

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES**

**WEDNESDAY
JANUARY 29, 2020**

RECEIVED

FEB 12 2020

WESTPORT ZONING
BOARD OF APPEALS

Members Present: Roger Menard, Chairman
Gerald Coutinho
Peter Borden
Constance Gee
Barbara Pontolilo
Raymond Elias

Also present:

Jeffrey Blake, Esquire, Town Counsel
Ralph Souza, Building Commissioner/Zoning Enforcement
Officer.
Attorney Daniel Perry, 388 County Street, New Bedford, MA

Chairman Menard called the Zoning Board of Appeals meeting to order at 6:38 p.m. in the Westport Town Hall, 816 Main Road, Westport, MA with the reciting of the Pledge of Allegiance.

Pledge of Allegiance

Chairman's Announcement - Under MGL Chapter 30A, Section 20(f) - Meeting being recorded.

Chairman Menard opened the hearing at 6:38 p.m. with the reading of the Public Hearing Notice on the petition of Mary Ferry/Bruce Sylvia, Jr. d/b/a Absolute Martial Arts for a finding that the proposed use of the front building as a martial arts studio will not be more detrimental to the neighborhood than its former non-conforming use as a tractor sales and repair facility under Zoning Bylaw Article 4, Section 4.1.2. The subject property is located at 287-289 Gifford Road, Westport MA and is shown on Assessor's Map 31, Lot 5A.

Chairman Menard stated that the Board would hear evidence from the applicant, the Board will then ask questions, and then the Board will open the hearing to anyone in the audience wishing to comment.

Attorney Daniel Perry, 388 County Street, New Bedford, MA addressed the Board. He stated that:

1. He represents the applicant, Mary Ferry, who intends to rent the space to Bruce Sylvia, Jr., d/b/a Absolute Martial Arts.

2. Mrs. Ferry purchased the property in 1984 from the Goldsteins and ran the business for a time.

3. Mr. Sylvia currently occupies space on State Road, where he conducts his martial arts studio and has done so for several years.

4. The applicant wishes to change the current non-conforming use, formerly occupied by Goldstein's tractor business, and rent to Mr. Sylvia to occupy the space as a martial arts studio.

5. If evening classes are conducted, they will not be held past 8:30 p.m.

6. There will be no structural changes to the building.

7. There is ample off-street parking for studio patrons.

8. Any noise derived from the business will be minimal to the neighbors.

Mr. Coutinho stated that he reviewed the Town records and no information exists regarding former businesses; that the selling of tractors is not considered "agricultural" within the meaning of the bylaw. He also noted that the applicant would be required to provide evidence that the prior non-conforming use was a legal use in order for the Board to consider allowing the change of use; that, in 1957, zoning bylaws went into effect; and the maps of 1939 and 1941 were repealed.

Mr. Perry submitted photographs of the building, as well as photographs of the State Road property where Mr. Sylvia currently conducts his business. He also stated that he had aerial photographs of the property that date back to 1971.

After discussion, Mr. Perry requested that the hearing be continued to a further date so that he may conduct some research on the legality of the prior non-conforming use.

Chairman Menard asked Mr. Perry if he would like to hear comments from the audience, in that, it may help him in his research and prepare for the next meeting. Mr. Perry agreed to have the audience express their opinions.

Chairman Menard noted that the Board must keep in mind that what is at issue here is, if the finding is approved, the business would become a legal non-conforming use into the future.

Also, Chairman Menard said that he drove by the property, which is in a residential area. The neighborhood may be affected by the lateness of the activity. He also noted that the Board's decision will be a critical impact to the neighborhood. He also noted that there seems to be ample parking for patrons.

Mr. Perry said that the business is not the type which would produce loud noise and the building is set back from the street and other properties.

Chairman Menard disputed that fact, and said that there are houses close to the property that would be affected.

Mr. Elias asked as to whether there have been any further changes to the zoning bylaws. Mr. Coutinho stated that the changes pertained mainly to dimensions of land (e.g. 40,000 square feet to 60,000 square feet) to be considered a legal buildable lot.

Clayton Harrison, 278 Gifford Road, addressed the Board. He stated that he is a direct abutter to the subject property. He said that he researched the Assessor's records and he believes that the applicant should be requesting a variance, not a finding. He also noted that the Goldsteins not only conducted their business at the property, but he lived there as well. He stated that there have been numerous issues with the entire property and that the martial arts studio would most likely be the least detrimental of activity there. Finally, he stated that the business was never a legal prior non-conforming use.

Chairman Menard stated that the use would be in the building at 287 Gifford Road. He also mentioned a letter dated November 7, 2017, that Ralph Souza, Zoning Enforcement Officer, had sent to Ms. Ferry makes note of various zoning violations.

Tony Oliveira, 121 Charlotte White Road stated that, before 1957, the property contained a dealership -- buying and selling cows.

David Borges, 286 Gifford Road stated that he has lived at his home for about 15 years. He said that he had no major concern with the martial arts studio there, but that parking may be an issue. He also noted that the owner of the property has been

absent from the property for about 2-3 years, thereby causing many problems to thrive (i.e. sale of marijuana, cars racing, police activity). He also expressed a concern that if the studio leaves that property, what will happen then. He was also concerned with lighting and signage.

Judith Souza, 292 Gifford Road said she has lived in her home for 52 years and is now retired. She said that the last 3 years have been problematic with vehicles in the rear of the property, racing, vehicles being repaired there as well.

Bethany Borges, 286 Gifford Road was concerned with the hours of operation and the effect of traffic in the neighborhood, especially children in the neighborhood.

Mr. Perry stated that weekend classes will take place on Saturday morning only.

Melissa Bouchard, 287 Gifford Road stated that the applicant, Bruce Sylvia, Jr., is her husband and that the hours of operation will be: Saturdays, 1-1/2 hour to 2-hour class; Monday and Wednesday up to 8:00 p.m., which will be mostly with adults. She said that there is no congregating of people in the outside of the business; that the business is catered mostly to families and is not a competition-type business. She said that the business has existed for 10 years, 3 of which were at the State Road space. She lives at the property and understands the neighbors' concerns. Ms. Bouchard said there would be no additional signage installed.

After hearing all comments by audience members, Mr. Perry read into the record a motion to continue the hearing to Wednesday, February 12, 2020 at 6:30 p.m.

Mr. Coutinho made note that a Special Town Meeting is scheduled for the previous evening, February 11, and it would be possible that, if the town meeting does not finish on the 11th, that the Zoning Board will not be allowed to meet on the 12th and, therefore, this hearing would have to be further continued. Mr. Perry stated he was in agreement with having to continue the hearing further, if required.

7:18 p.m. - Mr. Coutinho made a motion to grant the applicant's motion to continue the hearing to Wednesday, February 12, 2020 at 6:30 p.m. Ms. Pontolilo seconded the motion and the Board voted unanimously to grant the motion.

Chairman Menard opened the second hearing at 7:19 p.m. by reading the public notice. The continued hearing before the Board is the petition of Weatherlow Farms LLC for a mixed use to maintain the farm stand's existing use while also selling alcoholic beverages and providing limited number of seats for public consumption, requiring a variance from Zoning Bylaw Article 2, Section 2.4.2.2, at property located at 845 Sodom Road, Westport, MA, shown on Assessor's Map 60, Lot 4D.

Present were Attorney Christopher Alphen from the law offices of Blatman, Bobrowski & Haverty, as well as Ryan Wagner, Petitioner.

Abutters Present:

Susan Sherman, 871 Sodom Road
Arlene Martel, 814 Old County Road
Steve Medeiros, 920 Sodom Road
Carmen Maiocco, 62 Cornell Road
Frank Sherman, 871 Sodom Road
Nancy Desrosiers, 90 White Oak Run
Linda (Medeiros) Maiocco, 62 Cornell Road

Chairman Menard read into the record a letter from Ralph Souza, Zoning Enforcement Officer, dated October 1, 2019, which states, in pertinent part:

"After review of the submitted Code Narrative in regards to the existing farm stand, the structure in question was originally permitted as a farm stand for the sale of farm produced products, which is classified as a Mercantile use group M. The narrative indicates that the structure use would change to a mixed use with the adding of the sale of alcoholic beverages and providing a limited number of seats for the consumption.

The proposed change of use would require a variance issued by The Board of Appeals as per the Westport Zoning By-Laws, Article 2.4.2.2."

Attorney Alphen submitted a letter and attachments dated January 29, 2020 for the Board to review.

Chairman Menard stated that this letter should have been sent to the Board in a timely manner so that the members could review it before the hearing this evening.

Mr. Coutinho stated that he had just received the letter and was not given an opportunity to read it prior to the hearing.

Attorney Alphen stated that, because the applicant disagrees with the Zoning Enforcement Officer's determination, he would be going forward this evening with the administrative appeal. Although the original application requests a variance and administrative appeal, the applicant would proceed with a request for a determination on the administrative appeal and not a variance. If, however, the administrative appeal is denied, the applicant may opt to request a variance.

Chairman Menard noted that, in 2017, the Board approved special events on the farm, (i.e. weddings in the barn), but did not identify other events that may take place daily.

Mr. Elias stated that he supports agricultural endeavors.

Mr. Coutinho noted that, in 2017, the Board was divided on whether to approve the special events, using farm products. However, the applicant does not farm or grow any products that would produce alcohol.

Attorney Alphen addressed the Board, stating that:

1. The bylaw allows agri-commercial activities, which would, therefore, allow alcohol to be served at the farm.

2. The applicant would request full service of all alcoholic beverages; however, is willing to discuss a lesser alternative of beer and wine only.

3. The use does not need to be "farm-like," only that the patron may consume alcohol while enjoying a "farm-related" experience.

4. The proposed use meets the definition of the bylaw as the legislature (i.e. the Town) has defined.

5. The farm stand would serve the same products, with the addition of alcohol.

6. The stand consists of a retail shop and would sell a glass of wine or bottle of beer to be consumed on the premises.

Mr. Coutinho stated that he has major reservations about the Board having to interpret the bylaw, specifically regarding the terms "agri-tourism" and "agri-entertainment."

Attorney Blake stated that the Board would be entitled to have the applicant provide a plan as to where "on the premises" the alcohol will be served. Attorney Blake also informed the Board that the "accessory use" is the predominant use, which is farming.

Ms. Gee mirrored those concerns about the broad language of the agri-tourism bylaw, and the passing of these bylaws at Town Meeting now puts the Zoning Board in a precarious position to interpret the meaning of the bylaws.

Ryan Wagner, owner and applicant, stated that:

1. The farm stand would be in operation for 8 to 9 weeks in the summer during the months of July and August; then, open 3 days a week during the other 10 months of the year.

2. He would maintain the use of farm products and that 75% of what is sold at the farm stand is a product of the farm. Food is always available for consumption as well.

3. Currently, whenever there is an event in the barn, he obtains a one-day liquor license for that event.

Chairman Menard stated that he did not agree that the applicant would need to sell alcohol in order to bring people to eat at the farm stand.

Mr. Coutinho said that, when the applicant appeared before the Board of Selectmen, the hours requested were not as narrow as what is being requested of the Zoning Board. He also stated that it is his understanding that, once an alcohol license is granted, the State determines the operation under the license and the Town can no longer regulate it.

Attorney Blake stated that the Town has the authority to regulate the hours from 8:00 a.m. to 11:00 p.m. and 11:00 p.m. to 1:00 a.m. or 2:00 a.m. The issue before the Board is whether or not bringing people to consume alcohol for a "farm-related experience," which is a term that the Board must interpret.

Mr. Borden stated that the Board of Selectmen, on 3 separate occasions, denied the applicant's requests for liquor licenses.

Board members had several concerns with the bylaw, specifically:

Mr. Coutinho stated that he also was concerned with being tasked with having to interpret the bylaw, knowing that, if the Board were to deny the administrative appeal, the applicant could bring this matter before the Superior Court and a precedent would be set for future applications.

Chairman Menard stated that the Board must interpret the bylaw as to what constitutes "commercial" business that will bring a patron to the farm stand. Further, by granting the administrative appeal would mean that the Board disagrees with the determination by the Zoning Enforcement Officer, which may bring other farm owners before the Board for similar requests.

Attorney Blake stated that the Board must look to the meaning of the bylaw, and interpret and clarify the language of "for a farm-related experience."

Attorney Alphen stated that the bylaw does not call for the Board to make a determination as to whether or not the serving of alcohol would be more detrimental to the neighborhood.

Ms. Pontolilo asked whether the alcohol is to be consumed on the premises only or if a patron can purchase a bottle of beer or wine and take it home.

Mr. Wagner stated that the alcohol is to be consumed on the property only.

Once the Board received all the evidence, Chairman Menard opened up the discussion to audience members.

Several residents expressed various concerns with the applicant's request. Those who addressed the Board were:

Susan Sherman, 871 Sodom Road
Arlene Martel, 814 Old County Road
Steve Medeiros, 920 Sodom Road
Carmen Maiocco, 62 Cornell Road
Frank Sherman, 871 Sodom Road
Nancy Desrosiers, 90 White Oak Run
Linda (Medeiros) Maiocco, 62 Cornell Road

The issues noted to the Board by audience members included:

- There are typically in excess of 10 events occurring in (and out) of the barn per year.
- The web site indicates cash bar.
- When the applicant appeared before the Board of Selectmen, he requested a liquor license for 7 days a week; 11:00 a.m. to 11:00 p.m.
- Request that the Board think about long-term ramifications.
- No grapes or other product needed to produce alcohol are grown on the farm.
- The applicant cannot show a financial hardship.
- Allowing the request would present a slippery slope and setting a bad precedent for future applications.
- Allowing the request would be stretching the meaning of the bylaw.
- Cattle are typically brought in from western United States.
- There are no pigs on the farm, only chickens.
- Concerns about well water and septic system.

Attorney Alphen stated that the Board of Health approved the sale of food and the applicant has obtained all food-related permits.

Chairman Menard stated that coming before the Board of Appeals is only one step in the process of the applicant's obtaining permission to run a farm stand with serving alcohol. Other Boards have exclusive authority to grant other permits required.

Chairman Menard read into the record a letter the Board had received from Paul Vigeant, 1380A Drift Road, strongly opposing the request.

Once all residents had addressed the Board, Chairman Menard stated that the Board has the discretion to:

1. Agree with the applicant and grant the administrative appeal, determining that the Zoning Enforcement Officer erred in his decision not to issue a permit.
2. Disagree with the applicant and deny the administrative appeal, determining that the Zoning Enforcement Officer was correct in his denial to issue a permit.
3. The applicant can withdraw the application and come before the Board at a later time.

Mr. Coutinho stated that the Board must make a decision on the request as indicated in the application as presented before the Board. He also noted that the 2017 decision issued by the Board allowed weddings in the barn, no music to be played outside of the barn.

Attorney Blake stated that the applicant can present information and evidence in requesting a variance. If the administrative appeal is denied, the Board can then reopen the hearing to the audience and address the request for variance.

Chairman Menard stated that a super-majority (4 members) must vote in favor of the administrative appeal or for variance for the appeal or variance to be granted.

8:42 p.m. - Chairman Menard made a motion to close the hearing. Ms. Pontolilo seconded the motion and the Board voted unanimously in favor.

Discussion:

Chairman Menard started the discussion, stating that it is a judgment call for the Board. Serving alcohol is stretching the intent of the bylaw and selling alcohol to bring people in to the farm stand he does not consider to be "farm-related."

Mr. Coutinho said that the Board, in 2017, provided the applicant with an allowance for weddings to take place in the barn, which substantially supplements the applicant's income; that the Board must consider seriously that, if granted, the potential exists for never-ending expansion by numerous other farms; perhaps, the Board should consider denying the application and have the Superior Court make the final determination; he would deny the appeal and the Board focused on weddings in 2017.

Ms. Gee agreed, stating the Board should not be the arbiter in interpreting the bylaw. She said that the Town should think seriously when considering allowing broadly defined bylaws at Town Meeting.

Ms. Pontolilo stated that the bylaw is too broad for her comfort level.

Chairman Menard asked the Board whether anyone wished to make a motion to grant the administrative appeal. No one made such a motion.

Chairman Menard then asked the Board whether anyone wished to make a motion to deny the administrative appeal. Accordingly, Ms. Pontolilo made a motion to deny the applicant's administrative appeal of the Building Commissioner's October 1, 2019 determination that the service of alcohol and providing a limited number of seats is not allowed under the "agri-tourism" and "agri-entertainment" section of the Zoning Bylaws. Chairman Menard seconded the motion with the Board voting 4 to deny the appeal (Menard, Coutinho, Borden and Pontolilo) and 1 to grant the appeal (Gee). [Note: Originally, Ms. Gee wished to abstain from voting.]

Chairman Menard then opened the hearing regarding the request for variance.

Attorney Alphen stated that, in light of the Board's discussion and denial of the administrative appeal, the applicant would request to withdraw his application without prejudice. He said he would discuss the variance further with Mr. Wagner and return to the Board at a later date.

Attorney Alphen submitted a written request to withdraw without prejudice, reading the motion into the record.

Ms. Gee made a motion to grant the request to withdraw without prejudice. Mr. Coutinho seconded the motion with the Board voting unanimously to grant the motion.

The hearing in this matter closed at 9:03 p.m.

Administrative Items

1. The Board discussed revision of the application form. Chairman Menard made a motion to amend the application form to include specific wording regarding the Board's advising a potential applicant to seek legal and other professional advice when completing the form. Discussion ensued as to whether or not the Board has the authority to waive a filing fee (e.g. for Town Department applicants or an applicant who had previously paid a fee and was returning to the Board for a similar request). Attorney Blake said that the Board can waive a fee (i.e. an error made by the Town or withdrawal of application prior to publication). However, he said that the Board should set criteria for such waiver. Mr. Elias seconded the motion to revise and the Board voted unanimously to revise the application, present revised copies to the Town Clerk and to

post the revised application on the web site in Word and PDF formats.

2. Minutes of May 16, 2018 - Ms. Pontolilo made a motion, seconded by Mr. Borden, and the Board voted unanimously to approve the minutes of the May 16, 2018 meeting.

3. Minutes of December 11, 2019 - Ms. Pontolilo made a motion, seconded by Mr. Elias, and the Board voted unanimously to approve the minutes of the December 11, 2019 meeting.

Chairman Menard stated that all minutes are now up-to-date; the web site has been updated with all decisions now having been posted.

Mr. Coutinho stated that he will be reviewing various documents that he has at home that span his service on the Board (more than 30 years). He will then bring those into the Town Hall and Maria will file them in their respective files.

The next hearing for the Board is Wednesday, February 12, 2020 at 6:30 p.m. The only matter on the agenda at this time is the continued hearing on the application by Mary Ferry/Bruce Sylvia, Jr. d/b/a Absolute Martial Arts at 287-289 Gifford Road.

9:25 p.m.

Motion made by Ms. Pontolilo to adjourn the meeting. Seconded by Chairman Menard. The Board voted unanimously in favor.

Adjournment.

Respectfully submitted,



Maria I. Branco, Principal Clerk
to the Zoning Board of Appeals

APPROVED:


Roger Menard, Chairman