of the Board of Health. A discussion ensued about what exactly was the nature of any error in Mr. Herweck's judgment and the Board agreed that his statement was ambiguous.

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As to both noise and glare the Board noted that there was no quantification presented. Mr. Bobrowski said that the standard is the 1956 bylaw. Mr. O'Brien disagreed with Mr. Bobrowski and argued that noise is ultimately governed by state law standards.

Mr. Klofft said that the matter before the Board was about the judgment of the Building Inspector who said that issues of noise and glare "may be in violation." The Board then discussed whether it was the jurisdiction of the Board of Health to enforce noise issues. In their discussion of glare the Board discussed the idea that headlights shining from trucks driving out of the driveway was not an enforceable issue but rather headlights used to light the work area was. All agreed that the Lewises had taken measures to rectify the situation by installing overhead lights and tenants have been asked not to leave trucks idling with the lights on as a means of illuminating the property. The Board agreed that the Acting Building Inspector did not make a mistake in judgment in his December 6, 2012 letter, because he used the word "may" in his assessment of violations. Therefore the ZBA agreed not to overturn Mr. Herweck's decision on this point.

Mr. Gossels suggested that Mr. Herweck perhaps erred in his decision when he did not address the issue of septage odor. The regular odor emanating from the site is in violation of section 3525 which states, "No vibration, odor, glare, or flashing shall be detectable without instruments at any lot line of a residential or institutional use."

Mr. Klofft asked whether tenants complained to the Acting Building Inspector about the septage odor. The answer was yes. Mr. Herweck said that he involved the Board of Health Director who said that there would be some odor.

Marcia Glatt, Unit 14, 6 Old County Road, said that the Board of Health Director was well aware of the odor because she complained that when her daughter and a friend were playing outdoors at the site the smell was so overwhelming that the children could not continue to play outdoors. The Board of Health Director responded that it was the Zoning Enforcement Agent's decision to deal with it and that he could not do anything about it. The Board agreed that it was the Zoning Enforcement Agent's responsibility to enforce issues of odors and the Acting Building Inspector is also the Zoning Enforcement Agent. In this case, when there were complaints, the Acting Building Inspector did respond to the situation by conferring with the Board of Health Director. Therefore, the Board agreed that Mr. Herweck's decision was not in error on this point.

Mr. Bobrowski said that this issue does not fall under the 1956 bylaws. He said that the residents of the 40B, The Villages at Old County Road (approved in 2006), were coming to the nuisance instead. Mr. Kaplan suggested that odors were a violation of both the 1956 bylaws and the 1987 site plan decision and the Board agreed with Mr. Kaplan.

Former Building Inspector Jim Kelly said that the process by which the ZBA was approaching this appeal was quite different than past appeals. He cautioned the ZBA to be careful of their approach that there should be some measurable enforcement action. He said that Mr. Herweck made a decision and the ZBA does not have to tell the Acting Building Inspector what he should do. Mr. Klofft disagreed because if the

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ZBA says that the Acting Building Inspector is wrong in not enforcing the odor issue then the Board needs to tell the Acting Building Inspector what a measurable odor is. He said that Mr. Herweck's error in the December 6, 2012 letter was a failure to address the odor issue when inquiries had been made to various authorities.

Mr. Bobrowski said that the glare and odors need to stop but the use should not have to stop. Mr. Gossels said that no one was suggesting that the uses themselves stop. He said that Sudbury needs these uses at industrial sites.

Initially the Board discussed whether Mr. Herweck erred in his December 6, 2012 letter when he failed to order the removal of unregistered motor vehicles which are unfit for use, permanently disabled or have been dismantled or are otherwise inoperative. Such vehicles were allegedly present at the time the original decision was issued however the owners have since removed them so this is no longer a problem at the property. Mr. Kaplan said that he noticed that unregistered vehicles had been removed. The Board agreed that if no improper vehicles were present at the time the building inspector visited the property, Mr. Herweck had no reason to cite the Lewises with regard to Section 2321, Unregistered Motor Vehicles, in his decision.

The Board agreed that Mr. Herweck was correct when he found that the site was in compliance with screening requirements of Section 3424, Solid Waste Storage. The transfer of solid waste storage is an allowed use at the site.

The Board agreed that Mr. Herweck was correct in not addressing the issue of screening along Old County Road. Requirements for screening at this site are governed by the 1987 Site Plan approved by the Board of Selectmen. Accordingly, the Board of Appeals does not have jurisdiction over screening. Mr. Kaplan presented evidence to the Board that this topic was specifically discussed during the 1987 Site Plan hearing in that Executive Secretary Thompson advised Mr. Lewis (the father of current owner Denis Lewis) that at some future time the Planning Board may request that the property be better enclosed, and the Senior Mr. Lewis stated that he understood this. Evidence of a further site plan violation was presented during the ZBA hearing. Specifically, that the space currently occupied by Mason Works is shown on the Site Plan as open space. The Board agreed that those are issues for the Board of Selectmen to address. The issues of idling trucks and police enforcement of all violations are also issues for the Selectmen.

With regard to the applicability of Section 3550, Screening and Landscaping, the owner cites Section 3580 and its exception, "...where the business or industrial use is separated from the single Residence District by a public street having a width of 40 feet or more." The layout width of Old County Road measures 49.5 feet as was verified in an e-mail dated April 11, 2013 to Mr. Lewis from Town Engineer Bill Place. The e-mail was submitted to the ZBA file at the hearing. The Lewises also showed the Board a copy of the 2006 Landscape Plan for The Villages at Old County Road which showed the measurement of the street clearly marked.

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Mr. Klofft attempted to summarize for the Board a determination. He said that Mr. Herweck erred in implying that the bylaws did not apply to this grandfathered industrial site and he should have been less ambiguous on the issues of noise and glare and further, he should have addressed the odor issues.

Chuck Mills, 47 Rolling Lane, said that he feels that his business is the cause of some of these complaints about nighttime noises. Mr. Mills is in the business of snow removal and road sanding for the City of Marlborough but his equipment is stored at Old County Road. He asked for clarification going forward on how he can continue his business if it makes noise. Mr. Gossels said that the ZBA does not want to deter businesses from operating in Sudbury and that when noise is generated in an emergency situation, such as would be made during a snow storm, the business would be exempt from violations. The board agreed that emergency services, such as Mr. Mills' snow removal, are exempt from the bylaws.

Mr. Bobrowski asked for a brief recess so that there could be discussions between the property owners and the applicant, Mr. Kaplan.

Upon resuming the meeting, there were no further questions from the Board or audience, therefore the hearing was closed.

The following motion was placed and seconded:

MOTION: "To find that the Acting Building Inspector erred in implying that the 1956 bylaws did not apply to this industrial site. While the Board prefers that there should have been more precise language in the Acting Building Inspector's letter with regard to noise and glare, the Board finds that the Acting Building Inspector's conclusion that there may have been a violation of noise (Section 3423) and glare (Section 3425) is correct. Additionally, given that there were complaints about odor the Board finds that the Acting Building Inspector's letter should have specifically addressed odor issues (Section 3422). The Board finds that the Acting Building Inspector was correct when he found that the site was in compliance with screening requirements of Section 3424, Solid Waste Storage, and he was correct in not addressing the issue of screening along Old County Road which falls under the jurisdiction of the Board of Selectmen as governed by the approved 1987 Site Plan."

VOTED: In favor: 5 Opposed: 0 MOTION CARRIES

REASONS: As reflected in the 1956 Bylaws which state that, "...no uses shall be permitted that would be detrimental or offensive to adjoining districts or reduce property values by reason of dirt, odor, fumes, smoke, gas, sewerage, refuse and other waste matters, noise or excessive vibration or danger of explosion or fire..." and as stated in the decision of the 1987 Site Plan Application #87-305 that the site shall be, "...subject to compliance with all governmental laws and regulations including, but not limited to zoning, building and health laws and regulations, and, further subject to conditions..." the Board found that the Acting Building Inspector erred when he said that current zoning at 9 and 23 Old County Road did not apply and that Mr. Herweck should clearly identify which version of the bylaws apply to each parcel in question, and the consequences of such application. While the Board felt that language in the Acting Building Inspector's December 6, 2012 letter was ambiguous they did determine that he was not incorrect

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in his assessment of noise and glare because he said that the property owners may be in violation. The Board agreed that the Acting Building Inspector should have addressed the issues of odor given that various complaints had been filed. And, given that screening of solid waste storage and screening along Old County Road are issues governed by the Board of Selectmen via the 1987 Site Plan, the Board finds that the Board of Selectmen should address issues of screening at the site in the future.

There being no further business the meeting was adjourned.

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Jonathan G. Gossels, Acting Chair

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Jeffrey P. Klofft

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Jonathan F.X. O'Brien, Clerk

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Stephen A. Garanin, Associate

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Nicholas B. Palmer, Associate