

Received by the Town Clerk on
June __, 2020.

Angela Garrity, Town Clerk



**TOWN OF RICHMOND
ZONING BOARD OF APPEALS
DECISION**

I. BACKGROUND

The Zoning Board of Appeals conducted a public hearing, pursuant to the provisions of Chapter 40A of the Massachusetts General Laws, and Section 7.2.1 of the Richmond Zoning By-Law, on a petition appealing a Request for Enforcement of the Richmond Zoning By-Law in which Jeffrey and Linda Caligari, and Jeffrey and Jennifer Morse, and Ira and Jami Grossman (together, the “Applicants”) requested the Richmond Zoning Enforcement Officer and Building Inspector to enforce Sections 8.3.2 and 8.3.4 of the Richmond Zoning By-Law against the Berkshire Natural Resources, Inc. (the “BNRC”), for its claimed violations of Section 4’s Use Regulations by its use of land off of Perry’s Peak Road (the “Hollow Fields Property”). The Richmond Zoning Enforcement Officer and Building Inspector declined the Request for Enforcement, and the Applicants appealed that decision.

A site-visit was held at 6:30 PM at the property, and a hearing was held at 7:00PM, on Thursday, April 29, 2021, and the hearing was continued to Tuesday, June 15, 2021, at 7:00PM.

The meetings were properly posted, and a notice of the initial hearing was published in the *Berkshire Eagle* on April 15, 2021, and April 22, 2021. A notice of the initial hearing was also mailed to the abutters on April 15, 2021.

II. EXHIBITS

The Board considered the presentations of the Applicants and their counsel, and comments from the general public in person and in written submissions. The Board did not receive any comments from any other Boards or the Board of Selectmen. The Board accepted the following documents as a part of the record:

1. Agenda with Consent
2. Notice of Appeal
3. Published Notice
4. Abutters' Notices
5. William E. Martin's Ethics Disclosure
6. BNRC Memo and BNRC May 26, 2021 Letter
7. Appellants' Reply Memo
8. Public Comments
9. Excerpts of Richmond Zoning By-Law
10. M.G.L. Chapter 40A, Section 3

III. FINDINGS OF FACT

The Board made the following findings of fact:

1. The Hollow Fields Property is in the RA-C District.
2. Applicants, Jeffrey and Linda Caligari and Jeffrey and Jennifer Morse, are abutters.
3. Applicants, Ira and Jami Grossman, are residents of Perry's Peak Road, but are not abutters or abutters to abutters within 300'.
4. The BNRC is a nonprofit Massachusetts corporation.
5. The BNRC's statement of purpose is:

stock having the right to vote therein.

Article No. 2, (Statement of Purposes):

To promote and protect the natural resources of Berkshire County to the end that said County shall be more livable and more attractive; to strive to eliminate pollution of streams and lakes, preserve open spaces for recreation and scenery, and discourage unsightly development in the interest of the County as a whole; to take an active interest in local and regional planning and zoning, pollution abatement programs, roadside beautification and the conservation of selected fields and forests for recreational use, for livability, for protection and for beauty; to acquire, hold, manage and dispose of land and interests in land within and adjacent to Berkshire County in accordance with generally accepted conservation objectives and practices; to work closely with the many groups concerned with allied issues and to coordinate and supplement the activities of such groups as they relate to the natural resources of Berkshire County.

6. The U.S. Internal Revenue Service has recognized BNRC as a 501(c)(3) Charitable-Educational nonprofit corporation since 1968.

7. The BNRC does not charge the public to access the property, which has walking trails through fields and woods of the Hollow Fields Property.
8. The Hollow Fields Property contains no manmade structures, except a gravel parking lot.
9. The Town of Richmond Conservation Commission and the Richmond Land Trust, Inc. hold a Conservation Restriction over 342 acres of the Hollow Fields Property, which represents more than fifty percent of the land.
10. Notwithstanding the Conservation Restriction, the BNRC has the authority to regulate the use of the property for the protection of public health, safety, and compliance with best management practices.
11. The Town of Richmond does not own and is not an operator of the Hollow Fields Property, and it is not a municipal park.
12. The Hollow Fields Property is used by the BNRC primarily for recreational uses.
13. To the extent that the BNRC engages in educational uses of the Hollow Fields Property, the educational uses are secondary and are not primary or predominant.
14. The current use of the Hollow Fields Property by the BNRC has a detrimental impact on the Abutters enjoyment of their properties as a result primarily of the traffic, parking, and hours of use.
15. The current use of the Hollow Fields Property by the BNRC has a positive impact on the Town generally, and there is broad community support for both the preservation of open space and passive recreational use of the preserved open space.
16. The BNRC's use of the Hollow Fields Property is in harmony with the general intent and purpose of the Zoning By-Law.
17. The current use of the Hollow Fields Property by the BNRC is desirable to the community at large, but not to the Applicants.
18. The current unregulated use of the Hollow Fields Property by the BNRC is detrimental to the character of the neighborhood.
19. The current unregulated use of the Hollow Fields Property by the BNRC does create undue traffic congestion.
20. The current unregulated use of the Hollow Fields Property by the BNRC does create an undue burden on the Town's Department of Public Works.

IV. DISCUSSION

Section 4.1 of the Richmond Zoning By-Law provides:

SECTION 4: USE REGULATIONS

- 4.1 Except as provided by law or in this By-Law, no building or structure shall be erected and no building, structure or land, or part thereof, shall be used for any purpose or in any manner other than for one or more of the uses set forth in the accompanying Table of Use Regulations, Section 4.8, as permitted by right in the district in which such building, structure or land is located, or which may be permitted in said district and so authorized by Special Permit Granting Authority as designated in Section 4.2 herein.

Section 4.8 Subsection 5 of the Richmond Zoning By-Law allows for the issuance of a Special Permit by the Planning Board for “philanthropic institution not exempt by M.G.L. Chapter 40A, s. 3” in the RA-C zone:

profit educational corporation.

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|----|---|-----|----|-----|
| 5. | Private non-profit library, museum or philanthropic institution not exempt by M.G.L. c. 40A s. 3. | SPP | NO | SPP |
|----|---|-----|----|-----|

Section 4.8 Subsection 8(a) of the Richmond Zoning By-Law allows for the issuance of a by the Zoning Board of Appeals for recreational uses in the RA-C zone:

neighboring premises.

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|----|----|--|-----|----|-----|
| 8. | a) | Golf, swimming, tennis or sportsmen's club, or other recreational facility of similar character; | SPA | NO | SPA |
|----|----|--|-----|----|-----|

The parties acknowledge that, as a minimum, the use of the BNRC of the Hollow Fields Property is subject to regulation of parking, even if the Board accepted its arguments. Massachusetts General Laws Chapter 40A § 3 provides “No zoning ordinance or by-law shall regulate or restrict the interior area of a single family residential building nor shall any such ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit

educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.”

Section 6.6 of the Richmond Zoning By-Law provides that off street parking shall be allowed in accordance with a Site Plan approved by the Board of Selectmen. The section provides:

6.6 Off-Street Parking and Loading

An off-street parking area in accordance with a Site Plan approved by the Board of Selectmen shall be provided for any public use hereafter established or expanded. The parking area shall be adequate in size for the maximum use of the proposed facility; shall be suitably surfaced, and shall be attractively screened from any abutting residential use or district. The term public in this section shall include any use by a business, professional or private organization.

Furthermore, even if the purpose of the BNRC as stated in its Article of Organization, as amended, included an educational purpose, its use of the Hollow Fields Property is not primarily or predominantly educational. The Board accepts the argument set forth in the Applicants’ Reply Memorandum dated May 6, 2021, at Section 4, Pages 9- 12. In particular, the Board notes that: Any doubt or ambiguity concerning whether the land use is primarily and predominantly educational must be resolved in favor of protecting local zoning.” A narrow interpretation of G.L. c. 40A,§ 3 has been mandated by the Supreme Judicial Court with the statement in *Regis College v. Town of Weston*, 462 Mass. 280, 289-290 & n. 12 (2012) as follows:

[T]he Dover Amendment represents a specific exception to the general power of municipalities to adopt and enforce zoning regulations and by-laws. See *Crall v. Leominster*, 362 Mass. 95, 101-102 (1972). "The whole of the Dover Amendment ... seeks to strike a balance between preventing local discrimination against an educational use, ... and honoring legitimate municipal concerns that typically find expression in local zoning laws" (citation omitted). *Trustees of Tufts College v. Medford*, 415 Mass. 753 , 757 (1993). As a practical matter, the protection afforded by the Dover

Amendment can be financially advantageous to the landowner. Because the statutory purpose of preventing local discrimination against educational uses is only furthered if the intended use of the land is in fact educational, the term "educational purposes" should be construed so as to minimize the risk that Dover Amendment protection will improperly be extended to situations where form has been elevated over substance.

Considering this authority and because the Board concludes that the BNRC's use of the Hollow Fields Property is primarily recreational, a Special Permit under Section 4.8 Subsection 8(a) is required for the BNRC's non-educational uses of the Hollow Fields Property.

The Special Permit requirements are set forth in Section 6.3.4 as follows:

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6.3.4 Findings Required

Before granting a special permit for any use requiring such permit under the provisions of this By-Law, the Special Permit Granting Authority shall find that the proposed use:

- a) Is in compliance with all provisions and requirements of this By-Law, and in harmony with its general intent and purpose.
- b) Is not undesirable or does not substantially derogate from the public good or convenience at the proposed location;
- c) Will not be detrimental to adjacent uses or to the established or future character of the neighborhood;
- d) Will not create undue traffic congestion, or unduly impair pedestrian safety;
- e) Will not overload any public water, drainage or sewer system or any other municipal facility to such an extent that the proposed use or any existing use in the immediate area or in any other area of the Town will be unduly subjected to hazards affecting public health, safety or general welfare.

The Special Permit "may be issued subject to such conditions, safeguards or limitations as the Special Permit Granting Authority may impose for the protection of neighboring uses or otherwise serving the purposes of this By-Law, Section 6.3.5. As noted above, the Special Permit shall be accompanied by a Site Plan that will identify parking, which will require approval of the Board of Selectmen under Section 6.6. The Board may impose additional conditions related to parking and other matters as set forth in Section 6.3.5: "Such conditions, safeguards or limitations may include, but are not limited to, the following: a) Front, side, and rear yards greater than the minimum required by this By-Law: screening buffers or planting

strips, fences or walls as specified by the Authority; b) Limitations upon the size, number of occupants, method and time of operation, time duration of the permit, or extent of facilities; c) Regulation of number or location of driveways, or other traffic features; and off-street parking or loading, or other special features beyond the minimum required by this By-Law. Any conditions, safeguards or limitations shall be imposed in writing and shall be made a part of the special permit and of the building permit, if any¹.

V. CONCLUSION

In light of the foregoing, by unanimous vote of its members, William E. Martin, Ina Wilhelm, Peter Killeen and Robert Gniadek (Stevan Patterson participated in the April 29, 2021, hearing but resigned before the June 15, 2021 hearing), the Zoning Board of Appeals found that the Berkshire Natural Resources, Inc.'s use of its land off of Perry's Peak Road is in violation of Section 4.1 of the Richmond Zoning By-Law because its use in a Residential District (RA-C) is subject to a Special Permit. Accordingly, the Zoning Board of Appeals reverses the decision of the Zoning Enforcement Officer. The Board directs the Zoning Enforcement Officer to commence an enforcement action forty-five (45) days after the filing of this decision with the Town Clerk to permit the BNRC an opportunity to apply for a Special Permit and to delay enforcement while a Special Permit application is being considered by this Board.

Any appeal from this decision must be made pursuant to Massachusetts General Laws Chapter 40A, Section 17, as amended, and must be filed within twenty (20) days from the filing of this Decision with the Richmond Town Clerk.

¹ The Zoning Board of Appeals cannot and will not preemptively rule on a Special Permit application, or even determine which Special Permit is required (the Board makes no determination as to whether a Special Permit is required under Section 4.8 (5) from the Planning Board or Section 4.8(8)(a) from the Zoning Board of Appeals, or both). Nevertheless, the Board's discussion made clear that the consensus of the Board is that a Special Permit of either kind should be granted with conditions imposed to balance the interests of the Applicants and other neighbors and the interests of the BNRC and the community at large. Ideally, the Applicants and the BNRC will reach consensus on which form of Special Permit is required and an appropriate set of conditions that will satisfy the interests all interested parties.

ENTERED as the unanimous decision of the Richmond Zoning Board of Appeals on the 15th day of June 2021.

/s/ William E. Martin

William E. Martin
Chairman

/s/ Ina Wilhelm

Ina Wilhelm

/s/ Peter Killeen

Peter Killeen

/s/ Robert Gniadek

Robert Gniadek

CERTIFICATE OF TOWN CLERK

This is to certify that twenty (20) days has elapsed since the filing of the above decision with this office and no appeal has been filed or an appeal has been filed and denied in this case.

EXECUTED this _____ day of _____, 2021.

Angelia Garrity
Richmond Town Clerk