

approved
1-11-22

ZONING BOARD OF APPEALS

Meeting Minutes of October 26, 2021

@ 7:00 p.m.

CARVER TOWN HALL

MEETING ROOM #1

Present: Stephen Gray, Chairman; Sharon Clarke, Vice-Chairperson; Members: Frances Mello, Frank Casey, and Mark Poirier.

Also present: Alternate Member, James Barrington.

Meeting opened at 7:00 P.M.

A. Approval of meeting Minutes of September 28, 2021

Member Poirier made a Motion to accept the Minutes as written and was seconded by Vice-Chairperson, Sharon Clark. The Motion passed unanimously.

Continued Public Hearings:

B. Public Hearing: Case 70-1-2R (cont.): Petitioner: VS Mass SMART TPD I, LLC appealing the revocation of Building Permit # 2020-143, to install a 600 KW ground mounted solar system on property located at 72 Center Street, Carver MA (Assessor's Map 70-Lot 1-2R), pursuant to M.G.L. c 40A, Sections 8 and 15, as well as Section 5223 of the Carver Zoning By-Law, on the ground that the Petitioner has not increased the height and tilt angle of the solar panels in alleged violation of a Special Permit Decision of the Town of Carver Planning Board.

Chairman Gray opened the continued Public Hearing. He stated that Mr. Silva, the owner of the subject property, was present.

Chairman Gray remarked that the Board had spent some time on the property during the site visit of the Board and was pleased to say how beautiful the farmland is. He then stated that Mr. Silva (who had objected previously to this Petition) had reported that a settlement had been reached with the Petitioner on this case.

Attorney D'Ambruoso, representing the Petitioner, stated that he concurred that a settlement had been reached on the case with Mr. Silva.

Chairman Gray asked the Board for comments but there were none.

Vice Chairperson, Ms. Clark, asked if the Petitioner, through counsel, if it were necessary to go back in front of the Planning Board.

Attorney D'Ambruoso stated he did not think that was necessary, as it was his opinion the ZBA should now reinstate the previously revoked Building Permit in view of the withdrawal of the objections of the

landowner. He said a Petition had been filed earlier with the Planning Board for a minor modification which had been denied by the Planning Board.

Vice Chairperson, Ms. Clark, stated she wanted to make sure exactly what the Zoning Board of Appeals was voting on.

Vice Chairperson, Ms. Clark, made a Motion to close the Public Hearing and was seconded by Member Poirier.

Ms. Clark then pointed out for the record that Member Fran Mello had recused herself from this hearing and vote.

Chairman Gray reviewed two Findings he was proposing for the consideration of the Board. As follows:

- A. The Board finds that an increase in the height angle of the subject solar panels to approximately 11 feet, 5 inches with a 35 degree tilt angle, falls within "approximately 8 feet 8 inches at a 25 degree tilt angle" as stated in the Plans filed originally with the Planning Board, which Plans state that these measurements were "for general reference only" and that the height was "approx."
- B. The Board finds that the height increase of the solar panels to approximately 11 feet, 5 inches with a 35 degree tilt angle would be in substantial conformity with the Plans filed originally with the Planning Board and made part of its Decision, dated November 13, 2018.

A Motion was made by Member Poirier to accept these proposed findings and was seconded by Vice Chairperson Clark. The Motion passed unanimously.

Vice Chairperson Clark asked about the height as an "approximate" number and wondered if the Board should place a limit, by adding the words "no greater than what is constructed now" in its Decision.

Chairman Gray then suggested Decision language for the consideration of the Board. As follows:

In accordance with its authority under M.G.L. c 40A, Sections 8 and 15, as well as Section 5223 of the Bylaw, the Board hereby reverses the revocation of the Building Permit (Permit #: 23020-143) subject to the following modifications:

- A. The height and tilt angle of the subject solar panels is not to exceed the current as built design.
- B. All other conditions of the Decision of the Planning Board, dated November 2018, shall remain in force and in effect.
- C. The ZBA Decision is subject to the terms and conditions of the "Fourth Amendment to Option and Lease Agreement" between the parties, dated October 26, 2021 (this document was not made part of the Board file, as it represents private settlement and financial terms between the parties).

Chairman Gray asked if there were any questions from the Petitioner or Mr. Silva.

Mr. Silva asked for clarification of the suggested Decision language.

Chairman Gray stated that the current Building Permit stands revoked and unless the ZBA votes to reverse that revocation, the project remains stopped.

A Motion was made by Vice Chairperson Clark and seconded by Member Poirier. The Motion passed unanimously.

C. Public Hearing: Case 131-2 (cont.): Petitioner: Save the Pine Barrens, Inc. requesting enforcement of the Town of Carver Zoning By-Law against AD Makepeace, Inc. due to alleged past and continuing commercial earth removal activities in the Residential-Agricultural District in the Town of Carver that are occurring both with and without an Earth Removal Permit. The sites in question are located at:

1. 59 Federal Road (Assessors Map 131, Lot 2-1C);
2. 46 Federal Road (Assessors Map 131, Lot 2-4);
3. Hamond Street (Assessors Map 131, Lot 1-4)
4. Golden Field Solar (Assessors Map 131, Lots 1-1, 1-2, 1-3, and 5.0)
5. Federal (aka Tihonet) East Solar (Assessors Map 131, Lots 2-1, 2-2 and 2-3)
6. 0 Hammond Street Solar (Assessors Map 134, Lot 4-2)

Upon resuming the Public Hearing as to this Case, Chairman Gray asked if it was the request of the Petitioner to seek from the ZBA or Building Commissioner a cease and desist order against A.D. Makepeace for all sand and soil removal activity in the Town of Carver.

Attorney O'Neill, on behalf of the Petitioner, stated it was just for the above-referenced six sites.

Chairman Gray remarked that on the Application, the Petitioner was seeking a Public Hearing under Zoning By-law 5321 and asked what that By-law referred to.

Attorney O'Neill and Attorney Sheehan, on behalf of the Petitioner, acknowledged that there was no such Bylaw.

Chairman Gray then asked if a 'meeting of the minds' had been reached between the Petitioner and A.D. Makepeace which owns the six sites in question. Both parties answered that talks had occurred but no settlement had been achieved at that time. Both parties requested that the Board make a Decision on the Petition.

However, counsel for the Petitioner and A.D. Makepeace, Attorney Crossen, both stated they were willing to continue discussions going forward.

Attorney Crossen observed that the Petitioner still had recourse to the courts and also to the Earth Removal Committee, if the ZBA were to decide against it.

At this juncture, Attorney O'Neill asked to show a short five minute video on behalf of the Petitioner. Attorney Crossen stated he would object to the showing of the video, as it was likely being offered on the merits and this case presented a threshold jurisdictional issue that the Board needed to decide first.

Chairman Gray inquired of the Board Members if they wanted to see the video at this time.

The objection was sustained unanimously after the polling of each individual Board Member.

Member Mello made a Motion to close the Hearing and was seconded by Vice-Chairperson Clark. The Motion passed unanimously.

Chairman Gray then reviewed a few findings that he asked the Board to consider in reference to this matter, as well as a proposed Decision. As follows:

1. The Board finds that it does not have subject matter jurisdiction over this case, as it is being asked to enforce a General By-law and Permits issued thereunder, or not issued thereunder, by the Earth Removal Committee.
2. The Board finds that, under General By-law 9.1.9c, "the Enforcement Officer for the provisions of this By-law (regarding earth removal permitting) shall be the E.R.C. (Earth Removal Committee) or their designee of the Town of Carver" (and not the Building Commissioner who is the Zoning Enforcement Officer for the Town of Carver).
3. The Board finds that, even if it retains subject matter jurisdiction, the Petitioner has missed pertinent filing deadlines pursuant to M.G. L. c 40A, Sections 7 and 15 that prevent it from proceeding on the merits.
4. The Board finds the Application filed by the Petitioner sought a Public Hearing under Zoning By-law 5321 but that there is no Zoning By-law 5321.

Suggested Decision: The Board declines to award the relief requested by the Petitioner, that is, a cease and desist order against A.D. Makepeace for all sand and gravel operations being conducted in the Town of Carver at the six (6) sites described, or to order the Building Commissioner (also the Zoning Enforcement Officer for the Town of Carver) to do so.

All suggested findings and the suggested Decision were voted and passed unanimously by the Board.

New Public Hearing:

A. Public Hearing: Case 131-4-3: Petitioner: Industrial Tower and Wireless, LLC requesting a Special Permit pursuant to Sections 4600, 4660 and 4676 et. seq. of the Carver Zoning By-law, for property located at 0 Federal Road in Carver, MA (Assessors Map 131 Lot 4-3), so as to construct a 150-foot monopole wireless telecommunication facility in the Industrial "A" District. The Special Permit request is made due to the fact that the tower must be set back from public ways and residential uses a distance of at least three (3) times the height of the tower.

Chairman Gray opened the meeting.

The Petitioner was represented by legal counsel and Project Engineer, Kevin Delaney, who told the Board that it wished to construct a 150-foot monopole wireless telecommunications facility in the Industrial "A" District at or near O Federal Road.

The Petitioner requested that the Board allow relief from the setback requirement from the public way under Section 4676 so as to allow the proposed site setback to be less than 450 feet from the public way, Federal Road. The proposed setback is +/- 347 feet from the 1973 County Layout of Federal Road, per Decree #: 1478, and +/- 423 feet from the closest edge of the pavement of the road. Accordingly, setback relief of 103 feet and 27 feet is sought, depending upon which indicia of measurement is used.

The proposed facility is intended to co-locate five (5) major wireless carriers in an area where wireless coverage is said to be non-existent or spotty, based upon testing performed by the Petitioner.

The proposed location of the project is described as a heavily wooded area with few houses in the vicinity. The nearest residence is said to be more than 1500 feet distant. The project would be beyond the 100-foot buffer zone from nearby wetlands. The monopole would be built with a narrow profile and would be manufactured with silver and grey coatings intended to blend with the sky, minimizing visual impact.

The proposed tower was described as not creating undue traffic on nearby roads or causing a danger to pedestrians, as the facility would be unmanned. There would be ample space for parking and turn-arounds for vehicles performing routine maintenance. There would be no overload of public utilities, no increased demand for such services as police or fire, and the facility would not create a negative fiscal impact on the Town.

Further, it was maintained that the compound area on the ground would be shielded and not visible from any property line, due to the wooded nature of the location. No light beacon or strobe is planned for the top of the tower. A "Determination of No Hazard to Air Navigation" letter authored by the Federal Aviation Administration, said letter dated September 30, 2021, was presented to the Board.

Concluding, the Petitioner maintained that the proposed facility is in compliance with all the conditions set forth in Section 4600 et. seq. of the Zoning By-law, but for setback, for which it was said the Board has the discretion to give relief, per Section 4679.

Attorney Margaret Sheehan, on behalf of the group called, "Save the Pine Barrens", was recognized and asked a number of questions. In response to these inquiries, it was disclosed by the Petitioner that the tower would be located at a 93-foot elevation and approximately .27 acres of trees would be cut down to allow for access to the site. No earth removal would be necessary, according to the Petitioner.

Additional information could not be provided by the Petitioner, such as whether MEPA or Historic review was necessary (land located on Native American tribal grounds) and how close a nearby earth removal company called, "Read Custom Soils," was located from the project site.

The Fire Chief for the Town of Carver, Craig Weston, testified that he wanted the top location of the tower to be reserved for Public Safety, as had been the usual practice with other wireless telecommunication facilities in the Town.

At this juncture, the Board continued the Case to its next meeting (December 7, 2021) to allow for the receipt of additional information.

Correspondence: None.

Adjournment:

Member Poirier made a Motion to adjourn and was seconded by Vice-Chairperson Clark. The Motion passed unanimously.

Respectfully Submitted,

Patricia Pacella