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TOWN OF CARLISLE

OFFICE OF Zoning Board of Appeals

66 Westford Street
Carlisle, MA 01741
978-369-5326

Minutes: Board of Appeals, August 3, 2020

Call to Order

The meeting was called to order at 7:30 p.m. Pursuant to the Governor's Executive Order Concerning Open Meetings during the COVID-19 crisis, there was no in-person attendance. Participation was entirely remote utilizing the teleconference application Zoom Meeting.

Roll Call and Declaration of Quorum

Chair Snell recognized the required quorum of Members. Present were Members Travis Snell (Chair), Steven Hinton and Associate Members Eric Adams and Gretchen Anderegg. Member Manuel Crespo (Clerk) joined the meeting at 7:35 pm and Associate Member Lisa Davis Lewis joined at 7:40 pm.

Statement of Compliance

The issue of compliance regarding posting of the hearing was confirmed by the Chair. According to Secretary Wang, the Meeting Notice was posted in Town Hall on July 29, 2020.

Public Comment – Approval of Agenda

Chair Snell asked those present if there were any matters other than those listed on the agenda which the public would like to add to the agenda. When none were offered, the agenda was accepted.

Approval of prior minutes

The Board voted to accept the minutes from July 6, 2020 as amended.

Old Business – Application 2007

Chair Snell reopened the public hearing that was continued on July 6, 2020 for the application of Sylvia Sillers requesting a Variance to build an addition 7 feet from the lot line where 40 feet is required under Section 4.2.1. The property is located within the Residence A District at 49 Concord Street. Present were the Applicant's Engineer Paul Kirchner, Secretary Peggy Wang and members of the public.

Secretary Wang reported that no correspondence was received since the July 6, 2020 hearing.

Applicant's testimony

Engineer Paul Kirchner from Stamski and McNary, Inc. stated that there had been no changes to the plans that were presented at the July 6, 2020 hearing

Board's comments

The Board had no comments.

Public comments

The Chair asked if there was anyone from the public who would like to comment, none was offered.

Deliberations and Decision

The Board determined it appropriate to GRANT the VARIANCE to build a breezeway and barn according to the plans presented. The Board voted 3-0 in favor of the VARIANCE, Snell (aye), Hinton (aye) and Crespo (aye). The decision was based on the standard findings and subject to the standard conditions.

New Business – Application 2011

The Chair opened the public hearing for the application of Sylvia Sillers requesting a Special Permit for the expansion of a non-confirming structure on a non-confirming lot by 13.25% where up to 50% is allowed under Bylaw Section 6.3. The property is located within the Residence A District at 49 Concord Street.

Present were Engineer Paul Kirchner, Secretary Peggy Wang and members of the public. Secretary Wang reported that no correspondence had been received.

Applicant's testimony

Engineer Paul Kirchner, having just appeared before the Board for Application 2007 VAR to build a structure that encroaches into the lot line, explained that application 2001 is to increase the habitable space on a pre-existing non-confirming structure. The existing structure is over 200 years old and was built before the 1932 Zoning Bylaw was amended adding article 6.3. The proposed structure would increase the habitable space by 13.25%.

Board's comments

The Board had no comments.

Public comments

When asked by Chair Snell if there were any comments from the public and when none were offered, the public hearing was closed.

Deliberation and Decision

The Board deliberated the case and determined it appropriate to grant the SPECIAL PERMIT for application 2001 for the construction of a breezeway and barn according to the plans submitted at this hearing. The decision was based on the standard finding and subject to the standard conditions in addition to the following specific findings:

- 1) The total amount of existing habitable space is 2879 square feet, 1690 square feet on the first floor and 1189 square feet on the second floor.
- 2) The proposed structure (the connector) would be an increase of 210 square feet on the first floor and 170 square feet on the second floor, a total of 380 square feet of habitable space.
- 3) Under the 50% expansion rule the maximum build out would be 4319 square feet or allowing for an addition of 1439 square feet of habitable space. Any future expansion must be limited to 1059 square feet of habitable space.

Appeals

The Applicant's representative was advised that the written Decisions would be prepared and signed within fourteen (14) days. A copy of the signed Decisions will be mailed to the Applicant and abutters at which time the twenty (20) day appeal period begins. At the end of the appeal period, if no appeal is filed, the Applicant shall pick up the Decision along with the Town Clerk certified Grant of Variance and Special Permit which must be recorded with the Register of Deeds in Lowell, MA and filed with the Building Commissioner before a building permit can be issued

Application 2009

The Chair opened the public hearing for the application of Barney Arnold, requesting a Special Permit under Section 3.2.2.8.6 for the continued operation of a riding stable and academy. The property is located within the Residence B District at 225 Lowell Street.

Present were the Applicant, Barney Arnold, barn manager Megan Iverson, Secretary Peggy Wang and members of the public. Secretary Wang reported that no correspondence had been received and the Building Commissioner had not received any complaints in the past year regarding the business

Applicant's testimony

The Applicant, Barney Arnold, informed the Board that Megan Iverson, the barn manager and riding instructor, is in the process of establishing a leasing agreement with her. The Applicant asked the Board if Iverson's name should be included on the Special Permit.

Iverson said that the business is operating the same during the COVID crisis, there are currently fourteen (14) horses being boarder with a capacity for sixteen (16) and there has been an increase in riding lessons.

Board's comments and questions

The Board discussed if the bylaw allows an individual's name to be included in the Special Permit who has no property interest or partnership on paper of the business under a lease that doesn't exist today. It was suggested that a simple partnership agreement formed under an LLC could be the solution and advised the Applicant to work with her Attorney and come back to the Zoning Board once the leasing agreement was completed to add Iverson's name to the Special Permit.

The Applicant informed the Board that she would like to renew the Special Permit under the same conditions established in the 2009 decision and return to the Board once the leasing agreement is complete.

Public comments

When Chair Snell asked if there were any comments from the public and none were offered the public hearing was closed.

Deliberations and Decision

The Board deliberated the case and determined it appropriate to grant the SPECIAL PERMIT for application 2009 for the continued operation of a riding stable and academy for a period of two (2) years. The Board voted 3-0 in favor of the SPECIAL PERMIT, Hinton (aye), Snell (aye) and Crespo (aye) with same findings and conditions from the 2019 Decision.

Appeals

The Applicant was advised that the written Decision would be prepared and signed within fourteen (14) days. A copy of the signed Decision will be mailed to the Applicant and abutters at which time the twenty (20) day appeal period begins. At the end of the appeal period, if no appeal is filed, the Applicant shall pick up the Decision along with the Town Clerk certified Grant of Special Permit which must be recorded with the Register of Deeds in Lowell, MA and filed with the Building Commissioner before becoming final.

Application 2010

The Chair opened the public hearing for the application of Kendra Thyne requesting a Special Permit under Section 3.2.2.9 for the continued operation of a pilates business. The property is located within the Residence A District at 46 Concord Street.

Present were the Applicant, Kendra Thyne, Secretary Peggy Wang and members of the public. Secretary Wang reported that no correspondence had been received and the Building Commissioner had not received any complaints in the past year regarding the business.

Applicant's testimony

The Applicant, Kendra Thyne, told the Board that she would like to renew the Special Permit to teach small group classes and that there are no changes in the operation of the business in the past year.

Board's comments

The Board asked if the business is currently operating 100% the same as it was last year. The Applicant said that during the COVID crisis there are fewer classes and that the classes have been mostly private or semi-private sessions with some remote classes. The Board noted that the Special Permit would only deal with in-person classes.

Public comments

When Chair Snell asked if there were any comments from public and when none were offered the public hearing was closed.

Deliberation and Decision

The Board deliberated the case and determined it appropriate to grant the SPECIAL PERMIT for a period of two (2) years. The Board voted 3-0 in favor of the SPECIAL PERMIT, Hinton (aye), Snell (aye) and Crespo (aye) with same findings and conditions from the 2019 Decision.

Appeals

The Applicant was advised that the written Decision would be prepared and signed within fourteen (14) days. A copy of the signed Decision will be mailed to the Applicant and abutters at which time the twenty (20) day appeal period begins. At the end of the appeal period, if no appeal is filed, the Applicant shall pick up the Decision along with the Town Clerk certified Grant of Special Permit which must be recorded with the Register of Deeds in Lowell, MA and filed with the Building Commissioner before becoming final.

Application 2008

The Chair opened the public hearing for the application of John and Jude Fry filing an Appeal of a Decision by the Building Commissioner for the denial of a Zoning Enforcement request under Section 7.4 and 7.6.1. The property is located within the Residence B District at 134 Ember Lane.

Present were the Applicants, John and Jude Fry, the Applicants Attorney Christopher Alphen, Attorney Kevin Smith, Attorney for Linda Rubenstein, business owner Linda Rubenstein, Secretary Peggy Wang and members of the public. Secretary Wang reported that no correspondence had been received.

Documents enter into the record

ZBA_2008_01 Letter from Attorney Alphen regarding the appeal dated June 19, 2020

ZBA_2008_02 Exhibit A Decision BOA 1907 SP date June 17, 2019

ZBA_2008_03 Exhibit B Letter from Attorney Alphen to Jon Metivier, Building Commissioner dated May 7, 2020

ZBA_2008_04 Exhibit C Letter from Jon Metivier to Attorney Alphen dated May 21, 2020

Applicant's testimony

Attorney Christopher Alphen, representing John and Jude Fry of 132 Ember, appeared before the Board to present the administrative appeal of the Building Commissioner's decision. He reviewed the appeal letter that was included with the application and supporting exhibits. Attorney Alphen explained that Carlisle Canines is a commercial use of the property in a residential district and requires a site plan review by the Building Commissioner. He noted that in the 2019 decision (ZBA_2008_02) a condition was included to install screening on the fence which would imply a commercial use. Attorney Alphen spoke about the parking, noise, invalid pre-existing use and that the accessory use is not allowed.

Jude Fry addressed the Board regarding the condition in the 2019 Special Permit that required audio and video recording by Carlisle Canines. She said these recordings are a violation of their privacy and that she and her family have a right to be left alone. Mrs. Fry denied the claim by Linda Rubenstein that the Fry's use a dog whistle to make the dogs bark.

John Fry told the Board that his property is the most affected by Carlisle Canines and complained about the video recording of his home by Linda Rubenstein. He added his home is not the only one on Ember Lane being captured by the cameras that are used to report to the Zoning Board of Appeals. Mr. Fry spoke about his concern for the invasion of his privacy. He proposed a simple solution that the screening on the fence conditioned in the 2019 decision be installed.

Board's comments

The Board discussed the need to think through the implications of the 2019 decision and determined it would be appropriate to consult with Town Counsel before ruling on the appeal. They discussed a possible continuance of the public hearing.

Public comments

Kevin Smith, Attorney for Linda Rubenstein, said that the use of residential property for kennel is permitted under the Town's bylaws and the 2019 decision was heavily regulated. The question before the Board now is did the Building Commissioner properly interpret the bylaw.

RJ Mathew, 120 Sunset Ln, spoke about the need for neighbors to live together peacefully.

Continuance

Chair Snell moved to continue the public hearing to the next Board meeting. All voted in favor of the motion, Snell (aye), Hinton (aye), Crespo (aye), Anderegg (aye), Adams (aye) and Davis Lewis (aye).

Adjournment

Chair Snell asked those present if there were any additional issues to discuss. When none were offered the meeting adjourned at 8:46 pm.

Respectfully submitted
Peggy Wang

BLATMAN, BOBROWSKI & HAVERTY, LLC

ATTORNEYS AT LAW

ZBA-2008-01

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CONCORD, MA 01742
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CHRISTOPHER J. ALPHEN, ESQ.
Chris@bbhlaw.net

June 19, 2020

The Town of Carlisle
Town Clerk's Office
Zoning Board of Appeals
66 Westford Street
Carlisle, MA 01741

**RE: Administrative Appeal
134 Ember Lane, Carlisle**

Dear Members of the Board:

This office represents John J. Fry and Jude A. Fry of 132 Ember Lane, Carlisle, Massachusetts (the "Appellants") regarding their Administrative Appeal Application pursuant to Section 7.4 of the Carlisle Zoning Bylaws (the "Bylaws") and G.L. ch. 40A, §15 concerning the operation of a commercial kennel at 134 Ember Lane, Carlisle, Massachusetts (Parcel 32, Map 27, Lot 0) (the "Subject Property"). The Appellants respectfully request this memorandum supplement their application.

The use of the Subject Property as a commercial kennel was approved by this Board by a special permit decision filed with the Carlisle Town Clerk on June 17, 2019 (the "Decision").¹ A copy of the Decision is attached hereto as Exhibit A. The Decision granted Linda Rubenstein D/B/A Carlisle Canines (the "Property Owner") a special permit under Section 3.2.2.7 to operate a commercial kennel.

Pursuant to G.L. ch. 40A, §7, the Appellants requested a determination from the Building Commissioner (the "Commissioner") that the use permitted by the Decision required site plan approval from the Carlisle Planning Board pursuant to Section 7.6 of the Bylaws. The Appellants' Zoning Enforcement Request is attached hereto as Exhibit B.

By a letter dated May 21, 2020, the Commissioner denied the Appellant's request for Zoning Enforcement. The Commissioner's decision is attached hereto as Exhibit C. The Commissioner determined that the use does not require site plan review under §§7.6.1.2-7.6.1.3 because the principal use of the Subject Property is residential. The Commissioner essentially reasoned that use permitted by the Decision is an accessory use and therefore site plan review was not required. The Appellants disagree.

¹ The ZBA Decision was appealed by the Frys and other neighbors pursuant to G.L. ch. 40A, §17 initiating *John J. Fry, et al v. Town of Carlisle Zoning Board of Appeals, et al.* (Superior Court Case No.: 1981 CV 0190).

The use permitted by the Decision is a commercial use. Section 7.6 of the Bylaws provide when a use or construction requires site plan approval. Section 7.6 states, in pertinent part:

“For the purpose of administering the provisions of the bylaw relating to nonresidential and certain other uses in all districts, not including... accessory uses permitted in General Residence Districts under Section 3.2.1.11 of these bylaws, and to ensure the most advantageous use of all properties within the same district and for the reasonable protection of the legitimate interests of adjoining property owners, site plan approval shall be required prior to the: ...

7.6.1.1 Construction of a new building or structure, the principal use of which is non-residential;

7.6.1.2 Construction of an addition to or alteration of any existing building, the principal use of which is non-residential;

7.6.1.3 Establishment of a principal non-residential use in an existing building not theretofore used for such purposes;

7.6.1.4 Establishment of a more intensive non-residential use on the site of a previous non-residential use, including, but not limited to, the establishment of or alteration to any parking, loading or vehicular access, or the increase in number of employees at the site or proposed pedestrian traffic to and from the site;

7.6.1.5 Construction of a new building or structure, or an addition or alteration of any existing building or structure, for use as multifamily housing; or

7.6.1.6 Construction or alteration of a municipal parking, cultural, recreational, water supply or protective use pursuant to this Section 7.6 in addition to any special permits or other approvals required under these bylaws.

7.6.1.7 Construction, installation or modification of an Accessory Ground Mounted Solar Photovoltaic Facility as allowed under Section 5.8.5.”

The Commissioner in his denial seemingly determined that the use is an accessory use and therefore is exempt from the aforesaid site plan review provision. But Section 7.6 specifically delineates the uses exempt from site plan approval. See Section 7.6 “...not including a senior residential open space community... under Section 5.7... personal wireless communication facilities... under Section 5.9... accessory apartments... under Section 5.6... intermediate ground-mounted solar voltaic facilities... under Section 5.8.6 ... a residential open space community... under Section 5.12... and accessory uses permitted in General Residence Districts under Section 3.2.1.11 of these bylaws...”. A commercial kennel does not fall under one of these exemptions. Specifically, a commercial kennel is not an accessory use permitted in the General Residence District under Section 3.2.1.11. A commercial kennel is in fact a use permitted by a special permit pursuant to Section 3.2.2.7.

Having determined the use is not exempt from site plan review provision under Section 7.6, the use permitted by the Decision falls under at least one of the categories which requires site plan approval.

7.6.1.2 Construction of an addition to or alteration of any existing building, the principal use of which is non-residential

The Decision requires that screening be installed to enclose the backyard area where the dogs will roam. See Condition #6 of the Decision attached hereto as Exhibit A. For a dog kennel, the construction of fencing to enclose the animals is an essential component of the commercial operation. The construction of the fencing for the purposes of screening and enclosing the commercial use is an alteration of the existing

structure for a non-residential use. Therefore, said construction and installation of screening requires site plan approval from the Planning Board pursuant to Section 7.6 of the Bylaws.

The Commissioner in his denial opines that the use permitted by the Decisions is an accessory and not a principal use and therefore Section 7.6.1.2 does not apply. Again, the use permitted by the Decision is a use permitted by special permit and not an allowed accessory use as specifically defined in Section 3.2.1.11. The fact the Property Owner also uses the Subject Property for a residential use does not exempt her from the requirements of site plan approval.

Even if the special permit could grant the use as an accessory use, the use permitted by the Decision does not meet the definition of "accessory use" under the Bylaws. The Bylaws define accessory use as "a subordinate use of a building, structure or land customarily incidental to, and located on, the same premises with the principal building, structure or use and which does not constitute, in effect, conversion of the main use of the premises to one not permitted." See Section 1.3.7.

The Decision permits a commercial use not otherwise allowed in the Zoning District. The Decision permits the business to care for up to ten dogs. It permits the commercial operation from 8:00am to 8:00pm. The Decision promulgates drop-off and pick-up procedures and screening. A commercial dog kennel is not "customarily incidental to" the residential use.

7.6.1.3 Establishment of a principal non-residential use in an existing building not theretofore used for such purposes;

The Decision permits the use of the subject property as a commercial kennel. As discussed, the use permitted by the Decision is not an accessory use. The use permitted by the Decision is a principal non-residential use in an existing building not theretofore used for such purpose. As discussed below, any non-residential use prior to the Decision was an illegal use and cannot be considered. The Decision permits the Property Owner to care for up to ten dogs between the hours of 8:00am and 8:00pm. Accordingly, the Property Owner is required to obtain site plan approval pursuant to Section 7.6 of the Bylaws.

7.6.1.4 Establishment of a more intensive non-residential use on the site of a previous non-residential use, including, but not limited to, the establishment of or alteration to any parking, loading or vehicular access, or the increase in number of employees at the site or proposed pedestrian traffic to and from the site;

The Building Commissioner in his decision determined that Section 7.6.1.4 does not apply because the commercial kennel was established as an accessory use prior to the Decision. The Commissioner reasoned that Decision does not increase the intensity of the use because it only places conditions on an existing accessory use. This analysis is flawed.

This Board or the Building Commissioner have never made a finding that the commercial kennel use was a legal pre-existing nonconforming use pursuant to G.L. ch. 40A, §6 and Section 6.1 of the Bylaws.² In fact

² The Landowner has the burden of showing that they are entitled to the protection of G.L. c. 40A, §6. See *Hall v. Zoning Ed of Appeals of Edgartown*, 28 Mass.App.Ct. 249, 549 N.E.2d 433 (1990). See *Cape Resort Hotels, Inc. v. Alcoholic Licensing Ed. of Falmouth*, 385 Mass. 205, 223 n.11, 431 N.E.2d 213, 223, n.11 (1982), appeal after remand 388 Mass. 1013, 446 N.E.2d 1070 (1983), and cases cited.

the contrary was found when the Building Commissioner determined the use required a special permit. Accordingly, any prior use of a commercial kennel on the Subject Property was an illegal use. This prior illegal use cannot be considered by the Board.

The use that must be considered by the Board is the use permitted only by the Decision. Any prior illegal use is irrelevant. The use permitted by the Decision is a more intensive non-residential use and requires site plan approval pursuant to Section 7.6 of the Bylaws.

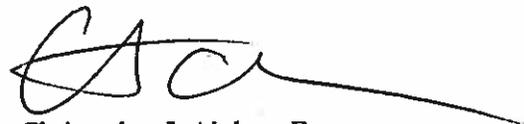
Conclusion

The purpose of site plan review is to establish criteria for the layout, scale, appearance, safety and environmental impacts of a commercial use. The Supreme Judicial Court defined its understanding of site plan review as "regulation of a use rather than its prohibition... contemplating primarily the imposition for the public protection of reasonable terms and conditions." *Y.D. Dugout v. Bd. of Appeals of Canton*, 357 Mass. 25, 31 (1970).

The use was permitted by the special permit Decision and now the use requires site plan approval. It is the position of the Appellants that the Building Commissioner's Decision should be reversed and the Property Owner should be ordered to cease the commercial activity until a site plan has been submitted and approved by the Planning Board as provided in Section 7.6. See Section 7.6.2 of the Bylaws.

Should you require additional information please do not hesitate to call me.

Very truly yours,

A handwritten signature in black ink, appearing to read "C. Alphen", with a long horizontal line extending to the right.

Christopher J. Alphen, Esq.

cc:

Kevin Smith, Esq.

ZBA-2008-02

EXHIBIT A

ZBA-2008-02



<http://carlislema.gov>

TOWN OF CARLISLE

**OFFICE OF
Zoning Board of Appeals**

**66 Westford Street
Carlisle, MA 01741
978-369-5326**

Attached is a copy of the decision related to:

**Linda Rubenstein
134 Ember Lane
Carlisle, MA 01741**

issued by the Zoning Board of Appeals on June 17, 2019.

The said Zoning Board of Appeals certifies that the decision attached hereto is a correct copy of its decision to grant a **SPECIAL PERMIT**, and that copies of said decision, and of all plans referred to in this decision, have been filed with the Town Clerk.

Appeal: An Appeal from this Decision made by aggrieved party shall be made pursuant to Massachusetts General Law Chapter 40A, section 17 and shall be filed within twenty (20) days of filing the Decision in the Office of the Town Clerk.

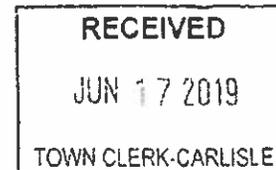
Manuel Crespo, Clerk
Carlisle Zoning Board of Appeals



<http://carlislema.gov>

TOWN OF CARLISLE
OFFICE OF
Zoning Board of Appeals

66 Westford Street
Carlisle, MA 01741
978-369-5326



Record of Proceeding and Notice of Decision
Petition BOA 1907 SP

Name and Address of Applicant:

Linda Rubenstein
DBA Carlisle Canines
134 Ember Lane
Carlisle, MA 01741

Identity of Land Affected:

Street Address: 134 Ember Lane
Parcel 32, Map 27, Lot 0

Action Sought: Requesting a Special Permit under bylaw 3.2.2.7 to operate a commercial kennel. The property is located within the Residence B District at 134 Ember Lane.

Notice: Notice of a hearing to be held at 7:30 pm Monday May 6, 2019 at the Town Hall, 66 Westford Street, was published in the Mosquito (a newspaper published in Carlisle, MA) on April 19, 2019 and April 26, 2019. On April 19, 2019 notices were mailed via certified mail to the petitioner, abutters and owners of land within 300 feet of the property in accordance with Massachusetts General Law Chapter 40A, Section 11. These parties were certified by the Town Assessor. Notice of the meeting was posted at Town Hall on April 29, 2019.

Hearing: The Board of Appeals held a hearing at the time and place set forth in the notice. Board Members Travis Snell (Chair), Manuel Crespo (Clerk). Steven Hinton and Associate Members Lisa Davis Lewis, Eric Adams and Gretchen Anderegg were present. Also present were the Applicant, Secretary Peggy Wang, Mosquito reporter Helen Lyons and members of the public.

Documents entered into the record at the May 6, 2019 hearing:

- 1907_01 Letter of support from Kelly Doyle, Concord resident and a client
- 1907_02 Letter of support from Keith Therrien, an abutter at 128 Ember Lane
- 1907_03 Letter of support from Peggy Greenough, Concord resident and a client
- 1907_04 Letter of support from Bonnie and Peter Krims, Concord residents and clients
- 1907_05 Letter of support from Kathie DeRoche, Concord resident and a client
- 1907_06 Letter of support from Christine Zinke, Westford resident and a client
- 1907_07 Letter of support from Stefani Keene, an abutter at 123 Ember Lane
- 1907_08 Letter of support from Lindsey Parkers, Concord resident and a client
- 1907_09 Letter of support from Liz Paley, Concord resident and a client
- 1907_10 Letter of concern from Attorney Mitali Biswas, representing abutters
- 1907_11 Letter of support from Stan Durlacher, Carlisle resident at 933 Concord Street
- 1907_12 Letter of support from Krista Stengrevics, Carlisle resident at 1184 Westford Street
- 1907_13 Letter from the Applicant's Attorney Kevin Smith detailing reason why Special Permit should be granted
- 1907_14 Letter of support from Jennifer Silversone, Carlisle resident at 121 Carriage Way
- 1907_15 Letter of support from Anne Wilke, Lexington resident and a client
- 1907_16 Letter from the Applicant regarding noise
- 1907_17 Letter of support from Lori and Sean Monahan, Concord residents and clients
- 1907_18 Letter from Carlisle Rubbish regarding waste pick schedule

- 1907_19 Letter of support from Debby Merz, Carlisle resident at 168 Bingham Road
- 1907_20 Letter of support from Laura Baliestiero, Carlisle resident at 153 Log Hill Road
- 1907_21 Letter from the Applicant regarding the business
- 1907_22 Letter from Carlisle Police Chief regarding lack of noise complaints
- 1907_23 Letter from Carlisle Building Commissioner stating there have been no complaints in 15 years
- 1907_24 Letter with spread sheets from the Applicant with dog, street and tail activity since the April 1, 2019 hearing
- 1907_25 Letter from the Applicant in response to the neighbors' petition
- 1907_26 Letter from the Applicant with aerial view of property
- 1907_27 Letter of support from William Smith, Carlisle resident at 137 Bingham Road
- 1907_28 Letter from the Applicant with video of her dog
- 1907_29 Letter from the Applicant with video of the dogs watching children
- 1907_30 Letter from the Applicant with video of the dogs at play
- 1907_31 Letter from the Applicant with video of the dogs watching people on the adjacent trail
- 1907_32 Letter from the Applicant with video of the dogs watching horses on the adjacent trail
- 1907_33 Letter from the Applicant with video of the dogs watching a runner on the adjacent trail
- 1907_34 Letter from the Applicant with video of the dogs watching a carpenter working on the deck
- 1907_35 Letter from the Applicant with video of the dogs watching the neighbors
- 1907_36 Letter from the Applicant with video of noise from abutter at 161 Ember Lane
- 1907_37 Letter from the Applicant with video of dogs' reaction to a UPS truck
- 1907_38 Letter from the Applicant with video of her dog playing
- 1907_39 Letter from the Applicant with video of children playing in front of the house
- 1907_40 Letter from the Applicant with video of dogs' reaction to a bobcat operating in the backyard
- 1907_41 Letter from the Applicant with video of a client leaving
- 1907_42 Letter from the Applicant with information regarding the business
- 1907_43 Letter from the Applicant with picture of Morse trail
- 1907_44 Letter from the Applicant in response to abutters' statement
- 1907_45 Letter of support from Barbara Ruskin, Watertown resident and a client
- 1907_46 Letter of support from Alys Scott, Concord resident and a client
- 1907_47 Letter from the Applicant with picture of the backyard
- 1907_48 Letter of support from Chris Worthy, Marlborough resident and a client
- 1907_49 Statement by the Applicant read at the hearing

Applicant's testimony: The Applicant, Linda Rubenstein, read a prepared statement (1907_49) with details regarding the operation of the business and the relationship with the abutters. The Applicant added that she is requesting to continue the operation the dog daycare business as she has for the past 15 years with up to 12 dogs.

Board's comments and questions: When the Board asked about parking for the dropping off and picking up of dogs, the Applicant explained that clients always pull in to the driveway, never park on the street. She arranges with the clients to stagger their drop off and pick up times to avoid issues in the driveway. The Board inquired about the website section "Meet the staff". The Applicant stated that there are no paid employees and that the "staff" is her son and two other people who live in the house. Regarding the number of dogs present on the average day, the Applicant said that up to 12 dogs have been present but only at vacation time and holidays. She could not provide an average number of dogs currently coming to her home per day because according to her it varies.

The Board asked about waste pick up and signage. The Applicant said that waste is picked up 3 times a day and removed weekly by Carlisle Rubbish (1907_18) adding that there is no signage.

The Board reviewed with the Applicant the spread sheets submitted (1907_24) that provide the data regarding the traffic on Ember Lane, the length of time the dogs bark and the number of dogs present per day.

Public comments: Attorney Mitali Biswas, representing a group of abutters, distributed to the Board a letter of concern (1907_10). She noted that the Applicant must meet the traffic, noise and safety concerns of the abutters. Her clients have observed that the Applicant is operating a major business in a residential district. The Attorney spoke about a video that was sent to the Board that indicated dogs barking day and night up to one hour at a time. She explained that the abutters

purchased their property to live in a rural setting and any type of barrier proposed would take away from the character of the neighborhood.

Chair Snell asked if the abutters have been hearing barking for over an hour. Abutter John Fry, 132 Ember Lane, said that today he heard barking for an hour while he was working from home. Jude Fry, 132 Ember Lane, confirmed that there was barking for one hour today. Mr. Fry said that the barking could be heard in his house when the windows were closed. He noted that he was not aware the Applicant was operating a business out of her home until he received the public hearing notice. Mr. Fry expressed concern that the Applicant intends to "ramp up" the business noting that as the business revenues increase, the abutters bare the impact.

Neelam Sihag, an abutter at 163 Ember Lane, complained about the barking and traffic. David Casebier, an abutter at 161 Ember Lane, questioned the Applicant's ability to manage the dogs' barking include her own dog Sunny. Robert Morgan, an abutter at 157 Ember Lane, noted that there have been 2 traffic accidents in the past 10 years and that the Applicant's tenants park on the street to accommodate the businesses clients' use of the driveway.

Keith Therrien, an abutter at 128 Ember Lane, said that he has never heard dogs barking for one hour and told the Board that he supports a 12 dog limit. Stefani Keene, an abutter at 123 Ember Lane, said she had not seen traffic impact while waiting for the school bus with her 5 children.

Lisa Earic, 63 Old East Road, as a client, spoke in favor of the business. Dr. Charles Bradley, 296 Fiske Street, spoke in favor of the business. Stan Durlacher, 922 Concord Street, said that has not witnessed long periods of barking when during the time he works at the house. Heather Keefe, 251 Stearns Street, as a client, spoke in favor of the business.

Board's response to public comments: The Board asked the opposing abutters if there were any conditions under which the abutters would support a decision to grant the Special Permit. Abutter at 161 Ember Lane David Casebier said no. He said that the Town would not be able to enforce any conditions included in a Special Permit.

Chair Snell noted that the Board had heard plenty of public comments but did not want to close the public hearing at this point in case additional information from the Applicant would be required. The Board discussed the testimony of the Applicant and those present. Each Member spoke about their site visit to Applicant's property and abutters' property.

Regarding the issues of noise from barking, it was noted that the Applicant's dog was the main source of long lengths and frequency of barking. It was noted that if the Special Permit were denied the Applicant's dog would continue to be there. The Board discussed the impact of the property's topography and lack of acoustical fencing has on the sound traveling to the abutter's home.

The Board spoke about the need for a plan that addresses the topic discussed at the hearing and determined that a Business Operation Plan from the Applicant that addresses the following was required:

- 1) Number of dogs allowed at any time including the Applicant's dog
- 2) Driveway parking
- 3) Limited hours the dogs can be outside
- 4) Employees – formal statement that the Applicant is the sole employee
- 5) Definition of an employee
- 6) Record keeping – number of drop off and pick up, number of dogs per day
- 7) All parking off street
- 8) Inspections – Town requirements
- 9) Screening - visual and acoustical
- 10) Staggered pick up and drop off times
- 11) Limit on turn-over per a day
- 12) Total number of dogs per month

Continuance: The Applicant requested a continuance until the next Board meeting to allow time to prepare a Business Operation Plan. The public hearing was continued until June 3, 2019.

Reopen public hearing: On June 3, 2019 the Board of Appeals reopened the public hearing continued on May 6, 2019. Present were Board Members Travis Snell (Chair), Manuel Crespo (Clerk), Steven Hinton and Associate Members Lisa Davis Lewis and Eric Adams. Also present were the Applicant, Mosquito reporter Mark Brittle, Secretary Peggy Wang and members of the public.

Documents entered into the record at the June 3, 2019 hearing:

1907_50 Letter from Applicant with updates and questions
1907_51 Carlisle Canines Business Operating Plan
1907_52 Letter from Amica regarding replacement of damaged fence
1907_53 Letter of concern from abutters John and Jude Fry and Robert and Leslie Morgan
1907_54 Applicant's Policies and Procedures for the business
1907_55 Report for May 2019 of dog activity and barking from the Applicant
1907_56 Letter read by Applicant at June 3, 2019 public hearing

Applicant's testimony: The Applicant read a prepared statement (1907_56). In her statement the Applicant noted that she is willing to reduce the number of dogs allowed, put up cameras and decibel readers to be used by the Board to monitor compliance and install screening. She talked about the success of the anti-bark collar being used on her dog Sunny. The Applicant stated that she wants to operate the Business as a good neighbor.

Board's comments: Regarding the Operating Business Plan the Board asked if the dogs are left alone during the day. The Applicant responded that the dogs are left alone for an hour or so but always inside the house. The Board reviewed possible noise screen options with the Applicant that were suggested in the letter from abutter John Fry (1907_56) and other products that are available.

When the Board asked the Applicant about the anti-bark collar she said it has been in use since the day after the May 6, 2019 hearing but she explained it is only on when other client-dogs are in the house, never when Sunny is the only dog present.

Public comments: Abutter at 132 Ember Lane, Jude Fry, expressed concern that the Board is not addressing the noise issue to her satisfaction. Today while outside she could hear barking from noon to 1:00 pm.

Abutter Neelam Sihag at 163 Ember Lane said that she could hear barking even when her windows were closed. David Cascbier, abutter at 161 Ember Lane expressed concern that the Applicant is making minimal effort to provide a sound barrier and added that there is not a long-term plan for the business.

Abutter at 128 Ember Lane, Keith Therrien, spoke in favor of the application and noted that the anti-bark collar is working well. Deb Kablosky of 55 Lowell Road and Gail Macleod of 239 Lowell Street spoke in favor of the business. John Bakewell of 290 Rutland Street spoke about the success of Town's 15 minute barking law. Charles Bradley of 296 Fiske Road spoke in favor of the business and reminded the Board that there is Town bylaw that allows for Commercial Kennels in residential districts.

Board's response to public comments: Chair Snell noted that the Board wants to balance the rights of a small business to operate and the noise concerns of the abutters when considering the application. In this case, there is a 15 year history of use by the Applicant and there have been no complaints during that period. Chair Snell said there has never been a Special Permit to operate a non-medically related Commercial Kennel in the Town of Carlisle.

The Board discussed the need to develop a method of monitoring the noise and traffic. It was noted that there are several economical and sophisticated devices available that would provide time and date stamped information which the Applicant could install. The data could be made available to the Board for periodic review. Agreeing to this type of self-monitoring would show a good faith effort on the part of the Applicant.

Closing of public hearing: When no additional comments from the public were offered, the public hearing closed.

Deliberations and Decision: During deliberations Board noted that the issue of traffic could be managed by a staggered drop-off and pick-up schedule. In addition, any septic, smell and fly concerns have been eliminated with the current procedure of picking up waste 3 times a day and removal by a professional service. The noise factor and number of dogs requires a comprehensive plan and conditions.

After deliberating the Board determined it appropriate to grant the SPECIAL PERMIT. At the June 3, 2019 meeting, the Zoning Board of Appeals voted 3-0 in favor of the SPECIAL PERMIT, Hinton (aye), Snell (aye) and Crespo (aye) with the following findings and conditions:

The decision was based on the following findings

- 1) A Special Permit is necessary to operate a business in the Residence B District under the terms of Zoning Bylaw Section 3.2.2.7.
- 2) The plans presented at the hearing are not detrimental to the neighborhood.
- 3) There were 2 letters of support was received from abutters. There were 2 abutters present at the hearings who spoke in favor of the application. There were 6 letters of support from Carlisle residents who are client and 12 letters of support from client who do not reside in Carlisle.
- 4) There were 3 letters of concern representing 6 abutters received. There were 5 abutters who were present and spoke against the application at the hearings.

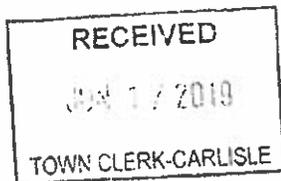
The decision is subject to the following conditions:

- 1) The business shall operate according to the Plan of Record (1907_51) subject to the modifications discussed at the June 3, 2019 public hearing.
- 2) The maximum number of dogs allowed shall be ten (10) at any one time and any day that maximum number to include all dogs owned by the business operator.
- 3) No dogs shall be dropped off before 8:00 am or picked up after 8:00 pm. Staggered drop-off and pickups need to be scheduled at interval with at least 15 minutes between each other.
- 4) The Applicant shall make every effort to mitigate noise 365 days of the year.
- 5) The Applicant shall install a decibel meter to measure the sound intensity and duration of any barking and camera with numeric tabulators, each operating 365 days of the year. Data shall be retained for a period of no less than 3 months. If deleted in less than 3 months it will be considered a serious violation of the conditions.
- 6) The Applicant shall present a detailed plan to be approved by the Board that addresses screening which balances cost with neighbors' concerns for noise reduction and a visual barrier at the next Board meeting on July 1, 2019.
- 7) This Special Permit is granted to Linda Rubenstein DBA Carlisle Canines only and cannot be transferred to any person(s) through sale or assign.
- 8) The business will not operate as a nuisance
- 9) The permit is granted for a period of one (1) year to expire on June 3, 2020.
- 10) In 6 months, there shall be a review of Applicant's compliance to the conditions.
- 11) This Decision does not relieve the Petitioner of complying with all other applicable federal, state, or local statutes, ordinances or bylaws and/or regulations.
- 12) Violations of any conditions contained herein or failure to comply with the Special Permit shall subject the Applicant a zoning enforcement action in accordance with the remedies set forth in G.L.c.40A.

Certification of Filing: It is hereby certified that copies of this Decision have been filed with the Planning Board and the Town Clerk of Carlisle.

Appeal: An Appeal from this Decision made by any aggrieved party shall be made pursuant to Massachusetts General Law Chapter 40A, Section 17 and shall be filed within twenty (20) days of filing of this Decision in the Office of the Town Clerk. Per Massachusetts General Law, Chapter 40A, Section 11, this decision shall not take effect until the Town Clerk certifies that the Decision has not been appealed after the twenty (20) day appeal period, AND that a certified copy of the Decision has been recorded at the MIDDLESEX NORTH REGISTRY OF DEEDS. A copy of the recorded Decision shall be filed with the Building Department before becoming final.

ISSUED AND CERTIFIED this 17th day June, 2019



Manuel Crespo

 Manuel Crespo

Steven W. Hinton

 Steven W. Hinton

Travis J. Snell

 Travis J. Snell

Cc. Applicant Board of Selectmen Board of Health Planning Board Town Clerk
 Abutters within 300 feet Assessor Building Commissioner Conservation Commissioner

ZBA-2008-03

EXHIBIT B

BLATMAN, BOBROWSKI & HAVERTY, LLC
ATTORNEYS AT LAW

2BA-2008-03

9 DAMONMILL SQUARE, SUITE 4A4
CONCORD, MA 01742
PHONE 978.371.2226
FAX 978.371.2296

CHRISTOPHER J. ALPHEN, ESQ.
Chris@bbhlaw.net

May 7, 2020

Via Certified Mail and Email

Jon Metivier, Building Commissioner
66 Westford Street
Carlisle, MA 01741
jmetivier@carlislema.gov

**RE: Request for Enforcement
134 Ember Lane**

Dear Mr. Metivier:

This office represents John J. Fry and Jude A. Fry of 132 Ember Lane, Carlisle, Massachusetts (the "Frys"), with regard to certain zoning violations alleged to have occurred in the operation of a commercial kennel located at 134 Ember Lane, Carlisle, Massachusetts. The Frys are direct abutters to the subject property and are "aggrieved persons" as that term is used by the Zoning Act.

Pursuant to Mass. Gen. L. ch. 40A, s. 7, I hereby request that you determine that the commercial use at 134 Ember requires site plan approval from the Carlisle Planning Board pursuant to Section 7.6 of the Carlisle Zoning Bylaws (the "Bylaws"). The commercial kennel use was approved by a special permit decision from the Zoning Board of Appeal filed with the Carlisle Town Clerk on June 17, 2019 (the "ZBA Decision").¹ A copy of the decision is attached for your convenience.

As reason for their allegation, the Frys state that the use at 134 Ember Lane is a change from a residential use to a commercial use. Section 7.6 of the Bylaws provide when a use or construction requires site plan approval. Section 7.6 states, in pertinent part:

"For the purpose of administering the provisions of the bylaw relating to nonresidential and certain other uses in all districts, not including... accessory uses permitted in General Residence Districts under Section 3.2.1.11 of these bylaws, and to ensure the most advantageous use of all properties within the same district and for the reasonable protection of the legitimate interests of adjoining property owners, site plan approval shall be required prior to the: ...

7.6.1.1 Construction of a new building or structure, the principal use of which is non-residential;

¹ The ZBA Decision was appealed by the Frys and other neighbors pursuant to G.L. ch. 40A, 17 initiating *John J. Fry, et al v. Town of Carlisle Zoning Board of Appeals, et al.* (Superior Court Case No.: 1981 CV 0190).

7.6.1.2 Construction of an addition to or alteration of any existing building, the principal use of which is non-residential;

7.6.1.3 Establishment of a principal non-residential use in an existing building not theretofore used for such purposes;

7.6.1.4 Establishment of a more intensive non-residential use on the site of a previous non-residential use, including, but not limited to, the establishment of or alteration to any parking, loading or vehicular access, or the increase in number of employees at the site or proposed pedestrian traffic to and from the site;

7.6.1.5 Construction of a new building or structure, or an addition or alteration of any existing building or structure, for use as multifamily housing; or

7.6.1.6 Construction or alteration of a municipal parking, cultural, recreational, water supply or protective use pursuant to this Section 7.6 in addition to any special permits or other approvals required under these bylaws.

7.6.1.7 Construction, installation or modification of an Accessory Ground Mounted Solar Photovoltaic Facility as allowed under Section 5.8.5.”

The action permitted by the ZBA Decision falls under at least one of the above categories requiring site plan approval under Section 7.6.

7.6.1.2 Construction of an addition to or alteration of any existing building, the principal use of which is non-residential

The ZBA Decision requires that screening be installed to enclose the backyard area where the dogs will roam. See Condition #6 of the ZBA Decision. For a dog kennel, the construction of fencing to enclose the animals is an essential component of the commercial operation. The construction of the fencing for the purposes of screening and enclosing the commercial use is an alteration of the existing structure for a non-residential use. Therefore, said construction and installation of screening requires site plan approval from the Planning Board pursuant to Section 7.6 of the Bylaws.

7.6.1.3 Establishment of a principal non-residential use in an existing building not theretofore used for such purposes;

The ZBA Decision permits the principal use of the subject property as a commercial kennel. Section 7.6 specifically excludes accessory uses permitted by Section 3.2.1.11 from the requirement to obtain site plan approval. A commercial kennel is not an accessory use permitted by Section 3.2.1.11. A commercial kennel is permitted by a special permit under Section 3.2.2.7, which the landowner has obtained. The use permitted by the ZBA Decision is a principal non-residential use in an existing building not theretofore used for such purpose. Accordingly, the landowner is also required to obtain site plan approval pursuant to Section 7.6 of the Bylaws.

7.6.1.4 Establishment of a more intensive non-residential use on the site of a previous non-residential use, including, but not limited to, the establishment of or alteration to any parking, loading or vehicular access, or the increase in number of employees at the site or proposed pedestrian traffic to and from the site;

If it is determined that a commercial use was previously established at the subject property prior to the ZBA Decision, the use permitted by ZBA Decision is surely a more intensive non-residential use and still would require site plan approval pursuant to Section 7.6 of the Bylaws.

The use permitted by the ZBA Decision requires site plan approval. It is the position of the Frys that the landowner should be ordered to cease the commercial activity until a site plan has been submitted and approved by the Planning Board as provided in Section 7.6. See Section 7.6.2 of the Bylaws.

Please respond within the fourteen days specified by Mass. Gen. L. ch. 40A, s. 7.

Should you require additional information please do not hesitate to call me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'C. Alphen', with a long horizontal flourish extending to the right.

Christopher J. Alphen, Esq.

cc:

Kevin Smith, Esq.

ZBA-2008-04

EXHIBIT C

2BA-2008-04



Town of Carlisle
MASSACHUSETTS

Office of

BUILDING COMMISSIONER

Telephone: 978-369-6689

Fax: 978-318-0098



66 Westford Street
Carlisle, MA 01741

May 21, 2020

Christopher J. Alphen, Esq.
Blatman, Bobrowski & Haverty, LLC
9 Damonmill Square, Suite 4A4
Concord, MA 01742

RE: Request for Enforcement, 134 Ember Lane

Dear Mr. Alphen:

I am in receipt of your letter dated May 7, 2020, requesting zoning enforcement, pursuant to *M.G.L. c. 40A, §7*, at 134 Ember Lane, Carlisle, Massachusetts (the "Property"). Specifically, you request an order that the owner of the Property cease commercial activity until a site plan has been submitted and approved by the Planning Board pursuant to §7.6 of the Town of Carlisle Zoning Bylaws. I have reviewed your letter, and for the reasons discussed below determine that no zoning enforcement action is appropriate at this time.

In your letter you allege that pursuant to the June 2019 decision of the Carlisle Zoning Board of Appeals (the "Decision") granting a special permit to allow a commercial kennel at the Property, the use at the Property has changed from a residential use to a commercial use. You further allege that this change requires site plan review under § 7.6 of the Zoning Bylaws. The relevant portions of § 7.6.1 provide that site plan review is required prior to the following:

- 7.6.1.2 Construction of an addition to or alteration of any existing building, the principal use of which is non-residential;
- 7.6.1.3 Establishment of a principal non-residential use in an existing building not theretofore used for such purposes;
- 7.6.1.4 Establishment of a more intensive non-residential use on the site of a previous non-residential use, including, but not limited to, the establishment of or alteration to any parking, loading or vehicular access, or the increase in number of employees at the site or proposed pedestrian traffic to and from the site...

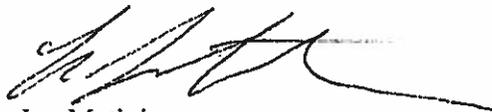
You argue that site plan review is required under §§7.6.1.2-7.6.1.3 because (1) screening required by the Decision constitutes an alteration of the existing structure for a non-residential use and (2) the Decision establishes a new principal, non-residential use at the Property. It is my determination that site plan review is not required under §§7.6.1.2-7.6.1.3 because the principal

use of the property is residential. Site plan review is not mandated by the Zoning Bylaws in the case of accessory uses, such as the kennel permitted by special permit at the Property.

You alternatively argue that the Decision establishes a more intensive non-residential use at the Property which requires site plan review pursuant to §7.6.1.4. It is my determination that the commercial kennel was established as an accessory use prior to the Decision. Further, the Decision placing conditions on that accessory use does not increase the intensity of the use and therefore does not require site plan review under §7.6.1.4.

As outlined in this letter it is my determination that zoning enforcement at the Property is not appropriate at this time.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jon Metivier', with a long horizontal flourish extending to the right.

Jon Metivier
Building Commissioner