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February 4, 2016

Ms. Katie Green
Chair
Acton Board of Selectmen
472 Main Street
Acton, MA 01720

SUBJECT: Permitting Procedure and Variances

Dear Ms. Green:

On behalf of the residents at Quail Ridge, thank you very much for the serious time and attention that you and the Board of Selectmen are putting into the Site Plan Special Permit Application and the Special Use Permit Application filed by the town of Concord for the Nagog Pond water treatment plant, solar panels, and pipe intake. During the January 25, 2016 public hearing on this project, so many issues were raised that I feel it is important to send you a letter identifying two specific permitting issues that could have been forgotten in the midst of all of the serious issues raised at the hearing.

The two issues are:

1. The proper legal procedure for permitting the proposed activities is first through an amendment to the original variance, and then subsequently through the Special Permit process, and
2. For a variance and special permit to be 'legally effective,' they must be recorded at the Registry of Deeds. It is possible that the variance and special permits were never recorded by Concord, raising questions as to the legality of the present facility to exist at the site.

Variance First, Then Special Permits

The present ozone facility at Concord's Nagog properties was originally permitted through a variance issued in 1994 by the Acton Zoning Board of Appeals. A copy of the original variance is included in Concord's permit application. The Variance shows that it was needed for relief from eight separate sections of the then-Acton-zoning-bylaws. Three special permits were then issued by the Selectmen after the variance was received.

In this case, Concord is bypassing the variance process. However, without the original prior variance having been granted, the present ozone building could not have been constructed.

Case law establishes clearly that, when a building is originally permitted under a variance, it can not then only use the special permit process for future expansion. The leading case on this issue¹ decides as follows:

“The statutory criteria for a variance set out in GL c. 40A, Section 10, are demanding, and variances are difficult to obtain...By comparison, the special permit power presupposes the allowance of certain uses, but only with the action of the local permit granting authority...In view of the different approaches to the grant of a variance and a special permit, the former grudging and restricted, the latter anticipated and flexible, we do not think the Legislature intended in G.L. c. 40A, Section 6, to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit.”

AND

“..it would be anomalous if a variance, by its nature sparingly granted, functioned as a launching pad for expansion as a nonconforming use.”

Given established case law, I believe that the proper legal method of permitting the proposed Nagog Pond facilities is through the variance process initially. The facility exists at the site because of a variance, and therefore the variance should be legally amended before the special permits are acted upon by the Board of Selectmen. I urge you to obtain special council fluent in zoning law and have this issue thoroughly examined before you proceed on February 22nd.

Variance and Special Permit Recording

The second issue deals with the requirements in MGL Ch. 40A, Section 11, which requires that variances and special permits be recorded at the local Registry of Deeds in order to be effective. A cursory review of Registry files does not reveal that the original 1994 variance and special permits were ever recorded with the Registry by the town of Concord. And the copies of the variance and special permits in the Special Permit Application before you do not bear registry stamps.

A legal question arises. If there was no recording with the Registry, were the original variance and special permits not effective? Is a new retroactive variance required for the present building before you can proceed to amend the variance? What is the impact of the lack of recording on this process to expand the scope of

¹ Cesar A. Mendes v. Board of Appeals of Barnstable & Others, 28 Mass. App. Ct. 527 (1990) – referencing other cases that decided the issue the same way.

activities at the Nagog site? Again, these are serious questions for an expert zoning lawyer, and directly impact the course of action that the Acton Selectmen should be taking regarding permitting this proposed project. In order to protect the citizens and environment of Acton, all appropriate and legal matters regarding the permitting of this site must be considered before the proposal gets too far down the path towards a decision.

Thank you for all of your time and effort on this project, and thank you for considering my viewpoints. If you have any questions, feel free to contact me at the above telephone number.

Sincerely,

Carolyn Kiely, Esq.

cc: Acton Board of Selectmen
Mr. Steven Ledoux
Mr. Roland Bartl