

## Zoning Board of Appeals Minutes, 01/12/2017

### Zoning Board of Appeals Minutes January 12, 2017 Board of Selectmen's Meeting Room

**Members in Attendance:** Acting Shawn Leary Considine (SLC); Robert Fuster, (RF); Robert Fuster Jr. (RFjr); Ned Douglas, (ND); Cliff Snyder, (CS)

**Absent with notification:** Chair Ethan Berg, (EB)

**Staff in Attendance:** Gwen Miller, Land Use Director & Town Planner, (GM); Peggy Ammendola, Land Use Clerk, (PA)

**107 Yokun LLC, 107 Yokun Avenue (Map 12 Parcel 2)** Special Permit under Section 5.2 (A) "Schedule of Uses" and Section 9.4 "Extended-Care Nursing, Assisted Living, Congregate Care" to permit the adaptive reuse of an existing building for a residential center for women with eating disorders.

Approximately 15 members of the public were present. Continued from December 21, 2017.

Presenting the Petition were Jamie Berg, Project Director of 107 Yokun LLC; Attorney Alex Glover who represents Ms. Berg; and Jim Scalise of SK Design Group.

Also present were Attorney John Gobel who represents abutter Robert Brown and Attorney William Martin who represents George Krupp, also an abutter.

The hearing was called to order at 7:05 PM. There was a site visit earlier today.

Attorney Glover stated that it was important that people understand that the proposed facility is a resident program, not an "out-patient" facility that is for women with eating disorders and nothing else. She said that there have been numerous letters stating that there is a critical need for this kind of facility and the addition of which will complete the wellness community that Lenox is becoming. An existing structure will be used, so virtually no changes will be made to the property. Beneficial improvements include the reduction of impervious surface as some existing parking spaces will be eliminated and the creation of rain garden. Attorney Glover said that this project meets or exceeds all the zoning requirements, e.g., the typical dimensional requirements and the special dimensional requirements for this particular use, which is the defined use of Extended-Care Nursing Facility. She noted that this proposal is not an extended care nursing facility, but this is how the zoning bylaw defined that term. Attorney Glover read aloud the definition of Extended-Care Nursing Facility and stated that this proposal fits exactly into the definition, but added that the petition is limiting the number of persons to 48.

*Extended-Care Nursing Facility: Extended care nursing facility, rehabilitation facility, convalescent facility, or any such institution, however named, whether conducted for charity or for profit, which is maintained for the purpose of caring for up to one-hundred forty (140) persons, requiring medium to intensive medical, rehabilitative, or convalescent therapy and who need assistance or monitoring on a regular basis.*

Attorney Glover pointed out that the applicant could have applied for a nonprofit educational use and would be exempt from certain zoning restrictions. Austen Riggs, up until recently, had a step down facility for mental health treatment located only a few blocks away at Sunset Avenue and Main Street. She detailed a little of the Austen Riggs's history in the establishment of their Lenox facility and said that Land Court determined it was an educational use. Reference was made to The~Dover Amendment, a law which exempts agricultural, religious, and educational corporations from certain zoning restrictions.

Relative to the concern of Dr. Brown regarding an unpaved driveway on a separate property, Attorney Glover said that the Bergs agree to post a sign on this drive that it is restricted.

Attorney Glover said that a concern which has been voiced repeatedly is that the application is premature as it does not identify a specific operator and responded that the Board has been provided with complete information to make a decision. She also said that suggestions that the Board question the finances of the project, evaluation for admission, if such programs are effective, whether or not the residents are of means, whether profit or nonprofit etc., are not relevant to the petition. All of these things factor into medical and business decisions and has nothing to do with the impact to the town.

Ms. Berg responded to a neighbor's concerns about the choice of operator by saying how they are seeking an operator who is committed to the following:

- Effective, evidenced based treatment
- Creating a nationally respected eating disorder program that becomes a leader
- Committing, long term, to the property, and to Lenox

Ms. Berg feels that in order to attract the best operator, the permit must come first. They have put together an expert team to help create criteria for selecting an operator. The team consists of:

- A respected, published, board certified PhD psychologist who is in a senior position at a Harvard affiliated hospital
- A therapist PhD who is a specialist in eating disorders at another Harvard Hospital program
- A clinical psychologist and eating disorders specialist who is also a researcher doing work with some of the foremost experts in the treatment of eating disorders

- The executive director of an eating disorders association who has extensive experience sending women to and receiving women from over 25 residential programs nationwide
- Two recovered women who have been in residential programs, and their mothers

Noting that until 107 Yokun, LLC has a contract with an operator, one cannot be identified, but Ms. Berg said that there are operators who have expressed interest. The Bergs have been talking in depth to a prestigious non-profit university affiliated program, but other operators have expressed interest. No matter which program is selected, it will be required that it is accredited by the state in order to open, and the applicant will require that they seek the Gold Standard: Joint Commission accreditation. When there is a permit in place, there will be detailed vetting of an operator's qualifications, plan and commitment.

In conclusion, Ms. Berg pointed out the numerous uses in the neighborhood beyond residential. They are:

**Lenox Club** -140 members and is a direct abutter to proposed facility  
**Croquet Club**-hosts weekly games in the warmer months and an annual state tournament  
**Belvoir Terrace**-houses more than 250 campers and counselors  
**Boston University Tanglewood Institute** -340 or 375 students plus faculty and concerts  
**Kimball Farms**- 74 nursing home residents plus staff

Mr. Scalise updated on these three topics:

- The Conservation Commission has issued a Negative III Determination which means that the project is not subject to regulation under the Wetlands Protection Act.
- The review has been completed by Weston and Sampson. There is a difference of opinion regarding the size of a sewer force main, but Mr. Scalise said that however that is worked out, they will comply with the regulations.
- The Beta peer review hasn't changed. All comments have been addressed. There have been minor dimensional changes on the plan.

Mr. Scalise discussed parking spaces that are required for the use. Thirty seven spaces are proposed, and based on the site plan review the requirement has been met or has exceeded.

Attorney Glover presented to the board proposed conditions that she had emailed earlier to Attorney Martin and Attorney Goble. Regarding operators considered for the facility, Attorney Glover asked the Board to keep in mind that the only difference among the programs revolve around their philosophical focus and approach to therapy.

#### **Public Comment**

Attorney Gobel-He submitted suggested conditions which relate to the unpaved driveway which is on the Ethylwynde property that is situated between Dr. Brown's property and 107 Yokun as well as prohibiting expansion of the proposed facility. Regarding expansion, RF and SLC stated that the application is specifically for a residential program for women with eating disorders and is limited to 48 beds and that any change from that use would require a re-application and process. RFjr questioned the Board's ability to condition a permit granted to one property restricting an abutting property that is not a part of the application. Dr. Brown stated that the use of the unpaved driveway or expansion of it would adversely affect his property. He has a guest house on his property that is 200 feet away from the unpaved driveway and the driveway is right next to his boundary. Mr. Berg explained that they are not eager to have access via this drive as it is the primary view from the mansion. SLC said that the applicant has presented that 107 Yokun, LLC will not be using this driveway for access to the facility and that they will place appropriate signage restricting to residential use. Should the Board approve the petition a condition that this drive not be used to access the facility could provide a second layer of protection. Both Attorney Gobel and Attorney Glover discussed their respective conditions and agreed changes.

Reid White, 89 Cliffwood-He asked if it was typical that the Board would hear a petition that is for a very large business in the residential area. He claims that this type of business is replete with people who mismanage. He is concerned about an operator as the applicant has no experience. He feels that it is important that Board vet a perspective operator. The Board responded that this is not within their jurisdiction. Another concern is the diminution to the value of the neighboring properties.

Attorney Martin-He stated that this proposal is not defined regarding the operation. He suggested that those with an eating disorder may have other mental health issues and the level of care is not well described. He made a formal request on behalf of his client to engage an expert to present the nature of the operation and conditions. Without a thorough description of such an operation, he feels that the neighborhood's interests cannot be properly weighed. He questioned if it is known at what rate ambulances are called to this type of facility on a monthly basis. Attorney Martin argued that the Town of Lenox doesn't have a need for an eating disorders facility as there are not 48 people in the town who would use it. GM stated that it is not appropriate for one with a vested interest in the outcome to hire someone. The process is that the Town, if considered appropriate, would hire someone for a peer review but the applicant would be responsible to pay.

Regarding residents having cars, Attorney Martin asked if this was prohibited. Attorney Glover said that her personal opinion was that conditioning the permit that no resident may ever have a car on site is unduly restrictive and makes her uncomfortable. The Bergs responded that the operators they have been speaking with do not permit residents to have cars. It is endemic in these programs that residents do not have cars.

Mara Davis-She supports the project and disclosed that she has been a patient at an eating disorder clinic and is hoping that going forward she will be a therapist. She responded to Attorney Martin's comments about ambulances being called to a facility of this type by saying that it is highly unlikely. She added that the other uses in the neighborhood had a better chance of having ambulance calls, e.g., Belvoir Terrace, where there is a seasonal girl's camp for approximately 250 girls, and Kimball Farms Nursing Facility for 74 patients.

Attorney Glover commented that she found that the McNally letter and all of the attachments interesting and compelling, but that this information provided does not fit in with what the Board is to base their decision.

Reid White again brought up the impact of putting a large business in the neighborhood. Attorney Glover responded that this facility as proposed is allowed by Special Permit. She added that it will be housed in a building that was built as a commercial building which operated for a much greater commercial use for decades.

Judy Usow, Cliffwood St.-She is a neighbor and spoke in support the Bergs and their idea to bring something that is harmonious to the area. She believes that this is the best use for the property. She is happy to have the different uses in the neighborhood.

Kameron Spaulding, Director of the Lenox Chamber of Commerce, a resident of Lenox and on the Planning Board-He spoke in support and pointed out that the Bergs are known in town, versus an out of town developer and that they are using an existing building. He quoted a statistic from a national association on anorexia that nationally 10 percent suffer from an eating disorder. For the population of Lenox, this would be 500. Mr. Spaulding said that the treatment of eating disorders is the largest growing sector and largest paying sector in MA.

#### **Correspondence:**

SLC said that at the last meeting 12 letters were read, some in their entirety, and some excerpts due to the length. Excerpts were read from the following:

Mara Goodman-Davies-Support

Kate McNulty Vaughan-Support

Giovanna Fessenden-Support

Melissa Freizinger-Support

SK Design-Different letters with different document. One was a copy of a letter to the Fire Chief regarding the radius for a fire truck. Other documents included, but not limited to, water and sewer flows, Determination of Applicability regarding wetlands, and technical review from BETA. SLC explained that the review is to look over SK Design's proposal to determine if it is acceptable under the bylaw. This confirmed that all Mr. Scalise had mentioned in his presentation has been resolved.

Scott and Ellen Hand-Concerns and questions

Beth Mayer-Support

Liponis & McNally-Oppose. RF, commenting that this was a comprehensive letter which included attachments, gave an overview of the contents. While helpful, it is not considered applicable to the permit.

Regarding accreditation, Ms. Berg said that in order for the facility to open, it would have to be accredited by the state, but that they will require the operator to have the Joint Commission accreditation. This is a voluntary process, very lengthy, and all of the operators that they are considering are Joint Commission accredited.

ND made a motion to close the public hearing. SLC advised those present that once the hearing was closed, there would not be any further opportunity for anyone to speak unless the Board asked for input.

Attorney Martin asked Mr. Scalise about parking. Mr. Scalise responded that he has come up with 10 surplus spaces which is beyond any study that he has reviewed. No more than 10 patient's cars can be left on the property.

RF seconded ND's motion to close the hearing and the Board voted to agree 5-0.

#### **Decision Meeting**

CS commented that mental health, wellness, lifestyle changes, spas, unique schools and programs fall under a giant umbrella and named many of the numerous facilities which fall under that umbrella that have been located in our area for years. The therapeutic industry is major in the area due to the beauty and serenity and it is a quick access to the larger market. Lenox will benefit from the non-seasonal professional and non-professional jobs. There will be no change in the footprint or additional construction. In response to a comment that Lenox residents do not need such a facility, CS said that many residents do not personally need the facilities, e.g., spas and health that have prospered here for years. There is a history of commercial use for this particular property and this proposal is not detrimental to the neighborhood, but it is a change, which prompts residents to ask that it be located to another area of town, or another town. CS said that his property is adjoining Valley Head and the Town has not found it detrimental to the neighborhood as his taxes keep going up. He said that properties such as this struggle to find uses. This project is quiet and unobtrusive to the neighborhood. Regarding comments about not knowing the operator's credentials or reputation, CS said that management teams are not routinely identified for projects. This project could have come in under an educational use. He supports the proposal.

RF agreed with CS's comments and supports this proposal. He stated that in facilities like Hillcrest and Valleyhead, many of the children have severe mental disabilities and problems. Some have gone through the criminal justice system. (It should be noted that Valleyhead has closed.) This use is not disruptive. RF said that it is an adaptive use of a substantial building which was a commercial use. He added that this meets the criteria of the Special Permit and it will not have negative impacts. Nearby is a nursing home, Austen Riggs, Lenox Club and Belvoir Terrace. The project, he said, could not have better developers and therefore endorses the project.

RFjr agreed with the comments of CS and RF and stated that many residents in Lenox didn't know that Valleyhead existed or that Hillcrest is located here. Valleyhead at one time had a small home on Church Street which housed some of their residents. He reminded everyone that the applicant is held to their presentation and to conditions that will be imposed. He supports this project.

ND agreed with the others and reminded everyone that the applicant could have filed as an educational, non-profit facility, but chose to come in to define the facility and to listen to the concerns of the public.

SLC agreed with everyone's comments and said that this proposal meets Sections 9.4 and 3.4 of the zoning bylaw. She repeated that the Bergs could have filed as an educational use as Austen Riggs had. She predicted that if this decision were to be appealed, the Bergs could return to the Board to ask for approval as an education use and the Board would have virtually nothing to say in regards to conditions. She added that the building is perfectly suited for this use as it is tucked away over a hill and on an incline. It abuts the Lenox Club which is not a residential. SLC said that it is important to note that while the Board may not know the identity of the operator, they do know the Bergs who live right next door. Ms. Berg will be managing the property. She supports the project.

CS made a motion to grant the Petitioner's request and RFjr seconded the motion. The Board voted to approve 5-0.

Attorney Glover offered to write the decision and the Board agreed. SLC explained that often this happens with more extensive hearings. The proposed decision will be presented to the Board, reviewed, and then rewritten to make it suit the needs of the Board. Attorney Glover will send to GM.

Respectfully submitted,  
Peggy Ammendola

