



TOWN OF BOXBOROUGH

Zoning Board of Appeals

29 Middle Road, Boxborough, Massachusetts 01719

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Mark White, *Chair* • Kristin Hilberg, *Clerk* • Mark Barbadoro • Stefano Caprara • Michael Toups •
Shawn McCormack, *Alternate* • Than Stuntz, *Alternate*

APPROVED ON: October 18, 2022

Meeting Minutes

July 19, 2022

7:30 PM

Remote Meeting

Members Present: Mark White (Chair), Mark Barbadoro, Kristin Hilberg, Michael Toups, Stefano Caprara, Shawn McCormack (Alternate)

Also Present: Tracy Murphy (Town Planner)

Mr. White outlined the meeting process and opened the meeting at 7:30pm with a roll call attendance.

Review Correspondence – None at this time.

Minutes: June 7, 2022 & May 31, 2022

Mr. Barbadoro moved to approve the meeting minutes of June 7, 2022, as presented. Seconded by Ms. Hilberg.

Roll call: Shawn McCormack - aye, Kristin Hilberg - aye, Stefano Caprara – aye; Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Mr. Barbadoro moved to approve the meeting minutes of May 31, 2022, as presented. Seconded by Ms. Hilberg.

Roll call: Shawn McCormack - aye, Kristin Hilberg - aye, Stefano Caprara – aye; Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Mr. Barbadoro moved to approve the meeting minutes of July 5, 2022, as presented. Seconded by Ms. Hilberg.

Roll call: Shawn McCormack - aye, Kristin Hilberg - aye, Stefano Caprara – aye; Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Public Hearing (cont.) 60 Codman Way – Special Permit

Mr. White read the legal notice for 60 Codman Way.

The Board reviewed a number of questions previously submitted to Town Counsel, Adam Costa.

Mr. White stated that one of the questions was how much of a pre-existing, nonconforming structure must remain before it must be treated as new construction. Attorney Costa stated that Chapter 40A, Section 6 is the portion of the Zoning Act that addresses nonconforming uses and structures. The nonconformity section of the Town bylaw is effectively being rewritten almost in its entirety during the current recodification. The recodified bylaw will address some of these questions more thoroughly. Regarding this question, some bylaws address reconstruction explicitly and the Town's bylaw does not. Section 4200 deals with non-conformities or the concept of reconstruction. It refers to reconstruction or structural changes of structures, as well as alterations of structures, to provide for substantially different purposes. After this subsection the bylaw simply refers generally to the phrase "change, alteration, or extension," and does not use the term 'reconstruction.' Many municipalities interpret the phrase "change, alteration, or extension," to include reconstruction. There is case law that indicates that, where reconstruction is allowed by a municipal bylaw, it can be on the same footprint, or it can be on an entirely different footprint, or it can be partially on the existing footprint and partially on a different footprint. There is no standard to address this specific question, as to when it ceases to be a modification of a pre-existing, nonconforming structure and become "new construction." The bylaws state that one can effectively reconstruct in an entirely new footprint and still benefit from the protections that are afforded to pre-existing, nonconforming structures. There is no test as to when a structure crosses the threshold from modifying a pre-existing, nonconforming structure, to new construction, to reconstruction of a pre-existing, nonconforming structure. In many municipalities this does not matter, as both are permitted so long as the substantially more detrimental test is satisfied.

In one specific case, the Supreme Judicial Court held that in the absence of a variance any extension, or a structural change of a non-conforming structure, must comply with the applicable zoning ordinance or bylaw. If the proposed extension or change conforms to the bylaws, project approval requires a finding that the extension or change will not be substantially more detrimental to the neighborhood than the existing nonconforming structure.

The proposed plan shows that the existing Floor Area Ratio (FAR) is 2.6 and the proposal would bring the FAR to 2.1. This is still nonconforming, as there is a maximum 1.0 FAR allowed in the district, less nonconforming. The proposal will also be fully compliant with items such as setbacks, and lot coverage. It appears the applicant is proposing to maintain the existing nonconformity. The site will not be brought into full compliance with the bylaw, but it appears the applicant is proposing to make circumstances better. Attorney Costa stated that, in his opinion, this does not trigger the need for a variance. It does trigger the need for the Board to apply the substantially more detrimental test and make a determination on that.

Regarding Section 4202 of the bylaw, states that a special permit must be obtained from the Board of Appeals before any change, alteration, or extension of a nonconforming use or structure may be made and no such permit will be granted unless the Board of Appeals shall have found that the change, alteration, or extension shall not be substantially more detrimental to the neighborhood than the existing nonconforming use. This language mirrors the statute. The use that exists today is a conforming use or the use that previously existed in the existing footprint

was a conforming use, and the applicant has proposed a conforming use that is allowed by the bylaw.

Mr. White stated that the next questions are what must the applicant do regarding a nonuse, can the entire structure be razed, and a new structure be placed and still be considered pre-existing, nonconforming and should the new construction conform to the bylaw, and does the abandonment mean that the lot coverage FAR must be made to conform to the new bylaw.

Attorney Costa stated that the Town's bylaw uses the term nonuse. The statute previously equated nonuse with abandonment and those terms were used interchangeably. The statute now uses both terms and case law shows that these things are different. Abandonment requires intent and some evidence of a purposeful abandonment of the use. Nonuse does not necessarily require intent; it requires the owner to discontinue the actual use. The Town's bylaw uses the term nonuse, which is a less stringent test than abandonment. In this case, there has been a period of two years of nonuse of this structure. It would be hard to sell in a court of law that, due to this two-year period, the applicant must now bring the structure into full compliance with the bylaw.

Mr. Barbadoro asked if the bylaw includes the term abandonment or only nonuse. Attorney Costa stated that the bylaw only uses the term nonuse; it does not include the term abandonment. This gives the Town a greater authority to make a determination. If there had been a period of 24 consecutive months where the property had not been used for the prior illegitimate use, the Board has the full authority to say no to the effort to resurrect that use. Bylaws that utilize the term abandonment typically apply the same 24-month test before that the town is vested with the right to refuse resurrection of the nonconforming use.

Mr. Toups asked if there was a situation in which a preexisting, nonconforming office building or house was owned and attempted to be rented for two years, without any success, does the ordinance imply that the owner would have to raze the structure. Attorney Costa stated that he would need to determine if the nonconformity referred to is the use of the property or the structure itself.

The next question is, if an existing nonconforming structure is repurposed, can the new purpose in its intensity of use be considered detrimental and thus denied. Attorney Costa stated that Section 4201 says that grandfathered uses and structures will be grandfathered. The bylaw states that it will apply to reconstruction extension or structural change of these nonconforming structures, or alterations of these nonconforming structures, to provide for a substantially different purpose, or for the same purpose in a substantially different manner or to a substantially greater extent. There are exemptions for single- or two-family structures. The answer to this question is yes because the Board could determine that the new use of the nonconforming structure checks one of those three boxes: substantially different purpose, substantially different manner, or to a substantially greater extent. The caveat in this case is that the intent is not to change a nonconforming use to a different nonconforming use. The use was conforming before and will continue to be conforming. The applicant is before you for a special permit. The mere change in use, even in the same footprint, could trigger a need for a special permit. This is not the case for this hearing, but this could be used as a learning opportunity. Mr. White noted that the proposal is for a different use, but it an allowable use.

The next question is, if the Board is only allowed to consider the nonconformity, does it waive the requirement of other information required under Section 9200. Attorney Costa stated that Section 4202 says that a special permit must be obtained from the Board of Appeals, pursuant to the provisions of Section 9200 before any change, alteration, or extension of a nonconforming use may be made. He does not believe this is accurate and this will be better clarified during the recodification. Section 9200 is the traditional special permit section and defines the special permit granting authority. This includes a seven-part test, including evaluating social and community needs, evaluate traffic and utilities, population density, health, environment, and fiscal impacts. The special permit tests are not applied to changes, extensions, or alterations to nonconformities, or reconstructions of nonconformities. That test it is very simply whether the change, extension, or alteration is substantially more detrimental to the neighborhood.

In response to a question regarding if Section 9200 requires that the benefits of the proposal outweigh the detriments to the community, Attorney Costa explained that the standard of ‘not substantially more detrimental to the neighborhood’ is verbatim directly from Chapter 40A Section 6. This authorizes municipalities to adopt that standard and to expand the circumstances under which it applies, but it does not authorize municipalities to alter the standard. The standard in Section 9200 is also taken directly from Section 9 of the Zoning Act and it says that the special permit granting authority shall find that the structure, or proposed uses, shall not have adverse effects which outweigh its benefits on either the town or the neighborhood, in view of the particular characteristics of the site and of the proposal in relation to that site. It then lists the seven-part test and factors to be considered in applying that test.

In response to a question from Mr. Barbadoro, Attorney Costa explained that there is no balancing test under Section 4200 with respect to non-conformities. The determination is that the Board must find that the change, alteration, or extension is not substantially more detrimental. In a circumstance where there is a change to a nonconforming use or to a non-conforming structure that is only somewhat more detrimental than the existing, the Board should issue a special permit. The threshold is if the change is substantially more detrimental.

Attorney Costa explained that applicants generally like to know if they will be able to move forward with a proposed use before designing the site. Thus, making applicants move through a Planning Board site plan application process before knowing if the use will be allowed by the ZBA seems a bit backward. However, the process of applications through various boards currently exists in the Town’s bylaws. Section 4200 regarding nonconformities, states that a special permit must be obtained from the ZBA per Section 9200. For a special permit under Section 4200, the application process under Section 9200 is the process that would apply. It may be reasonable to waive some of the requirements, based on the proposed change to a nonconformity. The Board has the ability to change this process, but also to direct an applicant to get site plan approval first. Mr. Troups agreed that this seems to be a chicken-and-egg situation. Mr. Barbadoro stated that he prefers the process in which an applicant receives site plan approval prior to the issuance of any special permit.

Lou Levine, representing the applicant, stated that he believes it is a burden to ask any applicant to go through the site plan approval process without first knowing if the ZBA will approve the proposed use in the nonconforming structure. This process can be waived by the ZBA, with a condition that site plan approval be obtained by the applicant. This would not lead to a lack of review on any aspect of the application. It is unclear if the site plan approval will change anything the ZBA will be discussing at this hearing.

Mr. Barbadoro stated that the distinction between site plan review and special permit review is that one is discretionary, and one is not. The applicant is asking Town to expend its discretionary authority prior to obtaining all of the information from site plan review.

In response to a question from Mr. Barbadoro, Attorney Costa stated that, if the ZBA approved a special permit for nonconformities with the condition of obtaining site plan approval, and that site plan application was denied by the Planning Board, then the applicant cannot get a building permit under the ZBA's decision. The applicant could then appeal the site plan approval based on that decision of the Planning Board. If the court remands that decision, once site plan is issued, the ZBA's condition is complied with. It is common to include a condition of approval that the ZBA grants a special permit for nonconformity, with the condition that the applicant shall seek and obtain any and all other permits as may be required. Failure to obtain any of these permits shall render this permit null and void. A municipal permitting authority can waive procedural requirements, and the bylaw also give that authority.

Ms. Murphy stated that the Board previously told the applicant they would need to first seek site plan review from the Planning Board, pending comment from Town Counsel.

Mr. McCormack asked for a Board vote on waiving the requirement of a site plan approval prior to the application for a change in the nonconforming structure. He is inclined to waive this item.

Mr. Barbadoro asked if the Board is prepared to grant a special permit to reconfigure the building only and leave it as unpermitted until there is a specific use, or to grant a special permit to allow for any number of potential uses.

Mr. McCormack stated that he Board cannot grant permits for applications which are not before it. At some point, the applicant will need to state a use for the building and that will either be by-right or trigger a use special permit application.

Mr. Barbadoro disagreed. He stated that a Section 6 finding cannot be approved when five or six uses are being proposed to the Board at this time. Some uses may be more substantially detrimental to the neighborhood than others. He would be inclined to issue a special permit to the applicant to allow for the shell of the building to be built and require the applicant to come back to define the use. The use is needed to make a finding.

Mr. McCormack stated that the finding is whether the altered structure is substantially more detrimental than the prior existing structure, not the proposed use to the prior use.

Mr. Barbadoro noted that the proposal is to turn this structure into a high cube warehouse. This implies a different level of use and different impacts based on traffic and a number of other criteria. He asked if the Board could approve the structure with no clear use. Attorney Costa stated that the chief focus of the analysis is on the proposed reconstruction for a preexisting, nonconforming structure. Case law indicates that the change of use in a preexisting, nonconforming structure can be considered as part of the analysis. The Board can look at the proposed footprint and the proposed use and consider if it would be substantially more detrimental than the previous footprint with this proposed use. Both uses are permitted, so the uses cannot be examined in a vacuum. The Board can consider if the proposed use will have a different impact on the neighborhood, based on the proposed footprint.

Ms. Hilberg stated that she feels there are appropriate checks and balances in place. The ZBA should examine if the proposed structure is substantially more detrimental, not the use.

Mr. Toups stated that, if the change in the building allows for uses that could not occur in the previous building, this should be taken into account. However, he does not believe a full site plan review is needed prior to ZBA decision. More information on the proposed use is likely needed.

Mr. Barbadoro asked what criteria the Board could use to determine if the proposal is substantially more detrimental to the neighborhood, if not the use.

Ms. Hilberg stated that the applicant does not yet know who the tenant will be and cannot know the use until allowable uses are known. She would like to find a compromise.

Mr. Toups stated that he does not believe the Board can issue a permit only to build a shell, requiring the applicant to come back before the Board for a future use. Ms. Hilberg agreed that the Building Inspector will check to see if the proposed use is an allowable one before issuing a building permit. Mr. Toups noted that some of the allowed uses may have a more detrimental impact though.

Mr. White stated that the issue is how to know what ‘substantially more detrimental’ means without knowing the use. The Board is between a rock and a hard place. The ZBA has discretion, but the Planning Board does not. If the ZBA gives the applicant a permit predicated on Planning Board approval and the applicant eventually forces that issue, the ZBA has given away its discretionary rights.

Vincent Cannistraro stated that he has purposefully presented this building at 20% less than the existing structure and marketed it for flex users. Each potential tenant has asked about Town permits. No one will sign a lease until the Town approves a use. It would be a different story to market this building to Amazon, and he understands this is a concern of the Town.

Mr. Barbadoro noted that the proposed structure may have less square footage than the existing building but is larger in volume. The proposed building is closer to the well water supply. The building footprint may encompass a well on the property as well. Occupancy permits are administrative and nondiscretionary. If a special permit is issued and the structure meets the

building code with a use allowed by right, a certificate of occupancy will be issued, even if it is substantially more detrimental to the neighborhood.

Mr. Caprara asked that the Board make a decision regarding if site plan approval will be required before discussing the special permit application.

Mr. McCormack agreed that the items regarding the proposed configuration of the building and lot line located near the wellhead should all be considered as part of the Board's Section 6 finding. However, the Board should first answer the preliminary question regarding prior site plan approval.

Mr. Toups stated that he would like to flush out the ideas of proposed use and structure in order to write conditions to move to site plan review by the Planning Board.

Mr. Levine suggested giving a list of proposed uses to the Board, in order to move forward with the special permit approval process.

Mr. White stated that he is inclined to approve this conditioned on site plan approval, believing that the Planning Board will have a thorough review process.

Ms. Hilberg suggested conditioning this on what the applicant cannot do on the site.

Attorney Costa stated that he is uncomfortable with the Board determining appropriate and inappropriate uses for the site. It is fair to expect an applicant to have some basic proposed uses for the building. This does not require an applicant to go through the entire site plan review process. The Board may state that it will issue a special permit, but only when a few proposed basic uses are presented to it.

Mr. Cannistraro stated that he has been marketing this building to flex users because of the regional power in Boxborough for that type of use. He has engaged with several potential light manufacturing and flex user tenants. 80% of the interest in this property has been in that vein of use.

Attorney Costa stated that it is the applicant's responsibility to present the Board with what it proposes to do on the site. The Board can then decide if it needs more information, or if it would like to move forward with the process in some way.

Mr. Levine stated that the applicant is interested in continuing this hearing at this time. It will put together a list of potential uses before the next meeting. He will send this list to Ms. Murphy

Mr. Barbadoro moved to continue this hearing to August 2, 2022, at 7:45pm. Seconded by Mr. Toups.

Roll call: Shawn McCormack - aye, Stefano Caprara – aye; Kristin Hilberg - aye, Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Public Hearing (cont.) 235 Summer Rd. – Special Permit Modification

Mr. White read the legal notice for 235 Summer Road.

Ms. Murphy explained that Jim Garreffo, Board of Health Agent, has stated that he is waiting on DEP regarding if the generator needs a certification.

Mr. Barbadoro stated that he has concerns regarding a substantial amount of diesel fuel being stored in the Aquifer Protection District, the potential for a condition to schedule monthly testing at a time that will not bother neighbors, and the potential noise issue. He suggested that approval be conditioned upon the generator meeting the government standard, otherwise the special permit will need to be modified.

In response to a question from Mr. White, Daryl Gresham, American Tower, stated that the generator can hold 300 gallons of diesel fuel.

Mr. Caprara stated that the Aquifer Protection District considers a ceiling of 2,500 gallons of fuel stored.

The Board agreed to consider monthly testing hours from 9am – 5pm on weekdays.

Ms. Hilberg moved to close the public hearing. Seconded by Mr. Barbadoro.

Roll call: Shawn McCormack - aye, Stefano Caprara – aye; Kristin Hilberg - aye, Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Mr. Barbadoro moved to approve the special permit application for 235 Summer Road with the following conditions: generator testing shall take place between 9am-5pm Monday-Friday, and that the generator shall comply with DEP specifications for its size and type. Seconded by Ms. Hilberg.

Roll call: Shawn McCormack - aye, Stefano Caprara – aye; Kristin Hilberg - aye, Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

New Business – None at this time

Next Meeting: August 2, 2022

Mr. Barbadoro moved to adjourn the meeting at 10:15pm. Seconded by Mr. White.

Roll call: Shawn McCormack - aye, Stefano Caprara – aye; Kristin Hilberg - aye, Michael Toups - aye, Mark Barbadoro - aye, and Mark White –aye. 6-0-0, motion carried.

Respectfully submitted,
Kristan Patenaude

Zoning Board of Appeals Meeting Minutes

JULY 19, 2022

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Join Zoom Meeting

<https://us02web.zoom.us/j/84066194560?pwd=alNvMTNwUGtua29pWGxkcjQ4VVpodz09>

Meeting ID: 840 6619 4560

Passcode: 090788