

Great Barrington Zoning Board of Appeals

Minutes of April 3, 2018, Meeting

Chairman Ron Majdalany opened the Great Barrington Zoning Board of Appeals meeting and public hearing at 7:30 p.m. at the Great Barrington Town Hall. Attending were members Kathy Kotleski, Steve McAlester and Michael Wise and alternates John Katz and Don Hagberg. Also Town Counsel David Doneski and Town Planner Chris Rembold. This is case 878-18.

The recording secretary read the notice for the appeal filed Feb. 14, 2018, by **Marc Fasteau, Anne Fredericks and Joe Krummel** appealing the letter dated Jan. 23, 2018, from Zoning Enforcement Officer Ed May explaining reasons he allowed by-right installation of a replacement below-ground fuel storage tank at Great Barrington Airport, 70 Egremont Plain Road, and requesting enforcement, i.e. referral to a Special Permit Granting Authority. The property is within the town's Water Quality Protection Overlay District (WQPOD). The secretary attested the meeting was advertised in a local newspaper, posted, mailed to abutters of record and agenda'd.

The board received letters from the Board of Selectmen and Planning Board, urging support for the ZEO's decision, and from the town planner, outlining the zoning issue. The board the day of the hearing received a brief from attorney Thaddeus Heuer of Foley Hoag LLP, representing the appellants. Richard Solan and Thomas Vigneron of Berkshire Aviation Enterprises, former owner Ed Ivas and attorney Lori Robbins were in the audience, as was ZEO May.

Attorney Richard Dohoney of Donovan & O'Connor LLP introduced Mr. Heuer. Mr. Heuer said the matter is one of legality having to do with zoning bylaw sections 9.2.11 (fuel storage tanks) and 9.2.12 (special permits). He said Mr. May indicated the airport met conditions of 9.2.11 and decided no special permit was needed under 9.2.12. When two rules are in conflict, the more specific takes precedence over the general, Mr. Heuer said. But, he said, town meeting provided for conflict resolution in WQPODs with another bylaw section 9.2.2. that says the more restrictive course should be followed. Or, he said, the requirement that the airport seek a special permit under section 9.2.12 from the SPGA, in this case the Select Board. Mr. Heuer said the appellants don't deny the airport's grandfathered fuel storage tank needs to be replaced, but they assert it also needs an added level of review.

Mr. Wise asked if the new tank is the same size and in the same location as the previous one. Mr. Vigneron and Mr. Solan said it is. Mr. Wise said seeking a special permit would impose a further cost on the airport applicant, and the SPGA would still assign the conditions already being met under 9.2.11. Mr. Heuer said the SPGA would take into account other matters such as setting requirements and could impose further conditions.

Mr. Katz said the ZEO was satisfied the highest and best standards were being met and this appeal was seeking two bites of the apple. Mr. Heuer said the appellants in this case had to come to the ZBA to ask the matter be rendered to the SPGA.

Mr. McAlister said 9.2.11 says a legal pre-existing, non-conforming use must be allowed to continue, in this case, a new tank installed, and a SPGA would be bound by

that to grant a special permit anyway. Mr. Heuer said the airport should have to go through the procedural step.

Mr. Katz said 9.2.11 has specific standards, 9.2.12 does not.

Mr. Wise asked what limits there were on SPGA conditions. Mr. Heuer said the SPGA could consider water quality, aviation, neighborhood and other issues.

Town Counsel Doneski spoke on behalf of Mr. May. He said there is no dispute of fact. He said the language of 9.2.2 is intended to address conflicts that may exist between restrictive requirements applicable to uses permitted within the WQPOD, and it was not meant to automatically trigger a special permit requirement as 9.2.11 conditions were already being met. He said the airport (or other applicants) is already required to go before the Planning Board for review under the procedure described in section 9.2.11.2, and the Planning Board has the ability to direct the ZEO not to issue a permit. It would be redundant and unreasonable to require further standards than Fire Department and Massachusetts Department of Environmental Protection strictures. Planning Board member Jonathan Hankin indicated the airport had obtained review from that body.

Mr. Hankin said he helped write the WQPOD bylaw, with Mr. Doneski and others, and agreed the wording of "shall" grant a permit for legal pre-existing, non-conforming uses could be clarified, but the goal was to encourage replacement of underground, single-vault fuel storage tanks, so it was made by-right. Mr. Heuer said the ZBA must consider what the bylaw says, not what the stated intent was.

Neighbor Claudia Shapiro stated the appeal should have been assigned a number. She said the airport locus map submitted was inaccurate. She distributed an affidavit that largely described the situation at her 78 Egremont Road property.

Mr. Wise moved to close the public hearing at 8:30 p.m., Ms. Kotleski seconded and the board voted in favor. The chairman asked alternate member Hagberg to sit in for Vice-Chairman Carolyn Ivory.

In discussion, Mr. Wise said 9.2.11 sets the rules for replacing (not altering) fuel storage tanks and there is no reason 9.2.12 would come into play.

Mr. Hagberg said, considering the airport sits above the town's drinking water supply, it could do no harm to have a second review.

Mr. McAlister said he agrees 9.2.11 is intended to allow replacement of pre-existing, non-conforming fuel storage tanks and is sufficient.

Mr. Katz said he feels the ZEO has rightly determined the highest and best standards will be met with compliance with 9.2.11 conditions.

Dr. Majdalany said he agreed with Mr. Katz.

Ms. Kotleski said the Planning Board and DEP have already established guidelines and no further permit should be needed.

Mr. Wise moved to deny the appeal and uphold the decision of the ZEO. Mr. McAlister seconded. The vote was Mr. Wise, Ms. Kotleski, Dr. Majdalany and Mr. McAlister in favor, Mr. Hagberg opposed.

In other business:

Mr. Rembold explained that the ZBA has received a letter from White Engineering regarding a request for a certificate of occupancy for Construct Inc. for **Forest Springs**, 316 State Road, a Chapter 40B comprehensive permit project. The building is done, and the only remaining work is spring grass seeding and plantings.

The board also received an annual report from Citizens' Housing and Planning Association, the monitoring agent for another Chapter 40B permit holder, **Blue Hill Commons**, for which six of the 24 existing units are designated affordable.

Mr. Wise pointed out minor corrections to be made in the minutes of Feb. 27, 2018, and moved to approve the **minutes** as amended. Mr. Katz seconded and members were in favor. (Dr. Majdalany was not at that hearing/meeting.)

The meeting adjourned at 8:40 p.m.

Respectfully submitted,

Bernard A. Drew
Recording Secretary