

Great Barrington Zoning Board of Appeals

Minutes of February 10, 2015, meeting.

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

The chairman opened the public hearing on **Lynn Hutchinson's** appeal of a building inspector cease order (Case 836-15). The secretary read the notice for the hearing and said it had been properly posted and advertised and mailed to abutting property owners of record. A site visit was canceled due to the amount of snow on the ground and the board's familiarity with the property from last year's hearing. Vice-chairman Ivory asked Mr. Katz to sit on the hearing in place of the chairman, who had recused himself.

Attorney Francis DiLuna, representing the appellant, said the point of the appeal is wording in a forest cutting plan zoning enforcement order dated Dec. 12, 2014, that any activity "not related to the operation and maintenance of the public water supply Zone A and Zone I are prohibited by Section 9.2.6 of the Bylaw."

Edward Denham, forester, New England Woodland, said he has made forestry plans for water supplies in Adams, Dalton and Pittsfield, among others. He said a forest cutting plan is an agricultural pursuit. The Zoning Act 40A3 prohibits unreasonable regulation of agriculture. The purpose of the forestry plan is preservation of water resources. Forests are managed based on an owner's objectives, he said, typically for wildlife or timber improvement, or to preserve water quality. The plan here is to remove tall white pines by mechanical means and encourage sugar maples, to develop a sugar bush. A portion of the acreage is full of invasive species such as bittersweet and Norway maple, which will be removed by mechanical means to contain from spreading. Chemical means are not proposed. The result will probably be 100 sugar maple trees. A similar cutting was done on an adjacent parcel in 1985, he said. Historically, land in the area has been forested since 1965 and once was cleared as agricultural land.

Mr. DiLuna said there is a clash of town and state statutes and the state prevails. Mr. Denham said he would not propose something that would degrade a water system. In answer to a question from Mr. Wise, Mr. Denham said an earlier plan was just to remove deadwood. Tom Ryan, a state forester, said he had visited the site and approved the proposed plan. He said no Conservation Commissioner representative was on hand during his visit. Shepley W. Evans, conservation agent, said when he received a copy of an early draft of a forestry plan, he had great concerns. He said there should be no cutting of trees without a permit from the Conservation Commission.

The secretary read into the record letters from Mr. Evans, on behalf of the Conservation Commission; Town Manager Jennifer Tabakin, reporting on a Board of Selectmen vote; and Kimberly L. Shaw, Planning Board secretary, reporting on that board's vote, all urging the Zoning Board of Appeals to uphold the building inspector's cease order. A letter from Jayne Smith, health agent, said the Board of Health urged the ZBA to look closely at positive or negative impacts of the proposed activity on the public water supply.

Richard Dohoney, special counsel for Building Inspector Ed May, said Mr. May has not denied a forest cutting plan. Based on anecdotal information Mr. May saw potential for another violative behavior on the property and issued an immediate cease and desist order to go through proper state and town statutes. He said the Water Quality Protection District was adopted at town meeting to give another layer of protection. He instructed the appellant to go through the

special permit process. There has been destructive activity at this property previously. Ms. Hutchinson can go before the Board of Selectmen, who can put proper conditions on a forestry plan. We've heard from experienced foresters, Mr. Dohoney said, and the plan appears to be thoughtful, but it is not clear it would not jeopardize the water supply. If facts support the activity, they could get a special permit. The type of regulation contemplated here is reasonable.

Mr. Katz said under Home Rule, towns may adopt regulations more strict than state standards. The forestry plans may be good ones, but not necessarily consistent with 9.2.6. Mr. Dohoney said local ordinances can't contradict state ordinances, but towns are allowed to regulate in a manner consistent with state edicts unless they are prohibitive or unreasonable. Mr. DiLuna said the statute absolutely prohibits special permits for lands in forestry/agricultural plans with the state. Mr. Katz suggested the applicant not include the Zone A or Zone 1 land in the forestry plan as an alternative. Ms. Ivory said the board at the June 2014 hearing upheld that no work was to be done in the area without the Conservation Commission's involvement. Mr. DiLuna said it is not up to the town to bless a forest management plan. Mr. Ryan said he had never seen a cutting plan scrutinized to this degree. Mr. Wise pointed to the hearing in 2014 as the reason. In answer to a question, said the impact of this plan on Long Pond water quality should be neutral.

Malcolm Frick of the Planning Board asked if Housatonic Water Works considered this forestry cutting to be a proper maintenance. Mr. Ryan said the water company had done its own cutting on land closer to Long Pond.

The appellant owns about 30 acres, nine of which are under the proposed forestry plan, about 8 acres of which are within the 400-foot buffer regulated by the town's bylaw, Town Planner Chris Rembold said. A 100-foot strip between this land and Long Pond is owned by Housatonic Water Works. Mr. Rembold said the regulation was voted at town meeting and approved by the Attorney General's office, which noted Massachusetts General Law has exceptions for agriculture but only for prohibited uses, not allowed uses. That suggests they were okay with the zone but gave a caution.

Mr. DiLuna said all of an owner's land needn't be under a forestry program to meet agricultural use requirements. In answer to a question, he said the Hutchinson land was put up for sale but a potential buyer backed out in December and she took it off the market.

On a motion by Mr. Katz, seconded by Ms. Kotleski, the board voted unanimously to close the public hearing. In discussion, Mr. Wise said the assumption of the board is the order issued last June is valid. The board's obligation now is to apply the zoning bylaw, being aware of state provisions. Is the bylaw in this circumstance unreasonable? He asked. The landowner has now hired a professional forester, which makes a difference. Is implementation of the appellant's plan presumptively unreasonable? We are not the right board to make that decision. Ms. Ivory said the ZBA can't ignore the town's adoption of the bylaw. Mr. Hagberg said there was an obvious gap in protection of water sources. Ms. Meagher noted most of the land is on a steep incline, so there could be considerable runoff.

Mr. Wise pondered what Mr. May might have done otherwise than issue the cease order. Tree cutting could be good management, maybe sensible forestry is consistent with water source maintenance. Mr. Katz said the question is whether to uphold Mr. May's order, as other town boards urge in their letters. Mr. Hagberg said it makes sense for the Conservation Commission to have a role.

Mr. Wise said he could offer a motion to the effect that a state-approved forest management plan by a licensed professional forester could be considered to meet the standard of

maintenance of land around a public water supply. No one offered to make a second if he made such a motion. Mr. Katz moved that the ZBA uphold the action of the building inspector, Ms. Meagher seconded. After further discussion, the vote was Ms. Kotleski yes, Mr. Wise no, Ms. Ivory yes, Ms. Meagher yes, Mr. Katz yes. Mr. Wise said he would write the decision.

The board on a motion by Mr. Wise, seconded by Ms. Kotleski, voted at 9:40 p.m. to enter executive session to discuss the status of litigation and would return to open session. All five members voted in favor.

The board returned to open session at 9:50 p.m. Ron Majdalany took over the chair for a presentation by Timothy Geller, executive director, **Community Development Corporation of the South Berkshires**, on a project proposed at the former Hi Fidelity property, 314 State Road. Once an eligibility letter comes from the state, there will be a 30-day waiting period then the ZBA can convene a hearing. He said this is a straightforward project, the land to be built on is flat, there are no environmental issues. Rikki SaNogueira, associate project manager, said three buildings with 11 units are proposed, to be clustered on 1.5 acres of the 13-acre property. The rear of the property is mountain forest. The existing building will remain as apartments managed by Construct Inc. She said the applicant will ask for waivers of building permits and sewer hookup fees. Construct, which will manage the site, will request a PILOT program similar to one at the CDC's Hillside housing. The only zoning waiver sought is of density; the R-2 zone doesn't allow multi-family units. Gregory Zorzi, principal, and Chris Novelli, architect, of Studio One in Springfield, showed preliminary renderings and site plans. There will be 20 parking spaces. There will be two disabled units in the farmhouse-style buildings. Cara Davis of Construct also spoke.

On a motion by Ms. Ivory, seconded by Mr. Wise, all members voted to approve the minutes of Aug. 5, 2014.

The meeting adjourned at 10:10 p.m.

Respectfully submitted

Bernard A. Drew, Secretary



