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February 20, 2024

Terri Iemolini, Town Clerk
Town of Stockbridge
50 Main Street
P.O. Box 417
Stockbridge, MA 01262

Zoning Board of Appeals
Town of Stockbridge
50 Main Street
P.O. Box 417
Stockbridge, MA 01262

Re: **Memorandum in Support of Enforcement: 9 Lee Road, Stockbridge, MA**

Stockbridge Zoning Board of Appeals:

Please accept this memorandum in support of Stephanie and David Alder, of 7 Lee Road, Stockbridge (the "Adlers"), in advance of the February 20, 2024, meeting with the Stockbridge Zoning Board of Appeals.

The Adler's property at 7 Lee Road, Stockbridge, and the Berkshire Gas property at 9 Lee Road, Stockbridge (the "Property"), are both located in the "R-2" Residential 2 Acre zoning district. This area has always been zoned for residential use and in 1973 was known as the "R—A" Acre Residence zoning district. In 1973 the Bylaws (see copy attached) allowed for certain uses by permit, including a "natural gas or power facility...or other public utility use". Without application for and grant of the 1973 Permit pursuant to the Bylaws, Berkshire Gas's use of the Property for a "natural gas or power facility...or other public utility use" would not have been legal. On May 25, 1973, a permit was granted to Berkshire Gas Company ("Berkshire Gas"), at the Property, based on Berkshire Gas representing "that the stored propane would be blended with the natural gas coming through the pipeline and the basic purpose of the installation was so that it would be a standby for the natural gas in the pipeline and would only be used on an average of perhaps 24 days per year" (the "1973 Permit"). The permit explicitly granted Berkshire Gas the right to install one 30,000 gallon propane tank on the Property, which was connected to the Tennessee natural gas pipeline, with the possibility of installing two additional 30,000 gallon propane tanks on the property at a later date. No other uses were discussed by the applicant or the Stockbridge Selectboard at that meeting. The 1973 Permit was limited on its face as recited above.

As foreseen by Berkshire Gas and as provided for in the 1973 Permit, a second special permit was applied for and granted to Berkshire Gas on June 16, 1981, that permitted the two additional 30,000 gallon propane tanks to be installed at the Property (the "1981 Permit"). The tanks would be used for "Storage and Production of Supplementary Gas Supply". All three tanks were filled with both natural gas that flowed from the Tennessee gas line (today known as Kinder Morgan) and propane that was only supplementing the natural gas. No other uses were discussed by the applicant or the Stockbridge Selectboard in considering and granting the 1981 Permit. The 1981 Permit is limited on its face as recited above.

Since issuance of the 1973 and 1981 Permits, the natural gas line from Kinder Morgan no longer runs to the three 30,000 gallon tanks. The Property and business conducted at 9 Lee Road has substantially changed from being a facility that was placed on the Property specifically due to its proximity to the Kinder Morgan line for supplemental purpose. It has become a facility that no longer taps off of that line at all, but has instead, wholly become a busy propane depot operation where large tankers deposit their loads of propane into the above mentioned 30,000 gallon mounded tanks on a daily basis, and 4-6 times a day 3,200 gallon delivery trucks onboard that propane to deliver it to homes and businesses in the area. This amounts to nearly 365 large delivery truck visits to the Property each year and between 1,460-2,190 delivery truck visits each year. Not only has the use of the Property at 9 Lee Road exponentially intensified since the 1973 and 1981 Permits were issued, but the impact of these new uses on the abutters and surrounding neighborhood have dramatically intensified also. Trucks enter 9 Lee Road at all hours of the day, including very early delivery trucks that idle for an hour while off-loading, and sometimes in the middle of the night. This is a stark departure from the "24 years a year" plus emergency situations represented by Berkshire Gas in the 1973 Permit application. The daily noise, exhaust fumes, and dust generated by numerous truck visits to the Site each day have impacted all abutters and the neighborhood in a negative way and was never anticipated when the 1973 and 1981 Permits were issued to Berkshire Gas.

Zoning Overview

The municipal zoning power, as set forth in the Zoning Act (G.L. c. 40A), attempts to balance the interests of three specific constituencies: the general public, the landowner, and affected neighbors. The general public, as well as abutters and affected neighbors, have an interest in ensuring that zoning regulations are implemented in a way that serves their intended effect of promoting the health, safety, and welfare of the community. Landowners have a right to the fair application of zoning bylaws, ordinances, and regulations (collectively "zoning regulations") to their property; they also have the right, secured under the U.S. and Massachusetts constitutions, "to use and enjoy their property," which extends to "the right to own land and to use and improve it according to the owner's conceptions of pleasure." Kennie v. Nat. Res. Dep't of Dennis, 451 Mass. 754, 760 (2008)(citing Articles 1, 10, and 12 of the Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution and stating that "the right to seek a permit comes within the scope of the right to improve [plaintiffs'] property")(internal quotation marks and citations omitted). The Zoning Act attempts to reconcile these competing and often conflicting interests. Enforcement of Zoning Requirements, Zone MA-CLE 13-1 (2021).

When conflict or ambiguity arises, the administrative process begins with the "zoning enforcement officer." The Zoning Act and local zoning regulations confer upon the zoning

enforcement officer, who most typically is the building inspector, the role of applying and enforcing zoning regulations. Id.

Analysis of Permits

The law in Massachusetts is quite straightforward on the subject of permit interpretation. For a permit to be enforceable, the “terms (of a variance) must appear on its face.” E&J Props., LLC v. Medas, 464 Mass. 1018, 1019 (2013)(citing Mendoza v. Licensing Bd. Of Fall River, 444 Mass. 188, 205 (2005)). The same can be said of special permits. Enforcement of Zoning Requirements, Zone MA-CLE 13-1 (2021).

In the instant case, the terms of the 1973 and 1981 Permits are explicit, clear and simple. The 1973 Permit granted installation of a single 30,000 gallon propane tank on the Property, which was connected to the Tennessee natural gas pipeline, with the possibility of installing two additional 30,000 gallon propane tanks on the property at a later date. The 1973 Permit was limited on its face to this use. The 1981 Permit permitted two additional 30,000 gallon propane tanks to be installed at the Property. The 1981 Permit was limited on its face this this use.

Berkshire Gas’s use of the Property in excess of the uses permitted by the 1973 and 1981 Permits, and subsequent use by Osterman Propane and now Superior Plus in excess of the uses permitted by the 1973 and 1981 Permits, are not sanctioned and are not legal uses according to the Stockbridge Zoning Bylaws, now or in 1973. In 1973 a “natural gas or power facility...or other public utility use” was only allowed by permit issued by the Selectboard, and today such a facility is not allowed at all in the R-2 zoning district.

Non-Conforming Use Argument

The current situation is not a case of a “pre-existing non-conforming use” that has naturally evolved over time, consistent with past use, where that use preceded the enactment of zoning in Stockbridge. Berkshire Gas appeared twice before the Stockbridge Selectboard, in 1973 and 1981. They never discussed the existence of a pre-existing use of the Property in the form of a “propane truck filling depot” nor did the Board, and Berkshire Gas didn’t request that any pre-existing non-conforming use be “permitted”, despite these obvious opportunities to do so.

Nevertheless, it is somewhat instructive to review Massachusetts law pertaining to whether a current use of property is a protected nonconforming use. In Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. Of Falmouth, 385 Mass. 205 (1982), the Supreme Judicial Court of Massachusetts recited the rule cited in Bridgewater v. Chuckran, 351 Mass. 20, 217 N.E.2d 726 (1966), setting out the three tests this court has adopted to determine whether a current use of property is a protected nonconforming use: “(1) Whether the use reflects the ‘nature and purpose’ of the use prevailing when the zoning by-law took effect.... (2) Whether there is a difference in the quality or character, as well as the degree, of use.... (3) Whether the current use is ‘different in kind in its effect on the neighborhood.’ ” (Citations omitted.) Id. at 23, quoting from Massachusetts Broken Stone Co. v. Weston, 346 Mass. 657, 662 (1964), and Medford v. Marinucci Bros. & Co., 344 Mass. 50, 60 (1962). The property owner bears the burden of proving the requisite similarity between the current use and the original nonconforming use. Bridgewater v. Chuckran, supra 351 Mass. at 24.

In this case the Court found that Cape Resort's reliance on the rule that a mere increase in the volume of business done does not constitute a change in use is misplaced. While it is true that a use is not different in kind simply because it is bigger, Building Comm'r of Medford v. McGrath, 312 Mass. 461, 462 (1942), the increased use must be attributable to growth of the original nonconforming use in order to fall within the rule. Kreger v. Public Bldgs. Comm'r of Newton, 353 Mass. 622, 627 (1968). Even where the facility in which a business is conducted remains the same, a significant increase in activity caused by a change in operating procedures will not be protected. *Id.* In the Kreger case, the increased business followed a change from a retail to a wholesale fuel oil operation. In the case of the hotel, the increased activity followed a shift in emphasis from lodging and meals to night entertainment. As in Kreger, this was more than a growth in business; it was a substantive change in use. Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. Of Falmouth, 385 Mass. at 224-225.

The Court further found that a valid nonconforming use does not lose that status merely because it is improved and made more efficient. Berliner v. Feldman, 363 Mass. 767, 775 (1973); Wayland v. Lee, 325 Mass. 637, 643 (1950). Such changes are permissible, however, only if they are “ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose of the undertaking.” *Berliner v. Feldman*, *supra*. The facts found by the judge (which are amply supported by the evidence) indicate that the expansion and updating of the hotel's activities were not adapted to the original nonconforming use. Thus the shift from hotel to “entertainment complex” constitutes a change in the nature and purpose of the undertaking. This transformation of the hotel cannot be justified as “modernization” to accommodate a changed society. Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. Of Falmouth, 385 Mass. at 215.

Finally, the Cape Resorts Hotel case determined that it was correct to find that the current use of the hotel property has an effect on the neighborhood “different in kind” from the effect of the use in 1926. Even when allowance is made for the limited use of automobiles in 1926, it is clear that the development of the hotel as a nighttime entertainment center capable of accommodating over 800 people has caused traffic and noise problems wholly different from those which would be generated by a business run primarily as a hotel. The change in effect on the surrounding area is sufficiently illustrated by the findings that nearby residents are sometimes kept awake until 2 or 3 A.M. and that management has found it advisable to station up to twelve employees outside the hotel at closing time to direct traffic and promote order. The findings, therefore, fully support the judge's conclusion that, under all three of the tests reviewed in *Bridgewater v. Chuckran*, *supra*, Cape Resort has failed to sustain its burden of proving that the operation of the hotel is not a change in use. Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. Of Falmouth, 385 Mass. at 219-220.

Laches and Estoppel Argument.

With regard to justification of the current use of the Property by a theory of “laches or estoppel”, “prior Massachusetts case law establishes that laches or estoppel is not a defense to an action to enforce municipalities' by-laws or zoning ordinances. See Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. Of Falmouth, 385 Mass. at 223-224; See McAleer v. Board of Appeals of Barnstable, 361 Mass. 317, 322-323 (1972) (laches); Ferrante v. Board of Appeals of

Northampton, 345 Mass. 158, 162 (1962) (estoppel); Everett v. Capitol Motor Transp. Co., 330 Mass. 417, 421 (1953)(laches). This is true even where there has been a substantial financial investment of the sort Cape Resort alleges occurred in its own case. McAleer, supra 361 Mass. at 322.

Thank you and I look forward to the Zoning Board of Appeals' consideration of this memorandum.

Sincerely,

Arienti & Klepetar LLP



C. Nicholas Arienti

CC: Matt Kollmer, Building Commissioner
Michael Canales, Stockbridge Town Administrator
Stephanie & David Adler