

ZONING BOARD OF APPEALS CONTINUED HEARING

Hollow Fields

Tuesday June 15, 2021 – 7:00 PM

PRESENT: Bill Martin, Chair; Ina Wilhelm; Bob Gniadek, Peter Killeen, Jeffrey & Linda Caligari; Jeffrey & Jennifer Morse; Ira & Jamie Grossman; Jeff Lynch, Att’y for the BNRC; Matt Morrison, Att’y. for the Litigants; Grace Mason, and others.

Reversal of Zoning Enforcement Officer decision on the Berkshire Natural Resources Council use of property known as Hollow Fields.

It was reported that a site visit had been made on April 29, 2021 at 6:30 PM, just prior to the Public Hearing that day at 7:00 PM, which is continued here, Tuesday June 15th.

A discussion ensued concerning the applicability of the Dover Amendment exclusion to the BNRC’s use of the land at Hollow Fields. The issue stands on whether the BNRC’s use of the land is primarily and predominantly educational. If it is, then the ZBA has no voice in the matter. If, on the other hand, their use of the land is predominantly recreational, then the ZBA can require the BNRC to apply for a Special Permit.

Matt Morrison argued that the Richmond Zoning Bylaw’s position is that the BNRC is an educational, non-profit corporation and that, therefore the section 4.8A applies and its use of the property is by-right and a Special Permit is not, therefore required.

In November of 2020, the BNRC came before the Board of Selectmen in company with the current appeletes, and took part in a meeting where a determination was made by the Board of Selectmen that the existing parking lot at Hollow Fields is permitted. The BNRC was invited to return to the Board with a revised parking lot plan that would increase the scope of the parking lot with the hope of alleviating some of the congestion on Perry’s Peak Road, provide more access and include increased screening. The BNRC was pursuing that application when the Building Inspector was asked to enforce the zoning bylaw, therefore stalling the work on the application.

The BNRC can continue with the plan set forth by the Board of Selectmen and agreed to by everyone to create a plan to address parking on Perry’s Peak Road, which the BNRC is willing to do. Some suggested additions to the proposed parking space would be to put in additional screening and fencing that will block ready access to off-leash dogs or other animals.

The basic question was raised, “Does the Zoning Board of Appeals have a role in this controversy?” which raises the underlying question about whether the BNRCs use of the land is primarily and predominantly educational and, therefore, protected under the Dover

Amendment or if it is primarily recreational and subject to Special Permitting. Both lawyers argued that the issue is not about parking, but about that basic question.

Strong arguments were made concerning the impact the use of Perry's Peak Road as the trailhead for Hollow Fields has had on the neighbors to the property, including the likely destruction of a horse-training enterprise that has been at that location for many years but is now unable to use the area due to the increasing danger of negative interaction between the large number of cars, off-leash dogs and other distractions that cause these young, untrained horses to panic.

Attorney Morris asked the ZBA to reverse the finding of the Building Inspector and issue a Cease and Desist Order to stop the unpermitted use by the BNRC of Perry's Peak Road unless or until they obtain the required permits.

Attorney Phillips for the BNRC spoke about the Dover Amendment and how the Board of Selectmen's ability to regulate parking will not solve the conflict. The question, he asserted, was not whether the BNRC wants to submit a Special Permit application, but whether the legal authority for them to do so exists. The issue around the Dover Amendment is the distinction between recreational and educational use of the land and the extent to which that use matters. He referred to case history on the question and the Massachusetts court cases that have considered this type of usage to be primarily educational.

Attorney Morris said that all they are asking for is to have the BNRC create a framework for conflict resolution whereby, through a Zoning Special Permit, the use can be allowed to continue, subject to legally enforceable conditions that will ameliorate the hardships imposed on the lives of the plaintiffs.

Both lawyers repeated their positions on the correct interpretation of the use of the land by the BNRC and the decision that must follow based on their interpretations of the relevant statutes.

Bill Martin laid out his conclusions as follows: The BNRC is a non-profit, educational corporation as recognized by the I.R.S. and Mass. Certifications. The question, Bill said, is whether the land is used predominantly for educational purposes and asked for a definition of "educational." It is not defined in the statute or in case history. He cited a court definition that read that "education is a broad and comprehensive term for the process of developing and training the powers and capabilities of human beings, partly directed to either their mental or physical powers and faculties."

Public Discussion: Some neighbors spoke about the importance of the trails remaining open to the public despite inconveniences they have encountered. The owner of the horse-training establishment spoke to the hardship he has endured and the need for some relief.

The issue of restricting traffic on a public road or the public's access to a public place is incidental to the use of the land by the BNRC. In response to some public comment about the lack of responsiveness of the BNRC to its neighbors, the following efforts of the BNRC to resolve

the conflict were outlined: Upon hearing the concerns, all outings at Hollow Fields were stopped and local resorts were asked not to bring their clients to the site. They increased signage and are working with the Morse family find a sensible solution to protect their horses from foot traffic on the path. They met with the Board of Selectmen to devise a new plan for increasing parking and screening at the parking lot and foot path to alleviate some concerns. They asked the Town how better to police the public way and are anxious to have the parked cars off the street.

After the last hearing, the BNRC was told to close the parking lot and find an alternate access to Hollow Fields. They have looked and found that in all 660 acres there is no other access route.

In closing, Bill Martin noted that he had ten exhibits included in his findings, which were available to both sides. He then asked for a motion to close the public hearing. The motion was made, seconded and approved by unanimous roll-call vote.

The Public Hearing was closed.

Deliberation of the ZBA: Bill stated that the question is not whether there should be hiking at Hollow Fields, but whether the ZBA has any authority to regulate hiking there. The ZBA has no authority to deal with the issues of parking, policing the area, posting signs and finding a new trail head. Does the ZBA have the authority to deal with the basic issue? Bill distributed a draft decision to the Board for review and discussion. It contained several points:

Hollow Fields is in our RA district; the litigants are abutters; The BNRC is a non-profit corporation with recognition by the IRS as a charitable/educational corporation. The BNRC does not charge to access the walking trails of Hollow Fields and Hollow Fields contains no man-made structures except a gravel parking lot and a pre-existing barn.

The BNRC has the authority to regulate the use of the property for the protection of the health, safety and comfort of the public with the best management practices. The Town of Richmond does not own and has not operated Hollow Fields, which is not a municipal park. Hollow Fields is used primarily for recreational purposes. To the extent that the BNRC engages in educational uses at Hollow Fields, these are secondary – not predominant uses.

A discussion of the meaning or definition of “educational” followed. Bill clarified for the Board that if they find that the use of Hollow Fields by the BNRC is primarily educational, then the ZBA is out of the picture. If the Board decides it is not primarily educational, that triggers the request for a Special Permit, which gives the ZBA authority to articulate what the Town’s representatives feel is a reasonable balance between the interests of the direct abutters and the interests of the community at large. That consensus will be necessary before the Board can decide about whether to uphold or reverse the Building Inspector’s finding.

After further extensive discussion, Bill recommended that the Board reverse the decision of the Building Inspector and find that a Special Permit is required of the BNRC. He further suggested

that in their written finding, the Board call for a 45-day delay in enforcement to allow for either a request for a Special Permit to be submitted by the BNRC or for an appeal to be filed.

A motion was made to find that the BNRC's use of the land off Perry's Peak Road is in violation of Section 4.1 of the Richmond Zoning Bylaws because the BNRC's use of the land in a residential district is subject to a Special Permit under the bylaw. The Building Inspector's determination not to enforce the bylaw is reversed. The Board directs the Zoning Enforcement Officer to commence enforcement 45 days after the filing of this decision in order to grant the BNRC an opportunity to apply for a Special Permit and to delay enforcement while a Special Permit application is being considered.

The motion was seconded and adopted by unanimous roll-call vote: Ina Wilhelm, Peter Killeen; Bill Martin, Bob Gniadek.

There being no further business before the board, a motion was made to adjourn the meeting. The motion was seconded and approved by unanimous vote.

APPROVED ON JULY 28, 2021