

Zoning Board of Appeals – Town of Spencer

Minutes



Regular Zoning Board Meeting
Wednesday, August 3, 2011 7:15 PM
McCourt Social Hall
Memorial Town Hall

The meeting was called to order at 7:20 p.m.

Zoning Board Members Present: Chairwoman Joanne Backus, Clerk Allan Collette, Associate Members Delores Kresco, and Alternate Pamela Crawford.

Zoning Board Member Absent: None.

Staff present: Michelle Buck, Town Planner and Bea Meechan, Senior Clerk, ODIS.

Old Business:

A Continued Public Hearing – Jonathan Gabriel, Trustee of the ATV Realty Trust, 51 Borkum Road. Ms. Backus opened the hearing at 7:20 p.m. The original public hearing was held on 6/22/2011, the Board decided that a site visit was necessary. The site visit was scheduled for Saturday, June 25, 2011, and the public hearing would continue to 8/3/2011.

Chair Backus announced that all Board members met with Mr. Gabriel at 51 Borkum Road, on 6/25/2011 at 9:00 a.m. Ms. Backus asked the members for comments in regards to the site's observation at this time.

Mr. Collette: Mr. Collette described the site being located in the Rural Residential zoning district, there are no buildings on the property. The site has a track situated on many acres of the land. The track itself is the primary use of the site which had been used for motorcycle racings in the past.

Ms. Crawford: In addition the track was also used for ATV racing, not just for motorcycle racing.

The Cease and Desist Order (CDO) was issued on 10/3/2006 to Mr. Gabriel to stop all ATV and/or dirt bike activity at 51 Borkum Road, and the usage for such that activity after the CDO would be considered a violation to the CDO and Court Order. Since the CDO was a sensitive issue discussed at the previous hearing, Mr. Bergman asked for a clarification to the comment made by Mr. Collette in terms of "used for motorcycle racings *in the past*", whether Mr. Collette referred to the evidence that the track had been used *recently* in the past (as motorcycle racings), or referred to the existing track that was used for the racing several years ago.

Mr. Collette said his reference was intended (used for motorcycle racing) to the testimonial in the past.

In that case, you did not suggest that there has been recent motorcycle racing at the site, Mr. Bergman asked Mr. Collette.

Mr. Collette said the term “in the past” was not based on any specific time.

Ms. Backus said she would like to make one comment in connection to the CDO issued in 2006. When the Board members did a site visit in 2006, Ms. Backus said there were tracks at the site and the tracks were clearly less than 5 years old. Ms. Backus did not know whether the tracks were used by Mr. Gabriel’s guests, or un-invited guests, she was not there and could not attest to that.

Mr. Bergman submitted a copy of the 2006’s ZBA Decision to the Board at this time. He reserved the document to be used in his closing statement at the end of the hearing.

Ms. Backus distributed copies to all Board members. Ms. Backus opened the hearing to the public for any comments and questions. She instructed that the comments should be brief.

Mr. Andrew Cadrin of 79 Borkum Road said he spoke with a business owner, who owns the business next to the Gabriel’s business establishment “Gabriel Racing” near Route 290 in Worcester, and was told that when the motorized vehicles (ATVs, dirt bikes, motorcycles) were operated (e.g. for test drives, transporting supplies, etc) the noise could be heard along the road side of Route 290. In general, the noise volume created by the traffic on Route 290 is extremely loud, but yet you were still able to hear the noise generated by the Gabriel Racing business - this indicated the noise from these motorized vehicles is extensive. Mr. Gabriel also used his building, trailer, cars, and trucks to advertise his business – it is commercial in nature.

Mr. Bergman clarified that Mr. Gabriel’s son owns the business “Gabriel Racing” in Worcester, this subject matter was hatched out at the previous meeting, and it is irrelevant to the case being discussed here tonight. Mr. Bergman expressed that to bring this matter up again it was just another attempt to taint the objectivity of what is really needed to be decided on the case. He urged that everyone should acknowledge the fact that Mr. Gabriel is not the owner of the “Gabriel Racing” in Worcester.

Ms. Crawford asked whether Mr. Gabriel’s son is still participating in racing.

Mr. Gabriel said his son does not race anymore, but he does own the Gabriel Racing business in Worcester. Mr. Gabriel explained the property at 51 Borkum Road is owned by him; Jonathan Gabriel, Trustee, ATV Realty Trust.

Ms. Backus pointed out that Mr. Gabriel had acknowledged the fact that the site (51 Borkum Road) had been used for racing high performance ATVs on 11/4/2009; *this event occurred three years after the COD was issued (in 2006) to Mr. Gabriel.*

Mr. Gabriel explained the machines used at the site on the November 4th, 2009 were for test-driving and for testing on the mechanism - and not for racing.

Ms. Backus asked whether these machines were sold by his son. Did you understand that the event occurred in 2009 was after the CDO had been issued to you, asked Ms. Backus.

Mr. Gabriel replied no, there was no purchasing transaction that took place there. Mr. Gabriel concurred the event occurred after the issuance of the CDO of 2006.

Mr. Michael Ballard of 94 of East Charlton Road said the sound produced from these machines was highly offensive, and was a major intrusion and affected the quality of his life and the lives of others as well. He asked the Board to take this under consideration when making the decision on the case.

Mr. Collette, at this time, addressed that the Town of Spencer has “noise regulations”, which was adopted in November of 2008. These regulations include the following statement:

“Recognizing that people have a right to and should be ensured an environment free from excessive sound and vibration capable of jeopardizing their health or safety or of welfare or of degrading their quality of life, this regulation is enacted to protect, preserve and promote the health, safety, welfare and quality of life for the citizens of Spencer, Massachusetts, through the reduction, control and prevention of noise”

Mr. Collette said any use of this site for ATV/dirt bike related activities would have to conform to these regulations.

Ms. Susan LeBelle of 53 Borkum Road, who just had heart surgery, said she needs to avoid being in a “stressful” condition. Her four-year-old granddaughter is petrified when the bikes ride, and this is very upsetting to her. Her septic system needs to be replaced, and it is very costly. Ms. LeBelle expressed that since she will spend a large sum of money on the septic system, she does not wish to live and cope with the noise situation.

Mr. John Flint of 66 Bacon Road has a question and a comment to the Board. He asked whether the objections/opinions made by the public are relevant to the Board’s decision making on the case. He made a comment that if the ATV activity is allowed at the site, this will have a negative impact to the value of the abutting properties.

Ms. Backus said the Board will certainly (and also bound to the Spencer Zoning Bylaw) take opinions and objections from the public under consideration in the decision process. On behalf of the Board, Ms. Backus appreciated all the input from the public.

The following were additional comments from the public:

Mr. Paul LeBelle of 53 Borkum Road: He opposed the ATV activity. He would have a difficult time in selling the property due to the noise from the ATVs.

Mr. Lenard Lamonda of 37 Borkum Road: He works at night and sleeps during the day. The noise will disturb his sleeping and cause an impact to his well being.

Ms. Christine Mancini of 55 Borkum Road: The wildlife started coming back to the neighborhood, and all of the people that live there enjoy seeing that. It would be shameful to scare them away again due to the loud noise from the 51 Borkum Road. The owner of the property does not even live at the site or in town.

Ms. Buck noted that Borkum Road is “scenic road.”

With no further comments and questions from the Board, the applicant and his attorney, and the public, Ms. Backus asked Mr. Bergman to present his closing statements to the Board at this time.

Mr. Bergman made the following closing statements:

First:

The site originally was a junk-yard prior to Mr. Gabriel’s ownership. Mr. Gabriel bought the property, had spent a lot of money to improve the site and also benefit the surrounding properties as well (as opposed to the junk-yard).

Second:

There were repeated comments from the abutters stating Mr. Gabriel does not live at the site or in town, and somehow he deserves less consideration than the rest of people who live here in Spencer.

Mr. Collette interjected and said it was not a fair statement - whether Mr. Gabriel lives in town or not, it does not change anything.

Mr. Bergman said there were numerous statements in the past and again tonight which to his interpretation were that somehow since Mr. Gabriel does not live in town, he shall not be treated the same as the rest of people who live here. With all due-respect, Mr. Gabriel has been paying taxes for his property whether he lives in town or not, he is entitled to every consideration with respect to his application.

Third:

The purpose/use of the site: there is no dwelling on the property, thus, this case is not about the accessory use; it is pertinent to the recreational use (e.g. horseback riding, snowmobiling, and ATVs riding). The question is - is Mr. Gabriel allowed the usage of the ATVs in his property for recreational use?

There is nothing in the Zoning Bylaw Ordinance Regulations preventing the recreational use in the Town. Furthermore, Mr. Morra and Ms. Cullen had recognized and indicated in the documents which presented to the Board at the previous meeting that there was nothing in the town that prevented Mr. Gabriel from doing what he has been doing – using ATVs for private and personal use.

However, Mr. Gabriel raised the question to the use on whether or not it could be more of a commercial use - he might use the property for some kind of a league, team, or a group. Mr. Gabriel brought the attention upon himself when he sent a letter to Mr. Morra inquiring on the aspect of the commercial use of the site.

Mr. Gabriel received the CDO letter, dated 10/3/2006, from Mr. Morra. Mr. Bergman paraphrased the first paragraph to the Board "anything but personal and private use of the track is prohibited." Once again the personal and private use of the track is not prohibited according to Mr. Morra. The decision of the Board (dated 12/7/2006) also upheld Mr. Morra's decision. Mr. Bergman said in the decision the Board made a reference that "the racing track as a practice facility is out of realm of a family outing kind of place based on their own advertisement."

Based on the above references from Mr. Morra and the Board, the use of this property for a racing track as a private and family use is permitted, but for a commercial use it is prohibited.

Conclusion:

Mr. Bergman said Mr. Gabriel and himself do not dispute the fact that the use of the property At 51 Borkum Road for ATVs activity use on a commercial scale is prohibited under the Zoning Bylaw. Recreational use (horseback-riding, cross country skiing, snowmobiling, or ATVs/dirt-bike riding) in the town of Spencer does exist, and multiple properties have endorsed that use - based on the evidence and testimonials presented in the previous meeting. Whether the recreation produces the smelly odor (waste from horses), or loud noise (from motorized vehicles), it does not matter - the recreational use is allowed in town. The town has noise regulations in place; Mr. Gabriel must comply with the regulations. Mr. Gabriel does not live in Spencer; however, he has been and still is paying taxes on 51 Borkum Road.

Mr. Gabriel had admitted the site was used once or twice in association with the motorized activity after the issuance of the CDO. However, Mr. Morra, the Zoning Enforcement Officer, made the determination in 2006 that there was nothing in the bylaw that would have prevented Mr. Gabriel from using his property for recreational or private use. There is nothing in the Board's Decision stating the Board did not agree with Mr. Morra; the Board upheld Mr. Morra's decision.

The facts Mr. Morra had in 2006 and the facts presented to Board (in the previous meeting and tonight) have not changed, therefore the Board's opinion shall not be any different. The Board believed that Mr. Morra's decision was correct in 2006, in that Mr. Gabriel is entitled to use the site for personal and private use, and with all due-respect the Board shall uphold that decision today by noting that Mr. Gabriel is prohibited the use of 51 Borkum Road for commercial use, but he is allowed for private and personal

use. This would be consistent with the 2006 decision issued by the Board. [Mr. Bergman finished his closing at this time].

Ms. Backus made comments as follows:

First: The 2006 decision the Board made addressed the business aspect which identified the track use as a commercial use. The Board was asked to make a decision on the given proposal - for the business use/commercial use.

Second: Mr. Gabriel has been grossly dishonest and has been frequently in violation of the CDO. Ms. Backus recalled that Mr. Bergman suggested a resolution - an agreement between the Town and Mr. Gabriel at the end of the previous meeting. Ms. Backus said she “strongly recommended that hell freeze over first” before the Board could consider doing any agreement with Mr. Gabriel. Mr. Gabriel clearly was not honoring the Cease and Desist Order, which was the “Order”, the Board could not and shall not take a chance to make any agreement with him.

Third: In the past, Mr. Gabriel misled the Board that he voluntarily worked and complied with the Conservation Commission (ConCom). The fact was that Mr. Gabriel got into trouble with ConCom; ConCom stepped in and forced Mr. Gabriel to work with them.

Furthermore, Mr. Gabriel tried to convince the Board that he has no involvement with his son’s business – Gabriel Racing. Ms. Backus personally did not believe that. If the Board does permit the use to Mr. Gabriel, the Spencer Police would certainly get the complaint calls due to the loud noise from the ATV activity at the site.

Mr. Collette replied to the comment made on the “recreational use.” The track at 51 Borkum Road is on a grand scale and it has never changed. When he did the site visit the only thing there is the track - there is nothing else on the entire property. Mr. Collette said to his knowledge the town does not have this recreational use (using the track as a private and personal use) and of that *large size of the property* in Spencer.

Mr. Collette also referenced to Section 4.7 - Prohibited Use in the Spencer Zoning Bylaw which adopted on 11/16/2006, which read as follows: Section 4.7 Prohibited Use: 4.7.1 - Any use not included in the Table of Used is prohibited. Motorized sports tracks are not listed in the Table of Uses. In addition, the Table of Uses, (Section 4.2), includes use E.22 – Outdoor sports facility for *non-motorized* sports such as a golf course, country club, tennis club”. Motorized racetracks are therefore not allowed. Mr. Collette said the commercial use at the site was not grandfathered under the previous zoning bylaw (prior to the 2006 Zoning Bylaw).

Mr. Bergman said Mr. Collette made a reference to the “size” of the site and he may feel that the track at the site is for commercial use. However, the question in the discussion is the “use” and how the site would be used. [While Mr. Bergman was arguing how the use was being determined by the Board, Mr. Bergman objected to a negative “facial expression” made by Ms.

Backus which Mr. Bergman thought was directed at his client. Ms. Backus quickly apologized for “making any faces.”]

There were no additional comments and questions; the Board was ready to close the discussion at this time.

Mr. Weinberg advised the Board to make a motion to close the public hearing, and conduct the deliberation and discussion on the Decision. Any decision the Board make should be predicated upon specific findings referencing the provisions of the Zoning Bylaw.

Ms. Kresco made a motion to close the public hearing at 8:00 p.m. Mr. Collette seconded the motion and the vote was 4-0 in favor. Ms. Backus made it unanimous.

Mr. Weinberg suggested the Board to review all documents and testimonials presented in the meetings, and go over the minutes of the meetings, and establish a draft decision.

At this time the Board members reviewed the materials discussed in the public hearings:

- Section 4.7 Prohibited Uses, this type of track is not listed in the Bylaw, and simply it is not allowed
- the site, 51 Borkum Road is within the Rural Residential district; there is no dwelling on the property
- the track is situated on many acres of land
- the track has appeared to be the primary use of the property
- the use of the track as a recreational use is not applicable to the site; the site consists of a large area of land – and is more of a business/commercial use
- in referencing to the Cease and Desist Order, the track had been used for a business purpose in the past

Mr. Collette noted that the prior memos (2006) between the two formal Town Officials; the Building Inspector and Zoning Enforcement and the Town Planner, has no weight/bearing on the Board’s Decision tonight; they are strictly only in the advisory sense.

Mr. Weinberg clarified that things had occurred in the year of 2006 and led to the use question of 51 Borkum Road and the relation between the owner of the site (Jonathan Gabriel) and Gabriel Racing, and the use and marketing of the site for ATV racing. There wasn’t consideration by Town Officials, at that time, as to what extent the private and personal use was allowed. The Building Inspector (BI) and the Town Planner (TP) at the time had to make the determination regarding the commercial use. Mr. Weinberg said that in any event things that were said by the BI and TP in 2006 are not relevant to the current case.

The CDO issued previously was contemplated and specifically directed to the private and personal use. Mr. Weinberg explained the purpose of this case tonight and with the agreement for judgment for remand to the Spencer Zoning Board of Appeals that, to whether, and to what extent if at all, personal and private use [of ATV/dirt bikes] is permissible at the site.

Ms. Backus said that the Board already did address the use on the business aspect, Section 4.7 Prohibited Use; if the use does not exist on the Table Use, it is simply not allowed.

Mr. Weinberg and Ms. Buck will synthesize all documents, materials, and testimonials in the meetings, and incorporate them in to the draft findings and present this to the Board at the next meeting.

Mr. Collette made a motion to continue the finding and the Board's Decision to Wednesday, August 17, 2011 at 7:15 p.m. Ms. Kresco seconded the motion and the vote was 4-0 in favor. Ms. Backus made it unanimous.

Ms. Crawford made a motion to adjourn the meeting at 8:15 p.m. Ms. Kresco seconded the motion and the vote was 4-0 in favor.

Submitted By:

Bea Meechan, Senior Clerk, ODIS

List of Documents used on August 3, 2011

- Decision dated 12/7/2006 issued by the ZBA.
- Cease and Desist Order issued by Mr. Morra dated 10/6/2006.
- Article dated 11/4/2006; website atvriders.com referencing to Gabriel Racing, ATV Test Drive.
- Memo from Town Planner Michelle Buck, to Stanley Weinberg (Town Counsel) dated 8/2/2011
- Spencer Noise Regulations (adopted in November of 2008).
- Sections 4.2, 4.7, 4.7.1, 4.7.1.A, 4.2.E.22 of the Spencer Zoning Bylaw.