

Zoning Board of Appeals Town of Great Barrington

Minutes of Tuesday, April 5, 2022

The meeting was held via Zoom Video/Telephone Conference as stated on the agenda.

Chair Majdalany called the meeting to order at 7:30 PM.

All members were present: Ron Majdalany, Carolyn Ivory, Stephen McAlister, Madonna Meagher, Michael Wise, and alternate member JB Brodeur.

Also Present: Assistant Town Manager/Planning Director Christopher Rembold, and Town Counsel David Doneski

Public Hearing: *to consider an Appeal filed by Holly Hamer, 99 Seekonk Cross Road, Great Barrington, and Mark Fasteau and Anne Fredericks, 77 Seekonk Cross Road, Great Barrington, all c/o Thaddeus Heuer, Esq., Foley Hoag LLP, appealing the Building Inspector's February 1, 2022 decision to deny the petitioner's request for zoning enforcement relative to the scope of the current airport use at 70 Egremont Plain Road.*

Mr. Rembold read the notice of the public hearing which was sent to abutters. He said it was published in the Berkshire Eagle newspaper.

Tad Heuer, Attorney from Foley Hoag, spoke for the petitioners. He covered three basic points: the Building Inspector's request should be denied on procedural grounds, the airport's expansion over the last 90 years exceeds what is allowed under the state statute and local zoning, and that the statute and local zoning discourage expansion of nonconforming uses.

Heuer argued that the building inspector refused to enforce against the airport because they are a preexisting nonconforming use, but that was not the question we (the petitioners) asked. He said that is wrong because the mere preexistence of the airport does not allow it to expand, unless the airport had sought and received approvals from the town. He added that the airport cannot use structures built after 1932 for the preexisting use. He said the Building Inspector's response to the enforcement request did not answer these questions, so it should be overturned on procedural grounds. He also argued that the Building Inspector's position is also legally incorrect. He said the Zoning Board could overturn the Building Inspector on procedural grounds, remand it for further consideration, or issue its own superseding order.

Heuer argued that the airport's expansion over the years far exceeds what is allowed under state law and local zoning. He said there is no statute of limitations to enforce against a nonconforming use. He cited the *Lord v. Somerset* case. He said the Building Inspector does not dispute the evidence we submitted that shows the airport has expanded and uses buildings that did not exist.

Heuer argued that the airport has not sought or received any approvals to expand beyond its preexisting use. He went through the three *Powers* tests. He said the present airport use, which has aircraft maintenance and night time helicopters, for example, does not reflect the use in 1932. He added that the airport has also physically expanded, to five buildings and paved runway and, which is a difference in quality, character and degree of use. Whether the use is different in kind on its effect on the neighborhood, he said the airport has many more planes established there and many more flights per year, has nighttime helicopter flights, a flight school, and maintenance. He said there is no doubt under any reasonable reading of the law and the facts that the airport's current operations are a substantial extension of the preexisting nonconforming use. He said unless the airport complies with the state law and local bylaw provisions under zoning section 5.2, the airport is in violation of zoning. He said the airport has never brought a request under 5.2 to this Zoning Board. He said the airport would also need a special permit from the Selectboard also, in order to be compliant with the local bylaw.

Heuer argued that the airport cannot use structures that did not exist when the airport become nonconforming. This comes from the *Powers* case. He said even if the use could continue on the property, it cannot use the buildings built after 1932 unless both the Zoning Board and the Selectboard give approvals.

Heuer said that law discourages and tries over time to eliminate nonconforming uses. The law disfavors nonconformities. He said there are good reasons why an airport in this zone is not allowed by right. Enforcement of the bylaw is important because the airport is a threat to the town's water supply especially because of the leaded fuel the airport's own planes use. He said it creates significant noise, reduces property values, is an ongoing health threat, reduces property tax revenue, and creates risk of airplane-car collisions at the end of the runway.

Chair Majdalany asked Town Counsel Doneski to comment and provide some guidance to the Board. Doneski said he did not agree with Heuer that the person requesting zoning relief is entitled to specific answers to each precise issue. He said the Building Inspector stated the reasons for his denial of the request, and that is sufficient. Doneski said he agrees with Heuer that the expansion of a nonconforming use is regulated under the state zoning act and under local zoning section 5.2, and the facts of each case matter. He said he agrees, in general, that a nonconforming use cannot erect new buildings to serve that use.

Member Wise said he reads the Building Inspector's answer as determining that the current use is consistent with the bylaw, not that it is allowed because it is preexisting. If the Building Inspector's decides that it is in compliance, then he need not respond to the rest of the request. Heuer said yes, but our position is that there is no way that that is a logical conclusion.

Wise asked, at what point should the airport have come to the town for a permit? Heuer said perhaps the airport could have come at any time for the Selectboard special permit. That would have authorized the use of the airport in that zone. Wise asked, when should it have been sought? Heuer said 1933. He said also the airport could have come piecemeal to the Zoning Board, for each of the new buildings, to expand and extend the nonconformity.

Wise asked, supposing the use has not expanded, are new buildings grandfathered? Heuer said the ten year grandfathering applies to structures; there is a difference between the structure and the use of the structure.

Wise asked, if the use now is beyond what is permitted, are they required land on the grass since the pavement was not there in 1931? And, what about the old hangar which has a permit but was moved? Heuer said he thinks the answer is that an airport use could continue; possibly the moved hangar could be used and the law would tolerate it to exist but not more structures erected.

Member McAlister said in 1931 there was a three day airshow. Would they be permitted to do that? Heuer said it depends. Heuer said one time uses are not necessarily a pattern. McAlister said it is related to the intensity of use. Heuer said it may be an abandoned use. McAlister said you are asking the Board to take away a lot, anything in the last 90 years. He said this is a matter of common sense and it is absurd. He said this request is positioned to put the airport out of business. Heuer said the airport owner has always had the right to come to the Selectboard and the Zoning Board. McAlister asked, if neighbors who moved in knowing there is an airport should have come forward? Heuer said no. Heuer said when zoning was established everyone knew where the airport was but it was still zoned that airports needed Selectboard permits.

Member Ivory asked the Building Inspector to speak, to defend his decision. Building Inspector Ed May spoke. He said he has nothing else to add. He did say whenever the airport has asked for permission, he has directed the airport to seek a special permit. Wise asked May how many airport matters we have had in the last 15 years. May said they have shown up on his radar innumerable times.

Member Meagher asked, if we voted to overturn the Building Inspector, what would the airport be? Heuer said this Board has the authority to fashion its own order. He said there needs to be a determination of what the 1932 use was. There is not a prohibition on all growth. If expansion occurs below the *Powers* threshold then it is permissible. But he said we believe it should be returned to a small hobby airport with one or two buildings, much more limited to the number of planes flying, it would not be allowed night time flights or helicopters. Meagher asked, how many flights could be allowed? Down from 30,000 to 100? Heuer said in 1944 they had two planes; he does not know what they had in 1932. He said the baseline is probably a small number of planes with a small number of planes, no flight school and no fly-in/fly-out service of airplanes not garaged there.

Attorney Dennis Egan of Cohen Kinne Valicenti & Cook spoke for the airport and said he wanted to set the record straight. He said the current owners have sought permits when they are required. He disagreed with the concept that some aspects of the airport use may have been abandoned. He said there are not 30,000 flights. He said the planes the airport owns use the unleaded fuel. He said the goal of the petitioners is not altruistic; their goal is to shut down the airport.

Egan spoke to the *Powers* test discussion. He said Heuer argues there is substantial documentation to prove what was done at the airport. Egan said Heuer does not have evidence of what did exist at the time, and that does not mean it did not happen. Egan said the Zoning enforcement officer does not have to determine how many flights take off and land, but rather to determine if the use is consistent with the preexisting aviation field use. He said of course the use is different in kind because of course planes change and engines change. He said of course there are more buildings, but in one case, in 2017 the Zoning Board considered and ruled on the office building.

McAlister asked what the Board could do here. Doneski said it could remanded to the Building Inspector if there is more to be answered. He said the Building Inspector found no violation. He said the thrust of the request was to take enforcement action, and the thrust of the response was that there is nothing anything against which to take enforcement action. He said this Board can agree with that decision and uphold the decision. He said if the Board disagrees then it could engage in some attempt to evaluate what is in or out, or the Board could make a specific direction about the activities or buildings at the property.

Wise said there are items in the enforcement request that were not cited in the Building Inspector's response, but could be a basis for this board. Doneski said information in the record can be used as a basis for an order from this board.

Majdalany asked for public comment.

Claudia Shapiro, 78 Egremont Plain Road spoke. She said the neighbors have not previously come forward because Walt (the previous owner) was a great neighbor. She said since BAE inherited the airport she has consistently come forward and has been consistently ignored. She learned yesterday the airport is seeking a bid for the runway. She said the airplanes do not use unleaded fuel. She said there is no property survey submitted. She read a statement into the record as follows:

I will email Chris to forward each of you a copy of the Petition for a Variance application the Planning Board approved and this Board granted in 2013 that is clearly not an application at all and B.A.E Rick Solan's Disclaimer of Abandonment of Special Permit Rights Without Prejudice, acknowledging to have received from this Board a variance and a special permit based on (2) applications.

The Notice regarding this appeal did not come in a Town of Great Barrington envelope instead the upper left hand corner had typed in Planning Department which consists solely of Mr. Rembold. Enforcement appeals are between the Town, building inspector and the ZBA not Mr. Rembold representing the Planning Department and the ZBA.

Mr. Solan claims he first felt himself in the crosshairs when he sought permits to build hangars in 2017 is untrue, he put himself in the crosshairs in 2013 and before this Board. On May 23rd 2013 B.A.E Rick Solan filed for a special permit with the Zoning Board. On May 23rd 2013 B.A.E. Rick Solan filed with the Planning Board for Site Plan Review. This Zoning Board then granted that Variance and Special Permit that are still in effect. On March 25th, 2015 resulting from an action filed pro se' against the granting of the special permit and variance Mr. Solan filed a Disclaimer of Abandonment of Special Permit Rights Without Prejudice as "petitioners and applicants" with Superior Court and the Town Clerk admitting to have received from this Zoning Board a variance and a special permit being their intention to disclaim and abandon without Prejudice to reapply or take any other action at any time said special permit and all rights represented thereby. On August 3rd, 2015 Town Counsel representing the Great Barrington Zoning Board stated in part in Superior Court, from the town's perspective the case is over, the permits have been abandoned.

The flaw in this argument and Solan's Disclaimer is it is the permit granting authority in this case this Zoning Board and their sole legal jurisdiction/authority to revoke/rescind permits granted by them, and that never happened. This Board specifically Mr. Majdalany, Miss Ivory and Miss Meagher are fully aware the variance

and special permit are both alive and in full effect. There is a presiding Court Order dated June 15th, 2015 stating the variance and special permit are still in effect.

A variance is a waiver of the strictures of the zoning bylaw designed to protect property values. If granted it allows the owner to use the land in a manner otherwise not permitted in the zoning ordinance.

Mr. Rembold stated March 24th at the Planning Board Site Plan Review that the Board could certainly vote on the structure tonight and the use addressed later. That "use addressed later" is here and now before this Board. That in fact this Board is activating the variance and special permit required in conjunction with this specific Site Plan Review. This is why Mr. Rembold email states the next step for the Site Plan is a building permit. That the Planning Board, Zoning Board and Assistant Town Manager Town Planner Mr. Rembold are "multi layer permitting" the airport through Site Plan Review and this enforcement appeal and exceeding their authority. It is specifically the Planning Board, Zoning Board and Assistant Town Manager Mr. Rembold that participated in the July 7th 2010 recorded training session with land use Attorney Bobrowski when the airport arose. Bobrowski suggested multi layer permitting, looked from left to right and said if no one is in the room, and shrugged his shoulders. To paraphrase ZBA member Miss Meagher, our little airport, of course I went to Chris about it, it wants to expand and build parking garages and also a cafe. Would that require a special permit? Mr. Rembold replied, Aviation fields are by special permit in the residential zone. Planning Board Chairman Mr. Hankin stated, there is no existing permit echoed by Mr. Rembold who stated, "there is no existing special permit". Mr. Hankin then stated "I think the bigger question is that it is in the recharge area for our aquifer Water Quality Overlay District" yet your Site Plan Review claims the airport does not need a WQPOD permit because they are here before this Board and now getting that waiver from the bylaw from the variance your Board approved in 2013 that is still in effect. Attorney Bobrowski then gave an example of a sawmill in existence for decades that never obtained a valid permit that was shut down. So this Zoning Board, Planning Board and Assistant Town Manager Community Planner Mr. Rembold know Attorney Heuer's enforcement request is valid. I think the bigger question at this point is the recorded comment Mr. Hankin made in 2021 stating, "if the airport doesn't get the Special Permit they will just go before the ZBA, and that is what we are doing here tonight.

This is permitting of the Massachusetts Statewide Airport System Plan Phase one 3.4 million dollar expansion of a Walter J. Koladza Regional General Aviation Community Business Airport that includes a 5,000 square foot terminal building, multiple hangars for the recycling plant, and runway expansion, all part of the extraneous material in the Site Plan Review if not challenged, is to be construed as accepted.

I am now since early January being subject to glaring runway lights on all night shining in my windows turned off the last few nights specifically for this meeting, coupled by dangerous flashing strobes from the runway end identifier lights.

This enforcement action filed November 15th should have been long heard. The scheduling of this hearing on this appeal filed close to 5 months after the enforcement request and just after the Site Plan Review approval warrants questioning as it is the enforcement action itself that brought on the Site Plan Review that brings the FAA. I want to be very clear I am not an airport antagonist, I have never given the airport or anyone in my neighborhood a hard time, quite the opposite. I find the tone of this meeting all of these meetings actually frightening. I am not in agreeance with this enforcement action to restrict the airport to an inoperable degree. I have no problem with the airport in its current form, but I adamantly against any expansion that requires more than B.A.E inherited in 2008, as that needed to be addressed before B.A.E was sponsored in the Massachusetts Statewide Airport System and the National Plan of Integrated Airports, not after. That is not legal. As I stated and am stating again, it is my property that is the vital component to this Zoning scheme, my end of the runway, my United States Environmental Protection Agency number, my DEP Permitted Regulated Facility, and my Very Small Quantity Generator of hazardous waste status defined in the Zoning bylaw as "any entity public or private other than residential" that will generate direct monetary compensation, grants and incentives for the Town and sustain the airport. It is these rights that are being sought after underhandedly all these years.

My education is severely limited and is a handicap. Town officials and my immediate neighbors are and have been for years intimidating, bullying and picking on me and that in itself is illegal. I first heard the expression criminal collusion and public corruption when I conversed with Alan Chartock and Roselle eight years ago regarding my struggle and that was when I was not so well versed. I am again putting the Town on notice, to

protect myself. This is a set up and I am being set up. Do not attempt to take anything of mine based on this set up. This is criminal collusion and public corruption with numerous supporting overt acts. Take this as a Sworn Affidavit based on personal knowledge that will be sent to Town Officials and the Great Barrington Fire District.

Daniel Miller, Jr., 140 Christian Hill Road, asked if there have been any more than one plane-car collision on the road at the end of the runaway. He said, the attorney spoke about the neighborhood but the appeal only lists three people. He said it was mentioned the airport depreciates the values of properties and he does not see that happening. He said one of the appellants' properties was worth a million dollars twenty years ago and now is worth over two million dollars. He asked if the appellants are affected by the runway, if they adjoin the airport, if they want to purchase property. He said he sees appellants' actions as more than their civic duty.

Jonathan Hankin, 43 West Plain Road, said he is an airport abutter, unlike two of the three appellants, since 2003. He is in support of the airport trying to replace their office building. It would be a win for the community. The airport is a valuable community resource and he would hate to see anything happen to put it out of business.

Heather Fish, 65 Pumpkin Hollow Road said she loves the airport. She said her one complaint would be the helicopters.

James Garzon, 84 North Plain Road commented that there is a lot of passion here but we should stick to the laws and listen to Town Counsel.

Hearing no other comment, Chair Majdalany asked members how they wished to proceed. Wise said there is enough in the record that we do not need to keep the hearing open.

Motion: Wise moved to close the public hearing

Second: McAlister seconded.

Vote: Ivory-aye, McAlister-aye, Meagher-aye, Wise-aye, and Majdalany -aye (passed 5-0).

Motion: Wise moved to affirm the Building Inspector.

Second: McAlister seconded.

In discussion, Wise said as he sees the facts in this case, revealed by the record, there were training flights, blimps, maybe an autogyro in the early years. As he sees the *Powers* test, the present use does in fact reflect nature and use prevailing at the time zoning was first adopted. Second, whether there is a difference in quality and character, he thinks there is not; there has been training since the outset, we do not know how many flights or how many airplanes were there. Third, whether the current use is different in kind and effect on the neighborhood, he said the answer is no. The effects are noise and activity, but those are not materially different now. The opposition frames their argument with adverbs, and when you take out the adverbs, Wise said, he is not persuaded. Certainly there has not been a material change in the operation of the airport for at least 70 years, and to go back another 20 years to 1931 on the basis of one newspaper article is not persuasive. Wise said he believes the Building Inspector got it right.

Hearing no further discussion Majdalany asked for a vote.

Vote: Wise-aye, Meagher-aye, McAlister-aye, Ivory-aye, and Majdalany -aye (passed 5-0).

Minutes: April 20, 2021 and the September 21, 2021 meetings.

Wise offered two corrections to the September minutes.

Motion: Ivory moved to approve and Wise seconded.

Vote: Ivory-aye, McAlister-aye, Meagher-aye, Wise-aye, and Majdalany -aye (passed 5-0).

Motion: Wise moved to approve the April minutes and Meagher seconded.

Vote: Ivory-aye, McAlister-aye, Meagher-aye, Wise-aye, and Majdalany -abstained (passed 4-0).

Citizen Speak: None

Majdalany adjourned the meeting at approximately 9:20 PM.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Rembold", written in a cursive style.

Christopher Rembold