

Meeting Minutes, Zoning Board of Appeals
Town of Whately, MA
October 7, 2021
Remote Meeting via Zoom

Members Present: Roger Lipton, Bob Smith, Kristin Vevon, Fred Orloski
Members Absent: Debra Carney

Attending:

Ann Lomeli	Jared Glanz-Berger
Andrea Nuciforo	Jim Ross
Bob LaSalle	Chris Cimini
Christopher Chamberland	Julie Beauchemin
David Ullian	Mark Cybulski
Chris Larrabee	Dick Evans
M. Wilson	Isaac Fleisher
R Cimini	Billy Beetz
Stuart Ludlam	Bill Harlow
Bernie Smiarowski	

At 6:40 Roger opened the meeting.

PUBLIC HEARING continued from September 2, 2021

Debilitating Medical Condition Treatment Centers, Inc. (DMCTC) has applied for a special permit to become a Marijuana Retailer in an existing commercial building, located at 424 State Road Unit B (Sugarloaf Shoppes).

At the previous hearing session DMCTC's competitor, ToroVerde (Massachusetts) III, Inc., which has already been permitted to operate in a different unit at the same address, had argued that an insufficiency of parking spaces precluded the permitting of a second marijuana retailer at the location.

The ZBA had asked for the opinion of Town Counsel on the matter. Today, ZBA Chair Roger Lipton received an email from Town Counsel David Donesky dated today, October 7, 2021, and sent copies to both parties, who acknowledged receipt. Roger noted that in Town Counsel's opinion the ZBA *can* grant a permit to DMCTC with the existing parking spots, without violating bylaw provisions.

Toro Verde attorney Dick Evans explained why he disagreed with the way Town Counsel had arrived at his conclusion. Isaac Fleisher, attorney for DMCTC, explained that Town Counsel's opinion is identical to the one he himself presented at the September 2 hearing session, and refuted Mr. Evans' points in order.

Roger noted that he and the attorneys for the disputing companies had written questions about this for Town Counsel which Roger then submitted. He explained that the ZBA rarely asks Town

Counsel for advice, and that the ZBA knows it is not bound by that advice. Roger said he can see that Town Counsel understood the problem that the ZBA presented. He said it was time for the ZBA to decide and to vote. Bob Smith said that he was ready to vote. Because Debra Carney was absent, it was decided that Fred Orloski would vote in her place. Roger moved to close the public comment portion of the hearing. Bob seconded and Fred voted Yes.

In the ensuing ZBA discussion Roger said that Town Counsel's opinion matches his own, that other than on parking the application is well thought out, and that he favored voting to grant the permit. Bob noted that he agreed and that the Board should focus on tonight's material. Fred also agreed, saying that the Board should vote with the parking available today.

Roger moved to approve the Special Permit and the motion was seconded. Roger voted Yes, Bob voted Yes, Fred voted Yes, and the motion carried unanimously. Roger will write the decision and file it.

At 7:05 pm the Board took a ten minute break until the next agenda item at 7:15 pm.

PUBLIC HEARING continued from September 2, 2021

Jerry Mason has applied for a special permit to add an accessory apartment on premises located at 149 Haydenville Rd.

At 7:15 pm Roger opened the hearing. Gerald Mason was not present, and no one else had come to appear on his behalf. The Board waited until 7:21 pm and at that time Roger sent Mr. Mason an email. He also left a voice message using the phone number on the application. The Board continued

to wait until 7:30, then rescheduled the hearing to November 4, 2021, at 7:15 pm (the 7:00 pm slot had already been filled).

PUBLIC HEARING, continued from September 2, 2021

On March 4, 2021 Whately RE Holdings, LLC (Canna Select) was granted a Special Permit for indoor marijuana cultivation on property located at 23A LaSalle Rd. Whately RE Holdings, LLC has now applied for a Variance to demolish existing greenhouses and replace them with modern ones.

At 7:32 Roger opened the hearing, explaining that he won't *close* it until after the posted 7:45 starting time, to give the public time to comment on the proceedings. It was noted that because Debra Carney is absent tonight, Kristin Vevon will vote.

Speaking for Whately RE Holdings LLC, Chris Cimini explained that he would focus on the variance aspect now and would later work on the next application for this project. Roger noted that the original application had been heard and the ZBA had visited the site, then asked why it had not occurred to the applicants that the existing greenhouses were not going to work for them. Chris Cimini said that their first consultant had given them bad information, but that they are now partnered with an experienced grower who quickly assessed things differently. He said his company has also secured funds with investors including building contractors and a law firm. Now they need to start from scratch and do everything right, he said.

Roger mentioned that an expert from California who had given the ZBA a presentation figured his odor-control equipment would work, and asked whether he was wrong, too. Mr. Cimini said the expert had thought that they would renovate in a manner that would make the greenhouses compatible with the odor-control equipment.

Roger noted that in order to claim a hardship case for a variance, they would need to give numbers to the ZBA for the cost of what is needed. Chris Cimini listed inefficiencies with the greenhouse layout “as is”, and said if they are forced to use the greenhouses “as is” and renovate them, it will be financially impossible for them to proceed.

Bob asked why it wasn’t noticed immediately that the greenhouses were laid out inefficiently. Mr. Cimini replied that since they are not growers themselves, they relied on the judgment of their prospective head grower and it turned out that he just didn’t know enough. He said they have already spent almost \$100,000 on the project.

Roger referred to *Johnson v. Bd. of Appeals of Wareham*, 360 Mass. 872 (1972), a court case which the applicants had submitted in support of their position. Roger noted that the Johnson case uses a number of figures and concludes that the cost of rehabbing the church in question would be more than the cost of demolishing and rebuilding.

Roger asked whether the applicant could come back with numbers from a contractor proving that renovating will cost more than demolition and rebuilding in this case. He asked what it would cost for the company to renovate, adding that it is apparently more than the company wants to pay, but we need to know the figure. Roger noted that plenty of people have come before the Board claiming financial hardship for their variance applications, and that if they could not prove the hardship with figures the Board denied them. He said he feels that requiring less in this case would be doing an injustice to those applicants. Chris Cimini told the Board that renovating the current greenhouses in the same locations would not only have high up-front costs, but that operational costs and inefficiencies would also be high. Roger allowed that this could be possible, but stated that it, too, must be quantified.

Roger told Attorney Nuciforo that if his client is claiming it is financially prohibitive to renovate these greenhouses, he needs to see both the amount it will cost to renovate and the amount it will cost to demolish and rebuild. If the amount to demolish and rebuild is not higher, he said, he sees no hardship.

Roger asked how long it would take to get the numbers needed. At this point Chris Cimini said considering the time delay involved, he thought they would have to reconsider the site instead. Roger asked whether the company could give the ZBA any numbers at all, and was told Mr. Cimini would have to consult with his partners but didn’t think they were prepared to do that. Mr. Nuciforo suggested they discuss it with the partners.

Roger suggested that Attorney Nuciforo and Chris Cimini speak with each other by phone in a ten minute private chat, to decide what to do about perhaps getting the Board some financial numbers.

At 7:59 pm Roger called a ten minute break from the hearing.

Gerald Mason joined the meeting and Roger explained that his hearing had been rescheduled earlier tonight, and would be held November 4, 2021 at 7:15 pm.

Roger resumed the hearing at 8:15 pm. Andrea Nuciforo said they think the information they submitted adequately supports the case. Also, he said they submitted the Johnson case not because of the economics discussion there, but because they believe it shows that if you have a unique or unusual structure in a zone, and that structure, or in earlier cases the land, could not be used in a manner that is consistent with the current zone – the allowed use – then that establishes a hardship, if you show that being able to put that structure or that land to the use as required is unreasonable. And obviously, financial hardship is a part of that, he added. Mr. Nuciforo asked that the Board think about this tonight and vote on it tonight. Given the information in front of the Board, he said, they hope it will be resolved favorably and if it is they will be back soon with a special permit application.

Abutters Stuart and Margaret Ludlam joined the meeting. Stuart Ludlam asked what, exactly, the Board would be voting on tonight – whether it would vote only on the requirement to use the pre-existing buildings. He asked whether everything else would remain the same as it was in the site plan prepared in early March. He said he assumes that tonight's vote will not be in consideration of anything that appeared later, such as the August 21 site plan, noting concern about the large area requested for the new plan. He asked what the Board will require of Canna Select in terms of evidence to support their claims.

Attorney Nuciforo said he would be happy to answer and Roger said yes to that. Mr. Nuciforo said that the Board issued a special permit for indoor greenhouse cultivation at this location in March; they are now asking that the Board grant them a variance to support that same activity at the same site, but not in the structures as they existed on April 20, 2018.

Kristin asked why a variance would be needed to build a new greenhouse. Andrea Nuciforo explained that because the property is in the AR/1 zone the bylaw requires them to use existing buildings unless a variance is granted.

The secretary read a letter from Dan Denehy. No others wished to comment.

Roger noted that there were no more comments from the public and that the applicant does not want to submit further information, and moved to close the public comment portion of the hearing. Bob seconded the motion. Bob cited bylaw section 171-33 Variances. A. (1) which reads,

A. The Zoning Board of Appeals shall hear and decide, upon appeal or petition, requests for variances from the provisions of this chapter in respect to the particular use or dimensions of land or a structure. A variance shall be granted only where the Board of Appeals finds that:

- (1) A literal enforcement of the provisions of this chapter would involve a substantial hardship, financial or otherwise, to the petitioner or appellant.

Bob asked whether the “otherwise” is that they cannot possibly do what they promised to do in the special permit, which was to abate light and odor. He asked whether that was enough. Roger said that he had circulated to the Board a land court case, *Whittemore v. Aron*, Mass. Land Ct., No. 318825 (2007), which mentions the Johnson case. He read from the Whittemore case:

“In fact, a substantial hardship, financial or otherwise, is satisfied only if it is not economically feasible or likely that the locus would be developed in the future for a use permitted by the zoning ordinance or bylaw.”

Roger said we don’t know what will be done with the LaSalle Farm if this project doesn’t go forward – maybe someone else will grow flowers – we just don’t know. Not being able to grow marijuana there is one thing, he said, but that doesn’t mean you can’t use it for something else – maybe a traditional farm. He noted that if marijuana is removed from the equation there is no requirement to use only the existing structures – it’s only the marijuana portion of the bylaw that requires a variance to avoid that. The next case, he said, is going to look at what we did here, and we should follow our tradition of enforcing these the way courts expect them to be enforced – with evidence.

Kristin asked why the applicant doesn’t want to provide the hardship evidence. Roger replied that he doesn’t know, noting that he had offered to have them come back in a month with figures and they said no, we should vote tonight on what has been presented.

Roger moved to approve the variance and the motion was seconded. Roger voted No, Kristin voted Yes, and Bob voted Yes. Since approval of a variance must be unanimous, the variance was denied.

At this point Julie Beauchemin, representing Greenjeans Farms, LLC, spoke briefly about that company’s application to grow marijuana on Christian Lane and asked to be put on the agenda for the November meeting. The Secretary explained that their hearing will be the second item on the agenda for the November 4 ZBA meeting, that the hearing would be advertised and legal notices sent out.

Documents Reviewed (kept in the ZBA files)

1. An email from Town Counsel David Donesky to Roger Lipton dated October 7, 2021
2. *Johnson v. Bd. of Appeals of Wareham*, 360 Mass. 872 (1972), a court case which Canna Select submitted in support of their position. This document can be accessed via the Lexis Nexus online database.
3. *Whittemore v. Aron*, Mass. Land Ct., No. 318825 (2007), a land court case which mentions the Johnson case. This document can be accessed via the Lexis Nexus online database.
4. An email to the ZBA dated Oct 3, 2021, from Dan Denehy

Mary McCarthy
Secretary
Zoning Board of Appeals
Town of Whately, MA