

LECIA

Jack Mee

From: Amy E. Kwesell <AKwesell@k-plaw.com>
Sent: Monday, July 24, 2023 2:23 PM
To: Jack Mee
Subject: RE: Dias - 182 Route 137

Jack – I have a significant amount of background materials on this as another buyer (a new car dealership) was also looking to buy this property. In my opinion, used car sales and retail sales of lumber are not the same use and this would not be the extension of a nonconforming use. As you noted, pressure treated lumber is a concern that is present with the proposed use while not a concern with the used car use. Further “Sale or rental of new or used motor vehicles” (used chart #36) is its own use category and clearly does not include lumber sales.

Below is my opinion to the then planner, Jon Idman:
Hello Jon,

You requested an opinion on the Jack Madden Ford’s (the “Applicant”) proposal to relocate its car dealership to 182 Route 137 in Each Harwich (the “Property”). According to the information provided to me, Peter Stagg has most recently utilized the Property for the sale of used vehicles under a Class II automotive license. The Applicant has indicated that it intends to operate a “typical” car dealership: inside and outside sales of new vehicles, offices, on-site repair, and servicing.

Peter Stagg, the current owner of the Property, has operated a used car dealership on the Property since the 1980s. See Affidavit of Peter Stagg at 2-3. Prior to 2012, he operated a Chevrolet and Chrysler dealership under the name “Stagg Automotive Sales.” Id. Since 2012, he maintained a Class II used car license and a Class IV vehicle repair licensee. Id. Since 2017, he made occasional vehicle sales. Id., at 4.

The property is located in the “CH2” (base zoning) district, Drinking Water Resource Protection (overlay zoning) District (DWRPD), and the Six Ponds Special (overlay zoning) District/ Zone B. Automotive sales use is permitted by right in the CH2 district and by special permit in the DWRPD, but is prohibited in the Six Ponds/ Zone B district. Automotive service and repair use is prohibited in all three applicable districts. See HZB Sections 325-8; 325-9; 325-93 through 95; 325-13 & Attachment/ Table 1 (Use Regulations). Therefore, the automotive sales use and service and repair use are pre-existing non-conforming.

You have specifically asked: “[i]f we assume that auto sales is a preexisting nonconforming use at the subject property, how intense can this use be without the need for a use variance or (if one is even allowed) without a finding/ special permit? Can it be a ‘full’ dealership with cars stored outside, repair, etc. where these conditions don’t currently exist?”

In my opinion, if you determine that the use was not abandoned, the Zoning Board of Appeals (the “Board”) should apply the “Powers Test” (explained below) to determine whether the protections afforded to the nonconforming automotive sales and service uses by G. L. c. 40A, § 6, will cease because the proposed use will be a “change or substantial extension of the use.” Lastly, it is my further opinion that if the Board determines that the proposed use is a “change or substantial extension” of the **existing** use, it may authorize the change upon the granting of a Section 6 Special Permit/Finding.

As a threshold matter, G. L. c. 40A, § 6 provides in part: “a zoning ordinance or by-law may regulate nonconforming uses and structures abandoned or not used for a period of two years or more.” Section 325-54B(3) of the Zoning Bylaws governs abandonment, and states:

Notwithstanding the provisions hereof, nonconforming uses, actual use of which has been discontinued for a period of two consecutive years, shall be conclusively presumed to be abandoned and thereafter shall not be reestablished, changed (except to a conforming use), or extended without a variance from the Board of Appeals.

The Affidavit of Peter Stagg provides some history regarding the use of the Property. However, and in my opinion, does not specifically detail the use of the Property between 2012 and 2017, other than saying he offered two (2) cars for sale on the Property. I recommend that the Board, as an initial matter, determine the extent of the use of the Property between 2012 and 2017, and determine whether at any point the use was abandoned for two (2) years.

Assuming the Board finds that the automotive uses were not abandoned, and are therefore pre-existing non-conforming, the Board should then apply the “Powers Test” to determine if the proposed car dealership use requires zoning relief.

The Supreme Judicial Court in Powers v. Building Inspector of Barnstable, 363 Mass. 648 (1973), established three criteria for determining whether an alteration of a nonconforming use constitutes a “change or substantial extension” of such use that will subject the use to the application of the current zoning bylaws. The Court concluded that in the following cases, the zoning bylaws are applicable to the resulting use:

1. The resulting use does not reflect the nature and purpose of the nonconforming use prevailing when the zoning laws took effect;
2. There is a difference in the quality of character, as well as degree, of the resulting use; or
3. The resulting use is different in kind in its effect on the neighborhood.

Powers, 363 Mass. at 653.

An alteration to a use that satisfies even one of the three Powers criteria will lose the protections afforded to a nonconforming use by G. L. c. 40A, § 6. Applicable to the current proposal is criteria 2 and criteria 3.

The second Powers criteria provides that the current zoning laws apply to the alteration of a nonconforming use if the resulting use constitutes a change in the quality of character, as well as the degree, of the prior nonconforming use. Under this test, a nonconforming use maybe enlarged as long as the increase is an outgrowth of the original use. See Cape Resort Hotels, Inc. v. Alcoholic Licensing Bd. of Falmouth, 385 Mass. 205, 214 (1982). Situations in which it was found that the changed uses were not different in quality or character include an increase in the number of trucks and buses stored on premises originally used for the storage of school buses and trucks. See Selectmen of Blackstone v. Tellestone, 4 Mass. App. Ct. 311, 315 (1976). On the other hand, a change from a new and used car dealership in which service and repair work was performed to a place used exclusively to maintain and service vehicles was found to be different in quality in character, and thus, subject to zoning. See Building Inspector of Groton v. Vlahos, 10 Mass. App. Ct. 890, 891 (1980).

The third Powers criteria provides that the current zoning laws apply to the alteration of a nonconforming use if the resulting use differs from the prior nonconforming use in its effect on the neighborhood. Only an increase in the severity of the adverse aspects of the use will trigger a “different in kind” holding. For example, the following have been the basis for finding a difference in kind in the effect on the neighborhood: noise problems; increased traffic; increased periods of operations; and increased noise, activity, vapors, and odors.

With all that said, even if the Board determines that the proposed car dealership use is a “substantial extension” of the pre-existing non-conforming automotive sales use, the Board may still authorize the new car dealership use pursuant to a Section 6 finding. The second sentence of the first paragraph of G. L. c. 40A, § 6 provides that a pre-existing non-conforming use may be extended or altered, provided that the permit granting authority finds that the change, extension, or alteration is not substantially more detrimental to the neighborhood than the existing nonconforming use.

Therefore, I recommend that the Board take the following steps:

1. Determine whether the pre-existing non-conforming automotive sales and service use was abandoned.
2. If the pre-existing non-conforming use was not abandoned, determine whether the proposed car dealership use is a “change or substantial extension” of the **existing** use using the Powers Test.
3. If the proposed car dealership use is a “change or substantial extension” of the existing use, determine whether the proposed car dealership use “is not substantially more detrimental to the existing nonconforming use,” and therefore, eligible for a Section 6 Finding.

I am happy to have a further conversation with you regarding this matter should you have any questions or concerns.

Thank you,
Amy

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From: Jack Mee <jmee@harwich-ma.gov>
Sent: Monday, July 24, 2023 1:13 PM
To: Amy E. Kwesell <AKwesell@k-plaw.com>
Subject: FW: Dias - 182 Route 137

Amy,

I am just checking in on this recent request as the attorney is pushing for my determination “If” I will be able to issue this permit.

When you have a chance could you let me know if you see any red flags with this?

Thank you,
Jack Mee

From: Jack Mee
Sent: Thursday, July 13, 2023 3:40 PM
To: Amy E. Kwesell <AKwesell@k-plaw.com>
Subject: FW: Dias - 182 Route 137

Good afternoon Amy,

Could I ask you or one of your team to review the attached zoning history on a property along with Attorney Crowell's request for administrative approval?

A couple of immediate concerns that I have;
the very limited use on this property over the past several years.
Requirements of Site Plan Modification
Potential of storing pressure treated and other materials within the 6 ponds district

Thank you,
Jack Mee
Building Commissioner
Town of Harwich

From: wcrowell.office1@comcast.net <wcrowell.office1@comcast.net>
Sent: Wednesday, July 12, 2023 8:55 AM
To: Jack Mee <jmee@harwich-ma.gov>
Subject: FW: Dias - 182 Route 137

Hello Jack:

Just checking back to confirm you received my e-mail below from July 3, 2023 and if so, inquire if you have had an opportunity to review.

Thank you,
Bill

William D. Crowell, Esq.
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Phone: 508-432-1643
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e-mail: wcrowell.office1@comcast.net

From: wcrowell.office1@comcast.net <wcrowell.office1@comcast.net>
Sent: Monday, July 3, 2023 11:06 AM
To: 'Jack Mee' <jmee@town.harwich.ma.us>; 'Paul Halkiotis' <phalkiotis@harwich-ma.gov>; 'Shelagh Delaney' <sdelaney@harwich-ma.gov>
Subject: Dias - 182 Route 137

Hello Jack:

Attached please find my letter regarding the property located at 182 Route 137, East Harwich.
Please let me know if you have any questions or would like to discuss further.

Thank you,

Bill

William D. Crowell, Esq.
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From: wcrowell.office1@comcast.net <wcrowell.office1@comcast.net>
Sent: Sunday, July 2, 2023 11:34 PM
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Subject: Message from KM_368e

