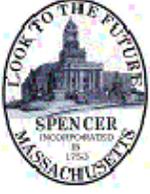


Zoning Board of Appeals– Town of Spencer



Minutes

Zoning Board of Appeals
Tuesday, February 24, 2009
McCourt Social Hall
Memorial Town Hall

The Meeting was called to order at 7:15 p.m.

Zoning Board of Appeals Members Present: Allan Collette, Pamela Crawford, Dee Kresco and Albert Drexler (alternate).

Zoning Board Member Absent: Chair Joanne Backus.

Staff present: Bea Meechan, Senior Clerk, ODIS

In the absent of Chair Joanne Backus, Allan Collette is acting as the Chairman and Pamela Crawford appointed as acting Clerk.

Old Business:

A. Continuation of Public Hearing – Edward Thibault, 89 North Spencer Road, Spencer, MA. *Mr. Drexler rescued himself from the hearing. Mr. Collette opened the public hearing at 7:25 p.m.* Mr. Collette announced the Board did a site visit at the location on February 7, 2009. The Board now has a precise perception of the distance from the abutter's property to where the screening operation is located.

Mr. Collette then opened the Board for questions or comments.

Ms. Crawford thought the applicant's business is a construction business; however she asked the applicant to clarify the nature of his business. The following were additional questions:

- ✓ When was the business incorporated?
- ✓ Was there any change or addition to the pre-existing nonconforming use?
- ✓ Has the screening operation continued consistently through-out, and with no stopping period?

Mr. Thibault clarified that his business is an excavation contracting business. The business was established in 1972, and the screening process had become part of the business two years after that. There was no change or addition to the use. Most of his contracting business was and still is for the Town and surrounding municipalities. The wet and cold climate/weather has an impact to the screening operation. The screening operation is restricted from April to September. In a

given year if he can operate the screening for 15 days, that would be considered a lot, said Mr. Thibault.

Ms. Kresco asked about the amount of material (for screening) and the stockpile, has it changed or is it still relatively the same amount since the start of the screening operation? Has the screening process always been conducted at the property, 89 South Spencer Road, or has it traditionally been done at the job sites?

Mr. Thibault responded that the amount of material screened from both his property and at job sites was an estimated 500 yards per year. He usually brings his equipment and screens the material at his job sites. Any extra material left is then stockpiled at his property at 89 South Spencer Road.

Mr. Collette inquired about the hours of the business and number of day per week in operation.

Mr. Thibault said that normal business hours are from 7:00 am to 5:00 pm and operates 7 days per week. He specified that it is an on-call contracting services business, if there is an emergency during odd hours (late at night) then he has to attend to the matter.

Mr. Collette made a clarification that the above hours and days are for the excavation contracting business, not for the screening operation. *The special permit is being requested for the screening operation only.*

At this time the Board had a discussion of why a special permit is required for the screening operation. The applicant has a grandfathered pre-existing use (Construction Trade Business), and the screening operation has continued through-out the entire time since, as stated by the applicant. Furthermore there was no change or addition to the use. The Board is trying to determine if this application of a special permit is even necessary.

Mr. Thibault said that a reason to acquire a special permit originated from the Building Department. Robert Morra, the previous Town Building Inspector, did a site visit at the location because of complaints from the neighbor. Mr. Morra determined that the screening operation was an expansion of the pre-existing use, which he said would be permitted only by special permit from the Zoning Board of Appeals (ZBA). As a result, a letter "cease and desist" was issued (in April, 2008) to stop Mr. Thibault from any further screening operation.

Mr. Collette indicated that the ZBA can only make a determination on a special permit, if indeed it is required, as accordance to the Spencer Zoning Bylaw. He expressed the situation appeared to be a dispute between two neighbors; both sides had presented arguments. The Board cannot regulate any "civil matter" among neighbors, said Mr. Collette.

With no further comments or questions from the Board, Mr. Collette then opened the hearing to the public.

Attorney Jonathan Finkelstine represented the abutter, Ron Sciascia. He presented the following document tonight to the Board:

- Spencer Assessment & Taxation (of the applicant, Mr. Thibault)
- MGL., Chapter 40A – Zoning
- MGL., Chapter 61A – Assessment and Taxation of Agricultural & Horticultural land
- Spencer Zoning Bylaw Section 4.9.3.A – Nonconforming Use

Mr. Finkelstine said that in his opinion Mr. Morra, the previous Building Inspector, issued a “cease and desist” letter to the applicant because the screening activity in the Rural Residential district violated the regulations of the Spencer Zoning Bylaw.

Mr. Collette stated that the applicant has a grandfathered pre-existing nonconforming use for the construction business.

In response, Mr. Finkelstine said it would be considered grandfathered only if there is proof/evidence *that it was a legally pre-existing use when the business was established*. Mr. Finkelstine argued there was no legal evidence to support the screening operation had been in existence since the business was incorporated in 1972. In addition, Mr. Finkelstine could not find any proof in relation to the pre-existing use in the application packet, submitted by Mr. Thibault.

Mr. Finkelstine had obtained the applicant’s *assessment and taxation* from the Town Assessors. According to this document, the Town assessed the applicant’s property as a single family house and 61A property.

Mr. Collette then asked the applicant if the property still assessed as a 61A property.

Mr. Thibault replied that portions of the property are assessed under 61A.

Mr. Finkelstine explained in this case, the Town Assessor had separated the property into two sections. The land with the house is taxed as a single family house; the remaining land is taxed as 61A property. Mr. Thibault has been paying taxes under this classification since 1989. Mr. Finkelstine has a different opinion. He thought that the Town Assessor has been taxing the property *as a single family house and other business purpose, not 61A property*. He then gave the following explanation referencing to MGL, Chapter 61A – Assessment and Taxation of Agricultural or Horticultural Taxation:

- Section 1: Land deemed to be in agricultural use when the land is primarily/directly used in raising animals such as beef cattle, sheep, horses...see attached document.
- Section 2: Land is considered to be in horticultural use when the land is primarily/directly used in raising fruits, vegetables...see attached document.
- Section 3: Land (of five-acres and more) devoted to agricultural or horticultural uses are subject to provide gross sales and files for tax benefit.

- Section 14: Land taxed under Chapter 61A shall not be sold for, or converted to, residential or commercial use – unless the city or town in which the land is located has been notified of the intent to sell for, or to convert to other use.

Mr. Finkelstine said there was no evidence to support that the property has been used for agricultural or horticultural, based on the definition of land used, Sections 2 and 3. Therefore the property has been *incorrectly assessed as 61A property*. In the event of the land in 61A *is converted to another use*, the owner must conduct the action described in Section 14 of MGL., Chapter 61A. It stated that the owner shall notify the Town Selectmen the intent to convert to the other use, and make an “offer to purchase” to Town. The Town has 120 days to make a decision and exercise its option to purchase. Mr. Thibault hasn’t done that, said Mr. Finkelstine.

Mr. Collette expressed that the ZBA has no authority and jurisdiction over the Town Assessors. In addition, the assessment of taxation has no valid bearing on the ZBA’s determination.

Mr. Finkelstine then asked if a person submits an application, asking a permit for screening use, and it is in the RR district - what would be the Board’s decision.

Mr. Collette said that the answer would be no. The screening operation within that particular district is not allowed in accordance to Spencer Zoning Bylaw. However in this situation, Mr. Thibault has a pre-existing nonconforming use. He asked to extend/expand the use (to have the screening of loam and fill material) as stated on his application. Mr. Thibault indicated he has been doing a screening operation since the business was established. The enforced requirements and regulations at that period were under 1985 Zoning Bylaw, thus, they are different from the current requirements/regulations Zoning Bylaw which the Town adopted in 2006.

Mr. Collette addressed that the concern for the Board is whether or not the screening operation is incidental to Mr. Thibault’s business use. At this time the Board is not prepared to make that determination.

Ms. Crawford made a clarification that at the previous public hearing (1-27-2009), the discussion was about the pre-existing nonconforming use; to determine whether or not the screening operation has been part of that use. The legality of the assessment and taxation was not presented and discussed at that hearing (1-27-2009).

Since Mr. Finkelstine has just presented the issue of the 61A assessment to the Board at tonight’s hearing, Ms. Crawford expressed that the Board needed a clarification on what is in 61A and what is not - in terms of buildings, structures and stockpiles. She then asked if Mr. Finkelstine could demonstrate where both the 61A land and the non-61A land is located on the property, at tonight’s hearing.

Mr. Finkelstine replied that he did not have such a plan; he could not demonstrate that to the Board.

Mr. Finkelstine said if the Board is to grant a special permit to Mr. Thibault, the Board must determine that the extension use is not substantially more detrimental to the neighborhood than the pre-existing nonconforming use, as indicated in Section 4.9.3 of the Spencer Zoning bylaw and Section 40A of MGL. There is no evidence to justify that the screening operation at the location has been part of a pre-existing nonconforming use. In addition, Mr. Thibault has not proven to the Board, that the screening operation will not be more detrimental to the neighborhood.

Mr. Finkelstine indicated that with all documentation presented tonight, the special permit should not be granted to the applicant.

Mr. Collette asked the Board and the public if they had any additional comments or questions to address at this time.

Mr. Finkelstine asked if the Town Zoning Enforcement (Building Inspector) will attend the meeting next time.

Mr. Collette said that the Board will contact the Town Assessor and may seek advice/opinion from Town Counsel if deemed necessary.

Note: No additional comments or questions from the Board and public were raised at this time.

Ms. Crawford then made a motion to continue the public hearing to March 10, 2009 at 7:15 p.m. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

Approval of Minutes: For January 27, 2009 and February 10, 2009

Ms. Crawford made a motion to accept the minutes for January 27, 2009. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

Ms. Kresco made a motion to accept the minutes for February 10, 2009. Ms. Crawford seconded the motion and the vote was 3-0 in favor.

New Business: None

Other Business: None

Ms Crawford made a motion to adjourn the meeting at 8:30 p.m. Ms. Kresco seconded the motion and the vote was 3-0 in favor.

Submitted By:

Bea Meechan, Senior Clerk, ODIS