

TOWN OF DOVER ZONING BOARD OF APPEALS SPECIAL MEETING HELD ON WEDNESDAY, December 8, 2010, AT 7:00 P.M. AT THE DOVER TOWN HALL:

PRESENT: Chair Marilyn Van Millon
Member George Wittman
Member Debra Kaufman
Member Henry Williams

ABSENT: Member Anthony Fusco

Also in attendance was Secretary to the Board, Maria O’Leary, and Attorney Michael Liguori.

Chair Van Millon called the meeting to order at 7:00 p.m. and began with the Pledge of Allegiance.

MOTION: Member Kaufman motioned to request \$150 in escrow; seconded by Member Williams.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

Chair Van Millon read the first item on the Agenda as follows:

RASCO Interpretation - Z 2010-03 – The applicant seeks an interpretation of a determination of the Code Enforcement Officer regarding whether the use of the property as a cold-mix asphalt facility is pre-existing non-conforming. This property is located at 2241 Route 22, Dover Plains, NY and is located in the M district on tax map numbers 7061-00-580190 & 7061-00-5850063.

In attendance were Jack Nelson of Rasco and his attorney, Jon Adams.

Chair Van Millon read the attached Resolution for the record.

The **RESOLUTION** was offered by Member Wittman; seconded by Member Kaufman.

MOTION: Member Williams motioned accept the Resolution as written; seconded by Member Wittman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

Chair Van Millon read the next item on the Agenda as follows:

PUBLIC HEARING – LukOil 3 Area Variance – Z 2010-06 - The applicant seeks to appeal Section 145-39D.(3) of the Town of Dover Zoning Law to permit a freestanding sign with a height of 15 feet 3 inches. 10 feet is the maximum height allowed. A variance of 5 feet 3 inches has been requested. This property is located at 3160 NY Route 22 in Dover Plains, NY, and is located in the HM district on tax map #7063-11-534507.

In attendance was George Mastoridis of Core States Engineering representing LukOil.

MOTION: Member Wittman motioned to open the public hearing; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

George Mastoridis was sworn in. The original approvals were 12' 6" with the ARB, but the sign for Freshco 22 Pizzeria, which is right in front of our sign, is 10' and if we shrink it down, you won't be able to see it.

Chair Van Millon: I attended the last ARB meeting and I think both of us agreed that a freestanding sign no greater than 12' 6" starting at 8' would give you probably 4.5' of space to put your sign.

George Mastoridis: Right now, the current cabinets are 8' total; we shrunk the price sign to meet current zoning codes. I would like to get some sort of approval so whatever it takes, it might be cost prohibitive to shrink everything down without going into it. It's a small sign so the structure should be fine with the footings as-is; I don't see that much of a problem with that. LukOil has made many concessions to try and meet this Code. The 15' 3", I believe, would be beneficial for the Town. It would bring the sign closer to conform with the Code, I believe now it's 22' 6", and it would allow the Freshco 22 sign to be seen from both sides of the road.

Chair Van Millon: I think also what has been taken into consideration is there's a light right there and the speed limit through the Town of Dover is only 30 miles per hour. I don't think a sign that big is really needed at that site

George Mastoridis: If the Board feels 12' 6", then we'll agree to 12' 6".

Member Wittman: Speaking for myself and I know for Marilyn and I think for the other Board members as well, we have been to this site a number of times. I've been up there with my tape measure and the current two up-rights are far enough back from the state highway to comply, that's not a problem and I think we went through that with sending the State to see what they felt about it. We've also discussed with the Board,

the ARB has reviewed this considerably too, and as it states, the maximum height allowed is 10'. There are other signs in the Town that are not in compliance with that, but they are going to be in compliance and that is underway, so I don't think there's any unfair advantage with the other service stations or gas stations that are involved. The other thing too is that we're taking into consideration the proximity of the signs for the business next door and I think that it is reasonable. We've discussed this among ourselves, I know the ARB has discussed it, and I think the ARB was pretty hardnosed about any kind of variance on anything like this and has been very generous as saying that they will permit it to go to 12' 6". My feeling is that after mulling this over for a long period of time, is that if we keep the current up-rights, cut it off at 12' 6", and you can have that height down to 8' to do anything that you and the ARB decide is appropriate, but as far as issuing any other kind of variance, I'm not in favor in doing anything in addition to that.

George Mastoridis: So, we need a minimum of 8' clearance?

Member Wittman: The sign should start at 8' and go to 12' 6" and then extend to the width of the posts.

George Mastoridis: And we have to go to another ARB hearing?

Member Wittman: I think the ARB is going to want to see it. I don't think you're going to see us anymore, but you need to see the ARB. I think that it would be a good idea for you to go to the ARB and let them agree with you in exactly what kind of sign you're going to put in that area. We're not going to tell you what kind of sign you should put in, that's up to them to determine.

George Mastoridis: Can we work it out with the ARB as far as the clearance underneath the sign?

Member Wittman: They have already recommended that to us and I think that it's reasonable. We're trying to be as reasonable as we can, but we also have the issue of granting the minimum variance necessary to comply with the zoning.

George Mastoridis: My main goal is to get all the approvals and try to get that station back on its feet again.

Member Wittman: I think this is the way to do it.

Attorney Liguori: George (Mastoridis), can you just convert for the Board exactly what the current request is from the Zoning Board? Is it just the height or is it also area as well?

George Mastoridis: The area was resolved with the price sign by putting the shroud around it and bringing it down; the only variance left is the height. We even changed it to a non-illuminated sign.

Attorney Liguori: If the Zoning Board were to grant the variance, then it's as if the impact of the variance is that, now the Code has changed and now the dimensions to work in now are different, so no longer will they be 10' high and no greater than 16 square feet, but if the Board were to grant the variance, now it can be no greater than 12' 6" plus reasonable restrictions that relate to that. If the variance is granted, now that the regulations are what the Zoning Board says they are, then you need to go back to the ARB to wrap it up

Member Wittman: The ARB has already suggested these; they think this is appropriate and that's why we're trying to get you to agree.

George Mastoridis: If we agree with the ARB and we meet their Code, why do we need to go back?

Attorney Liguori: To get their approval; they have made a recommendation to the Zoning Board. They said that because the issue is that when there's an effort to get the gas stations and nonconforming signage in the Town into compliance and so Cumberland came into compliance, I think Sunoco either did it or is in the process and so what happens is that because we have that now, the ARB is very reluctant to see other people get variances when things are finally coming into what the legislatures wanted, so what they have said is, "We're going to review this thing and we're going to make a recommendation to the Zoning Board" and the ARB's position is, "Although we don't want to see any variances granted, if you're going to grant a variance and this is ideally what we would like to see happen, so that when they come back we, can just wrap it up" and so basically what the ARB's position is that you would normally be entitled to up to 10' and so what the ARB has said is, "If you grant them a variance for up to 12' 6", then we don't want to have from 0-12' 6", we want the limited amount of signage as possible" and that's why they suggested to go from 8' to 12' 6" so you can clear Freshco 22, exceed the height but reduce the cumulative amount of signage, not interfere with other signs and with that in place they will be likely to go forward.

MOTION: Member Wittman motioned grant the variance with the condition that the sign begin at 8' on the existing post and be no higher than 12' 6"; seconded by Member Williams.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

MOTION: Member Kaufman motioned to close the public hearing; seconded by Member Wittman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

MOTION: Member Kaufman motioned to approve the November 3, 2010 minutes; seconded by Member Wittman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

MOTION: Member Wittman motioned to adjourn the meeting at 8:10 p.m.; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Absent
Member Williams – Aye

Meeting adjourned at 7:35 p.m.

Respectfully submitted by:

Maria O’Leary
Secretary to the Zoning Board of Appeals

APPROVED

TOWN OF DOVER

A meeting of the Zoning Board of Appeals of the Town of Dover was convened in public session at the Town Hall, 126 East Duncan Hill Road, Dover Plains, New York on December 8, 2010 at 1:00 PM o'clock P.M. local time. The meeting was called to order by Tom, and upon roll being called the following were present:

Present:

Absent: Tony Fusco

The following Resolution is offered by G W, seconded by Dk., to wit:

INTERPRETATION / DETERMINATION
WITH REGARD TO
RASCO MATERIALS LLC

WHEREAS, pursuant to an Stipulation of Agreement dated December 9, 2009 between Rasco Materials, LLC and the Town of Dover Town Board, Building Department and Planning Board, Rasco Materials submitted an application to the Planning Board for the approval of a site plan as a predicate requirement to resuming the use of the Mid Hudson Recycling Center, 2241 Route 22, Dover, New York (the "Premises") site for a cold-mix asphalt plant; and

WHEREAS, during the site plan approval process, the Planning Board received correspondence from the Building Inspector/Code Enforcement Officer dated May 5, 2010 which indicated that his review of the Town's file indicated that there was no record of approvals for Rasco Materials' predecessor TT Materials¹; and

WHEREAS, the Planning Board, although aware of the Stipulation of Agreement, referred the matter to the Zoning Board of Appeals for a determination as to whether the Rasco Materials' operation of a cold-mix asphalt plant is a legal pre-existing non-conforming use; and

WHEREAS, in furtherance of the request for the Interpretation/Determination, Rasco Materials made a formal application to the Zoning Board of Appeals on the question and through counsel has submitted numerous correspondences in support of its position that TT Materials was a valid pre-existing non-conforming use and that no site plan approval was required to be obtained at the time it began its use of the Premises; and

WHEREAS, the Zoning Board of Appeals has received public comment both verbally and in writing on the matter made at public hearings held on August 4, 2010, September 1, 2010,

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The Zoning Board of Appeals is curious as to why this letter was written when it was confirmed on three occasions in 2009 by the Building Inspector/Code Enforcement Officer that the use of the premises as a cold-mix asphalt plant was a valid pre-existing non-conforming use.

October 6, 2010 and November 3, 2010; and

WHEREAS, the Zoning Board of Appeals has reviewed (i) the materials presented by Rasco Materials in support of its position; (ii) the entire Building Department file for the Premises as it related to all uses formerly in existence at the Premises which consisted of nearly two hundred separate documents which are listed on Schedule A hereto, (iii) the Zoning Code in effect at the time the cold mix asphalt plant use commenced on the site; and (iv) all of the public comment made on the Application;

NOW THEREFORE BE IT RESOLVED, that the Zoning Board of Appeals hereby determines as follows:

1. The Record

The Premises consisted of nearly 200,000 square feet of buildings/improvements which were initially constructed as part of magnesium processing facility operated by the United States government. Following the cessation of the magnesium processing use, the premises were owned and operated by various single tenant occupancies, most notably by Mica Products.

The Building Department file indicates that in the early nineties there appeared to be a concerted effort on behalf of the Building Department and town officials of the Town of Dover to find a tenant or tenants to occupy the site as a method of stimulating the economy in Dover in response to layoffs that were either happening or going to happen at the Harlem Valley Psychiatric Center. See undated newspaper article circa 1992.

International Environmental Recyclers ("IER"), a tire recycling operation, appears to have been the first tenant following the cessation of the Mica Products use. See Letter dated January 8, 1992. There was no record of Planning Board approval for this use.

In addition to IER, Carbon Activation US Inc. ("CACTUS") also began occupancy of the Premises. CACTUS had previously made application to the Planning Board with regard to the use of the Old Country Iron Works for its carbon processing use and the May 19, 1992 minutes of the Planning Board reflect that no site plan approval was required in connection with the use of that facility as it was proposed in an existing building with an approved site plan. It was further determined that upon review of the SEQR documentation for the required outside agency permits for the use that the Planning Board would not be lead agency given the fact that it had no local approval authority. See Planning Board minutes dated May 19, 1992.

Allied Cold Mix Corp. then began the process with DEC to commence the use of the Premises for a cold mix asphalt plant, which use would be in addition to the IER and CACTUS uses. See Letter dated December 7, 1992. A letter dated December 28, 1992 from Allied indicated that it has begun negotiations to lease a portion of the Premises and had communications with Terry Binotto (former CEO) that the use was permitted provided a DEC

permit was first obtained.

Allied submitted further correspondence to DEC dated March 1, 1993 refining its proposed use of the premises and further stating that "I have spoken with Terry Binotto Code Enforcement Officer for the Town of Dover Plains, N.Y. and he assured me that if you approve our process he will have no objection." The Town appears to have been copied on all of the correspondence from Allied.

A March 8, 1993 Application for Solid Waste Facility along with an Environmental Assessment Form was submitted by Allied to the DEC

On March 25, 1993, IER wrote a letter to the Planning Board requesting whether approvals were required to resume the use of a watchman's home on the premises. See Letter dated March 25, 1993. No record exists regarding whether the approval of the Planning Board was granted.

On June 3, 1993, CACTUS wrote a letter to the Planning Board indicating that it would be relocating its proposed use to the Premises and it requested the permission of the Planning Board or in the alternative a letter confirming that no approval was required. A building permit was issued to CACTUS to convert a window to a doorway for use as an entrance only two weeks later. See Building Permit 93-73. A Negative Declaration was issued to CACTUS by the DEC dated July 15, 1993. The Negative Declaration stated in Paragraph 6 that "the Town of Dover Planning Board has determined that this action is within an approved site with an existing site plan. No local issues of concern were identified by the Town." No individual CO for CACTUS appears to exist in the file. No special permit was required to be obtained.

On August 1, 1993, Allied had further correspondence with the DEC regarding the cold mix use which again indicated that no local approvals would be required by the Town of Dover. See Letter dated August 1, 1993.

On August 30, 1993, the Town of Dover Planning Board received a Lead Agency Coordination Request from the DEC on the Allied Application for Solid Waste Facility. See Letter of DEC dated August 26, 1993.

A September 14, 1993 memorandum from Terry Binotto, CEO, to the Planning Board indicated that neither "site plan" nor "subdivision" approval was required, that he recommended that DEC have lead agency, that the action was not a "Type I" action and that the material be restricted from being used on site for any paving needs.

The September 21, 1993 minutes of the Planning Board reflected that the Planning Board declined to be lead agency since it was not a permitting agency but requested DEC perform a cumulative impact analysis of the three uses on site.

In a November 22, 1993 memo, Terry Binotto, CEO, congratulated those involved in the coordinated effort to bring the former Mica Plant back on line. He also indicated that a

provisional CO would be issued to allow for the operation of the facility and, upon completion a final electrical inspection, that a “full blown Certificate of Occupancy will be issued upon completion of activation and certification of the existing sprinkler system.” See Letter dated November 22, 1993.

On January 6, 1994, a negative declaration was adopted by the DEC for Allied. Specifically addressed in it were the comments made to the Planning Board regarding the cumulative impacts of the three uses on the Premises.

On January 27, 1994, a Certificate of Occupancy was issued for the Complete Plant Facility. See CO 94-05.

On October 4, 1994, Terry Binotto, CEO, drafted correspondence to TT Materials requesting information as to “the process being considered or has site plan approval been received for any modification or alteration to the site as required under our current zoning laws.”

On November 23, 1994, TT Materials was issued a Building Permit for alterations and commencement of its use of the site. Application was also made for a CO, which application is part of the application form for the Building Permit, but no individual CO exists for TT Materials. The use then commenced on the site.

Following the January 1, 2006 tire fire at Polytech (formerly IER), the uses in the Premises came under intense scrutiny by the Town and any involved outside agency, namely DEC. Violations were issued by DEC to TT Materials for illegal outside storage of materials and between 1996 and 2005, TT Materials was the subject of two Consent Orders.

TT then appeared before the Planning Board on July 16, 1996 for a discussion as to the whether it could place materials outdoors on its property. The Planning Board determined that it would be acceptable. A memo was sent to Terry Binotto, CEO from Ann Larsen, former Chair of the Planning Board confirming that “it did not see any problem with the applicant stockpiling their end product.”

A second building permit was issued to TT Materials (appears to be a reissue of the original permit) in 1997.

In 1998, there were numerous documented instances where the Building Department visited the property to enforce compliance with State Building and Fire Code. Specifically, issues were raised with the stability of the structure given the building was damaged from the improper use of various pieces of heavy equipment located on site, however, no record exists as to any local violations being issued under the Town’s Zoning Code for a lack of a CO, a site plan approval or a special permit.

TT Materials was then recognized in the Town’s 1998 Master Plan supplemental documents specifically as a “pre-existing non-conforming use.”

After a determination by the DEC in 2005 that its permit to operate had expired (although in operation under a Consent Order, TT Materials was issued a Stop Work Order by the Code Enforcement Officer for operating without a DEC permit. No mention was made of any possible violations of the Zoning Code for a lack of a CO, a site plan approval or a special permit.

2. The Applicable Zoning Code

According to the March 9, 1987 Zoning Code which, was the code in effect at the time TT Materials began its use of the Premises for a cold-mix asphalt plant (circa 1994), materials processing was a permitted use in the district where the Premises are located (Industrial District).

The following code sections were applicable:

Section 602 of the Zoning Code stated as follows:

“in order to occupy a permitted structure (a) all persons desiring to undertake any new construction, structural alteration, or changes in the use of the building or lot shall apply to the Zoning Administrator for a building permit by filling out the appropriate application form and submitting the required fee; (b) the zoning administrator will either issue or refuse to issue the building permit; (c) if a building permit is issued the applicant may proceed to undertake the action permitted and upon completion of such action, apply to the zoning administrator for a certificate of occupancy.”

Section 606 of the Zoning Code stated as follows:

“Application for site plan approval shall be made to the zoning administrator prior to consideration of a building permit for commencement of excavation, or the construction of any building or structure or the use of land.”

Section 303(f)(2) of the Zoning Code stated as follows:

“In an Industrial District M, Uses for which the Zoning Board of Appeals may issue a Special Use Permit and subject to Site Plan Approval by the Planning Board:

....manufacture, processing, or storage of coal, tar, asphalt or petroleum products...processing of industrial materials...any use not otherwise specifically mentioned and not prohibited entirely by law...”

3. The Application of the Zoning Code and the Record

It appears, based on the practices of the Code Enforcement Officer and the Planning Board at the time, that neither IER, CACTUS nor ALLIED (then TT), were required to obtain site plan approval or a special use permit for their individual processing uses on the Premises as

those uses were considered to not trigger site plan approval or approvals in general since they were being conducted in existing buildings and no external modifications were being made to the site. This reading is consistent with Sections 602 and 606 of the former Zoning Code as it does not apply to changes of use of existing structures. (Note that this would not be acceptable under the current Zoning Code.)

It is therefore the determination of this Board that the prior practices of the Code Enforcement Officer in his interpretation of the former Zoning Code and the Planning Board in its application of the former Zoning Code remain valid and in effect and that the use is a lawful-pre-existing non-conforming use.

With regard to the lack of an individual CO for TT Materials, it appears that the "full blown CO for the Complete Plant Facility" rendered the need for an individual CO unnecessary. Moreover, given the ample opportunity of the Town to raise that as an issue during the eleven years of TT Materials unimpeded operation on the Premises, this Board determines that the appropriate time to raise that issue has passed.

MOTION: Member Witt motioned to GT Accept _____ ;
seconded by Member G.W.

Upon a roll call vote of the Members of the ZBA, this Interpretation / Determination is hereby passed !

Boardmember Kaufman aye
Boardmember Williams aye
Boardmember Fusco absent
Boardmember Wittman aye
Boardmember Van Millon aye

