



**Georgetown Zoning Board of Appeals**  
*Memorial Town Hall ♦ One Library Street ♦ Georgetown, MA 01833*  
*Phone (978) 352-5742 ♦ Fax (978) 352-5725*

**MINUTES OF A PUBLIC HEARING**  
**Appeal of Building Inspector Determination**  
**Map 15, Lot 46 Carleton Drive, Georgetown MA**  
**ZBA File #21-01**  
**APRIL 6, 2021**

**Zoom Webinar for Audience**

[https://us02web.zoom.us/webinar/register/WN\\_L3iyDoeKTJysgCSnw76B2Q](https://us02web.zoom.us/webinar/register/WN_L3iyDoeKTJysgCSnw76B2Q)

**Board Members Present:** Jeff Moore Chairman, regular member  
Paul Shilhan, regular member  
Shawn Deane, regular member  
Gina Thibeault, regular member  
Dave Kapnis, regular member  
Sharon Freeman, associate member

**Also Present:**

Attorney/Applicant: Thomas Flanagan of MacLean Holloway, Doherty & Sheehan, P.C.  
Georgetown Town Counsel Attorney Jonathan Eichman of KP Law  
Attorney for G. Mello, Nancy McCann  
Patty Pitari, Administrative Assistant

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*\*Note Board Members are referred to by their Initials, Attorney McCann =(NM), Attorney Flanagan (Flanagan)*

**Chairman, J. Moore stated** (JM) at 7:19PM, stated; this Public meeting is being conducted in a way that is an attempt to satisfy the Open Meeting Law, and other State Laws pertaining to the Public Hearings of the Town's Public Bodies pursuant to Chapter 53 of the Acts of 2020, as recently amended by Chapter 201 of the Acts of 2020. It is a good faith, best effort attempt to comply with the Executive Order waiving certain provisions of G. L. c. 30A, sec. 20 during the COVID - 19 pandemic. Internet based technologies will be used by the Zoning Board of Appeals to conduct Public Meetings and Hearings until the Executive Order is rescinded, or the State of Emergency is terminated.

**Chairman Jeff Moore** stated The Board of Appeals will conduct this meeting according to rules laid out in Chapter 40A of the General Laws of the Commonwealth of Massachusetts, Roberts Rules of Order and its own particular set of rules, entitled Rules of Procedure, a copy of which is on file with the town clerk, another copy is available from the Administrative Assistant at this meeting, this meeting is being tape recorded for the purpose of taking minutes; once the minutes are approved the tape may be taped over.

**Chairman Jeff Moore read the legal ad:** The Town of Georgetown Zoning Board of Appeals will hold a public hearing by remote access on April 6, 2021, immediately following a previous continued scheduled hearing at 7pm, on the Application filed by Melinda A. Sawyer, Trustee, of 5 Spaulding Rd, Georgetown, MA, Amy Smith, 1 Katie Lane, Barry M. Enos, P.O. Box 183, and Lee and Leah Craig of 3 Spaulding Rd, all of Georgetown MA, being represented by MacLean Holloway Doherty & Sheehan, PC Attorneys at Law, Peabody, MA, appealing from the Letter of the Building Inspector dated 3/26/2020, concerning application of Zoning Bylaw Section 165-80.2: Major Development Review, to a proposal of G. Mello to locate a transfer station at property on Carleton Drive identified as Assessor's Map 15, Lot 46. Interested persons are invited to attend and participate using the following link:  
[https://us02web.zoom.us/webinar/register/WN\\_L3iyDoeKTJysgCSnw76B2Q](https://us02web.zoom.us/webinar/register/WN_L3iyDoeKTJysgCSnw76B2Q)  
If an electronic device (computer, tablet or mobile device) capable of utilizing the above link is unavailable, interested persons may call into this meeting by telephone by dialing any of the following numbers: 301 715-8592 or 312 626-6799 or 646 558-8656 or 253 215-8782 or 346 248-7799 or 669 900-9128, Webinar ID: 898 3859 0370, Passcode: 889918. The above-cited remote meeting connection information will be included on the April 6, 2021 meeting agenda, which will be posted on the Town of Georgetown website no less than 48 hours prior to the meeting. Further, the meeting will be broadcast live on the Georgetown Local Access Cable TV Comcast Ch. 9 and Verizon Ch. 42.

## **Application**

Attorney Filed the application in April 22, 2020, but was incomplete as was missing abutters list and fee, he then filed a complete application on July 1, 2020. On 12-8-2020 Attorney Flanagan was given the date of 1-12-2020 to open the Appeal after Gov. Baker stopped the tolling of applications and to restart the clock on December 1, 2020, Attorney Flanagan wished to postpone/extend the opening of the hearing to April 6, 2020, J. Moore spoke to Town Counsel and revised our extension form and it was signed by both Attorney Flanagan and Chairman Moore, and was placed on Business Zoom meeting of 12/8/2020 and the Board voted in favor to extend to the requested date, and filed with Town Clerk on 12-9-2020.

Appeal letter from Attorney Flanagan states Pursuant to Sections 29-11 (F) (2) and 165-98 (c) of Georgetown Zoning Bylaw, notice is hereby given of our clients appeal of the decision and determination by Mr. Godin of 3/26/2020 "Godin Decision", was in response to our 3/10/20 request that Mr. Godin enforce the requirements for Major Development Review, as set forth in Section 165-80.2 of the Georgetown Zoning Bylaw, which requires a developer/applicant to comply with all of the submittal requirements and procedures for Major Development Review. Also in appeal; In the Godin decision, Mr. Godin stated the he was "not prepared to make a determination on the application of Major Development Review." Mr. Godin also stated, among other things, the following: "Accordingly, it is my determination that your request does not constitute a request for enforcement against a present zoning violation, as required for a response under G. L. 40A, Section 7, and this letter may not be construed as such a response." As stated above, it is our position that Major Development Review applies to this project at this time. For the above reasons, we hereby appeal the Godin Decision.

**JM** gave the floor to Attorney Thomas Flannagan of MacLean Holloway, Doherty & Sheehan, P.C.

## **Flanagan Argument**

Flanagan stated co-applicants Lee & Leah Craig sold their home and moved, I will represent new owner at 3 Spaulding Rd., Emma Driskill & Connor Power-Smith who purchase their home from the Craig's, I know Ms. Pitari notified both of them. We are appealing the decision and determination of Mr. Les Godin, the previous Building Inspector of 3/26/2020 in response to our 3/10/20 request that Mr. Godin enforce the requirements for Major Development Review, as set forth in Section 165-80.2 of the Georgetown Zoning Bylaw, which requires a developer/applicant to comply with all of the submittal requirements and procedures for Major Development Review. For two reasons; The first based on Bylaw Section 165-80.2, Sec. B (1) in the CC zone, by the applicant's own traffic study, (a copy is attached to appeal), the new site at Carleton drive would involve 890 vehicles trips per day, 280 heavy vehicles and 610 passenger vehicles per day. Sec. B (1) requires Major Development Review and in this district, there will be at least 500 vehicles trips per day, so it far exceeds that in our estimation. If you look at the Table 1 of traffic study attached to appeal, the column "net new trips", its misleading and not accurate. The property generates zero trips, the traffic study is comparing the current trips at 203 E. Main St (existing site) to what the proposed trips are going to be at Carleton Drive, subtracts one from the other and says, it not going to be that bad. We believe it will be that bad, that is why we say Sec. B (1) is triggered, the other section is B (4) the plans submitted appears to show a 15,000 ft. sq. building, but at least 30,000 sq. ft. of the site will be used it appears on the site plan.

**Flanagan** – Mr. Les Godin Letter his letter or denial of 3/26/2020, seems to me to suggest there is nothing to enforce, he doesn't say it in there but I am assuming, I have not spoken to him since letter, I believe because he did not have a building application before him, to allow him to either allow or deny, our position is this is not how you view this, by bylaw requires that a new use that has either of those two criteria, needs Major Development Review. He declined to do that, that's why we are here, to have the Planning Board do MDR, they are doing site plan approval now.

**JM** places 165-80.2 up on the computer screen for all to view, the MDR bylaw. We are only here to determine really only Section B here, if anyone of the 5 conditions listed are met, then the board may or may not find that MDR is required. I just want to remind all that we did sign and extension of time

for this application in December 2020, to tonight 4-6-21, and final action to 6-4-2021. The special permit granting authority is the planning board for section 165-80.2 (B), before we open to comments for the record, we did do an extension of time on 12-8-2020, mutually agreed to tonight and final action until 6-4-2021.

JM asks Attorney N. McCann if she would like to speak as she has submitted as summary as well.

### **McCann Argument – 3 Issues of Procedure**

N. McCann - I have procedural issues with the merits this appeal to get on the record; we are not conceding that any of the appellants have standing in this appeal, there are 2 different claims of standing, the first; the parties of interest the people who get Notice, the abutters notice list, those folks can ask a inspector for enforcement, but once you take a matter up on appeal, whether with this board or into court, it must be by a party aggrieved, I am citing case; “ Sheehan vs. Board of Appeals of Plymouth” in order to survive a challenge to standing the appellant must demonstrate not merely speculate that there is some infringement of their rights and the claim injury or loss must be personal to the appellant’s and not merely reflective of the concerns of the community, so again I am raising this for the record, that there is a question of Standing for one or all of the appellants in this case.

Secondly the issue that Attorney Flanagan discussed is the appropriateness of this matter before for the board at all, and that is related to the fact that the enforcement that was requested, was not an enforcement that was under 40A, Section 7, the enforcement requested did not allege a Zoning violation, and that is as Mr. Godin pointed out is a required for a response appealable required under 40A, Section 7, so I would suggest as a result there is no violation being alleged here, this matter is not appropriately before the Board of Appeals under 40A, Sec. 7; An appeal of the Building Inspector; 3<sup>rd</sup> – The letter being appealed is dated 3-26-2020, the letter is dated July 1, 2020, I don’t believe it was timely filed, I know that there was a letter submitted to the board/application in April 2020, it was not complete, and was not filed until July 1, 2020 long in excess of the 30 day appeal period. Those procedural items are now on the record.

McCann - I would like to go thru my letter that I submitted to the Board, which is a copy of the letter I sent to the Building Inspector last March 30,2020 relative to MDR, the inspector made a determination to this letter back in back in December of 2018 he laid out for us, as is customary to do; the procedure for permitting of this project by this board (ZBA), a required Special Permit, that was granted, A special permit under water resource, which is pending and Site Plan approval from the Planning Board which is pending now. He did not include any requirement for Major Development Review special permit from planning. The reason that he did not is that this project does not trigger any of the 5 thresholds for major dev review. Under 165-80.2 we saw the 5 thresholds, 3 of them don’t apply as they relate to residential developments, there are only 2 that potentially apply the 1<sup>st</sup> related to the vehicles trips, the trips however are not being correctly stated by the appellant’s, the vehicle trips relative to this project in the CC district are 1,000 vehicle trips per day, that is the trigger, not 500 a day, and so therefore, (as you can see up on the screen) #1 – all new uses defined by the Bylaw that generate 1,000 vehicle trips per day or more in the general commercial district, and/or 500 vehicle trips per day in any other district; The CC zoning district is a commercial district as determined and discussed many times with the Building Inspector, and therefore the vehicle trip trigger is 1,000 V trips per day, as indicated by the appellants. G. Mello our clients have submitted traffic information with trip generation of 872- 890 range, far less than 1,000 vehicle trips per day even using full trip generation. Our vehicle trip generation/traffic was reviewed by Planning Board’s technical review agent Larry Graham and he confirmed on December 31, 2019 that we do not hit the threshold of 1,000 trips per day. We are not taking credit for purposes of this trigger for what Mr. Flannagan mentioned was the delta, the difference between vehicles trips that are currently already in the corridor generated by the existing transfer station, and those generated by Carleton drive, if we take that delta, we are

looking at under 200 vehicles trips per day, as new vehicle trips, that is a valid argument, however, we don't even meet the 1,000 per day trigger based on Full? Considering from new vehicle trips associated with Carleton Drive, so the applicable trigger is 1,000 per day, we don't hit it.

\* The second threshold is the square footage that would be new uses of 30,000 sq. ft. or more, the proposed building we are to construct is only 15,000 sq. ft, the gross floor area is the correct floor area and the correct use being used for the calculation of the use. But we went beyond that, in my conversations with Les, I provided that information to him in my letter of last year, we looked at other areas that could arguably be determined to be a use on our site and added those to the 15,000 sq. footage, and the building footprint, the residential drop off area, including the sidewalk and the bins, the attendant shed, and the commercial tipping scale area, we determined the use areas have been added together and was provided to Les Godin and those as well are under 30,000 sq. ft., so the total area for use is 23,228 sq. ft. below the 30,000 sq. ft threshold, It does not apply, just because it's a big project, but we do not trigger those objective standards. Note: since adoption of Major Development review done in 2007, not a single development has been required according to Planning staff. This project does not meet the thresholds.

\*The next point legality of this process, even if project met one of those thresholds, the major development review rules and regulations for impact statements have never been adopted by the town. There are no criteria for the special permit, even if did meet one of the thresholds, it is incumbent upon the town if it wishes to enforce, to provide all information needed to comply, as well as criteria for approval. The criteria can't be found by applicant. The Case law MacGibbon vs. Board of Appeals, Duxbury MA, the zoning bylaw cannot leave the decision relative to a special permit subject to "the untrammelled discretion or unbridled fiat of the board" basically it means if you have to have criteria for the special permit and it has to be known, adopted and clear to the applicant. So, under 165-80. E, Criterial for MDR states that the following criterial shall be considered in the grant of a special permit. (3) The standard for evaluating the impacts of a project set forth in the MDR rules and regulations for impact statement; See attached summary by McCann.

In Summary a fully engineered Site Plan has been submitted 10-10-2019, the MDR does not apply to this project, the inspector found that and made that, determination in 2018, as well, as 3 other separate occasions thereafter during meetings that he was involved in for this project. It does not meet any one of the thresholds for major development review, even if did meet, the criteria does not exist. There was no zoning violation alleged in request for enforcement the letter from B. Inspector of 3-26-2020 that is being appealed was not a denial of an enforcement, simply there was no enforcement being requested that meeting the criteria of 40A Sec. 7, therefore this is not properly before the board. That is our position.

JM – Thank you. Mr. Flanagan would you like to discuss what Ms. McCann mentioned?

Flanagan – The major development review, it says general commercial district, there is no general commercial district that I could find in the bylaw, however the special permit that was obtained in May 2019, was granted because this board determined that...the applicant's application and argument, that although a transfer station is not specifically listed in the uses, it is most akin to light industrial, and it states it is similar in character to light industrial. It's another district/if its other district it's 500 vehicles per day and they don't meet it. In 165-80.2 I could not find regulations either, I don't think that is a successful argument. Our position that its light industrial we believe it applies.

NM – I would like to respond to that; JM – Yes. NM – I want to go back to this commercial district requirement, the commercial district (inaudible)...requires 1,000 vehicle trips per day, this is CC

district, the special permit was not issued because it was a use similar to light industrial and therefore that somehow puts it in the light industrial district, it was issued by ZBA was because the Use was similar in kind to light industrial uses and light industrial uses are permitted by special permit in the CC zone. So that argument I think is not correct, it does not change the district to light industrial it's a commercial district. \*Secondly not having read the regulations required under the bylaw MDR is case law that is you are going to require special permit, the criteria that is different from standard site plan review and all of which we have submitted, is the same information under Major Dev. Review, rules and regulation and those don't exist, we have submitted all under SPA, the only think that is different is major development review rules and regulations or impact statement, that is the big piece and it doesn't exist, because town never adopted it. All others are under review with planning board.

JM – I think we can say is the bylaw could be better written, and having been on this board for a decade and a half, this is not the only place in our bylaw that this type of thing comes up, we interpret the bylaw as best we can, right now we need look at this section to determine if this section applies, in 2007 was adopted, abiding by this section may be tricky for planning board as it is ambiguous, I think this board tonight needs to determine if this section applies, it may not be enforceable, I don't know that that is the Zoning Boards job tonight to review what the planning board may do with such a section if deemed to apply.

JM to NM – I have a couple of questions Nancy, in your letter, you mentioned that the determination of whether or not any MDR was required, in your opinion was made and was not required by the inspector and was not included in his denial, and the determination was further addressed subsequently on 3 separate occasions, in person and at a staff meeting and during some phone conversations, and in each of those conversations, it was your understanding that MDR is not triggered in this project, and you proceeded in good faith, accordingly, and the end of your letter; "It is our understanding that indeed you have already made the determination, and for all reasons stated above, the transfer station project is not subject to Major Development Review. I guess it's your position is the Les determined that MDR is not required, is that fair?

NM – Yes

JM to Flanagan – JM – your obviously appealing/is it your opinion that Les's determination is incorrect and MDR is not applicable here, is that a fair statement?

Flanagan – Yes, but for a different reason.

JM – I am not suggesting that you don't think it applies, but that you believe Les has made a determination that doesn't apply and therefore you have filed an appeal of that.

Flanagan – He made a determination doesn't apply, because he says there has not been any violation, he says I am not prepared to make a determination on the application of MDR on March 26, 2020, which is opposite of what is in counsel's letter.

JM – You're appealing a decision by the building inspector, in your opinion, he is not requiring MDR in this case, and you believe it is should, is that correct?

Flanagan – I am appealing his refusal to apply MDR to this project and in letter he states he is not prepared to make a determination and should I determine that it does apply, I will require the

application to obtain a MDR letter. I guess we are appealing his determination that he doesn't know that it applies yet, I don't believe he says basically your too early for this request for enforcement.

JM – the request before this board is to make a determination on those grounds if it applies or not.

NM – Is the role of the board at this point only to uphold or to overrule the inspector's decision?

JM – That is the question we are getting to, it has been filed as an appeal, in one case indecision, and in another case believe the determination was made., This has been discussed I the beginning it this applies, I have had discussions with Les along the way, and I said in my opinion, isn't it not in all best interest to figure out now, not later on.

JM to NM in your letter of a year ago, you say it is critical to the permitting process, as well as in fairness to the applicant, that a determination on MDR based on the plans and information presented be made now while Site Plan Approval is ongoing;

JM to NM – I agree with you on that.

NM – I do agree and that is why we discussed with Les in the fall of 2018, he laid out the permitting requirements, and those 3 conversations that with thresholds are not met, we don't meet and requirements for MDR. I submitted this letter a year ago, and he received confirmed it, and we never heard back.

JM speaks about the Inspector letter and McCann and Flanagan arguments. I think it's all best interest to know if this section applies sooner rather than later, and to confirm would be beneficial to everyone.

Flanagan – Could I add; The letter from Counsel to Mr. Godin, that lays out what Counsel believes the Mr. Godin has decided is as at least as to whether MDR has been determined to be applicable or not, is not consistent with the letter Godin's sent to my office 4 days before McCann's letter, in that letter he told us I am not prepared to made a determination; should I determine if does apply, I will require applicant to obtain permit etc. until then there is no requirement in the Zoning Bylaw's specifying when application for that permit must be made or authorizing me to determine submittal requirement or procedure, that says to me, that only determination he made as on 3/26 is that is does not apply, I disagree that he had already make that determination

JM– I understand, so it's your contention that that decision should have been made sooner than later, I think, maybe one thing we agree on, that we made a decision either way, Les retired end of last year, I don't want to put him in the middle of this. I have heard 2 arguments mirroring one another why this section should apply, and not withstanding Nancy has reserved rights of if there it standing.

JM – At this point are any Board members want to jump in at this point.

SD- Since we have the benefit of Town Counsel Jon Eichman here, I didn't know if he had any opinions, to provide clarity.

**Attorney Jon Eichman (Town Counsel)** – I tend to have fairly a strong opinion at this point, I don't think the issue of MDR is properly before the board at this time, I have both practical and legal reasons for saying that, the practical reason is that MDR may apply to this at some point, plans have not been

finalized, permits have not been issued, and based on final plans and permits being issued, no building permit application has been submitted, so to the extent that there is a defined project here, that the building office can look at and if on appeal the ZBA can look at to determine if that project requires MDR, that project is not here, it is still before various boards of the town, it may undergo changes, and to issue an opinion now on a project is in application, but not determined think it to issue a hypothetical decision and I think the decision could be vulnerable to appeal on those grounds.

\*The primary the legal reason, has been touched on by both counsel, I don't see that the Building Commissioner has issued a decision or order that can be appealed to the ZBA in this instance, to be clear as a matter of disclosure I did work with Inspector on his letter that he issued in response to the appellants request for enforcement, so I am familiar with that language, when you look at if an appeal is properly before the Board, the first think you look is what was placed before the inspector requesting him to act, in this case the letter from the applicant's counsel for request for enforcement, there are two ways in which an inspector an issue and order of decision to be appealed, one is on a request from a building permit and one is on a request for enforcement of the Zoning Bylaw, in this case it was not from a building permit, one is for enforcement of zoning bylaws, this was for zoning bylaws. In order to enforce from zoning bylaws, pursuant to state zoning act, it has to allege a present violation of the zoning bylaws, and you will see from his response, that he didn't believe that had been properly alleged in the request, the request I think fairly read, he would like to have an opinion of the building inspector on if MDR applicant to the bylaw in its present state, but what it says is that is requires the Building Inspector to require the applicant to apply for MDR, there in nothing in the bylaw as to the timing of when an applicant should apply for a particular special permit at this point there is no use on the property, so there is no violation based on use, nor has a building permit been issued for this particular use, so to the extent that MDR applies, and I don't offer any opinion on that, that determination can't be made the Building Inspector, until one of those 2 things happen, has a building permit application in front of him Or there is activity on the property to put the use into operation, and he determines they don't have the appropriate permit, in that sense he correctly denied the request, because in his opinion, he wrote it, but I did had some input in that, he determined that the applicant had not actually made a request for enforcement, because he had not alleged a current violation of Zoning bylaw, what he wanted was an opinion that MDR applied to this project, but an opinion is not an enforceable decision, (inaudible)..... enforceable can't only be issued on building permit applications or request for enforcement, it's not something that can be appealed, that is the legal basis, in my opinion, that the question of if MDR applies to this project, and is currently before other boards, is not the right for actions by this board and doesn't have jurisdiction to hear it at this time.

To the extent that the building inspector responded in writing and the Board wants to consider that as an order of decision, I think in my opinion that the building inspector was correct in finding that a request for enforcement hadn't been made, because no current zoning violation had been alleged, so summing that up, I would say the question as to whether MDR applies to this project remains unanswered, it's still out there, I don't believe that the building inspector has answered it, not withstanding that initially as Attorney McCann had pointed out in her earlier letter, he initially denied the building permit application and did not cite the fact that they had not obtained a MDR special permit, the building inspector is free to make a determination at any time going forward, prior to the use on the property and even after, whether this project requires MDR permit, he has not done so to this point in my opinion, I would caution the board in making an opinion about application of the Bylaw at this time, particularly for the practical reason that you don't have a final plan before you, those plans may change, you would essentially be giving an opinion that would not be enforceable.

JM to Attorney J. Eichman – I have two questions and this goes to Nancy as well; Was a building permit application originally presented to Les Godin to trigger a denial letter from the outset and in that denial letter did he not outline a list of permits he felt would be required at that time?

N. McCann – A request for a Zoning determination that is typically done in Georgetown, because your Board of Appeals process requires a determination from the Building Inspector, called a denial letter. We did not file a building permit application with all that goes along with that because that is not customarily how it's done in Georgetown or elsewhere, we did request a determination from the inspector regarding this project and whether it was permitted by right to go forward with a building permit or if permitting in the form of special permit or SPA or whatever he may determine, was needed in order to complete the permitting process and this goes hand in hand with the staff meetings that we had, that are typical when you are gearing up for a project. There was no formal building permit because, we would have to have all the information, construction drawings, etc. that you would submit with a building permit application, but we do customarily request a determination which is what he did on December 12, 2018 and we proceeded forward, that determination was part of the special permit application package that was submitted to the Board of Appeals.

JM – Thank you. In my mind, in our projects they would submit a building permit application, it gets denied with a denial letter, which does the same thing. Getting to Attorney Eichman's point, requiring a building permit application and it be granted or denied. Regarding the plans changing, if it does it kind of re-triggers permits again, so I know Attorney Eichman feels strongly that this could all change and our decision now would be unenforceable because the plans could change, I think the plans could change and disrupt all permits. I don't know if the plans change things for me as a board member.

NM – I think what is important here is that Attorney Eichman said is that as a result where we are procedurally and what has happened thus far, this matter is not right with the Board of Appeals to step into the shoes of the Building Inspector and that is what the appeal is asking you to do, and that is not right.

JM to NM – You are saying never or now? NM – Now, he hasn't issued a determination that is appealable.

NM – Back in December of 2018.

JM – So you're moving on the premise that a determination has been made but on the other stand you're saying yes, but you can't appeal that because he hasn't made that maybe in writing or something.

NM – No that is not what I am saying; The decision was made back in December of 2018, he made a determination and we proceeded in accordance with that determination, we did not appeal his determination, moved forward with the application, what is before you tonight, is not that, it is the appeal of the building inspector's letter, of last March, in which a determination was not made, and therefore, there is an appeal allowing the Board of Appeals to step into the shoes of the building inspector and make a zoning determination is not right, and I believe that to be correct, I believe that was a part of my presentation, and I believe that is what I just heard your Town Counsel.

JM – Any other Board members have anything. All Board members were fine.



JM – So where I was going with this, the board has some choices to make tonight, the appeal can be denied based on the facts that have been presented tonight, as statute, and what it is we are actually appealing, it can be continued until such time that the argument is sort of deemed to be valid, or we can decide that a decision is not to be made tonight by the board, obviously Town Counsel had indicated his concerns with that as well. What I struggle with the fact that this is something...granted the bylaw has some ambiguities in it, but it's there are we have to act on it, and this goes back years to the existing site, and asked town counsel whether or not this is something that would apply, during that hearing is it something that the ZBA needs to make, sometime we make conditions required, and I was not sure looking at the bylaw whether we needed a determination at that point, again it goes to the building inspector. I have been here a long time, I have never seen or experienced a project where a permit may or may not require and somebody went 2 years without making a determination based on the information that is before them, and I guess my question is Les where here, is ok, maybe you're not compelled to make a decision, the law doesn't compel you to do it now, but clearly, you've discussed this with the applicant on numerous occasions, and indicated that it was not a requirement, we have a group of neighbor's and residents, who feel that it is, what is holding up this decision at this point, is there information that you need, I don't think the plans are going to change that much. I would like to know why the town officials haven't completed their job here, and moved on. Even the applicant has said it is imperative that this be settled now, while Site Plan Approval is continuing, and the appellant wants to know, and Planning I am sure wants to know. This needs to be resolved. If we are unable to uphold it, then maybe we take that risk, and if someone wants to appeal it to the state. I liked Les, but I have to say, he said I don't need to make a decision, and then he retired.

JM – Now we have a new building inspector, and I don't think he should be thrown into this in my opinion, it's been going on way too long. I would not want to put that on anyone. Is it in anyone's best interest not to make this decision now? I ask that to all 3 attorneys', other than the fact that any are afraid that someone is going to appeal it.

JM – I would like to hear from any counsels on this Call.

GT – If I could for a minute, I personally don't think it's the ZBA's jurisdiction to make this decision, this is a Building Inspector's job and we are not inspectors, however I do understand your frustration there are a lot of people waiting, I am just not comfortable, there are so many ambiguities. At this moment I do not have enough information.

JM - Fair enough, I respect that. Our new Building Inspector has raised his hand as an audience member.

Angelo Salamone, Building Inspector – I think you are pretty spot on that a determination needs to be made, as to whether or not it applies, I think the summaries are good, like you said it sounds like a legal dispute or whether or not it fits the criteria, without studying it further and assuming that the information in front of me is what it is, is accurate, I am a simplistic man, and I think that it's as simple as that, does it apply or doesn't it, and the writers of the law, typically write these laws with the intent that even though it may be ambiguous, to leave it up to debate for the towns people to have a long discussion, as to how this best fits the town, that aside that is how I see it. Thank you.

JM – Thank you Angelo.

JM – One of the things we can do is continue this appeal until a determination is in fact made, or allow a certain amount of time to allow the new building inspector to make this decision, in which case the

appeal could be withdrawn or continue depending on what your decision may be. I think if this group withdrew, and that building permit application is submitted down the road, it may be appealed again and we start all over again, to me that doesn't make any sense. Angelo, if you're suggesting that this is something that this is something you want to take a look at and make a determination then we can have a discussion at that point, I am not suggesting you do that now, that decision is yours to make.

PS – It seems to me if Angelo makes a decision, it's going to be appealed one way or another, but at least the appeal won't be because we made the decision, it will be because don't agree with Angelo's decision, lets' let Angelo make a decision and let it be appealed.

JM – Shawn or Dave have a question; we do have audience. Unless we are going to discuss the merits of this case, I am not inclined to open to audience yet, but for now I see some hands, but no decision will be made until you have a chance to speak.

GT – I wanted to ask Town Counsel feels, I do feel a decision needs to be made, I am not saying it's not my job, I just don't this is our purview. What is the best way to move forward?

J. Eichman – Yes, Mr. Chair you anticipated exactly what I would say as far as the inspector making a determination here, the law is pretty clear on what are appealable decisions, in this case the Mello has made the determination that permit doesn't apply and they have to applied for it, and now the question stands out there. The building inspector really isn't plugged in legally until that happens, so I would not advise the Board wait until the inspector issues an opinion on this, I think you will be in same situation now, you can certainly issue a decision that gives the boards opinion on this, my determination or my opinion is that would be vulnerable to challenge because I don't see the authority of the building inspector at this point issue a legally appealable decision, one way to get at Gina's question, at this point, an appeal has been made, unless that appeal is withdrawn, or unless it's continued the board is required to make a decision on that appeal within the time allowed, and I think right now it's been extended to June 4<sup>th</sup>. (correction from July 4). Those are 3 options.

JM – An opinion by the current building inspector as to whether or not this applies, essentially doesn't change the authority of the board not to hear an appeal on that. Is that correct Jon?

J. Eichman – Yes that is correct.

JM – It doesn't change where we are tonight, I am not going to disagree with any of the risks here of making a decision, my view is that in this case we are in a no-win situation, we either don't act, and say come back when a building permit application if finally presented to the inspector, and he either denies or determines that major development review is required or issues a permit without it being required. But this could be quite some time. We either kick it down the road, or make a decision, and see what happens. The question is if the decision is legally enforceable.

DK – To me its muddy water, because both sides have good opinions, however there are issues, did town drop ball on bylaw, and now we have a new inspector dropped in this over 2 years, I don't think we are in a spot to say yes or no, I am not comfortable on voting on tonight. Maybe let the attorneys have a meeting and sort out that part of it. I think there needs to be more time.

SD – I am an attorney, but not a zoning attorney, but what I do know as an attorney and a board member, we are in some strange procedural areas here with respect to standing, rightness, and I do have some feelings about the applicability of certain elements being met as it relates to some of those

prongs in MDR, I don't know we can get there as a board and act on it from a procedural prospective, and we are sort of acting on a decision by in-decision that's coming before the board and it puts the board in a really tough spot, there are valid concerns on both sides that they have and have presented, and I see with the 3 attorneys who spoke, 3 different positions, I just don't know that we can....What are our procedural options, is it binary or can we decide there is insufficient standing or some other procedural aspect that we can decline, essentially to hear it, and then that can be appealed in of itself, I just don't know if we can get to the substantive issue of whether or not we can determine MDR, I think we could, and it be appeals, I just don't know if I can vote on it.

DK – I agree.

JM – So Jon there are 3 directions the board can go at this point; we continue and look at merits, to ask applicant if he wants to withdraw or we could vote that this should even be heard based on statutory limitations. JM asks Attorney J. Eichman if that is correct.

Eichman – To be clear if board continues you need to be mindful of decision date July 4th to make a decision, unless the applicant asks to extend it, but until that, if you make a decision it will be yes or no, the question of how you decide it could be procedural based on the issues we discussed, do we think that MDR applies or not, those would be reasons for a decision, but I think, the 3 options tonight; 1. continue for further discussion/information, 2. Applicant would agree to withdraw the appeal at this time without prejudice, so it could be brought later. 3. Make a decision, take a vote on the appeal to grant or deny and give reasons for decision.

JM – We have an extension with final decision for **June 4, 2021**.

JM to Flanagan- A withdraw without prejudice is something you feel like your interest in, based on what you have heard at this point, I assume you would want to speak with your clients first, is that something you would want to entertain tonight?

Flanagan – I would not inclined to seek withdrawal, I would have to speak with my clients first, I don't see a reason to.

JM – We have heard from a few board members that we are not ready to decide on this yet, and may need more time to think it through, so I think we are left with at continuance and it being 9pm, going forward, we would give the audience a chance to speak. JM – Asks the Board what they would like to do as far as continuing to next meeting date.

PS – I understand continuing but I am not exactly sure what is further to discuss if we all agree that the building inspector needs to be involved with this. It seems no matter what we do we are vulnerable to an appeal no matter what. I don't think we are in the position to make this decision. I would like to get a realistic schedule of when the Building Inspector might be able to make this decision, because it clearly has not been made yet, at least not in writing.

Angelo (Building Inspector) – Already did.

JM – I don't want to put Angelo on the spot, to Paul's point, if the inspector makes a decision to this prior to a building permit application coming before him, that would be his opinion and it would not be appealable, but at least that point, the project team, and the neighbors would have an understanding of

where he stands on it, that would be a benefit to both groups. That would be up to Angelo, and Jon said he could give him legal counsel, it may be until he gets an application, that is up to Angelo. That doesn't mean he can't look at this and determine that it is maybe more simplified than that, and render an opinion I guess, so my point is that we can either do nothing or we can think about doing something, and I agree this is complicated. We haven't asked many questions yet, it's Section B of MDR, there are 5 sections, a couple may apply, how large is project, is it greater than 30,000 sq. ft., how many vehicles trips per day are generated in the district, and that's it, when it comes to that piece of it, so I guess I am leaning toward a continuance.

SD to Chairman JM, - Can we have audience member's submit correspondence, by drafting a letter to the board, so they don't have to wait.

JM – Yes, they can be submit correspondence in writing to Patty assuming we continue to May 4<sup>th</sup> out next date. I don't want the board to let this matter go one way or another to let the audience speak.

DK – I agree, that is a good idea, saves time to take in questions and concerns.

JM – I see Mr. Steve Sadler has his hands raise, he has been involved in this for some time.

### **Audience**

Steve Saddler, 7 Hillside Drive – I agree the town has to take a pause and think about it, but in terms of the bylaws and way that they are written. What is a general commercial zone? What is it when the board actually grants an educational use permit in a commercial zone, like the CrossFit on Carleton Dr., There are 3 attorneys' here tonight, where do we go with zoning from here?

JM – We need to discuss bylaws as a board, general commercial is one, I am going to defer that discussion to when we pick this up. We need discuss but not the desirability of the project in general, but whether the project as its designed is triggered in MDR. I appreciate your comment, but I don't want to get off track.

JM – At this point it looks like a continuance. Several board members are not inclined to make a decision now. Thoughts from the board.

DK – I think we are asking the B. Inspector to get involved and for him to come forward and make a decision and he only been in town for about 4 weeks or so, he could use time to absorb all of this. I support a continuance.

JM – I would reach out to Angelo; I haven't even met him yet.

DK – I think he needs time, as well as the board.

JM – Do I hear a motion, to continue to our next date, May 4 immediately following business meeting.

JM to Patty is that correct.

P. Pitari – It would be immediately following the continuance for Map 15, Lot 46 Carleton Drive.

JM – S0 at 7pm, business, then Carleton Drive, then the Appeal.

**Motion** by PS seconded by DK to Continue to May 4, 2021, discussion: JM reminds audience if they would like to submit correspondence sent it to Patty Pitari, Ad min for the board; Patty states if we can get the correspondence 2 weeks as usual before next meeting. JM Chairman asks for Roll Call vote for remote participation, GT – Yes, DK – Yes, P. Shilhan – Yes, S. Deane – Yes.  
JM – Yes Motion carried 5-0. At 9:25pm.

*Patty Pitari*  
*Administrative Assistant*

*Approved 5-4-2021 Business Meeting*