



Town of Groton Massachusetts Zoning Board of Appeals

Meeting Agenda and Minutes

October 6, 2010

Present

Robert Cadle, Chairman
Cynthia Maxwell, Member
Mark Mulligan, Member
Chase Duffy, Alternate Member
Jay Prager, Member

Bruce Eason, Alternate Member, in audience

Not Present

Alison Manugian, Member
Megan Mahoney, Alternate Member

A quorum was attained. The meeting was called to order at 7:30 pm.

Preliminary Agenda

- Truax
- Wilson/Lyons
- Sign Bills
- Approve Minutes
- New business

Meeting Minutes

Chairman Cadle reconvened the Truax hearing, noting that the last hearing was approximately 60 days ago and was continued to tonight to allow the applicant to provide proof that the business has been operational long enough to be grandfathered. He said he wants to keep this hearing to that issue only-the scope of the business and length of operation -- and to avoid peripheral issues.

Mr. Truax said he has affidavits from some but does not have the paper trail that the board seems to want. He said that people he spoke to haven't come forward, noting that he was hoping they would change their minds and sign an affidavit.

Mr. Blouin asked how many affidavits are needed.

Chairman Cadle said there is no set number.

Mr. Blouin asked whether the issue is if the business is grandfathered.

The board said this was correct.

Mr. Blouin said there has not been a two-year gap in the operation.

Mr. Prager said he had a discussion with Mrs. Collette about a memo about the non-use issue.

Mr. Blouin said the Building Inspector told him the non-use bylaw was put in the books in 1987.

Discussion ensued regarding what standard the applicant is being held to.

Mrs. Collette said the home occupation bylaw was established in the 1980's. She said that if the board establishes that the business isn't grandfathered then there can be no home occupation.

Mr. Prager asked what standard applies.

Mrs. Collette said she thinks 1963 is the threshold.

Mr. Prager said the board needs to let the applicant know how far back he needs to provide proof of business.

Mrs. Duffy said the standard presented by Mrs. Collette of 1963 should be used.

Discussion ensued regarding what is the crux at issue here: there is not a home occupation issue because there is no home on the property.

Chairman Cadle suggested the issue could be handled under 218-6.

Kevin Petry said he went to court with the Building Inspector last year and he had to show receipts back to the 1960's.

Mr. Prager said this is totally separate, noting that a home occupation needs a dwelling.

Mr. Blouin said this is not a home occupation so that is not relevant.

Chairman Cadle said the board has determined this is not a home occupation and thus not an issue.

The board noted agreement.

Chairman Cadle said the year the business started is important.

Mr. Blouin, 35 Whitewood Ave, said he grew up with the applicant and spent a lot of time on the property and wood was worked with.

Mrs. Duffy asked how long the business has been going on.

Mr. Blouin said since 1974.

Kevin Petry said the same thing, that he has know the applicant for a long time and the applicant has worked with cord wood, pallets, etc., including making pallets for him.

Chairman Cadle asked where Mr. Petry brought the pallets.

Mr. Prager asked for Mr. Petry's records, as well as Mr. Truax's records.

Mr. Petry said he has a cash business but noted that this meeting is not for his business.

Mrs. Truax (applicant's mother) said the farm was given to her when her parents passed away, noting that she didn't sell it but gave parcels to her sons. She said it never went out of the family and never changed hands.

Chairman Cadle said he understands her concern, but doesn't understand the genesis of this. He said there is a letter from 2008 from the Building Inspector that there was a problem there, noting that maybe some are more tolerant of businesses than others.

Mrs. Collette said the non-use issues were adopted in 1978, noting that there were substantial changes to Chapter 40A in the mid 70's and cited a paragraph regarding non-use. She said she is not familiar with any claim of 1987, noting that the bylaw was recodified in 1978.

Mrs. Duffy said the issue then, was non-use in 1978.

Mr. Prager asked what years the business has to be shown in use.

Discussion ensued regarding whether the business zone is at issue, or the issue of non-use is at issue.

Mr. Prager said there are two standards: one that the business started prior to 1963 and two, that there was not a period of non-use for 2 years after 1978.

Chairman Cadle said the business would only be grandfathered if the business was in operation prior to the bylaw changing.

Mr. Blouin said he felt that the 1978 bylaw is the only issue: nonuse

The board disagreed.

Mr. Mulligan said the issue is whether the business predates zoning and if the applicant doesn't meet the standard, then he loses his grandfathered status. He said the affidavits don't address this due to the dates and lack of substance.

Mrs. Truax said they have done cordwood on the property forever, since 1969, noting that they had woodstoves and had to bring in wood for their woodstoves.

Doris Williams, Mr. Truax's aunt, said they didn't sell wood, but used it for their own use.

Mr. Prager asked when they started selling wood.

Applicant's mother said they never sold it but just bartered and that they don't have records.

Mr. Prager asked whether they were bartering for goods prior to 1963. He said that their own use of wood is not a business, although maybe trading for chickens could be considered a business.

Mrs. Truax said they bartered and she had to work very hard because they did not have a lot of money.

Mrs. Duffy said when she grew up her family didn't have a lot of money during the depression, noting that if she had a business she would have had receipts, etc.

Mrs. Truax said her parents never had bank accounts.

Mrs. Duffy asked how a business could be proven with no records.

Mrs. Truax said her husband did pallet repair for Hollingsworth and Vose, which was then taken over by Jimmy Downes.

Mr. Mulligan said the affidavits mean nothing and that he doesn't know what standard of proof is required.

Chairman Cadle asked who has the burden of proof.

Mr. Mulligan said the applicant does.

Mrs. Duffy said the board also wanted more than just affidavits.

Mr. Truax said that they don't have any records.

Mr. Prager said it is not unreasonable that they don't have records. He then asked Mrs. Truax whether there was a wood business in 1963.

Mrs. Truax said there was a business, involving wood at all times, run by her father and her brother-in-laws.

Mr. Prager asked who has run the business since 1963.

Mrs. Truax said that her brother in laws, sister, etc were all there at one time with her mother and they ran the business. She said almost everyone is dead now and they didn't have an easy life.

Mr. Prager asked whether the Building Inspector could establish that there was no business there in 1963 and asked for the basis of the complaint. He asked whether the Building Inspector was within his rights to file the claim.

Mark Dupell, new Building Inspector, said he doesn't know the Truaxes, noting that a Building Inspector has the right to serve notice if he thinks there is a violation. He said it is not the BI's responsibility to prove; the burden is on the Truaxes. He said there is a Land Court case, with affidavits and testimony from the Truaxes and not once in this document was a wood business mentioned.

Discussion ensued.

Mr. Dupell read testimony from the court case, that the property was used as a farm, etc., and in 1967 Dorothy Ann and Mr Truax moved away and returned in 1974, and maintained a garden. He said that not once was wood of any kind mentioned.

Mrs. Truax said she moved out and her sister and husband moved in during that time, and then they came back from Missouri. She said her lawyer is the one who did the deposition and she doesn't understand why he didn't mention the wood business. She did say that at one point in time, the road was blocked off by boulders.

Chairman Cadle said he was trying to avoid getting off course, noting that he does understand the BI's points. He said the Land Court decision makes much about how the lots were used, by whom and how. He said that, technically, the findings of the Land Court are not binding on the ZBA under principles of res judicata because the issues were not identical but the applicant was afforded a full and fair opportunity to establish his case and the court's decision is at least instructive as it provides quite a thorough treatment of how the property was used during the relevant period.

Mr. Prager said the BI didn't issue a cease and desist order for a non-grandfathered use, but for the cease of a home occupation. He said they can't have a home occupation here, so it is not a valid order.

Discussion ensued regarding how to proceed with the BI's letter.

Mrs. Duffy said she has read a lot about the property in the local papers because of Board of Health issues.

Mr. Mulligan asked whether there were issues with the business prior to moving to the front of the lot.

Mr. Truax said they are only here because of neighbors' unhappiness.

Mr. Prager said he is not going to call neighbors or audience members liars, and he is also not going to say that Mr. Truax has not been cutting corners, but he also feels that the board can't make them prove a business from that long ago. He said the new BI may slap them with a new zoning violation.

Chairman Cadle said the board needs to weigh testimony from abutters that the business has only been going on for a couple of years at the longest.

Mr. Truax said Mr. Western, abutter across the street, likes the fence and has no problems with the operation.

Chairman Cadle said he won't discount that testimony.

Mr. Truax said Mr. Alcott's testimony was wrong, as well as Connie Sartini's. He said there was much false information, noting that this is and was a business all along.

Mr. Blouin said he should get a correct ruling from the new BI and start over.

Chairman Cadle noted that the applicant first got a letter from the BI in 2008 and there was no appeal.

Mr. Truax said the town does things all wrong and doesn't help with the process, noting that he knows nothing about any letters from the BI in 2008. He said the BI and Health Agent were late for an appointment with him and he filed a complaint with the town manager. He said they lied to get on the property and then served him with a letter, and he is responding to that letter.

Mrs. Duffy said he has been negligent about dealing with the letter from the BI in 2008.

Discussion ensued from the Truaxes about what is wrong with this process. Applicant's mother said that it has gotten out of hand and away from issues. Mr. Truax said he is taking anxiety medication and is always getting pictures taken of him, etc.

Mr. Prager asked whether if he moved the pallet business to his mother's lot, it could be a legitimate business.

Mr. Truax asked whether he could give the lot back to his mother to make the business legit.

Mr. Prager felt that was a good question.

Discussion ensued regarding how to rectify this situation.

Mr. Prager asked when the home occupation bylaw went into effect.
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Mrs. Collette said 1982.

Discussion ensued regarding what ruling should be dealt with in the BI's letters.

Mr. Prager said either there is a home occupation violation, the cease and desist is flawed, or the board needs to determine whether there was a two year hiatus. He said he feels the Board has to reject the order due to flaws.

Mrs. Maxwell asked which address has the pallets.

Mr. Truax said at 148, where he lives.

Mrs. Maxwell requested clarification about whether the home occupation permit for VCR repair was issued to the same address.

Mr. Prager said the board should not uphold the BI and the applicant should merge the lots.

Discussion ensued regarding the implications of giving advice to applicants.

Mr. Mulligan suggested the board tell the BI that the applicant can't obtain what is required to rectify this cease letter.

Mr. Prager said if the new BI determines there is a zoning violation then the case can be reopened.

Mrs. Duffy said there is nothing solid to make a grab at.

Mr. Prager said the letter talks about a home occupation permit he can't get because he doesn't live there.

Mrs. Duffy said she doesn't want to grant an allowance to someone who has so flaunted the process.

Chairman Cadle read from the BI's letter, noting the reference to home occupation.

Discussion ensued regarding how to apply home occupation to a lot not lived on.

Chairman Cadle said the board is in agreement that one can't have a home occupation on a lot without a home.

Mr. Troupe said when the letter was written, Mr. Truax was living in a trailer on the property, which may be why a reference to a home occupation was made.

Mrs. Truax said he did not live in the trailer.

Atty Lyons (member of the audience), said he was speaking just to the process and not representing anyone here, noting that the BI's letter was written when he was "god", and now the ZBA is "god". He said it is the landowner's responsibility to prove length of operation, etc. and no one else's. He said the board should rule without figuring out how to get from here to there, and if the landowner doesn't like the decision then it can be appealed.

Chairman Cadle said they have come full circle back to home occupation, noting that the applicant is trying to justify that the operation is grandfathered, and can be continued. He said there is not a clear answer with all the affidavits and from what the neighbors say, etc.

Mr. Troupe said he thinks Atty. Lyons was telling the board to make a decision tonight, that either the business is grandfathered or not. He said the board asked for verifiable proof and they need to decide if it was provided or not.

Mrs. Truax said they have provided proof to the best of their ability, given that everyone is dead. She said Mr. Troupe has no idea how her family survived all those years.

Laurie Smigelski asked whether there are any current records indicating that this is a viable business.

Mrs. Truax said there is a business, but there is no paper work, because they run a different business from hers.

Mrs. Truax's sister said she doesn't know what the board wants from them.

Mr. Prager said he has a small business and can provide records for at least the last ten years.

Mr. Truax, Sr. said he doesn't understand why it is called a vacant lot.

Further discussion ensued.

A motion was made to close the public hearing; it was seconded and passed unanimously.

Mrs. Maxwell said she doesn't know what the board is supposed to do and based on the incorrect letter from the BI, she is not sure how to rule.

Mr. Mulligan said what is before the board is an appeal of the BI of a cease and desist of a business, noting that he feels home occupation is irrelevant. He said if the board can come up with a way for the business to continue, then it can. He said his gut feeling is this is a long-term family living in Groton trying to make a living, and feels the applicant has made a case that a living has been made on the lot for some generations. He said he suggests that the applicant should be more agreeable to neighbors but it can only be recommended. He said the applicant has so much more to lose than others in the neighborhood and the standard of proof of business is impossible to work with. He said he thinks there should be more evidence to the contrary that the business wasn't there all along.

Discussion ensued regarding whether moving the pallets to the other lot would constitute a home occupation and whether a permit could even be obtained.

Mrs. Maxwell said she agreed with Mr. Mulligan, that there is more evidence to prove a business rather than not.

Mr. Prager said there is not enough evidence to deny a man his income from this property. He said he would not call anyone liars, noting that if the lot line is moved, there is at least a potential for a solution. He said if the lot line is not moved, there is a good chance the BI will move on a zoning violation. He said the solution needs to be acceptable to the neighborhood.

Discussion ensued regarding how to put conditions on the business.

Chairman Cadle said he feels the appeal was not filed in a timely fashion, and feels the weight of evidence was in favor of the neighborhood. He said there is no doubt that a business was going on, but there is a question of what type of business and for how long. He said he does agree there is an equity issue for a gentleman who has been working in town for many years, noting that the Board can't expect 47 years of records.

Discussion ensued regarding what records should be required as proof.

Chairman Cadle said he is willing to overturn the BI solely on the grounds that the home occupation bylaw was misapplied. He said he is also willing to waive the 30-day time limit for appeal.

Mrs. Duffy said that in fairness to the neighbors the board could vote that the property has become unsightly.

Chairman Cadle said he feels the board can't do that now but could maybe suggest informally to the BI to keep an eye on it.

Discussion ensued regarding how to address site issues to the BI.

Mr. Prager made a motion to waive the 30-day appeal requirement and to overturn the BI's cease and desist order due to lack of basis.

Mrs. Collette asked whether the board has the ability to waive the state statute regarding the time requirement of an appeal.

Discussion ensued regarding whether the applicant filed within the 30-day appeal period, and what letter and what date should be used.

Chairman Cadle said he thinks that because the 30-day rules are in our code, the board has the power to waive that requirement.*

Further discussion ensued regarding how to handle the appeal requirement.

Mrs. Maxwell said the BI opened the door again with the May 2010 letter.

Mr. Prager made a motion to vacate the order of the BI dated May 4, 2010, based on the BI's misapplication of the home occupation bylaw. Mrs. Duffy seconded the motion and it passed unanimously.

Wilson/Lyons

Chairman Cadle convened the Wilson/Lyons hearing by reading the legal notice.

Chairman Cadle read a memo dated October 6, 2010, from Ira Grossman (Health Agent), that no action be taken before the BOH well issue is resolved.

Atty Lyons, agent for Wilson, said he met with Mr. Grossman last week and reviewed the building plan, etc. He said Mr. Grossman noted there is an existing well that needs BOH review. He and Dan Wolfe, engineer, will be meeting with the BOH. He said he disagreed that the BOH has final say regarding whether all ducks are in a row and said the Board should go forward with the hearing.

Mrs. Duffy noted that that being said, the most important issue on the lot is the source of water and said she thinks it is more seemly for the board to act after the BOH, rather than before.

Atty. Lyons presented a plan depicting the lot, existing house and proposed addition, noting that his client will be removing the hot tub and shed and replacing them with a garage. He said they have obtained Cons. Comm. approval and had to amend the conservation restriction. He said the garage will be 16 feet from the lot line and the house is 23 feet from the side lot line. He said the Cons. Comm. asked his client to move the addition forward to line up with the house so it is further from the lot line. He said when looking at this, the board can take the average of adjacent buildings and it comes down to which buildings are in the count. He said they are using the more conservative buildings and ignoring a shed in the right of way. He said the average is 22 feet and thus, using the averages, the addition is 1.3 feet from the lot line. He said in terms of public safety, this is not encroaching on the public right of way and there is no proposal to add a new well, but just continuing the use of an existing well.

Mr. Prager said there is something wrong with his argument, that it is an existing well.

Atty. Lyons said they will go before the BOH and do what they want, i.e., move the well or get a waiver. He said he wants to proceed with the permitting process.

Mrs. Duffy said she is against building an addition so close to the well.

Atty. Lyons said one corner of the garage will be about 1.3 feet closer (at 21.3 feet) to the front boundary.

* Chairman's note: subsequent to the hearing, Chairman Cadle learned that the 30-day time limit for appeals is in fact contained in the state statute, as suggested by Ms. Collette.

Mr. Prager said he thinks the applicant needs a variance.

Atty. Lyons said a non-conforming structure can be altered if it doesn't increase the extent of the non-conformity.

Discussion ensued regarding whether a special permit or a variance is required.

The board as a whole determined that a variance is required.

Discussion ensued regarding the lots used for calculations and whether there is a vacant lot next door.

Atty. Lyons said there are not vacant lots in the neighborhood and described the structures he used for his calculations noting it could be determined that it is a by-right addition.

Mr. Wolfe said the by law helps with planning in areas like Lost Lake.

Mr. Mulligan asked whether the BI would give a building permit by-right.

Mr. Wolfe said he was told that if he maintained the same offset, he would get a building permit, but during the Cons. Comm. process the addition was bumped out and thus, the need arose to come before the ZBA.

Atty. Lyons said the figures were completed after meeting with the Cons. Comm., noting that 18.5 and 22.6 are the most important figures.

Discussion ensued regarding how to make it a by-right project.

Mr. Wolfe said angling the garage would be an architectural problem.

Mr. Prager said the addition is far from the road and he has no problem with granting a variance.

Chairman Cadle requested clarification regarding whether the corner would be 21.3 feet from the lot line.

Mr. Wolfe said he wants the board to add an additional 1.5 feet to the variance to allow for the overhang.

Atty. Lyons said he is asking for a variance that allows the garage foundation and wall to be at least 21 feet from the street sideline and the roof overhang to not exceed a two-foot extension.

Of note: Reasons for the grant of a variance are the unique shape of the lot, as well as its shallowness, and how the lake lies compared to the lot line, the Cons. Comm. requirement that the addition be farthest away from the pond. Additionally, the grant is not detrimental to the public good and the dwelling will remain a modest house,

Of note: Condition BOH approval.

Discussion ensued regarding the floor plan and where the property is located.

Mrs. Duffy so moved, Mrs. Maxwell seconded and the motion passed unanimously.

Bills

The following bills were authorized for payment: Groton Herald; Nitsch Engineering from 593 account, Squannacook Hills.

Minutes approved 7/28/10; 8/3/10.

New business

Oakridge renewal scheduled for 10/27/10.

Mr. Mulligan moved to adjourn at 9:10 pm, Mrs. Duffy seconded and the motion passed unanimously.

Minutes approved 1/5/11.