

Town of North Andover
ZONING BOARD OF APPEALS

APPROVED
Oct 13, 15

Albert P. Manzi III, Esq. Chairman
Ellen P. McIntyre, Vice-Chairman
D. Paul Koch Jr. Esq.
Allan Cuscia
Doug Ludgin



Associate Member
Deney Morganthal
Nathan J. Weinreich
Alexandria A. Jacobs Esq.
Zoning Enforcement Officer
Gerald A. Brown

DRAFT MINUTES

Tuesday, August 25, 2015 at 7:30 PM
Town Hall 120 Main Street, North Andover, Massachusetts

Members present: Albert P. Manzi, Allan Cuscia, Doug Ludgin and D. Paul Koch Jr
Associate Member: Nathan Weinreich and Alexandria A. Jacobs
Also in attendance: Tom Urbelis, Town Counsel
Excused absence: Ellen McIntyre and Deney Morganthal

Pledge of Allegiance

Manzi called the Special Meeting to order at 7:38

Continued Public Hearing

**Request for a Findings from the Board appealing a Use Determination made by The Inspector of Buildings relating to an OSGOD Permit Application for Solar Photovoltaic System in the I-2 Zoning District at 1600 Osgood Street (Map 34 Parcel 17)
Petition 2015-003.**

Manzi stated that this is a special meeting that was continued from June. Manzi stated that the Meeting was called by him. Manzi then stated that we have two new Associate Members that were not at the last meeting, but have read all the materials, associated with this hearing and have signed the appropriate form and they are now eligible to vote on this.

Koch had concerns if these new members would be eligible to vote, since they were not members of the ZBA at the first meeting. Tom Urbelis responded that as long as they have read the materials and have certified this fact on the appropriate form they are eligible to vote.

Manzi stated since we only need 1 more Board Member for the vote, we will pick based on seniority, Nathan Weinreich will be the one to vote on this hearing tonight, but Jacobs will be allowed to ask questions to the applicant.

The Board was brought up to speed on what took place at the last meeting in June.

Manzi spoke of the various materials that were submitted to the Board Members and applicant such as legal definitions from Black Law, and various MGL documents such as Chapter 25A Section 3, Section 10, Chapter 40A Section 3, Section 9, Chapter 164 Section 1 and also Chapter 184 Section 23C.

Attorney Rosen walked up to the podium and stated that we will keep this short and then take questions. Rosen spoke of the 1600 Osgood Street property and of the 3 legal parcels of land on that location of a 1.67 Acres (or 1.4 million square feet). Rosen spoke of the various tenants and of the 2007 Town Approved Overlay District, called the OSGOD District. Rosen stated with the Overlay District there are three zones; Business Opportunity Zone, Residential Zone and Mixed Zone. Under OSGOD you are allowed to do things slightly different.

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Rosen spoke of OSGOD as an overlay district superimposing on all underlying zoning districts. Within the boundaries of OSGOD, a developer may elect to either develop a “site” in accordance with the requirements of Section 17 or to develop a site in accordance with the requirements of the regulations for Use dimension and all other provisions of the Zoning Bylaw governing the underlying zoning district. In this instance it is in the I-2 District.

Rosen referenced the letter from The Inspector of Buildings, dated March 24, 2015.

Rosen stated that on June 17th, 2014 this site (Map 17 Parcel 17) received approval of a Special Permit under the OSGOD. This was for ACT, a Community Theater. Rosen stated they would argue that was incorrectly determined.

Rosen stated that it was incorrectly determined in the OSGOD Letter from the Building Inspector that the project is not an allowed “As of Right” use under Section 17.6.3.2 of the Zoning By laws. Also it was without explanation that this project was not allowed in the I-2 District under the Zoning Bylaw.

Rosen spoke of “Site” and stated that nowhere in the Bylaw is “Site” defined. Manzi agreed Site is not defined in the Bylaw. Manzi reminded the Board and applicant that he submitted the legal definition of “site” to the Board.

Cuscia asked how many tax bills are sent; Rosen responded he believes there are 3, one for each site.

Manzi read Section 17.3.2 of the Bylaws “Underlying Zoning” The OSGOD is an overlay district superimposed on all underlying Zoning Districts. As required by the Enabling Laws, the regulations of use dimensions and all other provisions of the Zoning Bylaw governing the underlying zoning district(s) shall remain in full force, except for those sites undergoing development pursuant to this Section 17. Within the boundaries of the OSGOD, a developer may elect to either develop a site in accordance with the requirements of Section 17 or to develop a site in accordance with the requirements of the regulations for use, dimension and all other provisions of the Zoning Bylaw governing the underlying zoning district.

Manzi stated it was not defined on purpose and that the intent of this bylaw was to promote growth and development and not to be restrictive.

Cuscia asked why this is not at planning, Manzi stated under Chapter 40A Section 7, applicants are allowed to appeal a Decision and come to the ZBA, then they can go to Planning (depending on how the vote goes). Cuscia stated that basically the applicant does not agree with the Building Inspectors letters.

Cuscia asked of the existing solar panels today, and if this project, (if approved) will add additional solar panels to the roof. Rosen stated yes and we will also have solar car ports as well as additional solar roof panels throughout the property.

Cuscia asked if the Solar Panels that exist now subsidize some of the electric bill, Dan Leary, Project Manager for this project stated yes.

Rosen spoke of Net Meter Agreement (under state law) or how the electricity can be consumed on the property or a bidirectional meter that goes back into the Grid. You cannot sell it.

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Leary and Rosen answered questions and spoke to the Board of the tax benefits, Net meter and credit agreements, net present values, economic incentives, debit and credit agreements, and also spoke of various pilots being set up and how the town could benefit.

Leary wanted to make it clear that they have not negotiated with the Town as of yet.

Cuscia asked if this was similar to CapeWind in Cape Cod, Rosen stated no.

Rosen stated that it is his belief that they plan on installing these panels in either the I-2 or the OSGOD District.

Cuscia asked questions regarding the terms and definitions of Manufacturing and Generating in regards to this project. Rosen stated that you would need to go to a Legal Dictionary

Rosen stated Section 4.133 (11b) Renewable or alternative energy research and development facilities, renewable or alternative energy manufacturing such as "solar".

Rosen stated in Massachusetts Law Chapter 164, Section 1, "Manufacturing and Sale of Gas and Electricity" under "Generation Facility" a plant or equipment used to produce, manufacture or otherwise generate electricity.

Manzi spoke of Massachusetts General Law Chapter 40A Section 3 and 17.6.4 with respect to Special Permits and how it relates to Solar and this project. Manzi wanted to state to the Board that the Attorney General cautions Towns with these prohibitions. The state is very involved with promoting growth and development.

Rosen spoke of the permits that were issued on this property (OSGOD, and I-2).

Manzi stated that this is a complicated file. Manzi stated that it is sometimes unfair for the Building Inspector to interpret all the laws with everything else that they have going on.

Rosen stated how this new generation coming up is more environmentally conscientious. This generation wants these things. Also we make money for the town and for ourselves.

Manzi stated that tonight our Board is only asked to make Findings.

Cuscia stated he does not want to tell a taxpayer what to do with their property especially if this is an allowed use.

Urbelis, stated if the Board makes a decision to overturn or reverse the Building Inspectors decision, then the applicant can go to the Planning Board.

Rosen stated that based on the Building Inspectors letter, they cannot go forward. Rosen went over the letter and explained to the Board why he disagreed with it.

Rosen spoke of some of the findings that they were looking for tonight.

Rosen stated that they applied under Section 17.6.3.2 As-of-Right Uses upon Plan Approval by the Plan Approval Authority within the Business Opportunity Zone Located within Osgood Smart Overlay Zoning District.

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Rosen stated that “manufacturing” includes renewable or alternative energy manufacturing such as solar generating facilities as an As-of-Right Use.

Rosen also stated that under Section 4.133 (11b) in the I-2 Zoning District and section 17.6.3.2 that “manufacturing as it relates to solar energy facilities is not limited in any way to preclude the transmission of all or any portion of the energy being generated for use of the Property.

Koch stated that he has spent much time on this, and that he sees the arguments from the applicant, but has not been persuaded by them. Koch went on to say that he has not found clarity. Koch stated that he does not buy into the benefits that have been stated tonight. He also stated that the case that was submitted by the applicant was not as applicable as it should be. Koch stated that he struggles with the Development Merits and the Legal Merits of this project.

Koch states that he cannot see how 15,000 Solar Panels could bring life into this building and bring tenants to this property.

Urbelis suggested and cautioned the Zoning Board to concern themselves with what the Attorney General said and the prohibiting of Solar.

Manzi agreed with Urbelis.

Koch stated that he has reviewed the materials to find a clear path; we have been in and out of laws and interpretations tonight. Koch disagreed with some of the arguments from Rosen.

Koch spoke of 17.6.3.2 of the Bylaw and stated how anyone could see in the future that the word “manufacturing” would turn into a Solar Farm of around 15,000 solar panels. Koch stated that he was sure that no one would even consider this was on anyone’s minds.

Manzi stated that we need to focus on the laws and have the Planning Board do their job and let the Planning process take its course.

Manzi wanted to suggest closing the public hearing, but before he did he asked the Board if they had any further questions to ask, or if the applicant had anything to add.

Rosen stated he wanted to comment on two things that trouble him. First one is that under 40A Section 3 the entire parcel is not OSGOD that cannot be possible, and the second thing is that Solar is allowed in I-2 under 4.133 (11b) or under 40A Section 3

Manzi asked the Zoning Assistant to make two corrections on the document list that was submitted.

Ludgin made a motion to close the hearing
Cuscia second the motion to close the hearing
All in favor to close, Manzi, Ludgin, Cuscia, Koch and Weinreich.

The Board deliberated on what they heard tonight.

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Ludgin stated in his experience a site can consist of several parcels and can be broken into 15 different buildings sites. Ludgin can see how multiple sites can exist here.

Manzi agreed with Ludgin.

Manzi stated that he believes that the Planning Board and Building department can do their jobs effectively.

This area is called Smart Growth and created 3 different zoning districts with different purposes

Manzi stated that he is persuaded that this is a By-Right Use. Manzi stated it is not listed that it is a By Right Use, because it does not have to be.

Weinreich had no comment.

Jacobs had no comment

Koch stated that the applicant triggered OSGOD (intentional or not), but if it was I-2 that would be standing tall.

Manzi stated this is a very complicated Bylaw.

Manzi stated that under I-2 it is allowed, by Special Permit it cannot be prohibited, because it is exempt. All we are deliberating on is Use.

Cuscia agreed with Manzi let the Planners do their jobs.

- 1. Section 17.3.2 - Underlying Zoning as to the Property, that: the term “site” (a term that is undefined by the Zoning Bylaw) is not defined to mean “Lot” (a term that is defined by the Zoning Bylaw), and further that the OSGOD Section of Zoning Bylaw contemplates multiple “Projects” on a Lot.**
- 2. Section 17.6.3.2 As-of-Right Uses upon Plan Approval by the Plan Approval Authority within the Business Opportunity Zone located within Osgood Smart Growth Overlay Zoning District, that: the Building Commissioner erred in applying Section 17.6.1.2 and further, that “manufacturing” includes renewable or alternative energy manufacturing such as solar generating facilities as an As-of-Right use.**
- 3. Section 17.6.3.3 Uses Allowed by Special Permit within the Business Opportunity Zone located within the Osgood Smart Growth Overlay Zoning District by Plan Approval Special Permit issued by the Plan Approval Authority as Special Permit Granting Authority, that: the Building Inspector erred in his determination that that the Solar Photovoltaic System consisted of an application for Special Permit when in fact it was an application for OSGOD Plan Approval by pursuant to section 17.6.3.2 as an As - of - Right Use.**
- 4. Section 17.6.4 Prohibited Uses with respect to the Business Opportunity Zone located within Osgood Smart Growth Overlay Zoning District that: the Building Inspector erred in his determination that solar energy generating facilities are not expressly allowed and therefore a Prohibited Use;**
- 5. Section 4.133 (11b) in the Industrial 2 Zoning District and Section 17.6.3.2. - that: “manufacturing” as it relates to solar energy generating facilities is not limited in any way to preclude the transmission of all or any portion of the energy being generated for use off of the Property.**

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Ludgin made a motion based on the ZBA Decision on Findings 1 through 5 any and all conditions and moved to approve.

Cuscia Second the motion

Voting in favor Cuscia, Ludgin, Manzi and Weinreich

Not in favor Koch

4-1 findings Granted

Manzi declared it granted

Adjournment: 9:30

Cuscia made a motion to adjourn the meeting.

Weinreich second the motion

All were in favor to adjourn the meeting: Manzi, Koch, Cuscia, Ludgin, Jacobs and Weinreich.