

TOWN OF STOW

ZONING BOARD OF APPEALS

NOTICE OF DECISION

CASE #s: Volume III, Page 696 and Volume III, Page 697

Applicant: The Collings Foundation; The Collings Foundation, Inc.; Robert Collings; Caroline Collings¹

Relief Requested: Reversal of Building Inspector's denial of request to reconsider Cease and Desist Order dated March 24, 2015 relating to use of landing field (Volume III, Page 696)

Reversal of Building Inspector's denial of request to stay Cease and Desist Order (Volume III, Page 697)

Locus: 137 Barton Road, Stow, Massachusetts
Assessor's Map R-25, Parcels 16, 16A and 17

Sitting: Edmund C. Tarnuzzer, Jr., Chairman, Charles Barney, William Byron, Bruce Fletcher, Mark Jones

Decision of the Board:

Based on the common factual and legal basis of these two appeals, the Board heard and deliberated upon these appeals in concert. This Decision is dispositive of both Case # Volume III, Page 696 and of Case # Volume III, Page 697.

Pursuant to G.L. c. 40A, ss. 8 and 15 and Section 9.1 of the Zoning Bylaw, and following public hearing, the Zoning Board of Appeals voted 4-1 to uphold the Building Inspector's denial of the requested relief in both appeals.

The applications submitted in these appeals and all other evidence taken in these matters are considered part of the Board's records of proceedings and are incorporated herein.

Facts and Procedural History

On March 26, 2015, the Building Inspector issued a Cease and Desist Order to the Applicant with respect to an airport/landing field on the property located at 137 Barton Road. The Order noted that on June 28, 1982 Town Meeting had adopted a Zoning Bylaw change deleting the allowed use of airports and landing fields in Stow; thus the use of the subject property for

¹ According to the appeal documents, Robert Collings and Caroline Collings are the owners of the subject property; the Collings Foundation and the Collings Foundation, Inc. are tenants. They are referred to collectively as "Applicant."

takeoffs and landings is unlawful. The Order found that the earliest indication of airport or landing field activity on the Collings property was in May of 1984, following the zoning change. The Order concluded that the airport landing field is not a pre-existing nonconforming use and directed the Applicant to cease and desist such activity.

Pursuant to G.L. c. 40A, s. 8 and s. 15, the Applicant had a right to appeal the Order to the Board within thirty (30) days of the Order's issuance on March 26, 2015. The Applicant filed an appeal on May 5, 2015, following expiration of the 30-day statutory period. Public hearing was held on June 1, 2015. In a Decision filed with the Town Clerk on June 11, 2015, the Board found that it was without jurisdiction to hear the appeal because it was untimely. See *Connors v Zoning Board of Appeals of Waltham*, 460 Mass. 790 (2011). The Applicant appealed this Decision to the Land Court Department of the Trial Court where it is now pending.

On or about May 8, 2015, the Applicant submitted a written request to the Building Inspector requesting a "waiver" of the Cease and Desist Order so that certain aircraft could depart and land on the subject property for purposes of regulatory inspections. By letter dated May 13, 2015, the Building Inspector stated that he had no authority to "waive" the Order and declined to do so. On June 9, 2015, the Applicant filed an appeal of the Building Inspector's May 13, 2015 letter, framing it as an appeal from his "Denial of Request for Stay." This appeal is docketed as Volume III, Page 697.

On or about May 27, 2015, the Applicant submitted a written request to the Building Inspector requesting reconsideration of the Cease and Desist Order, based on a number of legal arguments presented through various materials.² The letter requested that Building Inspector "revisit the matter and respond with a new writing." By letter dated June 3, 2015, the Building Inspector advised the Applicant that his position remained unchanged and that he declined to withdraw his Cease and Desist Order. On June 9, 2015, the Applicant filed an appeal of the Building Inspector's June 3, 2015 letter, framing it as an appeal from his "Denial of Request for Reconsideration of Cease and Desist Order." This appeal is docketed as Volume III, Page 696.³

Public hearing on both appeals was duly noticed and held on July 6, 2015; continued to July 13, 2015 (no hearing held); and July 20, 2015. The Applicant was represented by counsel, and presented a number of legal arguments as to why the Building Inspector's Cease and Desist

² The May 27, 2015 letter also asserted as grounds for reconsideration the fact that only Robert Collings, and Robert Collings Jr., but not Caroline Collings (a property owner) received written notice of the Cease and Desist. The Board finds that there was no defect in notice or other deprivation of due process arising from the absence of a separate letter to Caroline Collings. The Applicant appeared at the public hearing on the (untimely) appeal of the Order, and was represented by counsel.

³ Concurrently with the two appeals to this Board, the Applicant also filed a "Motion for Injunctive Relief" in Middlesex Superior Court, naming the Building Inspector and the Town as defendants, asking the Trial Court to grant the same relief requested of the Board: invalidation of the Cease and Desist Order. In an Order dated June 1, 2015, the Trial Court found that it lacked jurisdiction and declined to reach the merits of the request for relief.

Order should be overturned. The Applicant also presented evidence supporting the argument that use of the subject property by aircraft had commenced in the late 1970s, prior to the Bylaw amendment, rendering such use lawfully nonconforming.

The Board closed the public hearing on July 20, 2015, and deliberated on August 3, 2015. On August 3, 2015, the Board voted 4-1 (Tarnuzzer, Barney, Byron, Jones in favor; Fletcher opposed) to uphold the Building Inspector's Cease and Desist Order in both appeals.

Findings of the Board

The Board finds that it has jurisdiction under G.L. c. 40A s. 8 and s. 15 to hear these appeals, both of which are appeals by a "person . . . aggrieved by an order or decision of the inspector of buildings" and where both appeals are timely, having been filed within thirty (30) days of the decision complained of. See G.L. c. 40A, s. 8 and s. 15, respectively. The Board further finds that the Applicant's appeal of Cease and Desist Order (denied by the Board as untimely, and now pending in Land Court) has no preclusive effect on the Board's jurisdiction to hear these appeals.

The Board finds that airport/landing field use was permitted in the Recreation-Conservation District, but not in the Residential District prior to June 28, 1982, when Town Meeting voted to eliminate airport/landing field use as a permitted use in all zoning districts.

The Applicant has presented a number of legal arguments as to why the Building Inspector's Cease and Desist Order should be overturned. The Board finds none of these arguments persuasive. The Board finds that use of that portion of the subject property located in the Recreation-Conservation District for aircraft takeoffs and landings is therefore lawful only if found by the Board to be a pre-existing nonconforming use. See G.L. c 40A, s. 6 and Zoning Bylaw Section 3.9.1.

The Board finds that the evidence presented at hearing and through written submissions does not support the Applicant's assertion that that "for some four years prior to 1982," the airfield on the subject property was used "for the takeoff and landing of ultralight and conventional aircraft."

The Board finds that although there was some evidence presented of occasional hot-air balloon and ultralight takeoffs and landings on the subject property during the late 1970s, such use was sporadic or intermittent and is insufficient to support of finding of vested rights under G.L. c. 40A, s. 6 and Bylaw Section 3.9.1. See Building Commissioner of Medford v. C.& H. Co., 319 Mass. 273 (1946)("casual and sporadic" use of land for dumping/filling prior to amendment of zoning ordinance " not in fact or in law a prior existing nonconforming use").

The Board finds that the evidence supports the Building Inspector's findings that earliest indication of landing field construction and recurring aircraft use on the subject property was in 1984, subsequent to the Bylaw amendment in 1982. The Board finds that the Applicant has not submitted evidence of pre-1982 use sufficient to overturn the Building Inspector's factual finding.

The Board therefore further finds that the evidence supports the Building Inspector's conclusion that use of the subject property for airport/landing field use is not a preexisting nonconforming use.

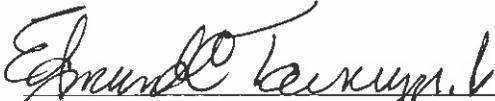
Where the Applicant has demonstrated no vested rights in airport/landing field use of the subject property under G.L. c. 40A, s. 6 and/or Bylaw Section 3.9.1, nor has the Applicant demonstrated entitlement to airport/landing field use of the subject property under any other legal theory or argument, the Board finds that it must uphold the Building Inspector's denial of both appeals of his Cease and Desist Order.

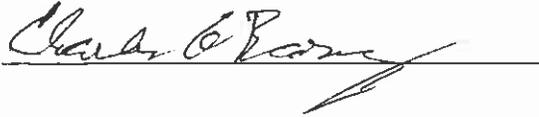
Conclusion:

For all the reasons stated above and on the record before it, pursuant to G.L. c. 40A, s. 8 and 15, and Bylaw Section 9.1, the Board votes to uphold the Building Inspector's Cease and Desist Order issued on March 26, 2015, and to deny both appeals brought by the Applicant requesting reconsideration or waiver of that Order.

SIGNATURE PAGE FOLLOWS

STOW ZONING BOARD OF APPEALS


Edmund C. Tarnuzzer, Jr., Chairman



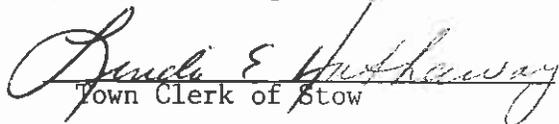




DATE: August 31, 2015

Appeals of this decision may be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A and shall be filed within twenty (20) days after the date this decision is filed with the Stow Town Clerk.

September 2, 2015
Received and filed
Volume III, Pages 696 and 697


Town Clerk of Stow