

Zoning Board of Appeals Meeting Minutes

Minutes of May 19, 2014

Members present: David Orth; Chairman, David Kirwan, Jim Buckley; Clerk, Vaughn Hathaway

Alternate members present: Jim Reinke, Paul Schold

Hearing on the petition of Matthew Schold of 77 Chickering Road, Spencer, Ma. for an Appeal of Decision by Inspector of Buildings to construct one (1) of three (3) multi-family dwellings as originally approved under a 1972 Variance on property located at 503 Stafford Street, Cherry Valley, Ma.

Meeting called to order at 7:30PM

Mr. Orth noted before the start of the hearing that alternate member Paul Schold had a conflict of interest regarding tonight's hearing. Matthew Schold, who is his son, has material interest with this hearing. Therefore, because of the State Ethics Commission's Conflict of Interest Law, he will be unable to participate in this hearing and will need to leave the room for the duration of the hearing.

Mr. Orth submitted, into the record, a copy of the email correspondence between himself and Mr. Schold asking his relationship with the applicant and a possible Conflict of Interest.

Mr. Schold agreed with the ruling and left the hearing.

Mr. Orth gave the instructions on hearing procedures and then opened the hearing to Mr. Buckley to read the submitted material into the record.

Mr. Buckley read the Notice, Application, a letter from the Building Inspector to Matthew Schold, dated 3/26/2014 and a letter from Attorney George Kiritsy to Mr. Robert W. Richard dated 2/12/2014.

Submitted into evidence: the green and white return receipts from the Certified Mailing, a copy of the 1972 Plot Plan, a copy of the denied building permit application, a copy of the 1987 opinion letter from Attorney Cove to the ZBA and a copy of the 1972 Variance granted.

Voting at tonight's hearing: Jim Reinke, Jim Buckley, David Orth, David Kirwan and Vaughn Hathaway.

Mr. Orth opened the hearing to the applicant to present his petition to the Board.

Mr. George Kiritsy, Attorney representing the applicant made the presentation.

Mr. Kiritsy said this application is an appeal of a denied building permit application to build a multi-family structure located at 503 Stafford Street, Cherry Valley, Ma.

This application for a building permit, for a multi-family, stems from the initial granting of a variance by this Board back in 1972. At that time, the zoning allowed the granting of a variance under the old zoning, which is the pre-1975 Zoning Act. The Zoning Enabling Act created the allowance of variances in which this variance was granted.

Mr. Kiritsy continued. There were no automatic expiration dates and expiration dates were a matter of statutory instruction for bringing into the statute in 1975. The 1975 statute carried with it a prospective, an express, expiration date from the act of this Board. In 1987, there was effectively an expiration date for this particular variance.

The pre-1975 zoning relief for special permits and variances didn't have an express expiration date and didn't expire at any particular time. More importantly, they don't expire at any time, if rights under the zoning relief, have been in any way exercised. If people do anything under that zoning relief, it's a formal acknowledgement of exercising their rights under this and that makes this zoning relief irrevocable.

An issue was taken up by the courts in the late 1970s and 1980s, where there were cases that dealt with this. The SJC never exactly determined whether or not the retroactive clause of 1975 Act applies to pre-1975 because you don't have to get there because they'll note for the record that the property owners, in fact, exercised their rights under it.

The exercise of any rights under the zoning relief puts to bed the issue that they don't have to get to the issue as to whether or not 1975 has a retroactive effect to pre-1975.

In any event, this property was originally granted a variance back in 1972. The original property owner in the 1970s constructed multi-family structures on site in accordance to the variance. That would have been step one of the exercise of the right under the variance and two of the multi-family buildings got built.

The property then gets transferred and the new property owner comes in the 1980s and seeks to build a commercial building on the property, also in accordance of this variance.

In 1987 there was an issue as to whether or not the variance had lapsed and if it was too late to add the commercial building. This Board took that up and Attorney Cove took that up and gave the Board an opinion, which was included in the submittal of this application.

In that opinion, Mr. Cove identifies the law and identified what the case law was at the time, saying that it was unconditional, it's irrevocable and it's still good. His letter goes on to say "It is my opinion that the rights to continue the development proposed in the 1972 variance are not prohibited by the language in Chapter 40A, Section 10 and the developer has the right to continue the construction in accordance with the original proposal of 1972". That is the opinion stated in the 1980s and the Town issued a building permit in reference to that opinion and following Attorney Cove's opinion at that time.

Mr. Cove's letter went on to state, "It has been pointed out that the courts have made it quite difficult for those opposing nonconforming uses to show discontinuance, where the courts has accepted the doctrine that discontinuance equals abandonment, and abandonment requires, first,

a voluntary completed affirmative act on the part of the owner of the nonconforming use, and second, the concurrence of an intent to abandon and some overt act or failure to act which implies abandonment”.

Mr. Kiritsy continued. Working with this case wouldn't warrant the evidence of any abandonment of this project. The worst-case scenario, it's been phased. It started in the 70s; it was advanced in the 80s and wanting to advance now to its completion. They are asking for a final building permit to do exactly what was planned and permitted in the 1972 plan.

They are not resubmitting a request for a variance; not demonstrating any hardship associated with the site because that was already done by the Board back in 1972. This isn't a special permit that they are trying to sell the Board on, this isn't a detriment to the neighborhood argument and this isn't an argument regarding the general intent in keeping with the Zoning Bylaws. All they are doing is exercising the rights under a variance, in which this Board has already adopted and in which this Board has already confirmed, over almost two decades after its original submission.

If the variance is expired, which is what's being suggested, then when it expired will need to be identified. If this has an expiration date, which is what the effect of the 1975 act is, you know when it ends, you know when it started and you come in and get it extended. This doesn't have that.

We know it wasn't expired in 1987 and he will challenge anyone to say that, if it's expired, when did it expire and when did they have to come in to reapply. If they applied for this in 1990, would ZBA have granted it? If they applied for this in 1992, would ZBA have granted it? That is the question he is asking now because no one is asking it, when did it expire?

The letter from the Building Inspector is noting this has been abandoned. It doesn't say when or how, under what language, what authority, what act or what overt act by the property owners, which is what Attorney Cove, stated in his 1987 letter, that they need to show an overt act. What overt act did they do that says they abandoned this?

The building inspector uses abandoned, so he respectfully suggests that this Board uphold it's decision of 1972, uphold the opinion of Attorney Cove back in 1987 and approve the appeal and order the issuance of a building permit.

Mr. Orth asked what happened in 1988 when building permits were asked for at that same location.

Mr. Kiritsy said that was with the prior owners, but he believed they built the strip mall.

Mr. Orth asked where the strip mall was located. Mr. Hathaway pointed out on the plot plan submitted, the strip mall location being on Stafford Street adjacent to the Staffordshire property. Mr. Kiritsy explained that Attorney Cove recommended, back then, to instruct issuance of a building permit in the clear direction of the variance.

Mr. Orth asked if the structure was actually built. Mr. Kiritsy said yes.

Mr. Orth asked what the date was when the last structure was built in that location.

Mr. Kiritsy said it was in the late 1980s.

Mr. Orth asked for a more specific date and exactly what was built.

Mr. Kiritsy said it was in 1987 and it was the strip mall.

Mr. Orth noted the strip mall being the last structure built.

Mr. Matthew Schold said that structure was built with the 1972 approval permit.

Mr. Kiritsy said in the late 70s, two of the five multi-families were built. Then after a period of time, the strip mall was built.

Mr. Schold said he would like to mention that the strip mall and all these proposed buildings were on the original 1972 design.

Mr. Orth noted it being approximately 25-years since construction of the strip mall.

Mr. Kiritsy said he did not find any specific timing issues or any stipulations noted in the 1972 approval. He noted a concern raised but not included in the 1972 vote and it was in executive session," Donald Stephens made a motion to grant the variance as per plot plan with all entrances and exits to be 30' wide off of Stafford Street. All roads, drainage, sewerage, water systems, maintenance and security to be taken care of by Duquette Builders; and it was seconded."

So there may be a restriction, but looking at the actual vote, it says, "All members present and voting, it was unanimously voted to grant a variance" and there doesn't seem to be any restrictions noted.

Mr. Orth said there was something in the 1972 approval about percentage stating, "Approximately 20% of the land would be used for the actual development. It would destroy the beauty and ecology to use the whole site." He asked how much of the property is currently being used. This includes the parking lots, the buildings, including all structures.

Mr. Schold said everything that has been developed is on the parcel of 10.6-acres and this additional plan has included the land that is still undeveloped.

Mr. Orth said it says 20% of the land would be used for the actual development.

Mr. Wayne Richard, owner of Staffordshire said there are 100-acres total there. All through the 90s, Cherry Valley Sewer District were engineering sewers in Cherry Valley to include this project through the Blackstone system. At some point, they had a meeting and voted them out of

the district. When that happened, they started designing different site designs and one was with the Gallo property across the street. They designed a system for a storage treatment plant with additional storage and this has been going on all through the 90s to present day.

Mr. Hathaway asked how that was relevant to the petition.

Mr. Richard said it shows we have not abandoned the project.

Mr. Kiritsy said it shows that there was no abandonment on the development process. They have been dealing with the sewer issues on site and trying to find a way to sewer the property and do it on site. So there was never intent to abandon the project.

Mr. Kirwan asked for clarification. Is this request about the construction of one out of the total of three future buildings?

Mr. Kiritsy said no, this is the third building out of three.

Mr. Schold said it's one of three. On the plan, it shows the proposed buildings and the one proposed; it is one out of the three.

Mr. Hathaway said it's more than one building, in fact, its three buildings. This is regarding adding on one of the three buildings. Mr. Schold agreed.

Mr. Hathaway said he keeps hearing one of three and it's actually three of seven.

Mr. Schold said he worded it, one of three proposed.

Mr. Kiritsy said it is shown on the original plan. It shows 6 multi-families and the strip mall. Three are left and they are building one out of those three.

Mr. Hathaway clarified it will be one of the three not built.

Mr. Kiritsy said it would be the 4th out of the 6.

Mr. Richard said one out of three buildings is what he is asking.

Mr. Kiritsy said of the allowed structures, this is the 4th out of 7 buildings.

Mr. Schold said we are asking for approval for one building.

Mr. Kiritsy said with the potential of 2 additional ones coming in. Mr. Richard agreed they want to finish the project as originally designed.

Mr. Kiritsy said this was originally designed with 7 multi-families buildings.

Mr. Hathaway said what the Board is hearing is an appeal of a decision to advance on one building.

Mr. Kiritsy said correct for one building. On the plan, there are 4 multi-families and 3 additional multi families and this application is for one of the 3.

Mr. Hathaway said the Board is hearing the argument because of the Zoning Enabling Act, the decision made in 1972, pre 1975. He asked how far back can we go. As an example, can we go as far back as 1838 and say that we need to enforce our agreement made by Town Official then.

Mr. Kiritsy said the zoning enabling didn't go that far back, but can go back to zoning enabling in the early 60s late 50s and there have been changes. Major changes were done to the zoning enabling and affected a lot of the variances done in the early 60s.

If there had never been any exercise done under the permit at all, there might have been an issue the courts may have had problems with, but the courts have said, if they have advanced, the rights under the zoning relief are exercised.

For example; a woman gets a variance for undersized lots. She gets 2 undersized lots and she sells one of them. Someone moves in and builds a house and the woman still has the other undersized half. She waits several years, 10 to 15-years, and applies for a building permit and they say no. The woman says it's not fair, she sold that lot and now she's undersized. It went to court and the courts said, the division of the property, the sale of the property, even though the other half wasn't built on, that alone, that act, was an act of exercise

As long as a person exercises their rights under their permit, it will forever protect it. What if they weren't the original property owners exercising their rights back in the 70s when they built some of those buildings and back in the 80s when they built the strip mall. Some of the things his client could do with the property, they can't and at that point, can't go apply for a subdivision out there. They can't do a residential subdivision because they have exercised their rights under the variance. So they foreclosed their rights that might have been available to a property owner because they exercised their rights under the variance.

That variance is a double edge sword, it kept the protections under it, but by the same token, that exercise closed the doors to other options that might have been available.

They are saying the activities done back in the 70s and the activities in the 80s were sufficient exercise of the rights under the variance to sustain with support, that the variance is still intact.

Mr. Hathaway asked if because of that, they can go back 100 years from now and say they want to build the other two? Mr. Kiritsy said yes, he believes they could and that would be his position on that. It's an irrevocable activity and won't change their rights or protection. Variances are designed like that even under the 1975 statute, which does in fact have an expiration date, any exercise under that statute, means it's permanent.

If he goes in there and he clears it, he applies for a permit under it, he starts working under the variance, he gets the protections of that variance. It's not merely the fact that even though there are expiration dates, under the variance, he erected something to exercise it.

Mr. Hathaway said he did not think it was indefinite and just going and clearing a lot does not qualify.

Mr. Kiritsy said he had clients who received zoning relief and didn't sell their property within the time frame, but they subjected the property to Conservation restrictions, which were required by the terms of the special permit.

The Special Permit was granted allowing the zoning relief and then they went out and restricted their entire property. They didn't divide it or sell it yet, but the mere fact that they restricted that property; they can now remove those restrictions with the sufficient exercise of the rights under that permit to survive any argument of abandonment.

Mr. Hathaway said he knew of properties that the Town gave special permit for and the lots were cleared then abandoned after that. He would argue that those special permits are no longer valid.

Mr. Kiritsy said he did not have any of the statutes with him.

Mr. Hathaway said he understood it to say that the work has to be continuous; to show that it is ongoing and continual. It may not be relevant to this discussion, but that is how he understood it.

Mr. Kirwan asked what the ongoing continual work was.

Mr. Kiritsy said on this site, Mr. Richard had raised the issue about the sewer design. He stated that they had been working on getting an onsite sewer design. The delay was because there was an issue with septic already there and he just got his final permit approval.

Mr. Kirwan said in 1972 when the variance was granted, Mr. Richard's, had in fact, done nothing with that property, could he have then started this year to develop it.

Mr. Kiritsy said there would have been a problem had that happened and he probably wouldn't have had an effective argument on that.

For example, there was a case from a grant of a special permit, a little different from this, but it was in the 1960s. There was nothing done for 20-years and the lady who got the special permit dies and her son, who gets it out of the Estate, tries to start the work and was told he couldn't. It was pre-1975 and had no exercise on that permit. The courts went out of their way and said that there was absolutely nothing done with that permit and the permit was granted to someone else.

Mr. Kiritsy said the permit was issued in 1972 and they are here tonight showing that the property is now in better position to finish the project.

Mr. Kirwan asked if given the proposed construction of the multi-family, is it in the Attorney's opinion, that it would have to strictly follow the guidelines as set forth in 1972; is that what is being talked about?

Mr. Kiritsy said yes, he felt that was what this application was calling for. He didn't know what the original plan actually had, but felt this was consistent with Mr. Cove's letter of 1987. In that letter, Mr. Cove states, "when issuing the permit, the permit is to be issued only in accordance with the terms of the 1972 variance".

His client discussed with him about making the project into an over 55-community, but he felt that effort may end up hurting them. When it comes to the main component of this project, it has to comply with the original plan.

Mr. Kirwan asked how many units in each multi-unit. Mr. Richard said 74 additional units, 24 units in this building. Mr. Kirwan said the proposed building will house 24-residential units. Mr. Richard said yes, they would be 1 or 2 bedroom units. Mr. Orth asked how many units exist currently. Mr. Richard said 78-units.

Mr. Hathaway asked if any correspondence was received from Attorney Cove. Mr. Orth said he had not received a current opinion from Attorney Cove yet. The plan Mr. Cove had suggested for the Board to do is, continue this hearing and in the meantime, he will issue an updated opinion and at that point, it will get read into the record at the continuance, because he wanted to see what the Board had discussed so far and go from there. He noted that there were some questions Mr. Cove wanted asked and they were regarding; what happened in 1988 when JNC asked for building permits at the same location; did a structure actually get built; what was built and when the date was of the last construction to take place and the strip mall was the structure built.

Mr. Kiritsy agreed and noted also with what Mr. Richard discussed, regarding the permitting and design of the on-site sewer plant.

Mr. Orth said that designing a sewer plant isn't building a building per-say. He wasn't sure if something like an activity can be considered, as opposed to actually building something there. He asked if the last building built was the strip mall.

Mr. Kiritsy said yes the strip mall was the last building built on-site, but wanted to note that, if the Board was going to have a conference with Counsel, there was this activity that in Mr. Cove's letter of 1987 goes into detail stating what would be required to demonstrate abandonment. It stated, "it would be required, first, a voluntary completed affirmative act on the part of the owner of the nonconforming use, and second, the concurrence of an intent to abandon and some overt act."

They would have to have intent to abandon and an action to abandon or inaction to act on that site. Mr. Richard has had a continuous intent to develop and he's acted in furtherance of that, by designing and redesigning; negotiating, buying and trying to find a way to support on-site sewage. It goes to an issue Mr. Cove was thinking in 1987 regarding what's been done. This is what's they've done, they've been trying to sewer the property for the last 20-years.

Mr. Orth asked if they were on Town water or well water. Mr. Kiritsy said private well and septic.

Mr. Orth asked how the proposed building would affect the design of the on-site sewer plant. Mr. Richard said that was what they've been working on. They've been working on the infrastructure for on-site sewer.

Mr. Orth asked when that on-site plant was expected to come on-line. Mr. Richard said hopefully soon, they just received DEP approval.

Mr. Orth asked what the barriers would be from building this additional building. Mr. Richard said none.

Mr. Orth said he felt the sewer and water would be two barriers.

Mr. Richard said they have been working with an engineering company who handles water and talked about that there was a sufficient supply of water.

Mr. Orth asked if this application were approved, when the construction would start.

Mr. Richard said when approval is received.

Mr. Orth said nothing has been completed to support this building, is that correct?

Mr. Schold said he can't give a time line, but the most would be within the year.

Mr. Richard said there will be a new treatment plant. Mr. Orth asked if the sewer plant was completed. Mr. Richard said just about, the infrastructure was complete but not turned on yet; National Grid just put in the power and they were waiting for final approval to turn it on.

They can't file for a building permit until they have final plans for the sewer and water, which they have been doing the planning on for the past 20-years.

Mr. Orth asked what would be restricting them from building the other two buildings in addition to this one being proposed.

Mr. Richard said they didn't want to build all three at once.

Mr. Orth asked why they waited until now to apply for a building permit to build this additional building.

Mr. Richard said because of the septic. They were working with Cherry Valley Sewer District, who abandoned the project after they assessed everyone from the Worcester Line all the way up Stafford Street Hill for sewers, including Staffordshire and then voted Staffordshire out of the district.

He then started redesigning for an on-site treatment plant and DEP stopped it because there were two other developments going in and they needed to exhaust the municipal remedy before going to an on-site design. So then he worked with the Twelve Oaks development and that whole system was engineered and paid for and Twelve Oaks ended up going bankrupt because it took so long.

He went back to DEP and was told he needed to try and work together with the other developer. So he worked with Gallo and paid for another engineering design, going in a different direction with a forced main and for whatever reason, Gallo ended up backing off. He went back to DEP and told them the only option he had was go back to the on-site treatment facility.

Mr. Orth asked for any comments from the floor.

Mr. Marc Antanavica, 479 Stafford Street said he had a couple of main concerns, one was with traffic and the other was about schools becoming overcrowded and how much water will be used, because he has a well also and he is only a couple of houses over and he didn't want to see his well running dry.

Mr. Kiritsy said this is not a request for zoning relief, it a request for a building permit and if it's permitted, it's permitted. As far as traffic is concern, that was already part of the original consideration. These buildings were already designed and contemplated.

Mr. Antanavica said there will be probably 4 people per unit and each having a car that is 4 more cars going 50 by his house. He has one young child and another on the way; he doesn't want increased traffic driving 50mph by his house.

Mr. Kiritsy said he understood his concern and traffic can be an issue, but he didn't know that it would be a building permit issue. It may have been appropriate for review at the time of the zoning relief and so weren't the school issue. It would be irresponsible for this Board to deny a building permit based on schools.

Mr. Orth said he felt the concern was, if they apply for a permit and it appears the existing variance is indefinite, you've worked on the property, so it doesn't appear to be abandonment, but by the same token, a lot of changes have taken place since 1972 or 1988 when the last building was put in and now. So, the impact of that building back in 1972 may not have been nearly as much as the impact of putting it in now, or those other two buildings in now or in the future.

He is not only looking at the fact, do you have a right to do this, but, what is the impact of you doing this to the neighborhood as it is now. If it is yes, you very well may have the individual right to exercise the existing variance relief, but the impact that it would have had in 1972, is different than it has 40 years later.

Mr. Richard felt it may have less of an impact. The treatment technology now is far above what it was 40 years ago.

Mr. Orth said he was referring to the neighborhood, not necessarily what the support of that building and being able to support that building on-site.

Mr. Richard said this is 1 unit per acre; this is not high density by any means. Hong Kong has 34-square miles and 8 ½ million people.

Mr. Orth said we are not Hong Kong and felt that was not the issue.

Mr. Reinke said the developer in 1972 could have built all these units all at once, it's the same thing, and they just didn't build it all at once.

Mr. Orth said but they didn't, so his point was, building it now may have a different effect.

Mr. Reinke said it would have the same effect.

Mr. Orth said it may have influenced the area and that assessment can't be made because we don't know.

Mr. Kiritsy said they just want to build out to the density that was originally approved. From his perspective is to keep the focus to what the actual application was, that this is the appeals power or the appeals authority of the ZBA. This isn't the granting of zoning relief, this is the appellant authority of the ZBA, where they overlook and determine the issues of the building permit.

If this is an approved permit, he can't tell anyone the effect it will have on traffic, because there will be more traffic. He doesn't know what the impact will be because there wasn't a traffic study done and he doesn't plan on doing a traffic study to get a building permit.

Mr. Orth noted the Board understood the criteria to appeal a building permit.

Mr. Kiritsy continued. During construction it may be noisy and there may be dust, but these things happen during development. This is a development that was well contemplated and has been contemplated in this Town for over 40-years.

Mr. Hathaway said he understood the statement made in regards to not having been abandonment. The interesting thing is that the long-term effect of the Zoning Bylaws and the action taken in the late 80s was adding a use that was permitted in BR1.

Mr. Kiritsy said he did not know what the bylaw provided in the 1980s when the strip mall was built. In the 1980s, the issue was denial of the building permit because it wasn't authorized and that was when the 1987 Town Counsel's opinion came in.

Mr. Hathaway said in the bylaw, as it exists right now, the strip mall is in harmony with the intent and purpose of the bylaw in that area.

Ms. Michelle Buck, Town Planner asked if the sewer upgrade required by DEP was to serve the existing development.

Mr. Richard said the proposed and existing development.

Ms. Carol Messier, 483 Stafford Street said her concern is with odor because there has been odor in the past. Was that design to eliminate any odor.

Mr. Richard said that has been addressed thoroughly and it has the latest and greatest technology.

Ms. Messier said this isn't a septic system; it's an onsite treatment plant.

Mr. Kiritsy said the odor was from the existing system onsite had been in failure, which necessitated the application for a sewer extension. The existing onsite septic system failed and Staffordshire had to fix that. They can fix it by either public sewer, by septic or by an onsite treatment plant, which was the final option and was applied for to DEP and now constructed. What Ms. Messier had been experiencing with the problems on site, was a failed and defective system. The system they have now is new and different that entirely approved and constructed. If there was odor before, there won't be any problems under this new system.

Ms. Messier said it was her understanding back in 1972 when the variance was first granted, the other three buildings would have been constructed if they had not had a failed system.

Mr. Kiritsy disagreed. Ms. Messier said isn't that what it's all about? There was the variance under other owners, but nothing was ever done until now.

Mr. Kiritsy said they built 4 buildings and then the strip mall, now they want to build the last one.

Ms. Messier said the existing buildings were all there on the original plan. Mr. Kiritsy said yes. Mr. Orth said all the buildings were originally proposed back then, they just hadn't been built. He asked when the original septic system was in failure which necessitated to other alternatives. It sounds like to him that the reason this went to different alternatives was because the original system failed.

Mr. Richard said the system has been in some degree of failure since he took the project over. That's when they first worked with the Cherry Valley Sewer and was looking to sewer the neighborhood. They paid the assessments, with hope that it was going to move forward and for an unknown reason, the district decided not to do it and voted that section of Town out of the district. From that point on, they then went to replace the current system; DEP said no they needed to exhaust all remedies, as he explained earlier.

Mr. Orth said the whole interest of this was because the system was in failure.

Mr. Richard said yes, it was the failure and the inability to develop it additional units and they couldn't develop the additional units without the ability to sewer the property.

Now they have the new system engineered and designed and there is a brand new water treatment system. That system is not to capacity and the infrastructure is now finally designed and in place.

Mr. Reinke asked if odor control was built into the system. Mr. Richard said yes.

Mr. Reinke asked is the system minimum height carried by what is in place now.

Mr. Richard said yes.

Mr Reinke said let's say you don't build anything now, what the minimum system is now, will you be able to maintain that.

Mr. Richard said they are adding carbon to make sure that it meets DEP.

Ms. Messier asked if it's correct that there are 100 acres involved and 20% held for recreation? How many other buildings can be put in there?

Mr. Orth said right now, according to the existing plan, there are three additional buildings that can be put up on the 100-acres, no more. What is being discussed is the original variance that was granted back in 1972. There is a plan available to view here tonight, showing the existing buildings, plus 3 additional buildings that were originally planned back then, they just hadn't been built. They applied for a building permit to build this one additional building, one of the three that were proposed on that plan. The building permit was denied and the purpose of this hearing is to appeal that building permit denial. That is why the applicant is here. They are not here for a variance, because the variance is from 1972 and the claim is that it does not expire, because it pre-dates 1975 zoning.

The buildings being discussed were proposed back in 1972, just not built.

Ms. Messier said she understood that, she was asking about the future. There is nothing to say that they couldn't come back in 10 years and start building again.

Mr. Orth said they can't put a 4th building in. They can only proposed to put in 3 more buildings, because those were the original ones from the original plan and they can only be the size proposed and can't be any bigger.

Ms. Messier asked if they could come back 10-years from now and ask for additional buildings. Mr. Orth explained that they can put two more buildings there according to what was originally proposed, just as they are putting this 1 building in and they can't put any more than that. They can put in 3 more buildings then that's it, because the existing variance has been satisfied.

Mr. Reinke noted for clarification that they can only build 3 more multi-family buildings and they can still build something on the left over acreage, as long as it met zoning or coming back before ZBA. Mr. Orth agreed.

Mr. Reinke said they would be able to build as long as it's within the zoning and they're not seeking relief.

Mr. Orth agreed and added that they would only be able to build the other two buildings under the existing variance.

Mr. Reinke thought they would be able to build single-family homes as well.

Mr. Orth disagreed and said they would have to abide by law. If they built anything different from what's on the 1972 plan, they could run into legal issues. They can't deviate from that plan because that's what the variance was issued for.

Mr. Hathaway noted that the variance in 1972 was for multi-family units on that property and that was not allowed, which was why they needed a variance. In that zone, they could have had single-family homes without a variance.

Mr. Orth agreed, adding that they would not have been able to have more than one single-family home on a piece of property, there can't be two single family homes on the same property, unless they subdivide.

Mr. Richard asked about the allowable use in the BR1 Zone. The reason he asked was because they wanted to keep this a conforming piece of property. These new units will be safe, managed and conforming. He can go in there under the existing zoning and apply for an industrial building, with minimal high traffic with tractor-trailers going up and down Stafford Street, because that is an allowed use for that property.

Mr. Richard continued. There are 10-acres of developed land, with about 90-acres of surrounding land or there can be future development of some sort, but there cannot be 90-acres of land feasibly paying taxes to the Town of Leicester and not generating any income, so something will get developed there. We hope, in conformance with the variance it will be conforming property that will be well managed and it continue to be well managed and it will a nice consistent use rather than going into another type of development there, which he felt would not be very nice to the neighborhood.

Mr. Antanavica asked why the building permit was denied.

Mr. Orth explained the Building Inspector denied the building permit citing abandonment and the question Mr. Richard's is answering now is; was the property abandoned because there hasn't been any work done on the property for a number of years.

Mr. Antanavica said he's been there for about 34 years and when he was a child, he can remember a bulldozer row about 100-feet from the back of his property and it was about 20-feet wide that went down to the back. Other than that, with the exception of the septic system in the last 4-years, there hasn't been anything.

Mr. Orth said that's the question. There is the clause of abandonment and the question is; what is abandonment, at what point do you abandon something.

The petitioner's argument is that they did not abandon, simply because they continued to work with the septic system on the existing building and it's not as if they hadn't done anything.

Mr. Orth agreed that they hadn't done any construction, which was the original reason the Building Inspector denied the building permit, was because of the question of abandonment and that is what's being argued now.

Mr. Reinke said in 1972 the variance was issued, it was done under the zoning enabling law and it did not have any time restrictions. As opposed to the 1975 law that we operate under now and the clock starts and stops. Mr. Orth agreed and noted that if nothing was down within two years, the permit is null and void.

Mr. Reinke said this variance was granted under the no time restriction.

Mr. Orth agreed that time expiration did not exist. The only thing that the Board could argue was whether the existing permit was abandoned, because there hasn't been any construction since 1988.

Mr. Reinke disagreed and said that they had improved the property in accordance with the variance; they just didn't finish and felt there was no stipulation.

MOTION: Mr. Hathaway moved that based on Attorney Cove's recommendation that the Board continue the hearing until a legal opinion is received from Attorney Cove.

Mr. Buckley asked how long it would take for Attorney Cove to send his opinion, because a date certain needs to be included in the motion.

Ms. Buck noted Attorney Cove suggested continuing 2 to 3 weeks.

Mr. Kiritsy asked to be recognized. Mr. Orth agreed.

Mr. Kiritsy asked that since Attorney Cove apparently had voiced an opinion in 1987, he wondered if Attorney Cove was suggesting any reason why his opinion would have changed?

Mr. Orth said he couldn't answer that and that is what we will find out.

Mr. Kirwan felt the meeting should be rescheduled as soon as possible, but enough time for Attorney Cove.

Mr. Schold felt Attorney Cove's opinion should be pretty quick because it should be the same as before. I hope it won't be a waste of the taxpayer's money to redo an opinion already given, which is very wrong.

Mr. Kiritsy said he thought Mr. Cove was going to attend this meeting, which was what he was told. His letter that was read into the minutes at the beginning of the meeting stated that.

Mr. Orth understood everyone's concern, but he didn't know what Mr. Cove's opinion will be but he didn't want to express an opinion until everyone's concerns were expressed.

Ms. Buck said Attorney Cove wanted to issue a new opinion because 27 years have gone by since his first opinion letter and the zoning then and the zoning now has changed. We can't rely on an opinion that is 27 years old and Mr. Cove wanted to review the information received from this meeting and form an updated opinion.

Mr. Schold noted that 15 years had passed from the 1972 approval and the 1988 opinion.

Mr. Hathaway said from his part, Attorney Cove has asked that the Board continue the hearing so he can form his opinion and he wasn't going to question the reason why.

Mr. Orth agreed.

Mr. Kiritsy said his frustration is that this just didn't happen yesterday. The meeting was set up months ago and Mr. Cove had plenty of time to form an opinion and instead of doing that, the meeting gets continued.

Mr. Orth said Mr. Cove wanted to hear what had gone on tonight before forming an opinion.

Mr. Kiritsy said as opposed to being here tonight to give an opinion, he puts this into another 4 to 5 week delay. He wanted to note his frustration and he recognizes the Board's position, but he just felt that Attorney Cove had plenty of time to form his opinion without having to put this project into another delay.

Mr. Richard added that this was the beginning of the building season. He tried to expedite this process by meeting with the Town Administrator and Town Planner, so this has been going on since February.

Mr. Kiritsy said part of their frustration was that they were told Attorney Cove was attending tonight's meeting. Mr. Richard noted that the Town Administrator told them that.

After some discussion, it was agreed to continue to Wednesday, June 4th at 7PM.

MOTION: Mr. Hathaway moved to continue this hearing until Wednesday, June 4th at 7PM

SECONDED: Mr. Kirwan – Discussion: None

VOTE: 4-In Favor / 1-Opposed (Mr. Reinke)

Meeting adjourned at 9PM

Respectfully submitted:

Barbara Knox

Barbara Knox

Approved at the July 9, 2014 ZBA Meeting