

Minutes Meeting of September 30, 2009 – Executive Session(Mattbob), Dufault/Fraser, AL Prime

Members Present: Chase Duffy (Ex/Dufault), Robert Cadle (all), Mark Mulligan (AL Prime), Jay Prager (All), Alison Manugian (Ex/AL Prime, Megan Mahony (All), Harris McWade (Ex), Bruce Easom (Ex/Dufault), Cynthia Maxwell (Ex)

David Doneski, Town Counsel, was present.

Chairman Cadle opened the meeting. Mr. Prager moved to go into executive session for pending litigation, Mr. Easom seconded and a roll call vote followed: Chairmain Cadle voted yes, Mr. Prager voted yes, Mrs. Duffy voted yes, Ms. Mahony voted yes, Mr. Easom voted yes, Ms. McWade voted yes, Mrs. Maxwell voted yes, Mrs. Manugian voted yes and Mr. Mulligan voted yes.

Chairman Cadle reconvened the Fraser/Dufault hearing, noting that the Board went for a site walk and asked if there was any further discussion.

Mrs. Duffy said that it seems that the proposed location is the best one, in part because it lines up with the abutting garage, and should be built as drawn.

Chairman Cadle said that he thinks the requested variance could be minimized by pushing the shed over to the west, nearer to the septic system.

Ms. Mahony wonders if there is a compelling reason to minimize the variance if the shift is not making the need go away.

Mr. Easom said that in using the measuring tape, he found that there was 21 feet by the wall, which if the shed was built to 6.5 feet, a variance would not be required. He said that he agreed with the principle that it is a good idea to try to make the exception as small as necessary, noting that setback requirements are set to minimize impact on neighbors. He said that it doesn't make sense to put the shed up against the wall but it could be set back a little and still allow for maintenance, etc.

Discussion ensued regarding what makes the most sense.

Mr. Prager said that he looked at the property and although there is discussion about moving the shed, he thinks moving the shed would make it more unattractive for the neighbor. He said that the further in the shed is, the more it will appear as an encroachment. He noted that the Board is haggling over where the shed should be but his sense of the Board is that the variance is okay for the neighborhood and he would be happy to locate the shed where it is proposed now.

Michelle Collette, abutter, said that she lives in a nonconforming house, on a nonconforming lot in a nonconforming neighborhood and has no objection to the proposal, noting that the applicant needs maximum flexibility.

Mrs. Manugian, abutter, asked how the height of the shed compared with the garage.

Mr. Dufault said that shed would be five feet lower than the abutting garage.

Mr. Easom asked about the history of granting variances like this.

Chairman Cadle said that the Board has been pretty flexible, especially in areas like West Groton and Lost Lake, where virtually all of the properties are nonconforming and flexibility is needed to allow homeowners to make improvements.

Mr. Prager felt that owing to circumstances related to shape, topography, etc., relief could be granted without nullifying the intent of the bylaw. He said that the Board has turned down variances where the setback could be met, but here, due to the location of the raised septic system and the fact that there is an existing shed, the variance should be granted.

Mr. Prager moved to grant a variance to Ms. Fraser, 6 Westview Ave., to place a shed in accordance with the drawing submitted with the application dated 8/3/09, showing the shed over the footprint of the existing shed, which will be removed. Mr. Easom seconded the motion.

Conditions: (1) No portion of the new shed shall be closer to the easterly lot line than the easterly side of the existing shed; and (2) the southeastern corner of the new shed shall be in the same location as the southeastern corner of the existing shed.

The motion passed unanimously.

Chairman Cadle convened the AL Prime/Kane appeal by reading the legal notice, noting that the applicant will present and the Board will ask questions. He said that the floor will then be opened to the public, the opposition will present, more questions and then again open to the public.

Mr. Mulligan wanted clarification, that the Board is only hearing an appeal of the issuance of a building permit.

John Kane, Greg Sweeney, and Pat Kenney, all of Oxbow Lane, were present as the appellants. Mr. Kane noted that this has been a long process and he is concerned with the issues at hand. He then presented a packet, beginning with a discussion of water protection and the gas station on the aquifer.

Chairman Cadle said that he wants to keep the meeting fairly focused, noting that tonight is not the night to go through all the details for a special permit. He said that the only issue before the Board is whether the Building Inspector's decision was appropriate.

Mr. Kane described grandfathering under the bylaw, noting that the business has to stay the same.

Mr. Prager said that what is grandfathered is the presence of tanks in the water overlay district, noting that the lot is zoned for business and thus the gas station is by right.

Discussion ensued regarding what is grandfathered.

Mr. Kane said this is a gas station in a water resource district and AL Prime is arguing that it is okay to add a convenience store.

Ms. Mahony said that she feels that a convenience store would be allowed by right.

Discussion ensued regarding how the convenience store could be integrated into the gas station.

Mr. Kane presented a plan showing the current configuration and then noted the applicable bylaws and said it is up to the ZBA. He said that the assumption that the PB or the BI could take on this responsibility is in violation of the bylaws.

Chairman Cadle said that he feels the PB only dealt with the storage tanks and site plan review.

Mr. Kane disagreed, noting that the BOS approved the tanks as an accessory, and something this large should not be PB or BI jurisdiction and should be treated as a new project.

Discussion ensued regarding whether the PB has authority, with Mr. Prager noting he feels that under the bylaw, the PB does have authority.

Mr. Kane said that under 218.6E.1, the intensity or dimensional requirements cannot be extended or increased and may not be substantially more detrimental to the neighborhood. He said that he doesn't feel that grandfathering allows for another business entity and he thinks the proposed gas station is too big for a ½ acre lot.

Chairman Cadle said that it looks like 98% of the lot is covered with pavement in the picture submitted by the applicant.

Mr. Kane noted that next door is an empty lot zoned R-A and then described abutting properties.

Howard Speicher, AL Prime lawyer, questioned the validity of the plan, noting that it is not stamped by an architect.

Mr. Kane said that his intention is to make it relatively easy for the Board to get a picture of the business on the lot. He said that he is glad there are going to be new tanks, but Prime's claim that the new tanks are to reduce deliveries is not true because there are more pumps, more nozzles and eight simultaneous gas deliveries to customers are possible at the same time. He said this is all about selling more gas, noting that they are going to raze the existing building and replace it with a 1250 ft. convenience store. He said that a canopy bigger than Mr. Mike's by about 900 square feet is proposed and then showed some pictures of canopies.

Discussion ensued regarding canopies. Mr. Prager asked about the Champney Street canopy and Mr. Kane said that it is about 3000 square feet.

Mr. Kane said there is a lot more building on a little lot, noting that big canopies are big marketing tools and this is at least twice as big as is reasonable.

Discussion ensued regarding the traffic impact study and whether the proposal will create more traffic issues. Mr. Kane said that it would.

Mr. Prager asked whether Mr. Kane has actually measured the traffic flow.

Mr. Kane said that he had not.

Atty. Speicher said they have submitted traffic studies to the court and the Town, although Mr. Kane is claiming that they didn't. He said that the court threw out their case because they didn't provide figures.

Mr. Prager asked where their figures were.

Atty. Speicher said that he didn't bring them because this is not a site plan review.

Discussion ensued regarding why the case was thrown out of court.

Atty. Speicher said that he doesn't believe anything heard yet has to do with what is before the Board tonight.

Mr. Kane said his source of data is from AL Prime, noting that the figures have been endorsed and no weekend traffic is included.

Mr. Mulligan apologized for interrupting but felt they were getting away from the scope of the hearing.

Mr. Kane said he thinks that this is based on the bylaws and the BI does not have the purview to issue the permit. He said AL Prime should make an application for a reasonably sized station that is safe and not detrimental to the neighborhood.

Mr. Sweeney said that the data they brought is trying to show how the proposal is detrimental to the neighborhood.

Mr. Mulligan asked whether a gas station and convenience store are allowed in a B-1 zoned lot, with the answer being that they are. He said that because of that, the storage tanks are what are at issue in the water overlay district, noting that the building permit is for a gas station and convenience store. He asked whether the buildings would be in compliance and Atty. Speicher said there is no question about that and no issues have been raised that they are not in compliance.

Mr. Prager said this falls in a funny area of the code, because but for the water overlay district, this would be allowed by right. He said that AL Prime has permits from the BOS and PB because the new tanks are much better and safer. He said he doesn't understand the argument about the business being in violation.

Mr. Kenney said it is because it is a much bigger store, etc.

Discussion ensued regarding whether this is an expansion of a non-conforming use.

Chairman Cadle said that the gas station has been there for a long time but was not non-conforming until the water overlay district came into law.

Mr. Kenney said that every aspect of this is an expansion and everything is detrimental to the neighborhood from increased traffic, the canopy, etc.

Chairman Cadle said he wanted clarification as to how Mr. Kenney wanted the ZBA to rule.

Mr. Kenney said the BI has exceeded his authority and AL Prime should have been before the ZBA right from the beginning.

Mr. Prager noted the parcel is zoned B-1, the gas station has been there forever, and a gas station and store would be allowed in a B-1 area.

Mr. Kenney said this is spot zoning and has not always been B-1.

Mr. Sweeney said that Town Counsel issued an opinion that the ZBA should issue the permit because this is an expansion of a non-conformity.

Mr. Prager said he feels how the Board interprets what the non-conformity is, is how to handle this case.

Mr. Kenney said he feels the sale of gas in a water overlay district is the non-conformity.

Mrs. Collette spoke from a PB perspective, noting that the PB granted a special permit for the storage tanks, and the Board was in receipt of two memos from Mr. Tuscino, the Building Inspector at the time, and one from Town Counsel. She said the PB referenced the BI in their decision, that it is his right to determine whether a permit from the ZBA was required and only addressed the underground storage of fuel and site plan review. She said it was agreed by all parties at the time that new tanks were a huge improvement and the addition of the canopy,

which is also a storm water management issue, is to protect the area from surface and storm runoff. She noted that the rezoning to B-1 was approved twice at town meeting too.

Chairman Cadle said it seems that every member of the PB except for Mr. Barringer agreed that Prime should go before the ZBA for a special permit.

Mrs. Collette said no, that the PB determined that the BI has the final say and standing, and told the abutters they have the right to appeal this decision.

Jim Patierno said he wants to hear from the BI and suggested that maybe the Board should discuss with Town Counsel whether the BI should issue the permit.

Mr. Herget said that he spoke many times to Mr. Tuscino about this and noted that AL Prime could have a convenience store there at present. He said he doesn't feel this is an expansion because the new building is smaller than the existing one.

Mr. Prager asked about the claim that the gas business is expanding.

Mr. Herget said that it is still a gas station and it will continue to be so in the future.

Atty. Speicher said he didn't represent AL Prime before the PB but did through the appeal. He said this matter has been before the town and courts for more than six years and the PB considered the very issue before the Board tonight. He said Town Counsel decided one way and the BI decided another way, and the PB ruled with the BI, noting that the abutters had a right to appeal that decision. He said that that appeal window doesn't last forever, noting that there is a right to appeal because landowners have a right to some finality. He said that this went through the courts and his client finally went to get the building permit that is rightfully theirs. He said that even if the abutters are right, which they aren't, they have lost their right to appeal, which should have happened six years ago. He said they broke up the areas of appeal and that can't be done, stating that the fact is, the BI in 2003 and in 2009 were correct in determining that there isn't a change in the non-conforming use. He said zoning laws are the only laws that allow exceptions via variances, noting that there are three uses: use by right, use by special permit (PB and ZBA), and uses that are forbidden unless a variance is obtained. He said that this is a use that was once allowed and although the bylaw changed, the right to operate cannot be taken away. He said that in adopting the water overlay district, the town adopted ways to make it fair to landowners and the PB has the right to grant a special permit. He said the PB is specifically authorized to grant underground storage tank permits and to do site plan review, noting that the PB allowed the convenience store and improvements associated with such, under B-1. He said that it is not a change in a non-conforming use if provided for in the current bylaw.

Chairman Cadle asked for clarification.

Atty. Speicher said that if they were making major changes, they would then get a special permit, which is what his client did for the storage tanks, through the PB. He said that they are making improvements, which should not be prohibited because the bylaws provide for such. He noted that the abutters should have raised all these points in court and didn't and it is not fair or correct to do so now. He said a lot of what was presented tonight is new to him, noting that he did submit a traffic study and he can't vouch for the numbers submitted by the abutters tonight. He said he objects to the numbers but that is not what is before the Board tonight. He said that this is not more detrimental to the neighborhood and the BI is the person entitled to make that decision, noting that they are conforming to the special permit provisions.

Mr. Prager asked what the extent of the non-conformity that can't be increased is because there is nothing in the regulation that says that a gas station is limited to four or six or eight pumps. He said that the gas station will continue to be a gas station and that putting in two more pumps is a logical step. He said they can sell candy bars by right and is not an increase in the use, noting that Prime can extend as long as the nature of the operation does not change. He said that it does not make sense that they can't do what they are doing now in a new building and then asked Atty. Speicher whether anything in the building is changing to make the structure non-conforming.

Atty. Speicher said that the building would conform to all zoning requirements. Discussion ensued regarding the intensity of the operation.

Mr. Prager said the PB and the court looked at those issues and both said that this would have less impact on the environment/neighborhood.

Mr. Kane said that during the fall of 2003 there was no discussion of impact of traffic, noting that Prime said that there would be fewer deliveries but what is proposed is much larger.

Mr. Prager asked what would be the applicable intensity regulations here.

Mr. Kane said intensity would be rate and flow.

Ms. Mahony said there is nothing in the bylaw stating that.

Mr. Prager said that intensity means size of building, lot coverage, etc.

Mr. Patierno asked what would AL Prime be looking for if the came to the ZBA, noting that Site Plan Review has been done and the use is not changing.

Mr. Prager agreed that Prime is not changing the use because they are still pumping gas.

Chairman Cadle asked whether the station would become self-serve.

The owner said that that is the intent.

Chairman Cadle said that this is different from a couple of guys pumping gas.

Mr. Prager reiterated that this is not a change in use and all setbacks, etc, have been met they have permits for the tanks.

Mrs. Sartini asked whether this discussion would be happening if the station was not in a water overlay district. Mr. Prager said it would not.

Mrs. Sartini asked whether the non-conformity of a gas station in a water overlay district was a grandfathered use.

Mr. Prager said yes, noting that the non-conformity is not changing.

Ms. Mahony agreed, noting her feeling that the bylaw doesn't say that a business owner cannot modernize.

Mr. Prager noted that as Mrs. Collette said, gas stations aren't built without canopies for many reasons.

Mr. Easom asked whether the ZBA agrees with Atty. Speicher, that a non-conforming business is conforming once a special permit is obtained.

Discussion ensued regarding what was meant by that.

Mr. Patierno said that some uses are allowed by special permit but aren't non-conforming.

Mrs. Manugian said the continuing paragraph talked about the ZBA needing to grant a special permit.

Mr. Prager said that that would only be the case if there were a change in use, which there is not. He said that two stations on Rt. 119 have canopies, one of which is significantly larger and this hasn't harmed the town.

Discussion ensued regarding what constitutes a change in use. Ms. Mahony said that the Board does not get to the question of impact if there is not a change of use.

Mr. Mulligan said the change of use is based on the nature of activity and not the scope of activity.

Discussion ensued regarding what constitutes an expansion vs. change in use.

Mr. Sweeney said that everything here is an increase.

Mrs. Manugian said the PB only allows for bigger tanks.

Atty. Speicher said that that is the increase and permitted by the PB.

Mrs. Manugian said that more pumps and the canopy is a change in use.

Mr. Prager said that the use is not changing.

Atty. Speicher agreed, noting that the size of the tanks holding gas on site has increased through the PB and more pumps and the canopy is associated with this. He said that if his client wanted to make a truck stop with many diesel pumps, that could be argued as a change in the nature of use.

Mrs. Manugian disagreed.

Barbara Weaver, Oxbow Lane, said there is a vernal pond on her land and runoff from Oxbow goes into the vernal pool. She said she has a well on the property, noting concern that there should not be a gas station to begin with because of the water resource district. She said that neighbors are very concerned about the impact.

Chairman Cadle said that the PB went through all the engineering in 2003.

Ms. Weaver said that that was a long time ago and things are different.

Mr. Prager said that the PB deals with those issues and has done due diligence and the Board is here to determine whether the BI has made a correct decision. He said that the Board can't reopen those arguments.

Ms. Weaver said that she thinks the BI has not taken into account that this is a water overlay district.

The BI said that he has taken this into consideration and the new tanks with the canopy are a much better design, noting that fuel spills will be contained under the canopy.

Ms. Weaver asked about cars going in and out, noting that it is a volatile situation having gas there.

Mr. Kane said he hears Mr. Prager's argument but it is not an absolute because when dealing with gas or hazardous materials in a water overlay district, it can't be considered absolute.

Mr. Prager agreed but said the size of operation is limited to the size of the lot, noting that the building is smaller and the canopy protects the pumps. He said he thinks going from 6 to 8 pumps doesn't change the nature of the operation. He said the applicants have to show where Prime is violating the bylaw.

Mr. Kane said the proposal too big for site, even if they are meeting setback requirements, noting that it is much more likely that spills will occur.

Ms. Mahony said that that is not even an issue here.

Discussion ensued regarding whether non-conformity is changing or increasing.

Discussion ensued regarding whether the proposal violates the lot coverage requirement.

Mr. Sweeney said that the PB only voted on the special permit for the tanks when the BI said there was not an increase in the non-conforming use. He said that AL Prime maneuvered it that way, so that is why they are here at the "11th" hour. He asked why the Board would not consider it an increase when Town Counsel said it was.

Mr. Prager said that Town Counsel is just mimicking what is in the bylaw and just because Town Counsel writes a letter doesn't make it law.

Mr. Sweeney said that Town Counsel is representing the town.

Atty. Speicher said that if the abutters thought the PB was wrong to rely on the BI's decision then they should have appealed. He said the BI made a written determination and thus can be appealed.

Discussion ensued regarding how the abutters could/should have proceeded.

Chairman Cadle said he thinks they would have had the right to appeal Mr. Tuscino's letter to the ZBA.

Mr. Kane said that they had counsel at that time and there was a lot of discussion about the expansion of use issue. He said they were not advised that they could appeal Mr. Tuscino's letter but that they could appeal a building permit.

Discussion ensued regarding what the abutters should or should not have done.

Mr. Kane said he doesn't think there has been any evaluation of traffic, etc, or the impact on the neighborhood and he is asking the Board to revoke the permit and have AL Prime start again and to do it correctly.

Mr. Mulligan said he sympathizes with the abutters but doesn't think the BI exceeded his purview, and does think the permit was properly granted.

Ms. Mahony agreed.

Mrs. Manugian disagreed.

Mr. Prager agreed with Mr. Mulligan and Ms. Mahony.

Chairman Cadle agrees that the use will not be altered or expanded and would uphold the building permit on those grounds.

Mr. Prager moved to uphold the Building Inspector's decision to issue a building permit and the appellant's appeal is denied.

Mrs. Manugian asked whether there are approved septic plans on file and the BI said there were. Mr. Mulligan seconded the motion and it passed four to one, Mrs. Manugian being the one nay vote.

Ms. Mahony moved to adjourn the meeting at 10:10 pm. Mr. Prager seconded and the motion passed unanimously.