

Board Members
Brian White, Chair
Gibb Phenegar, Vice Chair
Christina Oster, Clerk
Tom Emero, Member
Rori Stumpf, Member
Carol Gould, Associate Member



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TOWN OF MEDWAY

COMMONWEALTH OF MASSACHUSETTS

ZONING BOARD OF APPEALS

Wednesday, September 22, 2021 at 7:30 p.m.
Sanford Hall
155 Village Street Medway, MA

Meeting Minutes

Members Present: Brian White, Chair; Tom Emero, Member; Christina Oster, Clerk

Members Participating Remotely: Gibb Phenegar, Vice Chair; Rori Stumpf, Member

Members Absent: none

Also Present: Barbara Saint Andre, Director, Community and Economic Development
Anna Rice, Administrative Assistant, Community and Economic Development

Call to Order

Mr. White called the meeting to order at 7:32pm and read that this meeting is being broadcast and recorded by Medway Cable Access. He stated that members Gibb Phenegar and Rori Stumpf were participating remotely.

Public Hearing

6 Spring Street – The application is for the issuance of a **special permit** under Section 8.2 for an Accessory Family Dwelling Unit (AFDU) to be included in a proposed addition to the existing dwelling.

The Applicants Lesley and John Kinney were present and explained the application. The applicants are seeking a special permit for an addition to their main house, an Accessory Family Dwelling Unit, as well as a 2-car garage that will face Stanley Road. The AFDU is 791 square feet, and the addition is 616 square feet. The Applicants' designer, Ann Hurwitz, addressed a few questions that the Planning and Economic Development Board had submitted to the ZBA. Ms. Hurwitz stated that the porch and the ramp included on the AFDU would be outside the 35-foot setback, and nothing would be encroaching on the setback. Ms. Hurwitz also stated that though there will be two entrances on the building, the AFDU entrance is concealed by trees, so it would not encourage people to think it is the front, main entrance, which will remain on Spring Street. The AFDU entrance will be covered to ensure safety when it comes to ice and weather issues. Ms. Hurwitz stated that there is a ramp due to the grade change, as the grade slopes, and a ramp is needed to get up to the six-inch difference between the ground and the first floor. Gibb Phenegar noted that the AFDU is just under 800 square feet, so it falls under the guidelines of the Zoning By-laws. Ms. Saint Andre asked which plan should be used for the decision, as multiple plans were submitted, Ms. Kinney confirmed that the plan with the sewer line revised September 20, 2021 is the most current and accurate.

Joel Cutler of 3 Spring Street asked what the proposed addition was going to be used for, wondering if it will be an in-law suite, day care center, or any other sort of use. Ms. Kinney stated that the in-law suite (AFDU) will be for her father, and the addition to the existing dwelling will aid their needs when it comes to working from home, as she is working from home full time due to COVID, and Mr. Kinney is working from home 50% of the time. Ms. Oster commented that the architectural plans look very well done.

Mr. Cutler asked if the current driveway will be used for the existing house as well as the AFDU. Ms. Kinney stated that there will be a new driveway that will be accessed from Stanley Road, and that the current driveway on Spring Street will not be altered. Mr. Cutler asked if this plan is a 2-level addition, to which Ms. Kinney stated it is a single-level addition. Ms. Kinney stated that one of the spaces in the new garage will be for the AFDU. Ms. Saint Andre noted that the AFDU Bylaw requires the AFDU entrance to be on the side or rear of the building, not the side or rear of the lot. Where this is a corner lot with two front setbacks, the Board could find that the entrance to the AFDU will be on the side of the building, which faces Spring Street.

Mr. White states that all the criteria under section 8.2 seems to have been met.

Motion that the Applicant has met all the required decision criteria under section 8.2 made by Gibb Phenegar, seconded by Christina Oster, passed by a roll call voted of: 5-0

Rori Stumpf – Aye

Gibb Phenegar – Aye

Tom Emero – Aye

Christina Oster – Aye

Brian White – Aye

Motion to add the finding that the side door meets the decision criteria made by Rori Stumpf, seconded by Gibb Phenegar, passed by a roll call vote of: 5-0

Christina Oster – Aye

Tom Emero – Aye

Gibb Phenegar – Aye

Rori Stumpf – Aye

Brian White - Aye

Motion that the special permit decision criteria of section 3.4 has been met made by Gibb Phenegar, seconded by Christina Oster, passed by a roll call vote of: 5-0

Christina Oster – Aye

Gibb Phenegar – Aye

Tom Emero – Aye

Rori Stumpf – Aye

Brian White – Aye

The Board then reviewed the Boilerplate Conditions with the Applicants. The Applicants had no objections to the conditions. The Board members had no additional conditions.

Motion to grant the special permit with the conditions as stated made by Gibb Phenegar, seconded by Christina Oster, passed by a roll call vote of: 5-0

Christina Oster – Aye

Tom Emero – Aye

Gibb Phenegar – Aye

Rori Stumpf – Aye

Brian White – Aye

Motion to close the public hearing for 6 Spring Street and to allow any one Board member to sign the decision made by Gibb Phenegar, seconded by Christina Oster, passed by a roll call vote of: 5-0

Rori Stumpf – Aye

Gibb Phenegar – Aye

Tom Emero – Aye

Christina Oster – Aye

Brian White - Aye

RECESS 5 MINUTES

MOVE TO 25 WINTHROP AT 8:01PM

114 Main Street – The application is for the issuance of a **special permit** under section 3.4 of the Zoning Bylaw and Section 5.4, Schedule of Uses, for outdoor display of merchandise by Ocean State Job Lot.

25 Winthrop Street (Continuation from September 1, 2021) - The application is an **appeal** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant (D&D Mulch and Landscaping, Inc.) from operating at the site.

Amy Kwesell, Town Counsel, and attorney at KP Law, reminded the Board that there are two items to focus the discussion around: what the use of the land is, and whether that use is agricultural. Ms. Kwesell noted the complaints of noise, dust, and odor, and that these items are not under the consideration of the appeal, for they are not what the cease and desist was focused on. Ms. Kwesell informed the Board that the preliminary injunction motion in the Norfolk Court was denied, and the Judge stated that the Applicant's use was allowed. She does not agree with the Judge's ruling, and it is only a preliminary ruling, based on what was before the judge and the hearing held by the court. The case before the court will now move forward.

The Applicant's representative, John Maciolek of John Maciolek Law, and Paul Doherty were present. Mr. Doherty did not provide any testimony. Mr. Maciolek explained that this was a continuation of the

hearing for the appeal, and that the cease and desist is incorrect and should not be upheld. He stated that the court was correct in allowing the use. Mr. Maciolek stated that the use of the Applicant matches the definition of agricultural use. Mr. Maciolek noted the applicant had provided written responses to the questions that were asked of the Applicant at the last hearing.

Gibb Phenegar thanked the Applicant for putting together the materials, and noted that in reading through the documents, it looks like there are 20-30 trucks going in and out of the property a day, six days a week. Mr. Phenegar noted that the quantity of vehicles did not seem proportional with that of agricultural use and seems to be more of a commercial operation. Mr. Maciolek stated that the statute referring to agricultural use does not describe limitations on the number of vehicles, or the volume of material. Mr. Maciolek stated that the definition contained in the statute indicates that this is an agricultural use. Mr. Maciolek stated that the definition contained in G.L. c. 128 § 1A indicates that agriculture includes farming in all its branches, cultivation of soil, which he states is what is happening on the property, this is cultivation of soil.

Rori Stumpf noted that the answer to number 4 on the document provided by the Applicant states that the same amount of material that is brought into the property is brought out of the property, but the answer to number 3 states that some of the material is used on the farm. Mr. Stumpf notes that these two answers do not correlate with one another. Mr. Maciolek states that he would have to check on the information, but that the information does not change the definition of agricultural use and is not relevant in identifying the use. He stated that certainly most of the material is brought off the property, but claimed that some is used on the Briggs farm.

Tom Emero states his layman's understanding of the definition of cultivation is the tilling, or the sowing, of seeds or products into the soil to grow a crop and is not the aggregation of various products that come from another location including leaves, yard waste, and other products, composting them, mixing them, grinding them, and taking them off site. That might be the creation of soil, but cultivation is using soil that already exists on the property.

Mr. White asked the Applicant if there was any further information on Question #7: Does the haying on the Briggs farm depend upon the provision of compost or loam from this site? Mr. Maciolek stated that they did not have that information, and that there has been no communication to Mr. Briggs or the employees on the farm.

Dave Linardy of 28 Winthrop Street stated that 90% of the material on the property does go off site. Further, he does not believe that Mr. Briggs uses any of the materials. Mr. Linardy has never seen the trucks go towards the farm and has never seen a truck dump product at the farm. Mr. Linardy stated that he also once witnessed a truck go from 25 Winthrop Street to dump material at the D&D location in Bellingham, and the same truck went in and out of the site more than once that day.

Arthur Bergeron of 3 Wild Turkey Run states that he disagreed with the statements that Mr. Maciolek made. Mr. Bergeron notes that the statute that Mr. Maciolek referred to, MGL Chapter 128 § 1A, further defines agriculture, more than what Mr. Maciolek cited. Mr. Bergeron provided multiple definitions of the word cultivation, which were provided to the Board to be added to the record. These definitions

refer to cultivation as working the existing soil on a property by breaking the crust, turning the weeds and prepare a planting bed for seeds. It is not accepting truckloads of excavated soil from elsewhere and manufacturing a product by combining it with other organic materials, putting it through a screener, and providing a finished product. He noted that the D&D Website twice refers to its process as manufacturing. He referred to the case of Jackson v. Building Inspector of Brockton where the court stated that the product has to be used primarily for the farm or it is manufacturing. Based on the amount of product, and the price quoted on the D & D website, D & D is making over \$200,000 per week from this operation. This product is being sent to D & D's retail outlets for sale to homeowners and landscape contractors, not the farm. Mr. Bergeron also stated that he contacted local farms so ask how much screened, processed loam they purchase from companies to grow produce – the farms responded that they would not use this sort of manufactured loam because it would not enhance their land. Any compost that included grass clippings from lawns could have pesticides and herbicides that are commonly applied to lawns.

Ronald Rossi of 7 Maple Street reiterated that he rarely sees trucks heading towards Brigg's farm, and if they do, he has not seen loam or product distributed to the farm. He also stated that the answer to Question #8 provided to the Board states that tailings leave the site, which consists of stone, and therefore is not biodegradable material.

Ms. Kwesell clarified that the definition that Mr. Maciolek referenced was not complete, and that the full definition (G.L. c. 128 § 1A) from the General Court's website states:

Section 1A. "Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

This definition is why the Court has consistently held that materials sold commercially must be grown, raised, or otherwise produced on site. So, the materials that go into the loam which D & D produces must originate from this site, which they do not. This is from a Peabody case decided by the Supreme Judicial Court. There are also cases from the Land Court. Tillage of "the soil" refers to the soil on the site. Mr. Maciolek stated he disagreed with Ms. Kwesell's interpretation of the statute.

Mr. Stumpf stated that taking materials from off site and processing them and sending them out is agriculture. Ms. Oster notes that she is appreciative of the definitions that were provided and the due diligence of the public, as well as the information that Town Counsel provided.

Ms. Saint Andre provided proposed findings to the Board that the Board viewed and discussed. The first section of proposed findings are those that do not appear to be in dispute. The Board reviewed these first and had no changes. Mr. Maciolek stated that he objected to all the proposed findings.

Motion to approve these Findings of Fact 1-9, moved by Tom Emero, seconded by Christina Oster, passed by a roll call vote of: 5-0

Rori Stumpf – Aye

Gibb Phenegar – Aye

Tom Emero – Aye

Christina Oster – Aye

Brian White – Aye

Ms. Saint Andre provided three groups of proposed findings, the first based on the documents provided by the Building Commissioner (A1-9), the second based on the documents provided by D&D (B1-8), and the third based on the comments from abutters and neighbors (C1-6). The Board discussed A1-9, accepting all as Findings of Fact. There was discussion to add another finding on the definition of cultivation of soil as discussed during the meeting.

Motion to accept the Findings of Fact A1-9 with the added finding on the definition of the term cultivation made by Tom Emero, seconded by Christina Oster, passed by a roll call vote of: 5-0

Christina Oster - Aye

Tom Emero - Aye

Gibb Phenegar - Aye

Rori Stumpf - Aye

Brian White - Aye

The Board discussed the proposed Findings of Fact that are based on the documents and testimony provided from D&D. Mr. White noted that the applicant's interpretation of agricultural use did not take into account the entire definition, as pointed out by Town Counsel. Also, D & D's assertion that the use has not intensified or changed was contradicted by testimony from the neighbors. There was discussion among Board members and the Building Commissioner as to the applicant's assertion that town officials met at the site with Mr. Doherty and approved the use. It was agreed that there was nothing documenting approval from the Town, and the Building Commissioner had provided testimony as to a meeting held at the site which the Board credited. Mr. Maciolek reiterated his position that Mr. Doherty met with various town officials prior to beginning use of the property. There was further discussion that, given the Board's decision to find the facts based on the Building Commissioner's testimony, it was not necessary to include the contradictory facts offered by the applicant. The Board agreed that proposed findings B5, B6, and B7, describing the operations at the Site, should be included. There was discussion regarding the number of trucks entering and exiting the site. It was agreed that finding B7 needed to be clarified that the number of trucks are on a daily basis. The other findings were not relevant or were not credited by the Board. The Board discussed that there was no evidence to support the applicant's assertion that 650-750 cubic yards of material from the site were used on the Briggs farm hay fields. Mr. Bergeron further disputed this, based on the value of the material at over \$26,000, in light of Mr. Briggs' revenue from the hay fields of only \$11,000. There was contradictory evidence as to whether the site operated during the winter. Finally, the applicant's evidence that he took steps to mitigate dust and noise was not deemed relevant per Town Counsel's clarification that the issue before the Board is

whether the use is agricultural.

Motion to accept the Findings of Fact B5, B6, and B7, as amended to add 20-30 trucks “daily” to B7, made by Tom Emero, seconded by Christina Oster, passed by a roll call vote of: 5-0

Tom Emero – Aye

Christina Oster – Aye

Gibb Phenegar – Aye

Rori Stumpf – Aye

Brian White - Aye

The Board discussed proposed findings C1-6 based on testimony from neighbors. It was discussed that the first finding relative to the operations on the site was relevant and should be included. It was discussed that the other proposed findings were either redundant to findings already made or deemed irrelevant to the focus of defining the use of the property and whether that use is agriculture. There was discussion regarding the trucks entering the site and whether they were coming from construction sites.

Motion to accept proposed finding C1 as a Finding of Fact, made by Christina Oster, seconded by Gibb Phenegar, passed by a roll call vote of: 5-0

Christina Oster – Aye

Tom Emero – Aye

Gibb Phenegar – Aye

Rori Stumpf – Aye

Brian White – Aye

Motion to deny the appeal under M.G.L. chapter 40A section 8 seeking to reverse a Cease-and-Desist order issued July 1, 2021, by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant (D&D Mulch and Landscaping, Inc.) from operating at the site, made by Christina Oster, seconded by Tom Emero, passed by a roll call vote of: 5-0

Christina Oster – Aye

Gibb Phenegar – Aye

Rori Stumpf – Aye

Tom Emero – Aye

Brian White – Aye

Motion to find that the July 1, 2021 Cease and Desist order from the Building Commissioner shall be upheld, based on the above Findings of Fact, made by Christina Oster, seconded by Tom Emero, passed by a roll call vote of: 5-0

Christina Oster – Aye

Tom Emero – Aye

Rori Stumpf – Aye

Gibb Phenegar – Aye

Brian White - Aye

Ms. Kwesell stated that the decision should contain the definitions that were provided to the board by Mr. Bergeron.

Motion to close the hearing and allow one member to sign the decision made by Christina Oster, seconded by Tom Emero, passed by a roll call vote of: 5-0

Rori Stumpf – Aye

Gibb Phenegar – Aye

Tom Emero – Aye

Christina Oster – Aye

Brian White - Aye

114 Main Street – The application is for the issuance of a **special permit** under section 3.4 of the Zoning Bylaw and Section 5.4, Schedule of Uses, for outdoor display of merchandise by Ocean State Job Lot.

The Applicants for 114 Main Street had technological difficulties and requested a continuation of the hearing. Mr. Emero noted that to benefit a business in town, the Board should consider this application on October 6, 2021.

Motion to continue the public hearing for 114 Main Street to October 6, 2021 at 7:30 p.m. made by Christina Oster, seconded by Tom Emero, passed by a roll call vote of: 5-0

Christina Oster – Aye

Tom Emero – Aye

Rori Stumpf – Aye

Gibb Phenegar – Aye

Brian White – Aye

Other Business

Approval of Minutes

- September 1, 2021

Motion to approve the minutes for September 1, 2021, as presented made by Christina Oster seconded Tom Emero passed by a roll call vote of: 5-0

Gibb Phenegar – Aye

Rori Stumpf – Aye

Christina Oster – Aye

Tom Emero – Aye

Brian White – Aye

Upcoming Meetings

- October 6, 2021
- October 20, 2021

Adjournment

Motion to adjourn the meeting at 9:36pm made by Christina Oster, seconded Tom Emero.

The motion is non debatable and declared by the Chair.

Respectfully submitted,

Anna Rice
Administrative Assistant
Community and Economic Development

Edited by

Barbara J. Saint Andre
Director, Community and Economic Development