

KATHLEEN FISHER
APPEAL FROM UNFAVORABLE ACTION
OCTOBER 2, 2017

The public hearing was held in Stow Town Building and opened at 9:10 p.m. to hear the Appeal from Unfavorable Action of the Building Commissioner filed by **Kathleen Fisher, 1 White Pond Road, Stow** concerning the denial of a request for zoning enforcement related to the property at **84-92 Great Road**. (This is the second filing on the matter, the first of which was opened on September 11, 2017 and continued to this date at the request of the applicant.) The property contains 199,504.8 sq. ft. and is shown on Stow Property Map R-29 as Parcels 83 and 85A.

Board members present: Edmund Tarnuzzer, Charles Barney, William Byron, Bruce Fletcher, Mark Jones (associate).

Mr. Tarnuzzer chaired and read the notice of hearing as it had appeared in the *Beacon Villager* on September 14 and 21, 2017. He recited the criteria to be met for favorable action. The hearing notice had been forwarded by certified mail, return receipt, to all abutters. Those abutters present were Jennifer Surwilo, 10 White Pond Road; Dorothy Granat, 11 White Pond Road; Don Michael, 19 Great Road; and Ed Marsteiner, 29 Heritage Lane.

Mark Bobrowski, representing Katie Fisher, said that the second Appeal from Unfavorable Action of the Building Commissioner is a response to a letter written by the Building Commissioner. Mark Bobrowski said that there are several zoning violations at 84-92 Great Road not found by the Building Commissioner. Mark Bobrowski said that zoning changed in 2004 from a residential district to a business district, and that there is evidence that the use was discontinued long enough for the grandfathered status to be lost. Mark Bobrowski said that the burden is on the owner of the property to show that their use of the site did not lapse for a period of two years. Mark Bobrowski said that in 2009, the building was used for Steppingstone School, a tile store, and later Hobby Town. Images of the building from August 2011 show Steppingstone School as a tenant and a vacant storefront. Steppingstone School was located in the building until roughly 2012 or 2013. Mark Bobrowski said that from a 2015 image, a car dealership and Hobby Land occupied the building.

Mark Bobrowski said that there is a house, a barn, a shed, and the business building all on one lot, while Stow's Zoning Bylaw requires one building per lot, and any alteration of a structure to provide for a substantially different purpose or use requires a Special Permit. Mark Bobrowski said that there is currently a sign on the building stating that office retail space is available, which requires a Special Permit, as would other uses currently in the building.

Mark Bobrowski wondered if doors are shut at the building during auto repair and painting, as it is in proximity to the property owned by Kathleen Fisher.

Mark Bobrowski said that sales rooms and dumpster storage is prohibited in the Zoning Bylaw's principal uses.

Mark Bobrowski said that an increase in the intensity of uses would multiply the extent of non-conformity, thereby changing the use.

Mark Bobrowski discussed existing exterior lighting, saying that it does not conform to the existing bylaws. Mark Bobrowski said that there is not a 30 foot landscaped buffer between the building and Ms. Fisher's property.

Mark Bobrowski said that further evidence of a change of use is the striping of vegetation in the back parcel to provide for a contractor storage yard. Mark Bobrowski said that a good starting point to look into the grandfathered status of the lot is 2009 and the Steppingstone School's existence there.

Bruce Fletcher asked what the size of the lot is. Kathleen Fisher responded that she believes it is 3 parcels.

Craig Martin, Building Commissioner, said that from 1936 to 2004, the building housed a tire shop, an autobody shop, and a bus repair shop, and that the building had farm tools, snow plows, and landscaping equipment stored there. The owner had a Class 2 license from the Board of Selectmen. Craig Martin said that Rich Presti bought the lot in 2004 and continued licensing through the Board of Selectmen and had auto servicing and sales tenants in the building. Craig Martin said that in 2004, the uses continued, including automotive, express tire, school buses, autobody shop, and the school. Craig Martin said that to his knowledge, there was no substantial structural change in the building. In 1968 the business district was established, changing the zoning of the land. In 2004, the zoning of the back parcel changed from residential to business.

Rich Presti said that the rezoning covered the 150 feet from Great Road in to his parcel.

Kathleen Fisher disagreed that the zoning changed in that manner, stating that she believes the lot was entirely residential and changed to business in 2004.

Thomas Falwell, representing Rich Presti, said that 2009 is not a good starting point to assess the grandfathered status of the parcel, but to look at the uses since 1936, as there has always been retail uses in the building, including tile and tire shops. Thomas Falwell disputed the validity of the photos provided by Mark Bobrowski as evidence, as there are no images from behind the building, and they only show one moment in time.

Thomas Falwell described other business and commercial uses on White Pond Road, noting that the road is not used as a rural way.

Thomas Falwell said that the discussion around what uses would need a Special Permit disregards the fact that new businesses may need Special Permits, not grandfathered uses.

Thomas Falwell said that per a sworn affidavit with the owner of TSS graphics, there is no painting occurring on site.

Thomas Falwell disputed concerns about the fence between Rich Presti and Kathleen Fisher's properties, saying that the fence is 27 years old and in disrepair.

Thomas Falwell said that the lights are owned by Hudson Light and Power and that they recently converted to LED bulbs, though the lights were in existence when Rich Presti bought the parcel.

Thomas Falwell noted a natural ebb and flow to the tenants in the building, saying that contractors come and go, but there has been an active use of the parcel.

Rich Presti said that he believes what should be considered is zoning, and whether the uses have been grandfathered. Rich Presti reviewed three tests established by Massachusetts Courts for grandfathered uses: 1) Do current uses reflect 'the nature and purpose' of the uses that existed when zoning bylaws came into effect?; 2) Whether there is a difference in the quality or character, as well as the degree of use; and 3) Whether the current use is different in kind in its effect on the neighborhood. Rich Presti said his site passes these tests, as there has been continuous use, the hours of operation and intensity of use are not more than the former Buick Dealership, and that his effect on the neighborhood is similar to that of the former uses.

Thomas Falwell said that the dumpster storage previously mentioned includes clean container storage, occurring at a lower elevation in the southwestern corner of the lot.

Rich Presti estimated that when the property was owned by the Erkinen family, approximately 180-220 vehicles were on site, and now that number is roughly 90 vehicles. Rich Presti said that Kathleen Fisher purchased her home after he had bought the building, and that he felt she was familiar with the degree and intensity of use.

Bruce Fletcher asked how the businesses that operate out of the back of the building that area. Rich Presti said that there are two entrances, one to the east and one to the west of the building, and that those entrances have been in place for over 50 years. Rich Presti said that 1 White Pond Road is shielded from the back of his lot by a barn and a house.

William Byron said that he does not recall equipment, such as dumpsters and front end loaders, being stored on the lot, and asked how often that equipment passes 1 White Pond Road. Rich Presti said he does not have that information.

William Byron asked who owns the fence between 1 White Pond Road and 92 White Pond Road. Kathleen Fisher said that according to her surveys, it is hers.

William Byron asked if Rich Presti believes the excavation in the back of the lot is legal. Rich Presti said he believes it is, and said that the uses have to be of similar nature and purpose, with no difference in quality or character. Thomas Falwell referred the Board to a letter from the Building Commissioner from 2010 stating that the uses are grandfathered.

Bruce Fletcher said that the intensity of the use needs to be further discussed.

Charles Barney asked if there is legal guidance regarding the continuity of the intensity of use. Barbara Carboni, Town Counsel, suggested that the Board would need to look at the full context of the site, and the intensity of use over time, specifically to see if the current use is more intense than the time the site became non-conforming. Barbara Carboni said that there will be fluctuations in intensity, and the Board should be more concerned with Point A (the beginning of non-conformity) and Point B (intensity of use today) rather than Point A through Point B.

Thomas Falwell asked if the Erkinen ownership would function as the starting point. Barbara Carboni responded that it is for the Board to decide.

Bruce Fletcher said that he understands the issue before the Board is zoning adherence, though lighting is a concern. Bruce Fletcher asked if lighting is grandfathered. Barbara Carboni said that only uses may be grandfathered. Craig Martin said that he could ask Hudson Light & Power for the cut sheets for those lights and submit those to the Board.

Dorothy Granat of 11 White Pond Road said that she believes there was a lapse in continuity of use regarding the sales of automobiles for two years or more. Barbara Carboni reminded the Board that they will have to make a factual finding about whether any uses were abandoned for two years or more.

Mark Bobrowski said that every structure on the lot is non-conforming and to change the use requires a Special Permit. Mark Bobrowski said that the lot fails one of the tests established by Massachusetts Courts for grandfathering, as the current use is different in kind in its effect on the neighborhood. Mark Bobrowski said that Rich Presti would need to apply for a Special Permit through the Zoning Board of Appeals.

Jane Brown of Meetinghouse at Stow, said that she feels that as far as vehicle heaviness and bright LED lights, 1936 and 2017 are quite different.

Rich Presti said that he felt the Board's finding should focus on zoning issues, rather than 'good neighbor' issues.

Mark Forgues of 1 and 9 White Pond Road said that he is concerned that a sign for Apex autos was on the site for a few years, and he never saw the use occurring on the site.

Mark Bobrowski said that continuous licensing is not enough to establish continuity.

Ed Marsteiner of 29 Heritage Lane said that he feels there has been a change in the extent of use on the land, and that he saw excavators move dozens of yards of soil on the property. Ed Marsteiner said that the sound from the site has increased.

Mark Bobrowski said that he would be able to offer the Board additional images to show a change in use.

Barbara Carboni suggested that based on the conversation tonight and the interest in additional information, it would be appropriate to keep the hearing open.

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The Board discussed a time to continue the public hearing and the Board's interest in a site walk.

On motion of Mr. Barney, second by Mr. Jones, it was voted unanimously to continue the hearing until October 19, 2017 at 7:30pm.

At 11:15, the hearing was continued until October 19, 2017.

Respectfully submitted,

Valerie Oorthuys