

Great Barrington Zoning Board of Appeals

Minutes of June 10, 2014, meeting.

Attending were Chairman Ron Majdalany, Vice Chairman Carolyn Ivory, Kathy Kotleski, Madonna Meagher, Michael Wise and alternates John Katz and Don Hagberg. The meeting opened at 7:30 p.m. at Great Barrington Town Hall.

The hearing opened for **L&S LLP** with Sanford and Michael Lipton and attorney Jeffrey Lynch attending. Mr. Lynch said the site, a Lipton Mart/Mobil gas station at 246 Stockbridge Road, is in a B-2 zone. The service station was built in 1969 with proper permit and was expanded to be a gas station and convenience store in 2001 with a special permit from the Zoning Board of Appeals. The applicant wants to add 550 square feet on the south side of the building for a Subway restaurant franchise with 23 indoor seats. The lot has 1.36 acres and trees and plantings will remain. Eight parking places are required by zoning, plus five for the convenience store, and there are 20 spaces on the site now. One site will be displaced. The disabled parking space will be shifted south. The convenience store has 6-7 employees, the Subway will have 8-10. The Subway will be an accessory use to the convenience store/gas station. Terry Chamberlin of 3 Magnolia St. asked that vegetative screening be installed to block litter flying onto his property and to block bright vehicle headlights. The Planning Board, Board of Selectmen and Board of Health in letters recommended approval. On a motion by Ms. Kotleski, seconded by Mr. Wise, the hearing closed at 7:45 p.m.

The chairman ran through the checklist for special permits and board members were unanimous in saying the proposed expansion is not substantially more detrimental; it would have social and economic benefits in providing a specific type of restaurant in that location and in hiring more employees; traffic patterns would be the same as at present; there would be not substantive change in the use of town services or utilities; the character of the neighborhood would be the same, and with vegetative screening to the rear, would improve conditions for some homes; there would be no impact on the natural environment and the project would increase the town's tax base and employment. Ms. Ivory moved to approve the special permit for the building addition to accommodate a Subway franchise with the condition there be significant screening, preferably at the property line in the rear, to block lights and catch debris. Ms. Meagher seconded and board members were all in favor of approval. Ms. Kotleski said she would write the decision.

The hearing opened at 7:50 p.m. on **Housatonic Solar I's** special permit application for a solar array field on the old Gillett gravel bed on VanDeusenville Middle Road. Applicant Kirt Mayland in writing requested a postponement. The board on a motion by Mr. Wise, seconded by Ms. Kotleski, voted to continue the hearing to Aug. 5, 2014, at 7:30 p.m. at Town Hall. There will be a site visit at 5:30 p.m. All members voted in favor.

Tim Geller of CDC of South Berkshire gave brief overviews of two Chapter 40B comprehensive permits he intends to file in late summer. One is for property owned by **Construct Inc.** at 314 State Road, with an existing dwelling and plans for 10 or 11 new affordable units. The other is for the **New England Log Homes** site, where preliminarily there are plans for a 20,000 to 30,000 square foot retail building and 45 to 50 mixed income rental units, possibly another commercial building or restaurant and market rate apartments. There will be 2 acres of public open space.

On a motion by Ms. Ivory, seconded by Ms. Kotleski, the board approved the minutes for April 30, 2014.

On a motion by Mr. Wise, seconded by Ms. Meagher, the board voted at 8 p.m. to reopen the **Lynn Hutchinson/Brian Schwab** appeals hearing. Vice-Chairman Ivory assumed the chair, as Chairman Majdalany recused himself. Mr. Katz substituted for Dr. Madjalany and Don Hagberg participated in the discussion. Board members made a site visit that afternoon. The board was in receipt of letters from the Board of Selectmen and the Planning Board urging the ZBA to uphold the building inspector's action in enforcing the Water Quality Protection bylaw adopted by town meeting vote in 2006. The appellants were at the hearing, represented by Elizabeth Quigley. The building inspector, Ed May, was at the hearing, represented by Richard Dohoney, special town counsel. Ms. Quigley and Mr. Dohoney told ZBA members there are two appeals before them with the same set of facts. As a superseding order was issued by the building inspector following the filing of the first appeal, negating his original cease order, the first appeal could be dismissed. Mr. Wise moved to accept the building inspector's dismissal of the first (July 2013) order of conditions by agreement of the parties involved. Mr. Katz seconded. All five members voted in favor.

Ms. Quigley said the appeal is of wording in the building inspector's Feb. 3, 2014, order of conditions regarding tree and other cutting on land at 263 Long Pond Road within the 400 foot buffer (on the appellants' property and on the property of others). She asked Michael Parsons, surveyor, to show ZBA members a series of seven maps and aerial photographs that since 1968 (USGS map) there had been a cleared aisle from Long Pond Road to the pond. He said 2005 images showed trees beginning to grow in. Mr. Dohoney provided a copy of a 2011 Google Earth aerial.

Ms. Quigley said the images verified a pre-existing nonconforming aisle through the woods to which the property owner had a right to cut invasive and other vegetation. She said the building inspector came onto the property without the owner's permission and without an administrative search warrant to any evidence obtained should be suppressed. She said she raised the issue in case it might be of use in potential future litigation. She said the building inspector interrupted work, issued a cease order and created "controversy" at the site. The attorney wondered aloud if a private water company met the criteria of a public water source.

Ms. Quigley said Ms. Hutchinson and Mr. Schwab had no issue with a Conservation Commission order of conditions under the Wetlands Protection Act. She said professionals had been hired and work done to restore sensitive areas within 100 feet of designated wetlands. She said she believed the Conservation Commission was satisfied with the work done. She said the building inspector's revised order required the appellants to comply with the Conservation Commission enforcement order but also said "absolutely no further mowing or clearing is to be tolerated in this Zone A." She suggested this goes beyond the building inspector's scope of duties. She said the owner has a grandfathered right to mow a lawn or cut vines within the zone. By the building inspector's wording, no act of maintenance is allowed unless it is done to protect the public water source. She said it is a constructive condemnation of property. She said nothing done by the work had a deleterious effect on Long Pond. Mr. Katz told counsel she had cited no case law in making her assertions and that interpretation of the zoning bylaw in this case was up to the Zoning Board of Appeals. Ms. Quigley restated that a prohibition on cutting vines or picking flowers was equivalent to taking property without compensation. Mr. Katz said there is no authority for that statement. As this particular area protects the pond, owner rights don't apply to someone mowing their lawn. Ms. Quigley asked how the owners are to deal with invasive species? Or should they obtain a forestry plan, carry out provisions of that plan? It is an arbitrary and capricious zone. Ms. Kotleski said the 400-foot buffer is not capricious, it was voted at town meeting in order to protect drinking water supplies.

Brett W. Kamienski, environmental scientist with S.K. Design Group in Pittsfield, testified that he visited the site where vegetation had been removed and saw no evidence that it would

increase erosion or sedimentation. Nothing was done 100 feet from the water, he said. ZBA members questioned what parts of the property he had walked, whether he had seen evidence of earth moving equipment, if similar cutting the whole perimeter of Long Pond would result in problems. To the latter, he said yes, if there were wholesale cutting there probably would be an impact on the water supply. Ms. Meagher asked if what was cut was a strip or a swath. He said strip. Mr. Wise asked why a silt fence was necessary. Mr. Kamienski said it was a safety measure for newly installed replacement plants. He said the 400-foot buffer was adequate to contain any runoff generated in the area above the buffer. In answer to a question from Mr. Hagberg, Mr. Kamienski said any work that would expose soil or involve grubbing would merit a silt fence. For such work, he said he would first go to the Conservation Commission. Jonathan Hankin of the Planning Board asked how 310 CMR and the drinking water district differed. Mr. Kamienski said one is to protect resource areas, one to protect drinking water supplies. Mr. Schwab asked if a giant beaver dam would have a negative impact on a water supply. Mr. Kamienski said that was out of his realm of expertise. Mr. Katz asked what land use would most interfere with a public water supply. Mr. Kamienski said farming and the presence of high levels of nitrogen.

Ms. Quigley reiterated the owners should be allowed some degree of maintenance to their property. She restated the area is grandfathered. She asked the ZBA to rescind the building inspector's order. Mr. Schwab said there is still some work to be done to comply with the Conservation Commission order, including removal of some invasive plants.

Mr. Dohoney pointed out no certificate of compliance has been issued for the property. He said the building inspector was acting on open land. He said that despite the longevity case made through historical images, a use can't be grandfathered if abandoned for more than two years, as is shown in 2011 and 2013 images. And even if there were a pre-existing, nonconforming use, a special permit would need to be obtained under the Water Quality Protection District. He provided copies of an Oct. 10, 2012, letter from the building inspector to the previous owners of the property, Andrew and Elizabeth Humes, advising of encroachment on the neighboring Pfeiffer Arboretum (owned by the Great Barrington Land Conservancy) and said Ms. Hutchinson and Mr. Schwab were aware of previous violations (per a letter from attorney Kenneth M. Shearin on behalf of Ms. Hutchinson to Mr. May, dated July 17, 2013). Mr. Dohoney submitted color photos showing stumps, gas and oil-powered vehicles and the cleared strip of land taken when Mr. May made his site visit July 19, 2013. Mr. May said he learned that day that Conservation Commission Chairman Andrew Mankin and a representative of Housatonic Water Works were going to the Long Pond address and when he went with them he found conditions shown in the photos — work being done within the 400-foot buffer. He said he tried to arrange for the installation of silt fencing, and when Mr. Schwab showed up, he wrote a check for the fencing. Mr. May said he had been on the property the year before for another violation.

Mr. May said that when he has probable cause, and it's a reasonable hour, he is entitled to go onto a property. He said he would have left if asked to. He said the property was not posted and no one asked him to leave. Mr. Schwab vehemently stated he asked Mr. May to leave and characterized Mr. May demeanor as abusive. Mr. Schwab then left the hearing. In answer to a question from Mr. Wise, Mr. May said he looks to the Conservation Commission for advice in matters involving wetlands or water protection. William Martin, attorney for the water company, said cutting trees is not a use and cannot be grandfathered in the same fashion as a gravel bed. He said the town adopted the water protection overlay because it went beyond the Wetland Protection Act's 100-foot buffer. He said the cutting could, for example, provide open space that would encourage the Canada geese population, notorious for soiling water. In answer to a question from Mr. Katz, James Mercer, president of Housatonic Water Works,

described a violation two years ago which was not reported to the Conservation Commission or the DEP, as it seemed more prudent to stop the activity and allow vegetation to regrow.

There was further discussion. Mr. Dohoney agreed the ZBA had the ability to modify the wording in the building inspector's order. Mr. Katz said he could find little case law, but liked wording in Model Zone I Restriction for Public Drinking Water Supply Protection (DEP July 20, 2010), specifically regarding "cutting, removing or otherwise destroying trees, grasses or other vegetation."

Mr. Hankin made the point that after an earlier episode of cutting in the Pfeiffer Arboretum without permission, the then-owners of the property agreed to stop. He said the new owners were aware of that situation as indicated in correspondence.

After more discussion, Ms. Quigley said the board was hearing from a lawyer (Mr. Martin) without environmental credentials and it was only speculation cutting would attract Canada geese. She asked that, if the ZBA does modify Mr. May's wording, it consider provision for the continued work on the land under the restoration plan approved by the Conservation Commission. She reiterated the possibility of the land going into a forestry plan, which would supersede zoning. Mr. Wise questioned that a forestry plan would supersede zoning. Town Planner Chris Rembold said he was only aware of such discussion as involving vegetative wetlands, not drinking water resources. Mr. Hankin said the water company has an obligation to protect the water source to the utmost. On a motion by Ms. Kotleski, seconded by Mr. Wise, the hearing closed at 9:55 p.m. Board members agreed with Mr. Wise that the board would reject the appeal but support the order and refine it to make it more easily administered. There was brief discussion as to whether such action would impinge on a town meeting vote and document, but board members expressed confidence they were only giving clarity to language in the building inspector's order.

Mr. Wise moved: **That the ZBA deny the appeal and uphold the order of the building inspector, as amended by substituting the following language for the last sentence on the first page (which read, "Absolutely NO further mowing or clearing is to tolerated in this Zone A") with "In Zone A, you are prohibited from cutting, removing or otherwise destroying trees, grasses or other vegetation, except as required to comply with the Conservation Commission order of December 18, 2013."** Mr. Katz seconded. Members in a roll call vote were unanimous in approving the motion. Mr. Wise said he would write the decision and findings.

On a motion by Ms. Meagher, seconded by Ms. Kotleski, the board adjourned at 10:23 p.m.

Respectfully submitted

Bernard A. Drew, Secretary

