

TOWN OF KINGSTON
ZONING BOARD OF APPEALS

MINUTES
October 19, 2022

Members:

Mr. Paul Dahlen – Chairman
Mr. Doug Dondero – Vice Chairman
Mr. Lane Goldberg
Mr. Robert Mullen
Mr. Kevin Wrightington

All board members were in attendance. Mr. Goldberg was in attendance via Zoom.

Mr. Dahlen opened the meeting at 7:06 PM.

Appointment:

7:00 PM Applicants Mary and Shawn O'Donnell, Trustees of the O'Donnell Family Trust, both (1) appeal a certain cease and desist order issued by the Building Commissioner regarding the commercial importation of fill to 48 Marion Drive (Parcel No. 75-38), said appeal being conducted pursuant to G.L. c. 40A, §15 and §10.4.B.2 of the Zoning Bylaws; and (2) apply for a Special Permit under §4.2.A.1 of the Kingston Zoning Bylaws to alter or extend an existing use by adding reclamation and restoration of the property via the importation of fill.

Mr. Dondero read the public hearing notice for 48 Marion Drive.

MOTION: To open the hearing by Mr. Dondero for the cease and-desist order issued to 48 Marion Drive and seconded by Mr. Wrightington with a vote of 5-0-0.

VOTE: 5-0-0

Attorney Galvin representing Mary and Shawn O'Donnell, Trustees for the O'Donnell Family Trust referred to information provided to the Zoning Board of Appeals as requested as well as the plans from 2015. The site was called Greenway, mixed use project. Attorney Galvin displayed a small version of plans which were intended to comply with new zoning. Intention was to fill site to build. One change in the project was envisioned to be around windmills. Explained that the area on the black box on the plan is a solar facility that's different than what was originally planned. That has been interchanged up to the solar site. Roadways correspond to the layout of the solar field. When the solar lease ends, that area would be filled in with the housing and mixed-use units. There would be commercial in the front. Spoke of being 600' away from the mill to be careful of snow throw and ice. This is what O'Donnell's envision for the site now and back in 2015. Other renderings were displayed.

Mr. Dahlen questioned what the area is zoned, was it overlayed or changed?

Attorney Galvin stated that it was originally located in an industrial district and became commercial industrial – Smart Grove District, has subdistricts. The Smart Grove District has 4-5 subdistricts.

Mr. Dahlen asked what the project timeline is.

Attorney Galvin spoke of issues and further displayed plans for the property. This would have to be permitted after the reclamation project. Went on to discuss the matter presented in front of the Selectmen in 2015. Entered significant contracts. Spoke of town being dragged into abutter issues. Referred to memo sent to ZBA and the Zoning Enforcement Officer on 10/19/2022. Have not reached an agreement on how to resolve this. Urban fill material does not contain chemicals in this site. Explained for at least the last 35 years or longer it has been used as a sand and gravel pit. Referring to the letter of complaint made that material being brought in has waste, oil, and hazardous materials as well as materials blown onto abutter's property which Attorney Galvin stated that any damage would be paid for. Claims that he knows there was no bodily injury – eye or allergies.

Spoke of dust mitigation policy and add new well site to create new water so site can be irrigated. One well has been installed and draws 15 gallons per minute. Agreed to install a second well by December 1st. Speaking of Mrs. Demar's property. Roadway was relocated to reduce dust to abutter's property. Brand new berm that will be constructed, loamed, and seeded that will also trap any type of dust or particulates on the site at least 450' from the boundary line. As required by the DEP, already constructed a permanent weather station on the property. One or two dust monitoring stations will be constructed that costs \$5,000 per month. Spoke of watering 4 times a day except rainy days when there is no wind or migration. The result of the meeting yesterday was that there will be further edits that he suspects there will be a site visit with DEP next week. If the ZBA would like they can invite any town officials. A new Aco should be issued. Further remedial action not able to comment on because there is not an agreement yet.

Attorney Kennefick, Town Counsel spoke reminded the board of their role and the enforcement letter by Jason Silva and nothing outside of that. Look at the zoning bylaws. There are two different conversations going on. Explained an Uxbridge case. The board is limited, and determination needs to be made on whether Jason was right in issuing the cease-and-desist order.

Attorney Galvin responded to Attorney Galvin and spoke of the Uxbridge case.

Attorney Adam Brodsky, environmental and land use attorney from DTM Law from Hingham, represents Mrs. Demar who lives at 4 Royson Drive and is not here but is represented by her son, Larry Demar. She has lived full-time at the property for the last three years. House is 200' away from the property. She is seriously impacted by the clouds of dust from the project, incessant noise, and vibration from the 1000's of trucks that have transported billions of cubic yards of fill to their property. Mrs. Demar's property has been damaged. We haven't gotten into the discovery phase yet. She has not been able to go outside of her home at times because of the difficulty breathing due to the large amounts of videos and documents. She requested enforcement from MASS DEP as well as the town. When nothing was done, she retained Attorney Adam Brodsky to pursue her remedies. June 7, 2022, a cease-and-desist order was issued by Jason Silve, Enforcement Officer. Mrs. Demar claims that O'Donnell's have not implemented sufficient measures to protect her and her property. MASS DEP, because of these complaints is also pursuing enforcement and has issued a Notice of Non-Compliance and is requiring the O'Donnell's to change their operations to be consistent with their administrative consent order. The attorney makes points of why the O'Donnell's feel they can appeal from Attorney Galvin's 8/2022 letter. Reminded the board members that they are speaking of soil that contains solid waste, coal ash, coal dust, and hazardous materials. Attorney Brodsky requested that the ZBA uphold the Building Commissioner's decision and uphold the appeal.

Mr. Dahlen asked Jason and the board if they would like to comment at this point. All declined to speak at this point.

Pine DuBois, Jones River Watershed Association has a question regarding the DEP and the administrative order that was issued in June regarding the failure of performing ground water testing and leaching into Smelt Brook which is right there. Requested update.

Attorney Galvin responded to Ms. DuBois question. Dep did not receive reporting for a period. All the testing was done periodically until losing contact with the prior site professional Mr. DeBenedictus. The ground water testing was not included by him in the required soil management reports for which he was being paid for.

Mr. Dahlen asked how many wells are on the site of 100 acres.

Mr. Galvin stated 4.

Mr. Dahlen asked where the wells are located.

Shawn O'Donnell pointed out 4 monitoring wells on the plans.

Attorney Galvin stated that it is a state authorization and obligated to be reported to the town.

Pine DuBois spoke of the sand running down the roadway. Expressed concern.

Shawn O'Donnell spoke of phases of 4 different sections. Shawn also mentioned that they have a street sweeper to sweep the street. He offered to put stone down.

Mr. Wrightington stated that this is a good size project and mentioned his concern about water runoff and wants to make sure that it is not doing anything to the aquifer.

Attorney Brodsky asked for confirmation on addressing complaint order not necessarily recent complaints, second are there any existing permits that are in affect which authorizes any residential projects on this site.

Attorney Galvin replied and Shawn O'Donnell showed the members where Mrs. Demar's house is located.

Mr. Mullen reiterated that the board and people are there for one question, Are we in compliance with the existing bylaws today.

Jason Silva stated that this is zoned as commercial industrial and does have overlay district. The overlay is the Smart Growth District – 40R which Realistically does not exist anymore. The state was told that the town has abandoned the 40R, although it still exists in bylaw and do not have intentions of using that zoning.

Mr. Dahlen asked the board if they upheld Jason's decision. Mr. Dahlen went on to express his thoughts on the decision. There is nothing in the bylaw that is set for the import of any soil. The issue has started and is already there. Do we attempt to correct it because there is no bylaw. How do we move forward correctly. Sees other issues and should be more stringent. It is unrulred. How is it fixed down the road. Spoke of water pollution, air pollution, noise pollution, trucks going in and out Needs to be corrected for the future, so this does not happen. It is still happening and needs to be corrected. Town should correct this. This has been going on for 8+ years. There's no checks and balances.

Mr. Mullen stated that there needs to be laws and guidance for bylaws. Spoke of upkeeping of the road and thinks there should be a timeline and guidelines.

Mr. Goldberg agrees with Mr. Mullen. The scale here is ginormous and the residents of Kingston have not approved of this. ZBA's job is to shut this down. Attorney Brodsky stated that. The bylaw does not permit this. It does not mean that they can keep doing this. They did not get a permit to this project and put the cart before the

horse by building up the soil for this project. Is this allowed. As a board need to narrow down on this issue and is this allowed. Is Jason's order a yes or no.

Mr. Dondero agrees with what has been said. This is enormous and we are horsing around with our water table and we are all in trouble.

Mr. Wrightington agrees and is concerned about the water table.

Mr. Mullen suggested the applicant go through the process, come up with a plan and get a special permit. It's a large scale.

Attorney Galvin claims that when they filed for the appeal a special permit was also requested. They were told by Jason Silva that the application was incomplete.

Mr. Dahlen spoke of multiple problems. The board could do two things:

1. Keep up with Jason's cease and desist order.
2. Use Jason's cease and desist order to attempt get things done and correct the problem.

Mr. Wrightington stated that somewhere an agreement must be reached and resolved.

Jason Silva stated that there are no use variances allowed. Attorney Galvin does not have the right to come to this board and request the board give them a permit for import fill because it does not exist in the bylaw.

Attorney Galvin requested that it be in writing from Mr. Silva so that procedurally they can review that decision apply for a special permit at the same time.

Attorney Brodsky suggested that the board deny the appeal.

Keith Hickey, Town Administrator appreciates the ZBA desire to find a way to address this. Mr. Hickey respectfully suggests that the board define whether the zoning bylaw allows this use or does not.

Mr. Dahlen expressed his concern regarding no fees coming in, no bond, this decision comes down to getting things done, concerned about water quality that affects all of us, BOH, conservation - These issues are not getting properly solved and vetted and doesn't understand why.

Attorney Kennefick responded to Mr. Dahlen, section 8 & 15 you review the order and vote on whether to overturn it or not. It requires a 4 man vote to overturn the order. Must look at Jason's letter and decide if he made the correct interpretation of the bylaw.

Mr. Dahlen asked what is the consequence of giving them a cease and desist today, what do we fine them if they appeal it? How long does the appeal period take?

Mr. Mullen expressed his concern that if the cease and desist is upheld then no one is checking the water, no one is monitoring, no one is checking the wells. That could sit there for X amount of time and that could be worse than them working the site. Doesn't want the cure to be worse than the disease.

Mr. Dahlen spoke to Attorney Kennefick asking if this takes years in court who has won?

Attorney Kennefick Replied that they would have to go back to court to get them to stop.

Mr. Goldberg questioned if the board upholds the order, can we go back and ask for injunctive relief?

Attorney Kennefick replied yes.

Mr. Goldberg stated that they are still in Superior/Trial Court. It would potentially stop once the board decides.

Attorney Brodsky stated that even if the board upholds the Building Commissioner's order and the judge issues and injunction to cease and desist, that will not relieve the O'Donnell's from complying with all of monitoring requirements under their administrative consent order. That's a separate regulatory requirement managed by DEP until they go to DEP to change them.

Ms. Kimberly Emberg, "This is concerning", Listen to the town attorney and focus on the reason we're here.

Attorney Kennefick stated that if upheld it could take 4-5 years.

Mr. Goldberg asked if we could get them to stop.

Attorney Kennefick replied yes to stop importation.

Mr. Dahlen expressed his concern and worried that things won't get done and will linger.

Attorney Kennefick stated that it could be 4-5 years before the town meeting will render the case moot.

Mr. Dahlen expressed his concern that he wants corrections done by the O'Donnell's in a tight, short period and to be done right.

Mr. Wrightington felt that the ZBA had been left in the dark when this had been going on for so many years and then we're informed that we are going to have a special ZBA meeting. The board doesn't even get the reports from them.

Mr. Goldberg wants to uphold Jason's cease and desist order. Cannot negotiate on something that is not in the bylaw.

Mr. Dondero – Agree

Mr. Wrightington – Agree

Mr. Mullen – Agree

Mr. Dahlen - Agree

MOTION: Mr. Dondero motioned to close the hearing of 48 Marion Drive, seconded by Mr. Wrightington. (Roll call)

VOTE: 5-0-0 (Roll call) UNANIMOUS VOTE

MOTION: Mr. Dondero motioned to uphold the Enforcement Officer/Building Commissioner's cease and desist order, seconded by Mr. Goldberg. (Roll call)

VOTE: 5-0-0 (Roll Call) UNANIMOUS VOTE

Appointment:

7:05 PM Applicants Patricia and Dana Nemes request a **minor modification** of an existing special permit at 25 Rocky Nook Avenue for a proposed bedroom, Map 49 Lot 111.

Mr. Dahlen requested that the applicants explain and present the changes requested for the minor or major modification.

Dana Nemes, 11 Meetinghouse Rd. spoke of the initial special permit at 25 Rocky Nook Ave. He refers to page 6 of the paperwork given to the board. Would like to change and combine the mechanic/storage room to a closet and have a bedroom. Same structure.

Mr. Dahlen questioned how they have sewer for 4 bedrooms.

Mr. Nemes stated they currently have 3 bedrooms and are getting rid of the utility room and making it another bedroom.

Patty Nemes stated that she spoke to the sewer department, and they can have 4 bedrooms because they have the capacity. A letter from the sewer department was provided.

Mr. Dahlen pooled the board.

All members agree that this request by the applicant is a minor modification.

VOTE: 5-0-0

MOTION: to ADJOURN by Mr. Dondero and seconded by Mr. Mullen.

VOTE: 5-0-0

ADJOURNED: 9:28 PM

Respectfully submitted,

Debora Barry
Executive Secretary Zoning Board of Appeals